

BEFORE THE HEARING PANEL

IN THE MATTER

of the Resource Management Act
1991

AND

IN THE MATTER

of Natural Hazards – Plan Change
8 to the Rotorua District Plan

**LEGAL SUBMISSIONS ON BEHALF OF THE BAY OF PLENTY REGIONAL
COUNCIL TOI MOANA (SUBMITTER 45)**

29 APRIL 2026



PO Box 4406
Mount Maunganui South 3149
E: nick@nickswallow.co.nz
Ph: 027 282 3321
W: nickswallow.co.nz

Executive summary

1. The Bay of Plenty Regional Council Toi Moana (**BOPRC**) broadly supports Plan Change 8 (**PC 8**).
2. It also broadly supports the recommendations made in the Section 42A Report for Proposed Plan Change 8 dated March 2026 (**s 42A Report**).
3. BOPRC's planning evidence noted that the s 42A Report recommendations addressed all its submission and further submission points, other than four matters which remained outstanding.¹
4. Subsequently, through rebuttal evidence Rotorua Lakes Council (**RLC**) provided an addendum to the s 42A Report – Addendum 2 – Response to Circulated Submitter Evidence and Position Statements dated April 2026 (**s 42A Addendum**). The changes recommended in the s 42A Addendum resolve two of the four outstanding matters for BOPRC. The first resolved matter is BOPRC's relief related to overland flowpaths in the Rural 2 Zone which has been accepted. The second resolved matter is changes sought to NH-P2 to better recognise the land stability risk posed by land use activities. The recommended changes to NH-P2 by RLC staff satisfactorily addresses BOPRC's concerns.
5. BOPRC therefore respectfully seeks that this Panel accepts both of these two recommended changes from the s 42A Addendum, along with other changes recommended in the s 42A Report that satisfy BOPRC's submission points.
6. If this Panel accepts the RLC staff recommendations, only two matters remain outstanding for BOPRC. These are as follows:
 - 6.1. Flood level implementation around Lake Ōkāreka. Anna McKay (BOPRC's engineering witness) will confirm at the hearing that she is in broad agreement with Peter Cochrane's engineering assessment provided in rebuttal evidence on this topic. However, while there is no technical / engineering dispute about the nature of the risk, BOPRC remains of the view that changes to the planning response are needed. Specifically, it seeks that Lake Ōkāreka be treated the same way as other

¹ See Evidence-in-chief (**EIC**) of Nicole Marshall at paragraph 10.

areas in the District in terms of managing flood risk, rather than through the use of a bespoke set of rules; and

6.2. Building conversions within geothermal systems. BOPRC remains concerned that an activity which increases risk to people is not being adequately managed. It seeks changes so that, where building consent is needed for building conversions, an assessment that mirrors the more fulsome approach required for other building work is used.

Stream setback issue

7. BOPRC also sought changes to provisions so that there was a requirement to set back development from stream margins.² BOPRC is no longer pursuing this relief (although it still supports the limited changes recommended in the s 42A Report to provide access for flood management purposes). However, BOPRC asks that RLC consider this topic as part of a future plan change process. In support of that request, its witnesses touch on this topic to help show why the matter is important and worthy of a future plan change.

Overview of legal submissions

8. These legal submissions:

8.1. Outline the evidence presented by BOPRC;

8.2. Note aspects of the legal framework applying to PC 8;

8.3. Address the two outstanding matters noted above (Lake Ōkāreka and building conversions in geothermal areas);

8.4. Detail the two matters now resolved between RLC and BOPRC per the s 42A Addendum (overland flowpaths changes and NH-P2); and

8.5. Comment briefly on a future plan change on stream setbacks.

Outline of BOPRC evidence

² See Marshall EIC at paragraphs 47 to 49.

9. Three expert witness briefs have been submitted by BOPRC as follows:
- 9.1. Nicole Marshall (planning) who addresses the four outstanding topics (as matters stood prior to the s 42A Addendum). She also outlines BORPC's submission and further submission and other context;
- 9.2. Mark Ivamy (natural hazards planning) who focuses on the higher-level approach to natural hazard planning within PC 8 and provides helpful context on the Bay of Plenty Regional Policy Statement and the National Policy Statement on Natural Hazards 2025; and
- 9.3. Anna McKay (engineering) who details concerns related to land stability, overland flowpath and Lake Ōkāreka matters (as well as the providing comments on the risks posed by activities near streams in relation to the setback topic no longer being pursued).³

Legislative framework applying to PC 8

10. Section 3 of the Section 32 Report has an excellent summary of the applicable provisions of the Act, while the s 42A Report deals with more recent legislative developments (being those related to small standalone dwellings / granny flats and the National Policy Statement on Natural Hazards 2025).
11. Generally speaking, BOPRC's two outstanding issues are more technical in nature rather than matters that turn on how the Act is framed. As a result, I do not replicate the s 32 Report and its summary of the legislative context.
12. I do, however, wish to draw your attention to s 75(3), and the need for the District Plan to give effect to higher order planning documents. I note this requirement in support of Mr Ivamy's point that the Bay of Plenty Regional Policy Statement emphasises the need for a precautionary approach where there is scientific uncertainty and where there is the threat of serious adverse effects on the built environment.⁴ This need to proceed with caution underpins BOPRC's concerns around both Lake Ōkāreka and also the topic of building conversions in geothermal areas as will be developed below.

³ As noted, both the land stability and overland flowpath issues are now resolved between the Councils assuming the s 42A Addendum recommendations are accepted.

⁴ Mark Ivamy EIC at paragraph 14.

13. I also touch on aspects of the Building Act 2004 below in support of BOPRC's suggested changes for building conversions in geothermal hazard areas.

Outstanding matters for BOPRC – Lake Ōkāreka and building conversions in geothermal areas

14. As noted in the Executive Summary, BOPRC seeks changes on two issues that are not supported by the s 42A Report or s 42A Addendum recommendations. I address these in turn.

Lake Ōkāreka

15. BOPRC witnesses express a concern with the s 42A Report's recommended approach to flood risk at Lake Ōkāreka, and the way the proposed Lake Ōkāreka High Lake Level Resilience Area is tied to the 355.33m Moturiki Datum contour.

16. The issue BORPC's witnesses have with this approach is that this is a different approach taken from the rest of the District where the 1% AEP event is used to define when flood risk management steps are needed. It is also considered better by BOPRC witnesses that flood management levels are not locked in place *within* the Plan rules. Specifically:

16.1. Ms McKay's evidence speaks to dynamic nature of the lake level for Ōkāreka.⁵ She is of the view that a dynamic lake level (i.e. one that sits outside of the plan rules) is better able to accommodate a planned future study of this area and climate change which is an evolving science; and

16.2. Ms Marshall's planning evidence supports Ms McKay's engineering points, and speaks to need for internal consistency within the District on flood hazards, also the planning benefits of a dynamic flood hazard level that sits outside the Plan.⁶ A responsive approach of this type is also supported by higher order policy documents,⁷ a point also made by Mr Ivamy.⁸

⁵ McKay EIC at paragraph 48.

⁶ Marshall EIC at paragraphs 23 to 27.

⁷ Marshall EIC at paragraph 26.

⁸ Ivamy EIC at paragraph 22.

17. As outlined above, Ms McKay has now had the benefit of reading Mr Cochrane's rebuttal evidence for RLC on this topic. She will confirm at the hearing that there is broad agreement with the way he has framed the risks for the Lake. As a result, there is no outstanding dispute on the technical aspects for Ōkāreka (i.e. the nature of the risk both to life and property). Where the Councils remain at odds is on the appropriate planning response in light of that risk.
18. On this aspect, the s 42A Report itself carefully steps through the benefits of a more responsive approach where Geyserview would map the actual areas where flood hazard provisions would apply.⁹ While it concludes overall the use of Geyserview is better, it sees the need for an exception for Lake Ōkāreka which is said to be unique.¹⁰
19. BOPRC's position in its evidence is to recommend the notified approach to Lake Ōkāreka be used rather than the bespoke approach suggested in the s 42A Report. The s 42A Addendum analyses the notified and recommended position, noting:¹¹

In my view, although the bespoke provisions are more permissive for additions and replacements in some circumstances, these activities generally consolidate existing development rather than introduce new exposure. By contrast, the bespoke provisions are more restrictive in relation to new buildings and new residential development across the entire resilience area by removing any permitted pathway for buildings with an importance level greater than 1 and by introducing a strongly directive policy (NH-PBA) that seeks to avoid development that would significantly increase exposure. In recommending this approach, it was my view that constraining new development that would lock in increased exposure and future reliance on flood management infrastructure, is a proportionate and robust response to flood hazard at Lake Ōkāreka, which would also provide additional certainty for continued use (with possibility of some redevelopment) of existing properties.

20. In my submission, the position outlined by BOPRC's expert witnesses is to be preferred. There are compelling benefits to having the entire District using the same planning framework to manage flood risks. Indeed, an underlying goal for PC 8 appears to be to expand natural hazard approaches across the District

⁹ Section 3.8.2 at paragraph 15.

¹⁰ Section 3.8.2 at paragraph 17.

¹¹ Section 4.1 – High Lake Levels and Lake Ōkāreka, paragraph 4.

and to remove some of the differential treatment that comes through via the use of the Lakes A Zone provisions. A bespoke approach cuts across this wider drive for consistency.

21. Similarly, there are benefits to a “responsive” or “dynamic” approach to flood risk using the Geyserview system to identify flood risk areas. Here as elsewhere flood levels are dynamic and the underlying information could well change with in the life of this Plan. In my submission, the approach of locking in the precise level for Ōkāreka cuts across the general move towards having natural hazards mapped outside of the Plan itself (unless there are good reasons to include this, such as for geothermal mapping).
22. BOPRC therefore respectfully seeks that the Panel confirms the approach for Lake Ōkāreka to be as per the notified version of PC 8.

Building conversions within geothermal systems

23. As outlined in the evidence of Ms Marshall for BOPRC, PC 8 recognises the risk to people arising from building conversions. However, no change is recommended in the s 42A Report on this issue, although an alternative approach is set out if this Panel considers some management is required. That alternate approach would see NH-R8 altered such that, where a building conversion triggers the need for a building consent, it would fall outside of the permitted activity standard.
24. Ms Marshall’s evidence supports this “alternative” approach,¹² and Appendix 1 of her evidence sets out the necessary change to NH-R8 to enable this to be achieved.
25. One reason for the s 42A Report to not seek any change on building conversions is a concern that there limited Building Act 2004 process to enable RLC to assess this:¹³

However, many building conversions may involve little physical work to trigger regulatory processes that enable the consideration of natural hazard risks. In some circumstances, conversions may not require a building consent at all, limiting the

¹² Marshall EIC at paragraph 40.

¹³ See s 42A Report, Section 3.13.2.4 Building Conversions at para 5.

ability to apply Rule NH-R8 in its current form. For example, the use of a detached/attached garage or basement may change from storage to bedroom without physical alterations and without triggering “change of use” under the Building Act that would require notification to Council, upgrading of the building or an application for building consent.

26. The quote above bears some analysis. It is correct to say that a change of use may not involve physical work. It is also correct to say this may not trigger the need for a building consent. However, despite this it is important to recognise that changes of use are carefully scrutinised under the Building Act 2004.

27. Where a change of use does occur, the Building Act 2004 requires an assessment whether the “new” use meets the Building Code. Specifically:

27.1. Under s 114 of the Building Act 2004, an owner must provide notice to a territorial authority if a change of use occurs; and¹⁴

27.2. Section 115 then sets out certain requirements, including the role of territorial authorities where a change of use has been notified. In short, a territorial authority has to consider the change of use and give notice about whether the new use complies with the Building Code.

28. This fact the Building Act 2004 assesses whether a new use is up to Code is important. PC 9 (Housing for Everyone) considered the role of the Building Code for geothermal risks.¹⁵ The conclusion was that this was not a complete answer (i.e. RMA intervention was needed beyond the Building Code).

29. The s 42A Addendum recognises that various Building Code provisions help reduce risk to people.¹⁶ However, in my submission the overriding point recognised in PC 9 was that the Building Code *alone* was not sufficient – hence the development of RLC’s *Guidelines for Identifying and Designing for Geothermal Hazards* to supplement the Building Code.

¹⁴ What constitutes a change of use is defined in the Building (Specified Systems, Change the Use, and Earthquake-prone Buildings) Regulations 2005. In short, this is the change from an “old use” to a “new use” where additional building code requirements are triggered. The uses are set out in Schedule 2 to the Regulations.

¹⁵ Whether the Building Act / Building Code adequately addressed geothermal risk was the topic of a legal opinion commissioned by RLC and BOPRC for Plan Change 9 (Housing for Everyone). This opinion is available at the following link: https://participate.rotorualakescouncil.nz/download_file/view/1346/818

¹⁶ Section 8 – Geothermal Hazard Provisions, paragraph 8.

30. BOPRC's position on building conversions reflects this point. It is, quite simply, that where a building consent is needed this should "pull through" the wider framework designed by RLC to manage these risks.
31. While the change promoted by BOPRC may not be a complete answer here given not all conversions will need a building consent, it is better in my submission to close the gap as best possible in the way suggested by Ms Marshall. Since the Building Act 2004 already requires the territorial authority to consider the "new" use and the Building Code (per ss 114 and 115), this matter is already an established part of territorial authority processes. Given the risks and also that the Building Code does not completely mitigate this, it makes sense to require a broader geothermal risk assessment in situations where a building consent is needed.

Matters now resolved through s 42A Addendum

32. As noted in the Executive Summary, two matters that were identified as outstanding in BOPRC's evidence-in-chief are now resolved per the s 42A Addendum recommendations. As there is no further rebuttal evidence, I detail these two matters here for clarity.
33. The first resolved matter is around controls for overland flowpath modifications in the Rural 2 Zone. BOPRC initially sought to have controls apply for all Rural zones but refined its position to seek that NH-R2 and EW-S1(3)(e) only apply to the Rural 2 Zone. This is detailed in Ms Marshall's evidence.¹⁷ The basis for this change was that the Rural 2 Zone is similar in typology and risk to other urban areas. This refined position was accepted by the s 42A Addendum and the recommended position from that report was to extend the application of the two provisions noted above to the Rural 2 Zone.¹⁸ I confirm on BOPRC's behalf that this recommendation resolves its submission point. I also respectfully seek that this Panel accept the staff recommendation on the matter.
34. The second matter that was outstanding at the point of BOPRC's evidence was tied to greater recognition in NH-P2 of the effects of land use activities on land stability. The relief sought is detailed in Ms Marshall's evidence.¹⁹ While aspects

¹⁷ Marshall EIC at paragraph 46.

¹⁸ Section 4.3 – Overland Flowpaths, paragraphs 3 and 4.

¹⁹ At paragraph 55.

of BOPRC's evidence on this matter are questioned in the s 42A Addendum, changes to NH-P2 are recommended. This sees a sub-clause added to the Policy to recognise the need to consider land use aspects.²⁰ I confirm on BOPRC's behalf that this recommendation resolves its submission point. I again respectfully seek that this Panel accepts the staff recommendation on the matter.

Stream setbacks

35. As noted in the Executive Summary, BOPRC's submission sought changes to NATC-R3 to impose a setback requirement from all streams for natural hazard management purposes and to provide for access to streams for flood management purposes.
36. The s 42A Report accepted these changes in part and recommended changes to provide for access to streams. BOPRC supports this recommended change on access but is no longer pursuing the wider relief to require setbacks for all streams in the District. This is covered by Ms Marshalls evidence.²¹
37. Given the importance of the topic, Ms McKay has outlined in some detail the risks associated with development adjacent to streams. This aspect is addressed solely to emphasise the nature of the risk and to support the recommendation of Ms Marshall that RLC staff consider possible stream setback requirements as part of a future plan change.

Nick Swallow,
Barrister

²⁰ Section 7.1 – Policy NH-P2, paragraph 7.

²¹ At paragraphs 47 to 49.