

BEFORE BAY OF PLENTY REGIONAL COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of Lake Rotorua Nutrient Management - Proposed Plan Change 10 to the Bay of Plenty Regional Water and Land Plan under clause 8B of Schedule 1 to the Act

BETWEEN **ROTORUA LAKES COUNCIL**

Submitter

AND **BAY OF PLENTY REGIONAL COUNCIL**

Plan Change 10 Proponent

SYNOPSIS OF LEGAL SUBMISSIONS OF COUNSEL FOR ROTORUA LAKES COUNCIL

Date 3 April 2017

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INTRODUCTION

1. The submission of Rotorua Lakes Council (RLC) on Proposed Plan Change 10 (PC10) to the Operative Bay of Plenty Regional Water and Land Plan (RWLP) is generally supportive of a rules based approach to the reduction of nitrogen within the Lake Rotorua Groundwater Catchment in order to meet the nitrogen limit set in the Operative Bay of Plenty Regional Policy Statement (RPS).¹
2. In its submission, RLC signalled two important reservations it had concerning the detail of PC10 as notified by Bay of Plenty Regional Council (BOPRC). First, that the proposed nitrogen allocation methodology is inefficient and inequitable, particularly with respect to its impact on underdeveloped Maori freehold land within the catchment. Secondly, that PC10 does not adequately recognise and provide for the impacts of urban growth on the Rotorua wastewater treatment plant (WWTP), a piece of regionally significant infrastructure.
3. In respect of both issues, RLC sought changes to PC10 in the form of the inclusion of appropriate objectives, policies and methods to address these concerns.
4. Through expert witness caucusing and direct dialogue between both Councils, good progress has been made in respect of the WWTP issue. However, RLC's concerns regarding the allocation methodology remain unresolved, and are live issues in this hearing process.
5. This synopsis of legal submissions will:
 - (a) Update the Hearing Panel on the outcome, to date, of expert witness caucusing;
 - (b) Identify areas of agreement between BOPRC and RLC;
 - (c) Identify outstanding issues between BOPRC and RLC;
 - (d) Respond to matters raised in BOPRC's rebuttal evidence of 6 March 2017 and Memorandum of 22 March 2017;² and

¹ Policy WL 3B(c).

² Memorandum Regarding Additional Documents on Behalf of Bay of Plenty Regional Council; being addendums, clarifications, further rebuttal, and proposed amendments, dated 22 March 2017.

- (e) Respond to questions and issues raised by the Hearing Panel during the week beginning 13 March 2017.

RLC'S CURRENT POSITION ON PC10

6. The expert evidence presented by RLC clearly states its position on PC10. Like all First Schedule processes under the Resource Management Act 1991 (RMA), matters continue to evolve.

7. In the spirit of Direction 5 of the Hearing Panel's Memorandum No.5 – Caucusing of Expert Witnesses / Hearing Schedule, RLC's planning experts have caucused on a voluntary basis with Mr Lamb for BOPRC. The results, to date, of the voluntary caucusing are recorded in the document filed with the Hearing Secretary on Friday, 31 March 2017 by counsel for BOPRC. Mr Eccles will discuss the caucusing in more detail in his evidence. In the meantime, the following summarises RLC's current position on PC10:

- (a) The section 42A report recommendation to include new Policies LR P16 and LR P17³ is supported by both BORPC and RLC, subject to minor amendments agreed to in caucusing.
- (b) Further to new Policies LR P16 and LR P17, RLC recommends inclusion of a new Policy LR P18⁴ to expressly recognise the environmental benefits for Lake Rotorua achieved through municipal wastewater reticulation.

The inclusion of this new policy has not been agreed to by BOPRC in caucusing.

- (c) In order to give effect to new Policies LR P16 and LR P17, RLC recommends the inclusion of additional methods, namely -
 - (i) Inclusion of a new Method LR M5(g) to provide for the implementation of an agreed accounting methodology to shift nitrogen losses from rural land transitioning to urban land.

³ Renumbered LR P18 and LR P19.

⁴ Renumbered LR P20.

The inclusion of the new method is supported by both BOPRC and RLC and has been agreed to in caucusing. The final text of the new method (g) is yet to be agreed.

- (ii) Inclusion of a new Rule LR R14 to expressly provide for discharges from Rotorua's WWTP as a restricted discretionary activity.

The rule suggested by Mr Eccles is not an attempt to “litigate the outcomes or conditions of the upcoming (not yet filed) resource consent application for a future waste water treatment plan”.⁵ RLC submits that the rule is an appropriate method to provide for an existing physical resource that is part of the environment affected by PC10, which is recognised in the RPS as regionally significant infrastructure and that represents essential development infrastructure for the Rotorua District pursuant to the NPS on Urban Development Capacity 2016.

The inclusion of this new rule has not been agreed to by BOPRC in caucusing.

- (iii) Inclusion of a new section to Schedule LR One, clause E to clearly place land owners on notice that a complete or partial sell down of nitrogen discharge allocation may present challenges for the future subdivision of the property unless the nitrogen deficit is addressed.

The inclusion of this new section is supported by both BOPRC and RLC and has been agreed in caucusing.

- (d) RLC remains concerned however, that further assessment of economic effects is required to complete the section 32 evaluation underpinning PC10. This may prompt further refinement of the PC10 provisions and its approach to nitrogen allocation in order to promote a more equitable

⁵ Legal Submissions of Counsel for Bay of Plenty Regional Council, para 75.

outcome for the community and a more sustainable outcome for the environment along the lines of a catchment sustainability approach.

8. Mr Osborne, in particular, observes that further economic assessment is required before any approach to nitrogen allocation can be reliably identified. Mr Osborne very clearly refers to the alternative natural capital approach in his evidence only in order to illustrate his concerns with the economic assessment underpinning the current PC10 approach to nitrogen allocation.⁶ It is incorrect to interpret those references, as seems to have been done by BOPRC's expert witnesses in rebuttal,⁷ to suggest that RLC advocates adoption of the natural capital approach in the absence of a complete economic assessment.
9. Mr Osborne does not recommend one allocation approach over another at this stage. He does, however, identify concerns with the evaluation of the impacts of the sector averaging approach, and recommends a more comprehensive assessment be completed which evaluates a range of alternatives, before a preferred methodology is identified.

LEGAL ISSUES RAISED SINCE 6 MARCH 2017

Scope

10. An Environment Court decision issued late last year by Environment Judges Smith and Kirkpatrick in the case of *Bluehaven Management Limited & anor v Western Bay of Plenty District Council*⁸ provides a timely and helpful summary of relevant caselaw on the issue of scope. The Court in *Bluehaven* applied the familiar legal tests developed in the High Court decisions of *Clearwater*⁹ and *Motor Machinists*¹⁰ but also emphasised the need to avoid adopting too legalistic an approach to submissions and the relief requested in those submissions.¹¹
11. Applying the Court's analysis of scope in *Bluehaven* to RLC's submission on PC10, RLC respectfully submits that its submission on PC10 clearly records concerns that

⁶ See for example PM Osborne, evidence in chief, para 36, 43, 45, 47, 70, 76, 88 and 95.

⁷ See for example R Burton, rebuttal, para 116

⁸ [2016] NZEnvC 191.

⁹ *Clearwater Resort Ltd v Christchurch City Council*, Christchurch AP34/02, 14 March 2003, William Young at [59] to [69].

¹⁰ *Palmerston North City Council v Motor Machinists Limited* [2014] NZRMA 519 at [74] to [83].

¹¹ *Supra* at note 8 at [29] to [31].

reasonably fall within the ambit of PC10 and so are 'on' PC10, for the following reasons:

- (i) Recognition for the WWTP in light of the implied cap created by PC10 on future WWTP operations.¹²

PC10 regulates nitrogen discharges into Lake Rotorua. RLC's WWTP discharges nitrogen into the Lake through its consented treated wastewater discharge. The WWTP also performs a role in mitigating higher nitrogen discharges which would otherwise occur through septic tanks, in the absence of reticulation of urban communities, or occur through lower levels of treatment of wastewater, in the absence of the existing resource consent conditions requiring treatment to the limits of technology.

- (ii) The assessment of economic effects on the community.¹³

PC10 will result in adverse economic effects on the community. The PC10 provisions providing for the trading of nitrogen, the section 32 evaluation and BOPRC's evidence recognise and attempt to address this effect.

- (iii) Adverse effects on owners of underdeveloped Maori land.¹⁴

PC10 will result in adverse effects on the owners of underdeveloped Maori land. Again, the section 32 evaluation and BOPRC's evidence recognise and attempt to address this effect.

- (iv) The approach taken to nitrogen allocation and trading.¹⁵

PC10 introduces a nitrogen allocation and trading regime for the very first time in the Lake Rotorua catchment. In the absence of PC10, the operative provisions of the RPS and RWLP would continue

¹² See RLC's original submission: Preamble, fourth paragraph; Urban Growth para [12] to [15], [18] to [20].

¹³ See RLC's original submission: Preamble, fifth and sixth paragraphs; Introduction para [3], para [4a]; Rural Land Use para [5] and [6].

¹⁴ See RLC's original submission: Introduction para [4b]; Rural Land Use para [7].

¹⁵ See RLC's original submission: Introduction para [4c]; RLC's Particular Submissions on LR P7 and LR R10.

to apply. Those operative provisions do not impose the nitrogen allocation and trading regime now being considered by the Hearing Panel. PC10 has introduced this regime and provides the public's first opportunity to discuss a fundamentally new management regime through a First Schedule process of the RMA. By this fact alone, the scope of PC10 is inherently very wide.

12. Having raised these issues squarely within its submission, RLC then sought broad relief in the form of "appropriate objectives, policies and methods" to address these concerns. This was the same approach taken by Bluehaven in its submission which the Court decided gave it sufficient scope to pursue express amendments to the plan change on appeal. It is respectfully submitted that RLC's submission meets the legal tests established in *Clearwater*, *Motor Machinists* and *Bluehaven*, and no issues as to scope arise.

Fettering statutory powers

13. RLC rejects the suggestion by BOPRC¹⁶ that the participation of an RLC Councillor in the Lake Rotorua Stakeholders Advisory Group (STAG) and the participation of a former Mayor in the Regional Strategy, Policy and Planning Committee and the Rotorua Te Arawa Lakes Strategy Group (Strategy Group) should in some way fetter RLC in its position on and participation in the First Schedule process for PC10.

STAG

14. As a corporate entity, the only means by which RLC can exercise its powers is by majority vote of its governing body. Schedule 7, clause 24 of the Local Government Act 2002 (LGA02) provides that unless expressly delegated, the "acts of a local authority must be done, and the questions before the local authority must be decided", at a meeting by vote of the majority of the elected members that are present and voting.
15. Councillor Hunt was authorised, by RLC resolution, to participate in STAG.¹⁷ That resolution did not delegate to Councillor Hunt any power to bind RLC to a defined position or fetter RLC's future position on or participation in PC10 as a submitter.

¹⁶ R Burton, rebuttal, para 116 to 124. Legal Submissions on behalf of Bay of Plenty Regional Council, para 72.

¹⁷ Minutes of an Extraordinary Meeting of (Rotorua District) Council, 16 October 2012.

This was consistent with STAG’s own Terms of Reference which expressly recognised its advisory role, that no STAG member had delegated authority to make decisions binding their own respective organisation and that while STAG itself could not make submissions, the respective organisations of STAG’s members certainly could:

Group purpose

The main purpose of the Lake Rotorua Catchment Stakeholder Advisory Group (the “Group”) is:

1. To provide oversight, advice and recommendations on “rules and incentives” options that will achieve the nutrient reduction targets needed from rural land in order to meet Lake Rotorua’s water quality target. This shall include advice on implementation options and District and Regional statutory plan changes.

The Group shall also:

2. Facilitate engagement with all stakeholders, in conjunction with the three partners represented within the Rotorua Te Arawa Lakes Strategy Group (RTALSG).

3. Advise on progress in developing and implementing rules and incentives, and make associated recommendations, to improve both progress of the programme and stakeholder relationships.

...

Group advisory, engagement and reporting functions

...

6. Individual members of the group shall engage with their respective agencies and sectors to ensure a two way flow of ideas and feedback on draft advice and other relevant matters.

...

Limitation of powers

17. There is no delegation of Council and/or RTALSG decision making authority to the Group.

18. The **Group in its own right shall not make formal submissions** on Council plans or resource consent matters.

Group operations

19. The Group shall operate in a collaborative fashion, both within its own setting and in its engagement with others, guided by the following:

- a. Respect for all views at the table.
- b. Wherever possible, decisions on advice (the Group’s primary purpose) shall be by consensus, with a majority vote taken only if necessary.
- c. Minority view(s) and associated reasons shall be recorded along with the majority view.

...

e. **Group members** shall raise issues relevant to their sector/agency, but they **are not “representative” in the sense that they are mandated to or expected to speak on behalf of their sector/agency...**

[Our emphasis added.]

16. A closely related submission point can be made in response to the numerous references in the rebuttal evidence of BOPRC’s expert witnesses that BOPRC, as PC10 proponent, was somehow fettered in its drafting of PC10 provisions by STAG-developed principles.¹⁸ STAG is not recognised in law as a regional council with powers to make a regional policy statement, regional plan or a plan change. STAG, by its own Terms of Reference, had no power to fetter BOPRC in its drafting of appropriate provisions to achieve the objectives of the RPS and the RWLP. STAG’s Terms of Reference 1, Group Purpose, clearly stated that its primary purpose was to provide “oversight, advice and **recommendations**”.

Strategy Group

17. Former Rotorua District Council Mayor Winters, now an Elected Member of BOPRC, was one of six members of the Strategy Group established in accordance with s48 of the Te Arawa Lakes Settlement Act 2006 (TALSA). TALSA expressly applies the provisions of the LGA02 and the Local Government Official Information and Meetings Act 1987 to the Group,¹⁹ subject to a few exceptions.²⁰
18. RLC’s control over its own members are preserved by TALSA, with those RLC members of the Strategy Group:
- (a) Being subject in all things to the control of RLC, and required to carry out all general and specific directions of RLC given in relation to the Strategy Group and its affairs;²¹ and
 - (b) Able to be discharged by RLC.²²
19. RLC did not delegate any decision-making powers or responsibilities to its representatives on the Strategy Group. This was consistent with the Strategy Group’s stated statutory purpose, which is:

¹⁸ See for example GC Moletta, rebuttal, para 70, 71, 78, 80. R Burton, rebuttal, para 118, 119, Appendix 1. Prof GJ Doole, rebuttal, para 7, 10, 11. NJ Smith, rebuttal, para 15. S Barns, rebuttal, para 19. SG Lamb, rebuttal, para 18, 26, 28.

¹⁹ Section 51(1) of the TALSA.

²⁰ For example, the Group is deemed a joint committee within the meaning of clause 30(1)(b) of the LGA02 but is a permanent committee; unable to be discharged unless each organisation agrees to do so.

²¹ Section 51(1)(3) of TALSA and Schedule 7, cl 30(3) of the LGA02.

²² Section 51(1)(3) of TALSA and Schedule 7, cl 30(1) and (2) of the LGA02.

... to contribute to the promotion of the sustainable management of the Rotorua lakes and their catchments, for the use and enjoyment of present and future generations, while recognising and providing for the traditional relationship of Te Arawa with their ancestral lakes.²³

[Our emphasis added.]

RLC DISCUSSION WITH SUBMITTERS

20. In the spirit of Direction 4 of the Hearing Panel’s Memorandum No.4 – Further Directions as to the Conduct of the Hearing, RLC has discussed its submission on PC10 with representatives of CNI Iwi Land Management Limited²⁴ and PF Olsen Limited.²⁵
21. RLC wishes to advise the Hearing Panel that there is general alignment between the three submitters over their concerns that:
- (a) The assessment of the actual and potential economic effects underpinning the PC10 provisions needs to be completed;
 - (b) PC10 needs to achieve a more equitable outcome for the community and a more sustainable outcome for the environment; and
 - (c) PC10 needs to engage and recognise all ecosystems, including people and communities, which make up the environment relevant to, and affected by, PC10.
22. Mr Osborne and Mr Eccles are available to discuss their understanding of this general alignment in more detail during their respective appearances before the Hearing Panel as expert witnesses.

CONCLUSIONS

Provision for urban growth

23. RLC’s WWTP is essential infrastructure required to service the current and future urban population of Rotorua. Compared to alternative on-site treatment options,

²³ Section 49 of TALSA.

²⁴ Submitter 49 and Further Submitter 6.

²⁵ Submitter 73.

reticulation and centralised treatment of wastewater through the WWTP reduces nutrient inputs into Lake Rotorua, benefiting the health and well-being of the community and enhancing the Lake's water quality.

24. RLC therefore supports recommended new Policies LR P16 and LR P17 in PC10. RLC also advocates for the inclusion of new Policy LR P18 to ensure both BOPRC and RLC can carry out their respective statutory duties and functions to integrate land use and infrastructure in the Rotorua district.

Provision for future development of Maori freehold land

25. Maori freehold land constitutes approximately 25% of the land within PC10's Lake Rotorua catchment.
26. The PC10 amendments recommended by Mr Eccles go some way to addressing the significant concerns RLC has raised, and discussed with CNI, about the ability of owners of Maori freehold land to develop their land under PC10. RLC submits that the completion of the economic assessment, as recommended by Mr Osborne, will allow BOPRC to identify an appropriate approach to address, rather than dismiss, this inequity.

Approach to nitrogen allocation

27. Mr Osborne's expert opinion constitutes reasonably cogent evidence that should prompt further economic assessment in the section 32 evaluation for PC10 before any final decision is made on what is the most appropriate way to achieve the relevant RPS and RWLP objectives for Lake Rotorua. RLC respectfully submits that this is a necessary consideration for the Hearing Panel under section 32 of the RMA.

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3 April 2017