

**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

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**LEGAL SUBMISSIONS ON BEHALF OF THE  
BAY OF PLENTY REGIONAL COUNCIL  
DATED 1 MAY 2017**

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## Introduction

1. The starting place for a consideration of PPC 10<sup>1</sup> remains as set out in the opening submissions: namely Lake Rotorua as an identified catchment at risk<sup>2</sup>, and as such it is necessary to do somewhat more than nothing, or 'holding the line'.

### *Functions of the Regional Council: Section 30 RMA*

2. Regulatory provisions addressing these issues are a function of the Regional Council under section 30 of the Resource Management Act 1991 and it is entitled to make rules to address such issues – the main reason is to ensure that any reductions in nutrient losses to Lake Rotorua currently in place are **retained** and that further reductions are **made** in order to achieve the maintenance and enhancement of the quality of water in water bodies<sup>3</sup>; the control of discharges of contaminants<sup>4</sup> into or onto land and or water<sup>5</sup>, or indeed allocation of a natural resource to the extent this occurs under PPC 10<sup>6</sup>, including as to the establishment of rules to allocate the capacity of water to assimilate a discharge or a contaminant<sup>7</sup>. In this way PPC 10 as proposed by Council has been prepared in accordance with the functions of Council<sup>8</sup>.
3. [In so doing it has been directed by the Regional Policy Statement and thus can be said to give effect to the requirements of Part 2 of the Act<sup>9</sup>. This is set out in the opening submissions and further below at paras 54 onward regarding the integrated Framework, and in Lamb re components of s5. The accord with section 32 is also covered.

### *State of the Lake without Alum Dosing*

4. Some things do require regulation and this is clearly one of them. Without the presence of alum dosing masking the underlying inputs of contaminants, Lake Rotorua would be 'strongly degraded' at a TLI of 5.57<sup>10</sup>.
5. The RPS Objective 28 is to "Enhance the water quality in the lakes of the Rotorua district and other catchments at risk", and the Regional Water and Land Plan Objective 11 is that "The water quality in the Rotorua lakes is maintained or improved to meet the following Trophic Level Indices ...(j) Lake Rotorua- 4.2." Professor

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<sup>1</sup><https://www.boprc.govt.nz/media/612309/revisedtrack-change-version-7-revised-staff-recommendations.pdf>

<sup>2</sup> RPS Policy WL 2B

<sup>3</sup> S30(1)(c) RMA 1991

<sup>4</sup> The nutrients nitrogen and phosphorus have been identified as key nutrients for control under the RPS WL 4B fn 5

<sup>5</sup> S30(1)(f) RMA 1991

<sup>6</sup> S67(5) RMA 1991, as per the functions in s30(1)(fa)(iv), and sections 30(4).

<sup>7</sup> See below at footnote 52 and 58 regarding the extent to which an allocation of this assimilative capacity has occurred. Ultimately this matter could be summed up as per policy LRP 5 – the allocations are in relation to NDAs that align with the ranges for dairy and drystock activities. Recognition of the standardised Overseer loss rates for other matters is accounting, not allocating.

<sup>8</sup> See below at paragraph 100 re the legal tests.

<sup>9</sup> As discussed in the opening submissions, relying upon *Environment Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] 1 NZLR 593; [85], [88] and [90]; And see *Man O'War Station Ltd v Auckland Council* [2017] NZCA 24

<sup>10</sup> [2.3] Summary of EIC, Professor Hamilton

Hamilton explained that the TLI scale is log-based such that even apparently small failures to meet the TLI are 'significant' failures<sup>11</sup>.

6. Further, it would be very difficult to persuade a consent authority and Iwi<sup>12</sup> that due efforts were being made to establish sustainable levels of nutrient inputs into the Lake without the provisions of PPC 10<sup>13</sup> in place – and this failure would be adverse to an application seeking renewed or new consent for alum dosing into the Lake itself for the foreseeable future<sup>14</sup>. To put this another way, Council is well aware that it has an upcoming consent application to make in order to be able to continue alum dosing, but has very real concerns with how that application argument can be presented if the surrounding context does not include real commitments to reducing the flow of contaminants to the Lake to something sustainable so that alum dosing can be safely discontinued over time<sup>15</sup>. And without continuing alum dosing until a sustainable level of inputs is achieved, a cessation will reveal that high TLI level with all of its attendant adverse effects within approximately 3 years<sup>16</sup>.
7. The RPS expressly contemplated that reductions of nutrient losses in excess of limits established under Policy WL 3B may be required by way of rules<sup>17</sup>.
8. The Regional Council agreed that the required reductions in nutrient discharge from rural land<sup>18</sup> would not be secured by rules alone<sup>19</sup>, but would undertake a dual public/private approach using best practice, the purchase of nutrient allocation, funding for gorse conversion to lower leaching use, and engineering solutions, as well as the requirements set out in the plan change provisions. The requirements around utilising and retaining this level of public and community funding are set out in the answers provided by Mr Lamb to the Panel<sup>20</sup> - it is clear that the funding and agreement are reliant on achieving water quality improvements, and not changing the nutrient reduction targets, or timeframes, or undertaking other significant policy changes. This matter is addressed further at paragraph 50 onwards regarding the legal status of the Integrated Framework in Plan Change 10.
9. I'd like to point out that there is a real tension between the alternative realities of 'hold the line the lake is fine' and 'why hasn't Council acted to address sustainable management by way of regulation sooner<sup>21</sup>'?
10. In considering alternative proposals<sup>22</sup> to those put forward in PPC 10 by Council, it cannot be stressed enough that unless reductions in nutrient losses to Lake Rotorua

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<sup>11</sup> Rebuttal, Professor Hamilton, at [2.4]

<sup>12</sup> See Mr Lamb - Appendix 1 – Consultation and Development. Memorandum 22 March 2017

<sup>13</sup> As recommended to be amended – Version 7 PPC 10 filed 28 April 2017 and supported by additional s42A.

<sup>14</sup> See EIC Andrew Bruere

<sup>15</sup> See under science [44] – re David Hamilton

<sup>16</sup> Hamilton.

<sup>17</sup> Policy WL 6B

<sup>18</sup> As defined in PPC 10.

<sup>19</sup> Stephen Lamb, s32

<sup>20</sup> Stephen Lamb: Answers to questions 1, 2 and 4: memorandum filed 28 April 2017

<sup>21</sup> As pointed out in questioning by Commissioner Cowie.

currently in place are **retained** and that further reductions are **made**, it is not a viable alternative at all. Descriptors like ‘enabling’ and ‘best bang for buck’ are meaningless because what counts in this plan change is securing a sustainable level of nutrient flow to Lake Rotorua for the long term, by way of clear managed reductions to the sustainable load. If it doesn’t secure that necessary reduction it is just a waste of time.

11. To put it another way, an alternative needs to achieve the same objectives as PPC 10 seeks to. Doing something else in the hope that the RPS and/or RWLP might change is a backdoor way of challenging the operative RPS and RWLP objectives and policies. It is not an alternative way of achieving them.
12. In the submissions following we have briefly pointed out some of the ‘obvious flaws’ with regard to the alternative proposals put by submitters. We have not repeated the alternatives already considered and discussed by Council in the section 32 and evidence.

*Re-intensifying to the benchmark under Federated Farmers’ joint proposal: permitted  
Increasing N loss: RDA*

13. Under counter proposals put to the Panel (notably by Federated Framers acting in concert to some extent with others now, although the extent of this remains unclear following the Memorandum dated 26 April 2017 from Federated Farmers’ Counsel<sup>23</sup> ) there is little to stop farms that may have reduced intensity and nutrient losses below benchmarks in response to economic signals such as low milk price and high urea price, and perhaps uncertainty re regulation, moving quickly to restock if the price of milk rebounded enough, or to retain cows over winter and increase feed import etc (ie. undo the mitigations that are easiest).
14. And proposals such as that jointly made by Federated Farmers, Lake Rotorua Primary Producers Collective *et al* appear designed to provide for such floating re-intensification, making it permitted to farm back up to the previous Rule 11 cap or to the new cap (now proposed, as at 26 April 2017, as 1 March 2013 to 29 February 2016<sup>24</sup>, although no evidence has been provided in relation to this, including as to the

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<sup>22</sup> S32(1)(b)(i) RMA requires that the assessment of whether the provisions in the proposal are the most appropriate way to **achieve the objectives** proceeds by (i) identifying other reasonably practicable options for **achieving the objectives**... (emphasis added).

<sup>23</sup> Although the Memorandum purports to address this issue in detailed submissions made in paragraphs 7 to 18 at no stage is an unequivocal statement made that granting the ‘alternative’ PPC 10 as sought (and now amended as at 26 April 2017) will meet the requirements of named other parties such that the Panel need not also consider the relief specifically sought by them but only consider the Federated Farmers’ relief. It is also unclear if Federated Farmers do not support the proposed Policy amendments regarding the WWTP sought by Rotorua Lakes Council, as it appears that its proposal to remove its previous reference to ‘urban’ is signalling no support for the scope of such changes: paragraph 2 of the submissions entitled ‘Appendix 3 to FFNZ Memorandum 26.04.17.

<sup>24</sup> See Federated Farmers proposal, 26 April version, rule 3 notes re definition of ‘nutrient benchmark’ for the purposes of rule 3 at (b)(ii). Note that there appears to be a lacuna re the situation where a property has a Rule 11 benchmark as under (a) the note requires a ‘lawfully established benchmark **and** the supply of a register of the annual average export for nitrogen and phosphorus. It is unclear if this is intended to undermine existing lawfully established benchmarks to bring them into the new benchmark period 2013 to 2016 on the basis of a challenge to the register. It is also noted that the parties are not limited to their original benchmark in the rule framework – i.e. they could apply for a

effects on the Lake, or what the permitted amount of N loss would result in under this proposal). It appears that this new date range could ‘lock in’ and reward any non-compliance with R11, especially for those who intensified in the period since then and who either didn’t obtain a benchmark, or who will claim that they did not have an adequate register of N and P exports for that period and so seek to reopen their benchmark to reflect higher actual intensity. It also creates two different sets of data that may make future modelling difficult as the old benchmark figures are obtained through another version of Overseer than the new date range would be, and there appears to be no provision for reference files to maintain relativity.

15. The Federated Farmers et al proposal allows renewed intensification back up to the earlier benchmark by the inclusion of a proposed permitted activity - ‘rule 3’ - limiting farming activity to not exceeding the ‘lawfully established nutrient benchmark’ or establishing a benchmark in accordance with Schedule AA and not exceeding that. Incidentally, Schedule AA does not limit the new cap benchmark to the 2013 – 2016 period– this is only shown in reference in the notes to Rule 3. Enforceability of these proposed provisions seems to be an issue given the lack of certainty around what the permitted activity would be and when it was being exceeded. This point is not addressed in the analysis provided but is a central issue to assessing the effectiveness/efficiency and indeed equity of alternative scenarios/proposals. In contrast the Council proposed PPC 10 provisions have carefully considered the compliance issue and have only been criticised by submitters on that point because they seek compliance on agreed NMP actions and using Overseer – i.e. a perceived lack of flexibility. Evidence from the Regional Council has explained that this is not the case and the proposed PPC 10 provisions provide for updating of NMPs provided that the actions can be shown (by Overseer file) to result in the required reductions.
16. Consent to increase above the proposed Federated Farmers’ caps is (in comparison to PPC 10) easy to obtain as there is no intention of meeting the 2032 limit<sup>25</sup>, and consent status is RDA not non complying as proposed under PC 10.

*Giving effect to the RPS: s67(3)(c) RMA*

17. No attempt is made to explain how this Federated Farmers *et al* proposal better gives effect to the RPS, including the direction in WL 6B(c), but the conflict is, in my submission, entirely obvious.
18. (Federated Farmers) Proposed Policy LR P16 would be contrary to this requirement in particular, by failing to give effect to Policy WL 6B(c) given it states a policy of granting controlled activity consents for a period of 20 years (i.e. to 2037) that would clearly exceed the direction to **not** authorise discharges in excess of the 2032 limit for nitrogen as there is no required reduction in place to meet this and current levels are far in excess. It simply does not give effect to the RPS in any way in that regard, and therefore fails to meet the requirements of section 67(3)(c) of the Act.

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different one. Given the lateness of this proposal and lack of evidence of any consideration as to its effect (intended or otherwise), these submissions merely note the perceived inadequacy.

<sup>25</sup> Confirmed by Ms Edwards in presentation, despite it being an express requirement of the RPS that no discharges shall be authorised beyond 2032 that results in the limit for Lake Rotorua being exceeded (Policy WL 6B(c)) (*emphasis added*).

19. In my submission it is also not possible to proceed with such a proposal on an assumption that this RPS limit of quantity and timeframe will be changed under some future change to the RPS, particularly given that the science consensus is to proceed with PPC 10 as proposed by the Council<sup>26</sup> - i.e. the scientists' one area of disagreement has "*no effect upon the proposed structure and implementation of PPC 10*" and "*we have not proposed any change in the recommended nitrogen targets of LR Policy 1 in PC 10*"<sup>27</sup>. And of course, the objective is to meet the TLI as per Objective 11 RWLP.

*Paucity of evidence of regarding efficiency and effectiveness of alternative proposal*

20. No examples of substantial reductions of N of the level required under PPC 10 and the RPS being voluntarily made and sustained were provided in the circulated evidence of Federated Farmers, or of Mr McKenzie, although industry standards are acknowledged to be making some limited inroads into improving some farms' standards.
21. Up until 26 April 2017 no actual evidence was offered of successful voluntary reductions of nitrogen losses by any party.
22. The 2015 Dairy NZ document now provided via Federated Farmers as of 26 April 2017 comes without the opportunity to ask questions of Mr Burger from DNZ, and cannot be viewed as much more than a pathway towards good practice for some of the farms – for example: "*Nearly 23% of farms did not record a reduction in nitrogen losses as a result of SMP actions, as not all actions specifically targeted N reduction. Actions around wintering strategies and improved feed management had large impacts on reducing nitrogen losses on some farms (>20% farm N reduction) but these strategies are being implemented only on a small number of farms overall.*" "*The mean reduction in N losses was estimated to be 5%*"<sup>28</sup>.
23. This type of reduction can be compared to the situation in the Lake Rotorua catchment where the first level of reduction required under PPC 10 is 31.3% of the 140 tN/yr **plus** the community share of 180 tN/yr. Clearly there is no certainty that reliance on such voluntary methods will enable Council to fulfil its functions under section 30 of the Act, and therefore it appears most unlikely that the alternative PC 10 will meet the requirements of section 68(1)(a)<sup>29</sup> of the Act either as it does not address the required functions.

*Forestry under Federated Farmers' joint proposal: still unclear as to how treated*

24. Further to this, with regard to the alternative proposal put forward by Federated Farmers, and also to the other options canvassed by CNIIHL, no evidence on what would really happen if forestry, however owned, was enabled for conversion to higher

<sup>26</sup> Caucus statement of the Water Quality Scientists dated 3 April 2017 at 3.1 "Following caucusing between experts, a single matter remains in disagreement but that disagreement does not affect the proposed structure and implementation of PC 10."

<sup>27</sup> *Ibid*, at 2.3.

<sup>28</sup> Page 19: Dairy NZ: Potential reductions in farm nutrient loads resulting from farmer practice change in the Upper Waikato catchment 31 August 2015

<sup>29</sup> This relates to the power to make regional rules for the purpose of carrying out the Council's functions. Those functions have been noted in footnote and text above.

nutrient loss uses has been provided by anyone except for the Regional Council<sup>30</sup>. [It has undertaken a best attempt to quantify the level of risk, and nutrient ledger rebalancing required, although acknowledges that future behaviour in terms of how much land would convert if it could and what those parameters to drive this are can only be approximated.]

25. This was a gap in the alternative model of Federated Farmers et al as presented on Thursday 20 April 2017, because there was no specific rule that dealt with this. Instead, Counsel informed the Panel in further submissions dated 26 April 2017 that forestry was covered by being included in the **definition** of farming activity – see submissions in the Memorandum of Federated Farmers 26 April 2017 at 33 onwards. From this it appears that there is, at the very least, room for development through, say, offset agreements with farms that had reduced from an existing R 11 benchmark or who had previously intensified and then sought a Federated Farmers benchmark at the 2013-2016 level. No analysis was provided as to the extent of this or likely effect. The benchmark process provided for under Federated Farmers proposed Schedule AA is not in any way clear as to what benchmark would be provided to forestry or how this would be calculated (only requiring the provision of crop type(s) and area in each crop (including forestry) to be provided under Schedule AA (16) and possibly again under (5) as a land use. The recycling of the information table from Rule 11 overlooks that this data must be run through an Overseer programme and supplemented with additional material to provide a benchmark figure. However it remains very uncertain how plantation forestry is dealt with – particularly if provision is only as part of a farming activity. Given this forestry requires a benchmark. Presumably the benefit to forestry under this proposal is that there is no overall reduced limit to nitrogen imposed or intended under the Federated Farmer's proposal, so that there is more likelihood that intensification and increased N losses to the Lake can occur albeit not as of right.
26. Another area that is not clear is the proposed treatment of managed reduction, although there is a Policy (5) and an appendix there is no target to reduce to.

*Addressing the criticisms of PPC 10*

27. Over the course of this hearing the challenges to the proposed provisions of Plan Change 10 covered these main<sup>31</sup> areas:
- that they privileged polluters over all others and more N should go to others; (CNI, RLC);
  - that they would have devastating effects on farmers (Federated Farmers et al);
  - that they are inequitable in respect of underdeveloped Maori Land and provision should be made to enable development not restrain it (CNI, RLC);
  - that the science is too uncertain to sustain regulatory control (Federated Farmers et al);
  - that the section 32 report was inadequate in that the economic modelling did not cover Mr Osborne's option that either was or wasn't natural capital/land use capacity in some form (RLC)

<sup>30</sup> See rebuttal Moleta and Lamb. See too, the Answer to Question 12, provided in the Answers memo filed 28 April 2017 at page 12 and 13.

<sup>31</sup> There were others, but for the most part these are addressed via the s42A and updated s42A reports.

28. To some extent points 1 and 2 above cancel each other out – it is difficult to see that PPC 10 can simultaneously be both pandering to farming and having a devastating effect on it – clearly neither can be true at the same time. Aligned to this was the statements that the majority of farmers were at or close to the 2022 target – true of some, and indeed of many of the dairy farmers who had built bigger ponds, destocked and moved to non PKE systems (for example) so that at this moment in time approximately 20 of the approx. 26 dairy farms are at or near the first managed reduction target. As are some of the drystock farms, although there are a solid number that little is yet known about because they have not yet taken up offers through the support and advice programme.
29. What was evident was that there was a strong concern from some farmers that meeting the 2032 target would be hard, but little comfort was taken in the thought that by that time better science and better farming is likely to have changed the parameters somewhat (in much the same way as the past 15 years have seen many changes)<sup>32</sup>.
30. The timeframe of to 2032 was a matter agreed in mediation with LRPPC and LWQS in resolving the Regional Policy Statement appeal on this issue – it should not be overlooked that the original date when the RPS was notified was 2019.
31. It should also not be overlooked that the provisions of PPC 10 were carefully crafted to allow a lead in so that the pastoral sector reductions were staged in increments, while the community contribution of reducing the 180 tonnes N took place in the front end, across the catchment by permanently buying N allocation out of the system, funding gorse conversion to productive forestry or manuka, and funding engineering reductions.
32. As noted, the community commitment and funding is tied to the achievement of the 2032 limit and cannot remain in place if there is no commensurate managed reduction from the pastoral sector secured by way of rules. This is because the community funded portion allowed PPC 10 to require less reduction by way of rules, by taking up the costs of 180 tonnes N/yr of that reduction – which would otherwise have had to be done by rules alone. That public funding commitment has no place if without the certainty of achieving the reductions that PPC 10 would bring – the limited funding would be quickly exhausted trying to plug a very leaky bucket because none of the other proposals can successfully limit and reduce N in the catchment, and some (Feds) expressly doesn't even try to meet the agreed RPS target. To put it another way, unless there is a reduction on both sides of the public/private ledger there cannot be an overall net reduction secured for the Lake.
33. In line with this, it is apposite that there is also cannot be wide provision for enabling more development of the catchment land, without concomitant reductions elsewhere in the catchment. Increases have been sought by submitters for existing dairy land, Maori land, underutilised land, forestry land, and for commercial horticulture.

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<sup>32</sup> Panel questions to individual farmers about their expectations of future technological improvements.



34. The Regional Council has called evidence on the consideration given to underdeveloped Maori Land (Mr Lamb, Ms Moleta, Mr Kingi, Ms Barns) and the need to achieve a clean lake (TALT statement, Professor Hamilton, Mr Bruere, the planning evidence of Ms Burton and Mr Lamb), it has undertaken economic and scientific caucusing and met with as many of the parties during the process as it could on matters as diverse as the stocking rate table, equity, the overseer methodology, document security, reference files, the treatment of phosphorus, providing for commercial horticulture, internal accounting for rural land use change and wastewater treatment demands...
35. A comprehensive s42 report was produced, and added to via additional planning reports through this process until the final track change version of the proposed plan change was created that represented the culmination of all of the responses from the Council planning and technical team in light of all of the matters raised and discussed. An additional s42A report addressed all of the proposed amendments arising since 20 January 2017. To the extent that a s32AA report is required this is covered in those documents.
36. The Parliamentary Commissioner was right – this has indeed been part of an ongoing marathon effort, and there will always be more to do. But none of what has been heard and considered over these many days of hearing has fundamentally altered the Council case that the provisions of PPC 10 are the most appropriate way to address the Objectives, and indeed meet the purpose of the Act.
37. The issue of the section 32 analysis has been comprehensively addressed via the evidence and the caucus report of the economists. Although Mr Osbourne’s position arguably remained as a preference for an indeterminate type of land use capability allocation, no real gap in the evidence was shown in terms of the adequacy of consideration, and the caucus report did not agree with his position. Further background documents filed during the hearing confirmed this position. To the extent that there will always be more things could have been considered more, PPC 10 is not perfect – but the Council evidence has, in my submission, shown that the considerations were adequate<sup>33</sup>. By way of example, the modelling of Professor Doole.
38. The upshot of the relief pleaded by various parties initially ranged from reallocation of nitrogen allocation (more from farmers to underdeveloped land or urban growth) to do nothing/ (mistakenly) characterised as ‘hold the line’ but more fairly put as ‘go backwards’ for the reasons given above. Much was made of voluntary compliance despite the evidence of widespread previous non-compliance under rule 11 benchmarking requirements (partially rectified under this programme of information collection for NDA calculation).
39. Another option (again allied to the Federated Farmers’ position) was that it could all be better sorted under the NPS-FM process, and ‘evidence’ provided that this might

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<sup>33</sup> By way of example: <https://www.boprc.govt.nz/media/607804/24-march-2017-appendix-2-to-compodium-rebuttal-evidence-of-tanira-kingi.pdf>

start very shortly<sup>34</sup>. The paper referenced by Ms Edwards was an earlier version of the final document that was updated on 29 March 2017. The correct reference is linked here: <https://www.boprc.govt.nz/media/607615/freshwater-futures-national-scene-final.pdf>

40. Council is proceeding on implementing the NPS-FM across the region, but has not changed the timeframe for the Rotorua Lakes WMA – the situation remains as outlined by Mr Lamb.
41. What is clear from all of the NPS-FM material filed by Council is that the work done on PPC 10 for Lake Rotorua around achieving the nitrogen limit in the RPS means that the Rotorua Lakes WMA process will not revisit this. Current discussions around the Rotorua Lakes WMA are focussed on the other Lakes. Lake Tarawera is declining for example.

*Where's the science at?*

42. About the science: The Panel heard a lot about the extensive and intensive Lakes Programme of science<sup>35</sup>.
43. No scientist has said that the PPC 10 methodology or the targets of the TLI and the RPS sustainable lake N target of 435 should be abandoned or that there is currently a plausible new set of figures for N and P reduction: in fact, in the caucus statement of Professor Hamilton, Dr Stephens and Mr Bruere the contrary applies - ( emphasis added):

“To avoid confusion, we have not proposed any change in the recommended nitrogen targets of LR Policy 1 in PC 10. Hence, despite our confidence that reductions in P have plausibly driven recent improvement to water quality, we support both N and P being managed at this time. Instead, it is our opinion the balance of N and P reductions might change through improved understanding of algal-nutrient dynamics and specific knowledge about P-management strategies in the Lake Rotorua catchment. To act on that knowledge requires formal and robust best international scientific practice, with reviews of sufficient scope to redefine nutrient targets for the same fixed algal and clarity (effects) expected under Objective 11 of the Regional Policy Statement.

*Caucus statement Water Quality scientists, [2.3]*

44. Scientific uncertainty and ‘new science’ has been overstated, such as in the evidence of Ms McGruddy who based her support for the alternative proposal of Federated Farmers et al on her own analysis and conclusions, saying there were “strong sub-catchment patterns in nutrient loads, sources, pathways and attenuation factors”, and “significant shifts” in science<sup>36</sup>, which was simply not reflected in the science evidence in the manner contended, nor is the oft-quoted “new understanding” actually a fact.
45. The NIWA 2009 paper relied upon by Ms McGruddy was not new<sup>37</sup>, and showed subcatchment river flows, but this is not the same as the three pathways used by Dr

<sup>34</sup> Federated Farmers’: Synopsis of legal submissions at fn3.

<sup>35</sup> Summary, Andrew Bruere; Professor Hamilton; Dr Rutherford.

<sup>36</sup> EIC McGruddy, pages 4/1008 and 5/1008.

<sup>37</sup> Presentation , McGruddy at [xx]

Rutherford in modelling the manner in which nitrogen and water travel to the Lake – being quickflow, slowflow and stream flow<sup>38</sup>.

46. Sub-catchment processes are not the hoped-for silver bullet. Indeed Dr Rutherford was extremely clear that he saw “no prospect of developing a more realistic model (that accounts for this complexity at the spatial scale of individual dams or even different sub-catchments) with the data currently available, or likely to be available in the foreseeable future”. And this was based on modelling based on 10 locations over a 30 year period<sup>39</sup>. Dr Rutherford simply “could not discount the possibility that the variation between sub-catchments was an artefact”, and stated unequivocally that “I know that my estimates of attenuation at the scale of sub-catchments (viz., 30-150 individual farms) have a large uncertainty”<sup>40</sup>. He went further to say that: “At the risk of repetition, I would like to disabuse the panel, Council or submitters if they think that it is within the scope of the ROTAN modelling to provide quantitative predictions of the effectiveness of small scale mitigation measures. In particular, I warn against trying to exploit the apparent differences in attenuation between sub-catchments (alluded to by Mr McKenzie) because they are unreliable”.<sup>41</sup>
47. Professor Hamilton also “confirmed his advice that devolving actions to sub-catchment scale is not practical from the perspective of actual implementation across the catchment”<sup>42</sup>.
48. In fact, there are currently no known better scientific figures or current processes than those used by PPC 10, and to get to even a potentially different set of figures would, as noted above, require ‘formal and robust best international scientific practice, with reviews of sufficient scope to redefine nutrient targets for the same fixed algal and clarity (effects) expected under Objective 11 of the Regional Policy Statement’. That is not a quick or easy project and the science experts were clearly talking in a longer term frame than Ms McGruddy realised – for example – talking about information gathering that would be used for “exploring alternative dual nutrient management approaches focussed on greater P-limitation to sustain a TLI  $\leq 4.2$ , but under reduced anthropogenic P-loading instead of our present reliance on alum”<sup>43</sup>
49. As to that reliance on alum: it remains the case that alum dosing isn’t the silver bullet either, despite some submitter’s hope that it might be a long term solution<sup>44</sup> as an alternative to reducing on-farm nitrogen losses. Life without alum dosing is the desired long term outcome, but there is no cessation date assumed (unless of course new consent for further dosing is not granted, or is only granted for a short period.)

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<sup>38</sup> Annotated evidence: Dr Rutherford at [18], Appendix 10 22 March compendium memorandum

<sup>39</sup> Ibid, [19]

<sup>40</sup> Ibid, interpolation in red above [23].

<sup>41</sup> Dr Rutherford at Appendix 10: above paragraph 26 (interpolation in red): <https://www.boprc.govt.nz/media/607613/sew-133911-559-785-3-additional-documents-as-requested.pdf>

<sup>42</sup> Professor Hamilton at Appendix 9: p90, <https://www.boprc.govt.nz/media/607613/sew-133911-559-785-3-additional-documents-as-requested.pdf>

<sup>43</sup> Caucus statement Water Quality scientists, [2.8]

<sup>44</sup> See for example: Bushland at 34 and at ‘V’. <https://www.boprc.govt.nz/media/610366/bushland-summary-pdf.pdf>

What is required is that the catchment moves to a place where alum dosing can be safely stopped at some point in the future<sup>45</sup>.

50. And the scientists agreed that, even with the single matter in disagreement, (which was the weighting to assign various evidence preferred by Dr Stephens or Professor Hamilton), it “**did not affect the proposed structure and implementation of PC 10**”<sup>46</sup>(emphasis added).
51. Professor Hamilton has explained that the “The prospect of limiting P to the extent that the lake can be made phosphorus limiting would be highly challenging as research has shown there is a highly elevated contribution of P to the lake from natural sources #31. The old age ground water of the catchment (average age of 60 years) leaches geological P from the underlying geology #32. Generally without an intervention such as alum dosing this geological source cannot be managed, and therefore only a fraction of the P reaching the lake is from manageable anthropogenic sources.”<sup>47</sup> This makes it unlikely that there is a silver bullet out there that will mean there does not need to be a reduction in nitrogen of the scale that only PPC 10 can secure with any certainty.
52. As to certainty: the position on this is submitted to be as set out below<sup>48</sup>, in that modelling and scientific evidence as to future events is analogous to approximations of what may occur as potential effects, as these are based upon a best endeavours attempt to prophesise the future state of the Lake, all other things being equal, at a point in the future:

[90] In Resource Management Act proceedings, the allocation of the evidential and persuasive burdens of proof can be problematic, and sometimes inapposite. Ordinarily, where a party is seeking to persuade a decision-maker in the resource management context to make a decision in his or her favour, the onus is on that party to prove, on the balance of probabilities, the factual matters relied on support the position the party wishes to advance. The same standard does not apply when the decision-maker is asked not to ascertain what has already happened, but rather to prophesise what may happen at some stage in the future. An assessment of potential effects depends on an evaluation of all of the relevant evidence, but it does not depend on proof to a preordained standard that the potential effect is more likely to occur than not.<sup>59</sup>

(<sup>59</sup> *R J Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.)

53. The Lakes’ Water Quality Society supports the proposed rules and incentives programme<sup>49</sup>, including the sector allocation with ranges as being the “most pragmatic solution” to nitrogen allocation in the Lake Rotorua catchment. It also remains the only real option with any likelihood of success in securing the stated aim on the basis of the evidence as set out above.

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<sup>45</sup> Bruere, Hamilton.

<sup>46</sup> Caucus statement Water Quality scientists, [3.1 and 3.2]]

<sup>47</sup> Professor Hamilton summary [15]

<sup>48</sup> *Independent Maori Statutory Board v Auckland City* [2017] NZHC 356, Wylie J

<sup>49</sup> Presentation, LWQS Key Point #7

## Role of Integrated Framework

54. The Panel has expressed its interest in what the role of the Integrated Framework is. Mr Eccles<sup>50</sup> has suggested that it could be transformed to a policy.
55. In deciding how to proceed with the Lake Rotorua project there were some assumptions tested around how much of the required reduction in N leaching should be secured by rules requiring reductions and how much reduction could be otherwise achieved. This reflected the RPS intention that a consideration of *any land use change* that is required in the Rotorua Te Arawa lakes catchments<sup>51</sup> takes into account an 'equitable balancing of public and private costs and benefits'. These considerations are set out in a paper<sup>52</sup> by Sarah Omundson to the Regional Council's Strategy, Policy and Planning Committee and Rotorua Te Arawa Lakes Strategy Group<sup>53</sup>.
56. As part of the Rotorua Te Arawa Lakes Programme there are various interventions over the 12 Lakes, 5 of which Lakes have Deed funding from the Ministry for the Environment: Rotorua, Rotoiti, Rotoehu and Ōkāreka. The public funded Deed funding is a relevant part of this explanation, because it secures the majority of the reductions in N losses required (180 t/N/yr of the 320 t/N/yr reduction required)<sup>54</sup>.
57. For Lake Rotorua, while the RPS requires (directive policy) that a reduction of 70% of the required reduction to 435 t/N/yr by 2022<sup>55</sup> is set by a catchment intermediate target, it does not set out how this 70% reduction is to occur **other than** by requiring under WL 6B (a) that "rural production land use activities minimise their loss of nutrients as far as is reasonably practicable by implementing on-farm best management practices" and that the above-mentioned considerations in WL 6B(b) about land use change apply.
58. The relationship between WL 6B(a) and (b) is not mutually exclusive but more *sequential* given that *land use change* would logically include a consideration of pastoral land use and any change required<sup>56</sup>, and the details set out in the explanation to the Policy: that explanation says: "**The cost of achieving any further reduction in nutrient losses over and above on-farm best practice in a particular catchment will have a mix of public and private costs and benefits and should be funded accordingly.**" (emphasis added) Of course, the explanation is not the Policy, but does indicate that the 'compact' is that the pastoral sector first

<sup>50</sup> Eccles <https://www.boprc.govt.nz/media/612152/memorandum-of-grant-robort-eccles.pdf>

<sup>51</sup> Broader than just Lake Rotorua – see RPS Policy WL 6B.

<sup>52</sup> "Framework for allocation and incentives in the Lake Rotorua catchment" report to Strategy, Policy and Planning Committee 17 September 2013 and RTALSG 27 September 2013.

<sup>53</sup> RTALSG consists of 2 representatives each from Te Arawa Lakes Trust, BOPRC, RLC – a permanent joint committee under the Te Arawa Lakes Settlement Act 2006. This committee reports directly to the Regional Council.

<sup>54</sup> See the explanation of the parameters and constraints of the funding, set out in the Council answer to Panel Questions 1 and 2 filed on 28 April 2017 – at page 4 onwards.

<sup>55</sup> RPS WL 6B(c).

<sup>56</sup> As the major contributor of N to the lake and the only realistic area where reductions of N loss can occur as other land uses have little ability to reduce their loss rate.

makes all of the reductions that it can to achieve “best practice” and that from that point onwards a consideration of the ‘mix of public and private benefits’ applies.

59. In light of this it is difficult to see how any alternative proposal that does not require firstly best practice *and then* further reductions on top of that, including any land use change required, meets this RPS policy.
60. The Integrated Framework addresses the ‘equitable balancing of public and private costs and benefits’ under Policy WL 6B(b) and shows what takes place in the space after on-farm best practice (i.e. the ‘over and above’ as underlined above), and is directed at land use change to achieve reductions in nitrogen. The agreed pastoral sector reductions are therefore a combination of WL 6B(a) reductions from rural production land use activities and WL 6B(b) any further reduction in nutrient losses over and above on-farm best practice, in that more than best management practice is required to achieve the pastoral contribution to reaching the sustainable lake load<sup>57</sup>. This is shown in Table LR 1: Lake Rotorua Integrated Framework – annual catchment loads and reductions.
61. The rules reduction in PPC10 addresses the 140 t/N/yr reduction (96 t/N/yr dairy sector (reductions of 35.3% of sector load) and 44 t/N/yr drystock (reductions of 17.2% of the sector load)<sup>58</sup>. The Integrated Framework sets out the complementary public commitment and funding for the reduction of an additional 180 t/N/yr reduction: the 100 t/N/yr reduction (Incentives Scheme); 50 t/N/yr engineering solutions and 30 t/N/yr gorse removal funding – which is a requirement under RPS Policy WL 6B(b).
62. The inclusion of the Integrated Framework in the introductory part of PPC 10 is therefore a public statement of how PPC10 gives effect to both Policy WL 6B (a) and (b), being a demonstration of the commitment made under other Acts<sup>59</sup> to achieving the public/private funding required to achieve the limit set under Policy WL 3B. Its

<sup>57</sup> See for example section 4.2.1 of “Framework for allocation and incentives in the Lake Rotorua catchment” Strategy, Policy and Planning Committee 17 September 2013.

<sup>58</sup> These reductions have been associated with the final allocation of the Lake Rotorua assimilative capacity after 2032, in terms of having achieved the 2032 NDA this will be a fixed allocation. The possible gap in the Policy intent here is whether the allocation of the reductions to get down to the Lake limit (Policy WL 6B) and the allocations of N under that limit after 2032 (Policy WL 5B) are the same thing. It is not completely clear whether the RPS envisages a ‘post 2032 distribution’ under WL 5B, or the extent to which PC 10 precludes this, although by implication it does for the pastoral sector. The s32 rules formulation to reduce to the limit on assimilative capacity expressly considered the principles set out in WL 5B. While the focus of Plan Change 10 is to achieve the required reductions, it provides for a consent period of up to 20 years (2017-2037.) There are allocations of N via NDA in the period to 2032, and the process requires this so that the Incentives Scheme can purchase the 100 t/N/yr out of catchment (figures are ‘in lake’). In light of the consent period of 20 years in Policy LR P14 (PC 10) there is a (preliminary) post 2032 allocation of *that portion* of the assimilative capacity up until a maximum of 2037, although this is not fixed given that the PC 10 provisions do not prohibit other applications being made, and there is provision for other matters such as review conditions in consents. In my opinion the post 2032 allocations are made if they have been made for a period post 2032 such as permanent purchases of N by the Incentives Committee, or are covered in a consent with a life post 2032 (and are not otherwise reviewed). Policy LRP5 applies.

<sup>59</sup> LGA and Te Arawa Lakes Settlement Act 2006. Note that the public funding component is determined under Deed funding and occurs via the RTALSG process, and is confirmed by the Ministry for the Environment approving the works programme for Deed Funded Lakes. See at p84 of 170: <https://www.boprc.govt.nz/media/362742/rotorua-te-arawa-lakes-tuesday-3-june-2014.pdf> (the first page of this section on the Annual Plan of Interventions is set out in Appendix 2 to this note.)

retention is necessary to understand how the sector allocations for reduction are complemented by publicly funded reductions as otherwise there is no transparent way to understand how the dual requirements of Policy WL 6B have been met.

63. It is also a public statement that the RPS requires the following commitments in order to meet the limit in Policy WL 3B:
- a commitment to reduction from the pastoral sector
  - a commitment of public funding for additional reductions over and above the pastoral sector reductions
64. Without these commitments Policy WL 3B cannot be met.
65. In this way the inclusion of the Integrated Framework is consistent with section 67(2) (b) and (c) of the RMA to show the breakdown in the Integrated Framework being a method, other than rules, for implementing the policies of the region and a principal reason for adopting the policies and methods.
66. It is also consistent with section 67(h) being other information that is required for the purpose of the regional council's functions, powers and duties under the RMA, as explained above.
67. Beyond ("over and above") the reductions that are possible under WL 6B(a) on-farm best management practices there is a requirement, and a commitment through the RPS wording, to look at the mix of private and public benefits and fund these additional **reductions** accordingly.
68. This intersection of decisions under RMA, LGA and the Te Arawa Lakes Settlement Act 2006, and the need for approval of actions under the interventions and Funding Deed by the Ministry for the Environment make the decision-making space under the RMA less clear than is usual for a Plan Change. Although the Regional Council is acting under its functions in section 30 RMA, it is not the only consideration: Plan Change 10 is a creature of the RMA, being promulgated under it, but it was always the case that the overall reductions required to meet the limit in RPS Policy WL 3B would have to proceed under more than just the RMA in order to be secured.
69. It is an RMA matter as to the achievement of Policy WL 6B(a) – the Panel can determine if the level and share within the rural production sector of the 140 t/N/yr reductions reflect what is reasonably practicable by implementing on-farm best management practices when it comes to rural production land use activities.
70. The Panel could address this 140 t/N/yr reduction as between rural production land uses. It can address within that activity class of rural production what level of minimising their loss of nutrients can be achieved in this way.
71. It should be noted that the RPS **defines** rural production activities as *including* agriculture, pastoral farming, dairying, poultry farming, pig farming, horticulture,

forestry, quarrying and mining<sup>60</sup>. This definition suggests that **forestry** and **horticulture** too was expected to play its part in the required reductions by rural production land use activities to be achieved under Policy WL 6B (a), as well as when considering the funding of private and public costs and benefits under (b) for securing the additional reductions that are “over and above” those able to be secured by on-farm best management practices. This interpretation and the wording of Policy WL 6B and its explanation suggest that it is a mistake to jump to quickly to Policy WL 5B in considerations about the ‘sharing out of the pie’, or increasing losses rather than reducing them.

72. What the Panel cannot change is the level of commitment of public funding under the Deed or its allocation to interventions, because that is outside of the RMA process<sup>61</sup>. The decision to fund the securing of the reduction of 180 t/N/yr and the costs of that by public funding under the Deed and LGA is not an RMA decision.
73. One further important point needs to be made: this is about the relationship of the achievement of the 70% of the required reduction by 2022 under Policy WL 6B. The timing of the public and private contributions to this reduction is currently set by reference to the managed reduction targets determined in accordance with Schedule LR One and Policy LR P8: they are calculated as a percentage of the total reduction required (see definition and Table LR 7). Under Table LR 7 the 2022 Managed Reduction Target is set as being 31.3% of the total 140 t/N/yr reduction; a further 34.3% to be achieved by 2027 and then a final tranche of 34.3% between 2027 and 2032 to make up the full requirement to achieve the 140 t/N/yr. (see Table re 2022 consent start dates too). Currently the reduction commitments are weighted heavily towards the community but this is balanced by the 2032 commitment by the pastoral sector.

<b>Reductions in Tonnes of Nitrogen by Timeframes</b>				
	<b>2022</b>	<b>2027</b>	<b>2032</b>	
Community				
<i>Engineering</i>	50			
<i>Gorse</i>	30			
<i>Incentives</i>	100			180
Pastoral Sector				
<i>Rules</i>	44	48	48	40
Catchment reduction target	224			320
	<b>70%</b>			<b>100%</b>

74. The commitments provide upfront impetus and leadership for the programme and a 15-year timeframe to support pastoral sector adjustments in practice and land use.

<sup>60</sup> RPS, Appendix A: **Rural production activities**: Rural land use activities that rely on the productive capacity of land or have a functional need for a rural location such as agriculture, pastoral farming, dairying, poultry farming, pig farming, horticulture, forestry, quarrying and mining. Also included in this definition are processing and research facilities that directly service or support those rural land use activities.

<sup>61</sup> See Answers to the Panel’s Questions 1 and 2 (filed 28 April) in this regard.



They also have implications that flow into the PPC10 rule structure for example the trading moratorium, consent terms and NMP requirements.

75. If the commitments were to be altered then there are potentially significant impacts on the timing and splits of any public funding. For example, a pastoral sector commitment only to 2022, combined with, for example, a 50:50 private/public funding split would see the pastoral sector reduction increase to 112 Tonnes Nitrogen to meet the 70% catchment target.
76. This timing and proportion of reductions required within PPC 10 is also a matter that the Panel can determine but not to alter the amount and timing of public funding commitments to the additional reductions, or to move from the achievement of the required 70% reduction by 2022 as directed by the RPS.
77. So, to reiterate, the inclusion of the Integrated Framework as proposed is consistent with section 67(2) (b) and (c) of the RMA to show the breakdown in the Integrated Framework being a method, other than rules, for implementing the policies of the region and a principal reason for adopting the policies and methods, and is also consistent with section 67(h) being other information that is required for the purpose of the regional council's functions, powers and duties under the RMA, as explained above.
78. It is not considered necessary that this occurs via a Policy.

#### **Scope of WWTP proposed policy**

79. The RLC sought amendments to PPC 10 to recognise and provide for the WasteWater Treatment Plant. As described in the report<sup>62</sup> agreement between the two Councils was reached on 2 proposed policies that might address this and a method for internal accounting. This approach was not supported by the further submitter opposed to the RLC submission, on the basis that there should not be provision for increased discharges to Lake Rotorua achieved through PPC 10. The merits of this were discussed in the hearing, and we filed a memorandum addressing the point that PPC 10 does not and cannot provide for increased discharges to Lake Rotorua from further WWTP consenting<sup>63</sup>.
80. The RLC counsel's synopsis of submissions<sup>64</sup> relied upon the recent *Bluehaven*<sup>65</sup> decision of the Environment Court for in support of their argument that there was scope for the proposed policies and also further relief, not agreed by BOPRC.
81. In my submission, an analysis of the whether the requisite scope exists requires a start point earlier than the submission filed – it needs to begin with an enquiry of

<sup>62</sup><https://www.boprc.govt.nz/media/609746/sew-133911-559-844-1-report-on-agreed-proposed-amendments-and-outstanding-issues-wwtp.pdf>

<sup>63</sup> <https://www.boprc.govt.nz/media/612136/regarding-correspondence-nuit.pdf>

<sup>64</sup> [Synopsis of Submissions of Counsel](#)

<sup>65</sup> *Bluehaven Management Ltd v Western Bay of Plenty District Council 2016* [2016] NZEnvC 191  
*Caselaw - Bluehaven Management Ltd v Western Bay of Plenty District Council 2016*

whether the submission is 'on the plan change' in the first place. The decisions in *Motor Machinists* and *Clearwater*<sup>66</sup> clearly set out the two-limb test for this:

1. Does the submission address changes to the status quo advanced by the plan change? (and is this a matter that should have been dealt with in the s32 report?)
  2. Is there a real risk that people potentially affected have been denied an opportunity to participate in the plan change? (as part of this is it a consequential/incidental amendment which are allowed provided no further substantial s32 analysis is required to inform people of the comparative merits on the change).
82. The *Bluehaven* decision follows the above principles but clarifies that as part of the first limb you need to look at what matters should have been included in the s32 report because if Council had simply ignored a relevant matter from the s32 analysis and a submission mentions that, then the submitter should be able to deal with it.
83. In order to determine whether those submission points are within scope it then becomes necessary to go back and look at the notified version of PC10 to determine to what extent did PC 10 change the status quo?
84. Looking at the notified version it is clear that the intention was that it was farming activities / rural land that were intended to be regulated in order to meet the nitrogen limits set by the RPS. However, a number of the proposed policies simply referred to 'land uses'. These policies potentially may have been later applied to other land uses in the catchment, such as the consenting of the WWTP, even if the intention of PPC 10 was not to regulate any land uses other than rural ones within Lake Rotorua's groundwater catchment in order to enhance water quality. Potentially this may have become relevant during the consenting process, particularly as the Objectives from the RPS and RWLP (as noted in the plan change) just refer to 'enhancing the water quality' and maintaining the water quality to meet the TLI of 4.2.
85. PC 10 as notified had a number of policies in the notified version that were open-textured including:
- LR P1 'reduce nitrogen losses from land to achieve the 2032 lake load'
  - LR P3 recognising the balance etc. by using the 435; the 755 base; Overseer for NDA purposes (again not expressly restricted to farming in the policy although practically limited because of the purpose of Overseer and also the definition being clearly related to farms);
  - LR P5 makes it clear that the 435 is to be met by 'allocating NDA to dairy and drystock activities' (but then that arguably leaves the gap for urban/WWTP, despite these not being regulated via PPC 10);
  - LR P14 and P15 were not expressly limited to farming activities so it is not clear whether those might apply to the WWTP;
  - LR P17 which again refers to declining re-consenting activities that have failed to meet nutrient reductions (again I would say the obvious assumption is that is referring to farming activities but it is not specific).

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<sup>66</sup> Caselaw - PNCC v Motor Machinists Ltd 2014; Caselaw - Clearwater Resort Ltd v Christchurch City Council 2003

86. As can be seen above, we do not think it likely that such an interpretation would have been applied, and think it clear that it was not intended, but cannot completely discount this argument on the face of the words. This possibility has since been addressed through the s42A recommendations that have clarified the application of PPC 10.
87. There was therefore a limited argument that if the plan change was not read as a whole and in light of its specific and limited purpose, it could potentially change the status quo for activities in that area more broadly once viewed within the RWLP. This *might* have included a signal inadvertently sent via the consequential amendment originally proposed for Rule 11(f) that applied to point source discharges in the Lake Rotorua catchment. That deletion would not change the overall consenting status for new applications for WWTP, being discretionary, but (as argued by Mr Eccles) might have had some consequence by changing the overall way that such an application was viewed<sup>67</sup>. That proposed R11(f) amendment has since been withdrawn, and so this risk too no longer applies.
88. The Council accepts that no s32 analysis was undertaken of the potential for this type of impact, as it was outside of the purpose of the plan change – i.e. the s32 analysis considers rural land use and says at the start ‘the purpose is to reduce nitrogen losses from rural land’ and does not intend to deal with urban issues or the requirements for reconsenting/consenting WWTP<sup>68</sup>.
89. ‘Blue Sky’ provision for improving the position of future WWTP consenting processes are not triggered into scope from the above analysis.
90. In my opinion, what would be within the scope of the plan change, given the intent to address rural land use and provide drivers for land use change from pastoral land uses (including to lifestyle blocks and other less pastoral uses), is the *incidental* need to understand the movement of N and P within the land use changes and how this will affect overall nutrient accounting within the catchment towards ensuring the TLI for Lake Rotorua is achieved. That overall accounting is not held within PPC 10, or the RWLP or RPS, but occurs outside it within the Lakes’ Programme. To that extent the limited recognition that land use change from rural to other uses might need to be recognised in the manner proposed<sup>69</sup> would not be outside of the scope of this plan change.
91. In my submission on the above analysis the changes proposed to LRM5 and the addition to Schedule LR One E are within the scope of the Plan Change, and viewed overall, within the submission itself as they address these movements.

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<sup>67</sup> Presumably because of the signal sent by an RDA status to increase discharge of contaminants, in the R11 catchments, when taken into account in the overall D consideration.

<sup>68</sup> Although acknowledges that reticulation provides a benefit in reducing the level of loss from septic tanks, and notes that a new consent will be sought for the WWTP. This is at a level more of context than purpose.

<sup>69</sup> <https://www.boprc.govt.nz/media/609746/sew-133911-559-844-1-report-on-agreed-proposed-amendments-and-outstanding-issues-wwtp.pdf>

92. Proposed Policy LR P18 is a restatement of the RPS that explains the make up of the sustainable lake load, and is borderline within scope given that PPC 10 only actively manages some of the reductions required to reach that limit. However, in light of the discussion above we do not think that the inclusion is negated by the purpose of PPC 10 as it relates to that RPS limit and provides some context. The planning merits or otherwise are dealt with in the s42 report and the report between Council planners.
93. The inclusion of proposed new Policy 19 as immediately below also is within scope of PPC 10 **except** insofar as it references the reticulation of communities outside of the Lake Rotorua Catchment – as highlit. This is because PPC 10 is spatially limited to the area within the Lake Rotorua Groundwater Catchment. So while this is a Programme matter for the Lakes and the wording had been agreed on that basis, in my opinion it cannot fairly be said to be covered by PPC 10.

***LRP19 Acknowledge the increased demand on infrastructure located within the Lake Rotorua Groundwater Catchment resulting from land use change resulting from urban growth (and the consequential shift of losses between sectors) and reticulation of communities outside the Lake Rotorua Groundwater Catchment.***

94. However, the version of **LRP19** contained in V7 PPC 10 as suggested by Ms Burton refers instead to: *Acknowledge the increased demand on infrastructure located within the Lake Rotorua Groundwater Catchment resulting from land use change resulting from urban growth (and the consequential shift of losses between sectors) and reticulation of communities.*
95. Policy LR P19 as shown in V7 PPC 10 would be within scope of the Plan Change in my opinion. This is because there are a number of yet to be reticulated communities within the Lake Rotorua catchment, and change to these may well occur as a result of land use changes related to the Plan Change.
96. From this analysis it is clear that the alternative proposed version preferred by RLC's advisors that refers to all of the Lakes and the benefits of municipal waste water treatment does not appear to meet the criteria of being on the plan change itself.
97. From a legal perspective therefore I do not see scope for inclusion of the statement: *"Acknowledge the benefits of municipal wastewater reticulation and treatment to the overall water quality of the Rotorua lakes, and to the health and wellbeing of the community"*. This is not to say that the Regional Council does not itself recognise that the reticulation programme has these benefits, but that cannot change the scope of what PPC 10 is about. Likewise a proposed new rule specific to the WWTP would not be 'on the plan change'.

## Precedent

98. Some submitters<sup>70</sup> have referred to their concern that PPC 10 provisions and approach might have impacts wider than the Lake Rotorua Catchment. The Panel has confirmed that any decision/recommendation on PPC 10 will relate to the specific

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<sup>70</sup> CNIHIL, PF Olsen

facts and evidence of this Catchment and the Regional Council, via these submissions, reiterates this.

## Summary

99. The scope of these closing submissions is to highlight some of the legal issues and factual and planning matters developed through the hearing. In doing this we have considered the statutory framework and matters that the Panel's recommendations must address.

## Statutory framework for PC 10

*Does PC10 meet the requirements in sections 65 to 68 of the RMA?*

100. In addressing this question, the Panel is required to turn its mind to whether the Plan Change was prepared in accordance with the Council's functions under section 30<sup>71</sup>, the provisions of Part 2<sup>72</sup> and section 32<sup>73</sup>, including whether it gives effect to the relevant national policy statements and the Regional Policy Statement. These questions have been addressed throughout the hearing and above.
101. Although self-evident, it is recorded that the Plan Change sits within the wider context of the Regional Water and Land Plan, with its settled objectives and policies, and that there is also a series of other plan changes<sup>74</sup> underway addressing other important components of the national and regional policy statements. It does not by itself give effect to the full range of policies, which is why it needs to be read as a whole. The most relevant objectives and policies were identified in the section 32 report and the body of PPC 10 itself (by way of advisory). It is not considered that further objectives or policies are required.
102. The Panel has received confirmation<sup>75</sup> that the Regional Council is undertaking the requirements of the NPS-FM 2014 in accord with the timetable as resolved and notified<sup>76</sup>, and received the report from the Council to the Ministry explaining progress to date in achieving those. Mr Lamb provided information on the current status of the Rotorua Lakes WMA and Ms Burton confirmed that the Council had included the requisite interim Policy 43A to the Regional Water and Land Plan as required.
103. The Panel was also updated by Ms Burton on the programme of work being undertaken across the region towards giving effect to the NPS-UDC 2016, and the

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<sup>71</sup> S66(1)(a) RMA

<sup>72</sup> S66(1)(b) RMA

<sup>73</sup> S66(1)(d) and (e) RMA: 'its obligation (if any) to prepare an evaluation report in accordance with s32'; its obligation to have particular regard to an evaluation report prepared in accordance with s32'.

<sup>74</sup> <https://www.boprc.govt.nz/environment/water/freshwater-futures/freshwater-policy-and-plan-change-work/region-wide-water-quantity-plan-change/proposed-plan-change-9-and-other-supporting-documents/>; <https://www.boprc.govt.nz/media/528805/4-environmental-publication-2016-02-rangitaiki-wma-gap-analysis-for-web.pdf>

<sup>75</sup> <https://www.boprc.govt.nz/media/612138/15-march-2017-national-policy-statement-for-freshwater-management-implementation-further-information-filed-by-boprc.pdf>

<sup>76</sup> <https://www.boprc.govt.nz/media/607615/freshwater-futures-national-scene-final.pdf>

relevance of that NPS to this Plan Change (limited). She confirmed her opinion that PPC 10 had taken into account the appropriate growth requirements<sup>77</sup>.

104. The further planning report on phosphorus, and additional planning details on the way in which Council manages and reduces Phosphorus were addressed during the hearing. She proposed, in line with Professor Hamilton's figures, a further information table showing the components of the operative Lake Rotorua TLI expressed as NOF attributes. It is considered that, subject to acceptance of Ms Burton's proposed further amendments as set out in the additional s42A report, there is no requirement for any further changes in respect of the NPS-FM 2014 through this plan change. It is also considered that there is sufficient scope for those changes to be made (as set out in that report).
105. We have addressed the legal position regarding the Integrated Framework above. While this information could be held elsewhere, it would not be so evident that PPC 10 has given effect to the RPS in the manner explained above. Ultimately, although of great importance to the way in which PPC 10 works, the Framework is a method not a policy or a rule.
106. We have addressed above the issue of whether the s32 report meets the requirements of the Act, and submit that it does for all of the reasons canvassed above and in during the hearing.
107. We have also submitted that the s42A report/s meet the requirements of the Act in terms of a section 32AA report for further recommended changes.
108. The factual questions, regarding the Rule Framework, use of Overseer files, reference files, benchmarking periods and the like have been well traversed and we do not consider that a robust alternative to any of them have been presented. We refer particularly to the evidence from Mr Hansen<sup>78</sup> (Ravensdown) with regard to the technical matters, as well as the EIC and rebuttal on these matters provided by Mr McCormack and Mr Parks.
109. Although LRPPC and Federated Farmers (et al) challenged the use of the FNP and Overseer combination for compliance, no more certain or fairer system was provided that could ensure the maintenance of and achievement of reductions required in line with the best science evidence.
110. The Panel will have to decide if the relevant status of controlled activities and non-complying activities should be pegged where proposed or taken down towards a more permissive regime. The reasons for Council's proposals remain as stated in the opening submissions, and it is submitted, in part for the reasons set out earlier in these submissions, but also as a result of questions in clarification by the Panel and

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<sup>77</sup> Appendix 14: NPS-UDC update: addendum to the evidence of Ms Burton: <https://www.boprc.govt.nz/media/607613/sew-133911-559-785-3-additional-documents-as-requested.pdf>

<sup>78</sup> <https://www.boprc.govt.nz/media/609747/final-supplementary-planning-evidence-ebop-pc-10-030417.pdf>

Counsel, that the proponents of the lesser status rules (more enabling) did not provide sufficient reason to change this.

111. We have also dealt with the issues arising regarding the use of alum dosing and why Council contends that this is not the silver bullet that would allow a continuation of the status quo without securing reductions in both nitrogen and phosphorus. Notwithstanding the science and planning reasons for this, or cost, or risks, it remains outside of PPC 10 and cannot be assumed a permanent part of the toolbox.
112. We have also covered the scope issue on the proposed amendments in relation to the WWTP.
113. The evidence and staff have discussed the vexed issue of provision for underdeveloped (particularly) Maori land and what provision should be made for forestry land. It was noted that the provisions of PPC 10 do not limit the application of fertiliser to forestry, and are as such more enabling in this manner than R11, likewise the 2800ha of underutilised land that gets a lift to the bottom of the drystock range. Mr Lamb and Ms Moleta provided extensive analysis on this issue, but ultimately Council staff were not able to recommend alternative approaches than in PPC 10 at this time, although some options were developed for consideration (such as reallocation against the non-benchmarked average allocation, or against the drystock or pastoral allocations.)
114. In terms of settlement land, the issue of the extent to which the Crown provided fair value remains outstanding, and the Council raised the analogy of the Crown apparently failing to sufficiently provide ETS credits to allow for the development of such land (with this apparently being considered as a further Treaty breach). However, as noted, this approach is specific to the very constrained Lake Rotorua catchment, and reflects the extensive Crown involvement in securing the reduction of nitrogen losses to this Lake, which in itself reflects Settlement undertakings to return a clean Lake. Future WMA methodology for other catchments are not affected by this discrete issue for Lake Rotorua. In that regard, Council acknowledges that the tension between development and reduction may well play out in other ways in other places over time. This was evident in comparing the proposals in place under Waikato Regional Council's PC 1 and the reasons why they could not be utilised here<sup>79</sup>.
115. The last matter that I wish to cover in these submissions is that around embedding an acknowledgement regarding the importance of Lake Rotorua to the Te Arawa Lakes Trust and its place under the Settlement Acts.
116. Such an acknowledgement exists in the RPS, and in the Statutory Acknowledgements compendium that is already part of the RPS and the RWLP.
117. The RPS at page 97 states the following as part of the Issue Water Quality (2.9):  
 "Parliament, through the Te Arawa Lakes Settlement Act 2006, has recognised that development around the edges of the lakes has resulted in an increased nutrient load

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<sup>79</sup> Answer to Question 7 of Panel Questions, filed 28 April 2017.

flowing into the lakes. Excess nitrogen and phosphorus has led to the growth of blue-green algae in the lakes. This environmental degradation has affected the mana and wairua of the lakes for Te Arawa iwi.”

“The Te Arawa Lakes Settlement Act 2006 established the Rotorua Te Arawa Lakes Strategy Group. The group comprises Te Arawa Lakes Trust, Rotorua District Council and Bay of Plenty Regional Council. The purpose of the Group is to contribute to the promotion of the sustainable management of the Rotorua Te Arawa 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.”

118. A short statement in the introduction linking back to both the Statutory Acknowledgements and the above issue may have provided better for understanding of the existing context and integration of the RWLP and RPS. Absent submissions seeking the addition of further words in this regard to PPC 10 it is difficult to argue that this amendment can be made, but it is otherwise supported.
119. Accordingly, in my submission, it is appropriate to confirm PPC 10 as now proposed in Track Changes V7 for the reasons set out above and as per the analysis of the s42A reports.