

**Before the Marlborough District Council**

**IN THE MATTER** of the Resource Management Act 1991

And

**IN THE MATTER** of the Proposed Marlborough  
Environment Plan

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**Interim Decision of the MEP Hearing Panel  
as to Marlborough District Council's submissions seeking  
the inclusion of further Floodway zoning in the PMEP**

**Dated this 10<sup>th</sup> day of July 2018**

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**1. Background as to issue of interim decisions**

- 1.1 The Proposed Marlborough Environment Plan (PMEP) is a comprehensive plan for a unitary council providing in the one document a regional policy statement, regional plan, regional coastal plan and district plan.
- 1.2 Due to the comprehensive nature of the PMEP the various objectives, policies, methods and rules comprising it are interwoven, and are designed to work as a whole. For that reason the Hearing Panel does not wish to separate out any parts of the Plan by issuing any interim decisions until all submissions have been heard on all aspects of the PMEP.
- 1.3 However, where special circumstances require an interim decision, then consideration needs to be given to that possibility. The Panel will consider this only in those limited settings where there is a sustainable management purpose served and a particular subject matter can be regarded as entirely discrete from other subject matter in the PMEP.

## **2. Interim decision on Marlborough District Council request to add rivers to Floodway Zone**

- 2.1 For reasons outlined below, the Hearings Panel has decided to issue an interim decision in respect of the submissions<sup>1</sup> by Marlborough District Council (Council) itself, (or more precisely its Rivers and Drainage Group of the Assets and Services Department), seeking to add a large number of additional rivers to the Floodway Zone in the PMEP.
- 2.2 The submissions under numbers 91.264 - 310 were in relation to a number of planning maps and included the following wording:

*Following the notification of the Plan, the Council's Rivers Department identified further water features that would be appropriate to zone Floodway, as it is anticipated that the Council may need to exercise its functions, duties and powers to undertake river control and drainage works in those locations in the future.*

## **3. Summary of Interim Decision**

- 3.1 The submissions request a large number of Floodway zonings which, if accepted, could impose significant restrictions on the ability of landowners affected to be able to carry out various activities on their lands.
- 3.2 Some of the additional Floodway zonings requested in the submissions are located on private lands.
- 3.3 Because the zonings requested were not in the original notified form of the PMEP, affected landowners who checked the PMEP would not have known of the potential impact on them, unless they later checked whether submission requests had been made which affected their land.
- 3.4 No other form of consultation has occurred with affected landowners, meaning that the only legal avenue they have had available to engage in the process, was through checking to see if any submissions had been lodged which contained requests for relief which affected their lands, and to respond to such requests in a further submission.
- 3.5 No such further submissions were lodged by any of the affected landowners, so no other points of view have been heard by the Hearings Panel.
- 3.6 The proposed zonings relate to Floodway zonings in respect of many rivers which are not listed in Council's Rivers and Drainage Asset Management Plan.

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<sup>1</sup> Submission numbers 91.264-310

- 3.7 The submission process to the PMEP has occurred because of an oversight within Council's own administration, but the attempt to correct the oversight has in practical terms meant affected landowners have had very limited opportunity for involvement in the process.
- 3.8 The normal process would have involved identification of the proposed zonings within the Council's Rivers and Drainage Asset Management Plan, and then a proposed plan change or plan variation to give effect to the Rivers and Drainage Asset Management Plan.
- 3.9 The maps provided with the Council submissions are not precise as to the delineation of the boundaries of the proposed new zonings and leave uncertainty as to the detail of where those boundaries lie.
- 3.10 While the First Schedule of the Resource Management Act 1991 (RMA) does not specifically require consultation with affected landowners or the general public it does enable such consultation, and the whole RMA process, at the very least, envisages information sharing through the notification of the Proposed Plan to enable submissions to be made.
- 3.11 Where landowners' rights are significantly adversely affected it would be normal to expect some sort of informative process to be followed by Council. That could occur either through some level of consultation prior to the preparation of a new resource management plan containing such restrictions, or at the very least by the proposed plan itself containing the restrictions, and providing opportunity in that way for submissions to be made.
- 3.12 Furthermore, such a process of provision in the PMEP would have enabled other landowners or communities to seek inclusion in the Floodway Zone by way of submission.
- 3.13 Finally, on the issue of consultation, the First Schedule of the RMA does require, as a mandatory matter, consultation with various government agencies, and most importantly with Marlborough's tangata whenua iwi.
- 3.14 The consultation and/or information sharing processes described in the paragraphs above, have not occurred at all in this case. That failure to consult with Marlborough's tangata whenua iwi on these additional zonings alone is a potentially fatal flaw in the process.
- 3.15 Moreover, were the submissions to be accepted now, affected landowners could feel aggrieved at Council's actions in conducting significant amounts of zoning, which has the potential to impose considerable restrictions on activities, by way of submissions to its

own plan, rather than as part of the usual plan formulation process enabling other submissions.

- 3.16 The interim decision provides an opportunity to address the omissions in the process that have occurred.
- 3.17 A considerable period of time is yet to elapse during the course of hearing other submissions on the PMEP, with a final decision document unlikely to be notified until 2019.
- 3.18 In the meantime, the current operative Wairau/Awatere Resource Management Plan and the Marlborough Sounds Resource Management Plan do enable flood protection works to be carried out in the affected floodways so that no current problem arises as all areas subject of the additional Floodway zoning requests are covered by those Plans.
- 3.19 However, if the proposed additional Floodway zonings are not in force when the PMEP decision is notified, then the Council's Rivers Drainage Group will be unable to carry out protection works as permitted activities in those proposed additional areas.
- 3.20 That provides an opportunity which would enable the Councils' rivers section to undertake the preparation work for a new Rivers and Drainage Asset Management Plan, and its related proposed Variation to the PMEP.
- 3.21 That Variation might then be able to meld in with the process of hearing submissions on the PMEP, and decisions in respect of the Variation might be able to issue as part of the overall PMEP decisions.
- 3.22 No other parts of the PMEP are affected by this process which can genuinely be described as stand-alone and discrete.
- 3.23 For all those reasons the Hearings Panel has decided to issue this interim decision declining the relief requested by the Marlborough District Council in submission points 91.264 - 310, so as to enable a valid, appropriately informative or consultative process to be undertaken in respect of the proposed additional Floodway zonings.
- 3.24 Because this interim decision is essentially one related to ensuring a valid, fair and proper process has occurred, it would be inappropriate for the Hearings Panel to express any views as to merits of the relief requested in respect of any particular Floodway zoning.
- 3.25 Any such decisions on the merits must await the hearing of any submissions which may be filed in respect of the possible Variation.

#### 4. Discussion of grounds for interim decision

4.1 The discussion which follows of the detailed reasons for the interim decision will generally be related to the points made in the summary above.

3.1 *The submissions request a large number of Floodway zonings which, if accepted, could impose significant restrictions on the ability of landowners affected to be able to carry out various activities on their lands.*

3.2 *Some of the additional Floodway zonings requested in the submissions are located on private lands.*

4.2 The submission by Council requested that Floodway zoning be applied to a large number of rivers, or reaches of rivers, as set out in the submission. The rivers involved are generally in the following localities:

Locality	Number of affected rivers (as identified in Council Submission)
Renwick Vicinity	5
Northbank	12
Tuamarina and Koromiko	2
Wither Hills	16
Taylor River	2
Seddon	1
Waihopai River	1
Wye River	1
Picton Township	10
Havelock	3
Marlborough Sounds (Queen Charlotte, Pelorus Sounds and Okiwi Bay)	12

- 4.3 The number of rivers, (65), and their broad geographical spread, makes it clear that what is being proposed is a significant and major zoning process. They are located at very wide-ranging locations throughout the region, and involve some significant reaches of rivers on private lands.
- 4.4 This is a significant zoning proposal which has been identified by a request in a submission to a notified plan which did not contain these Floodway zonings.
- 4.5 In legal terms, that is effectively a last minute process which leaves those potentially affected with little notice of the proposal to be able to make a further submission. In practical terms, the chances of potentially affected parties being aware of the zoning proposed in the Council submission was extremely low.
- 4.6 No evidence was provided as to the number or nature of private properties affected by the proposed additional zonings but it was acknowledged on behalf of Council that some of the zonings affected private land.

*3.3 Because the zonings requested were not in the original notified form of the PMEP, affected landowners who checked the PMEP would not have known of the potential impact on them, unless they later checked whether submission requests had been made which affected their land.*

*3.4 No other form of consultation has occurred with affected landowners, meaning that the only legal avenue they have had available to engage in the process, was through checking to see if any submissions had been lodged which contained requests for relief which affected their lands, and to respond to such requests in a further submission.*

*3.5 No such further submissions were lodged by any of the affected landowners, so no other points of view have been heard by the Hearings Panel.*

- 4.7 The Council's senior Rivers and Drainage Engineer, Mr Geoff Dick, confirmed in oral evidence on 28 May, 2018 that no consultation had been carried out with affected landowners.
- 4.8 His written evidence was focused on both the statutory and practical importance of Council maintaining river protection within the identified rivers, and the advantages that would flow from those works for the landowners involved and for other community assets, developments and infrastructure, including in some cases residential dwelling protection.

- 4.9 His oral answers as to the consultation issue tended to indicate that those members of the public potentially affected were likely to be highly supportive of the river protection work the Council proposed to conduct under the proposed additional zonings as a permitted activity.
- 4.10 As the Hearing Panel did not hear from any of the affected owners, the assumption that Mr Dick's assertion is a fact is not one we could safely make for every affected owner of the additional rivers identified.

*3.6 The proposed zonings relate to Floodway zonings in respect of many rivers which are not listed in Council's Rivers and Drainage Asset Management Plan.*

*3.7 The submission process to the PMEP has occurred because of an oversight within Council's own administration, but the attempt to correct the oversight has in practical terms meant affected landowners have had very limited opportunity for involvement in the process.*

*3.8 The normal process would have involved identification of the proposed zonings within the Council's Rivers and Drainage Asset Management Plan, and then a proposed plan change or plan variation to give effect to the Rivers and Drainage Asset Management Plan.*

- 4.11 At the hearing of the submission on 28 May, 2018, in answer to questions from the Hearing Panel Chair and Commissioner Faulkner, the oral responses given by Mr Dick were that the normal process he expected to follow in planning rivers control works was to develop the Council's own Rivers and Drainage Asset Management Plan first. He explained that the Plan is developed internally without consultation with Marlborough's tangata whenua iwi and without any other formal consultation process. He also stressed that the process envisaged by the PMEP is that the Asset Management Plan is developed before any Floodway zoning is applied.
- 4.12 The logic behind that observation is provided by the wording at the commencement of Chapter 21 of Volume Two of the PMEP. That introductory wording makes the following statement immediately before the Permitted Activities heading:

**21. Floodway Zone**

*Unless explicitly specified, these rules apply to river control and drainage works only when carried out by the Marlborough District Council exercising its functions, duties and powers under the Soil Conservation and River Control Act 1941, the Land*

*Drainage Act 1908 and in accordance<sup>2</sup> the Marlborough District Council Rivers and Drainage Asset Management Plan, or the Marlborough District Council Marlborough Rivers Gravel Extraction Strategy.*

(Underlining for emphasis)

4.13 In other words, for the Council to be able to carry out, as permitted activities, the river works it proposes, the Council must have included that river in its Rivers and Drainage Asset Management Plan. The zoning sought at this stage would not, therefore, enable the Council to carry out permitted activities until the Rivers and Drainage Asset Management Plan was amended.

4.14 The current submission process requesting additional Floodway zoning, if accepted, would be the opposite timing and process to that implied in the introductory wording to Chapter 21 of the PMEPP.

*3.9 The maps provided with the Council submissions are not precise as to the delineation of the boundaries of the proposed new zonings and leave uncertainty as to the detail of where those boundaries lie.*

4.15 The submissions by the Council provided co-ordinates for the lengths of waterbodies in respect of which Floodway zoning was sought. However, even the maps provided with the evidence of Mr Geoff Dick are imprecise as to widths over the sections of river sought to be zoned.

4.16 Although detailed co-ordinates were provided which would enable the lengths of zonings to be fixed later, nonetheless the use of co-ordinates would require some level of skill to be applied by a landowner to even understand if their land was affected because no width delineation was provided.

*3.10 While the First Schedule of the Resource Management Act 1991 (RMA) does not specifically require consultation with affected landowners or the general public it does enable such consultation, and the whole RMA process, at the very*

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<sup>2</sup> The Hearing Panel observes in passing that the word 'with' seems to be missing after the word 'accordance' but that is a clerical step which can be corrected.



*least, envisages information sharing through the notification of the Proposed Plan to enable submissions to be made.*

3.11 *Where landowners' rights are significantly adversely affected it would be normal to expect some sort of informative process to be followed by Council. That could occur either through some level of consultation prior to the preparation of a new resource management plan containing such restrictions, or at the very least by the proposed plan itself containing the restrictions, and providing opportunity in that way for submissions to be made.*

3.12 *Furthermore, such a process of provision in the PMEP would have enabled other landowners or communities to seek inclusion in the Floodway Zone by way of submission.*

3.13 *Finally, on the issue of consultation, the First Schedule of the RMA does require, as a mandatory matter, consultation with various government agencies, and most importantly with Marlborough's tangata whenua iwi.*

4.17 The First Schedule to the RMA at clause 3 (2) and (4) provides the following guidance on general consultation:

**3 Consultation**

(1) ...

*(2) A local authority may consult anyone else during the preparation of a proposed policy statement or plan.*

And

*(4) In consulting persons for the purposes of subclause (2), a local authority must undertake the consultation in accordance with section 82 of the Local Government Act 2002.*

4.18 The consultation process under section 82 of the Local Government Act 2002 sets out a number of principles to be followed, but clause 3 of the First Schedule provides a discretion as to whether those steps need to be taken.

4.19 We acknowledge that under the RMA First Schedule process consultation on specific zonings is not normally required with each landowner. We also acknowledge that did not happen with the far more extensive Floodway zonings actually included in the PMEP, or for that matter other zonings.

- 4.20 What is important in the view of the Hearing Panel is that, at the very least, a process should be used which enables potentially affected parties to see the proposed additional Floodway zoning provisions in a notified plan format. That will enable them to lodge a submission either supporting the proposal, opposing it, or possibly even seeking its extension to other stretches. That can be achieved by preparing a Variation that follows normal plan preparation processes under the First Schedule.
- 4.21 By contrast the mandatory provision in the First Schedule as to consultation involving tangata whenua iwi, as well as other governmental agencies, is as follows:

*(1) During the preparation of a proposed policy statement or plan, the local authority concerned **shall** consult—*

*(a) the Minister for the Environment; and*

*(b) those other Ministers of the Crown who may be affected by the policy statement or plan; and*

*(c) local authorities who may be so affected; and*

*(d) the tangata whenua of the area who may be so affected, through iwi authorities; and*

*(e) any customary marine title group in the area.*

*(Bold added for emphasis.)*

- 4.22 It is plain in this case that Clause 3(1)(d) as to consultation with Marlborough's tangata whenua iwi has simply not been complied with as to the additional Floodway zonings proposed in the Council submission. That consultation would be necessary with a proposed Variation.

*3.14 The consultation and/or information sharing processes described in the paragraphs above, have not occurred at all in this case. That failure to consult with Marlborough's tangata whenua iwi on these additional zonings alone is a potentially fatal flaw in the process.*

*3.15 Moreover, were the submissions to be accepted now, affected landowners could feel aggrieved at Council's actions in conducting significant amounts of zoning, which has the potential to impose considerable restrictions on activities, by way of submissions to its own plan, rather than as part of the usual plan formulation process enabling other submissions.*

4.23 The fact that no consultation occurred with Marlborough's tangata whenua iwi or affected landowners was confirmed by Mr Geoff Dick in oral evidence before the Hearings Panel on 28 May, 2018.

*3.16 The interim decision provides an opportunity to address the omissions in the process that have occurred.*

*3.17 A considerable period of time is yet to elapse during the course of hearing other submissions on the PMEP, with a final decision document unlikely to be notified until 2019.*

*3.18 In the meantime, the current operative Wairau/Awatere Resource Management Plan and the Marlborough Sounds Resource Management Plan do enable flood protection works to be carried out in the affected floodways so that no current problem arises as all areas subject of the additional Floodway zoning requests are covered by those Plans.*

*3.19 However, if the proposed additional Floodway zonings are not in force when the PMEP decision is notified, then the Council's Rivers Drainage Group will be unable to carry out protection works as permitted activities in those proposed additional areas.*

4.24 The Wairau/Awatere Resource Management Plan and the Marlborough Sounds Resource Management Plan apply until the PMEP becomes operative. The relevant provisions of those plans are rules 27.1.8.1 (Wairau/Awatere Resource Management Plan) and 26.1.6.1 (Marlborough Sounds Resource Management Plan):

**27.1.8.1 Permitted Activities - River Control Works**

*River control and drainage works are a Permitted Activity when carried out by a local authority exercising its powers under the Soil Conservation and River Control Act 1941 or the Land Drainage Act 1908, whilst exercising the River Control Programme set out in Appendix F, provided the following conditions are met.*

And

**26.1.6.1 Permitted Activities - River Control and Drainage, and Road Works**

*River control and drainage works, and road works within the beds and banks of rivers are a Permitted Activity in all zones when carried out by a local authority exercising its powers under the Soil Conservation and River Control Act 1941 or the Land Drainage*

*Act 1908; or roading authority operating under the Transit New Zealand Act 1989, providing the following conditions are met:*

- 4.25 Each of those provisions is followed by a set of standards but in general they enable river protection works. Appendix F in the Wairau/Awatere Resource Management Plan, for example, which is referred to in rule 27.1.8.1, is entitled 'River Control and Drainage Works Programme'.
- 4.26 As a consequence, the Council will have the ability to continue to carry out river control and drainage works as permitted activities under both operative Plans.

*3.20 That provides an opportunity which would enable the Councils' rivers section to undertake the preparation work for a new Rivers and Drainage Asset Management Plan, and its related proposed Variation to the PMEP.*

*3.21 That Variation might then be able to meld in with the process of hearing submissions on the PMEP, and decisions in respect of the Variation might be able to issue as part of the overall PMEP decisions.*

*3.22 No other parts of the PMEP are affected by this process which can genuinely be described as stand-alone and discrete.*

- 4.27 These paragraphs 3.20 to 3.22 set out the procedural steps that are available if the Council wishes to pursue the Floodway zoning of the additional rivers described in its submission and evidence. No further discussion is necessary as to those steps or the processes involved.

*3.23 For all those reasons the Hearings Panel has decided to issue this interim decision declining the relief requested by the Marlborough District Council in submission points 91.264 - 310, so as to enable a valid, appropriately informative or consultative process to be undertaken in respect of the proposed additional Floodway zonings.*

*3.24 Because this interim decision is essentially one related to ensuring a valid, fair and proper process has occurred, it would be inappropriate for the Hearings Panel to express any views as to merits of the relief requested in respect of any particular Floodway zoning.*

3.25 Any such decisions on the merits must await the hearing of any submissions which may be filed in respect of the possible Variation.

4.28 Paragraphs 3.23 to 3.25 above similarly require no further discussion as they form the formal record of the interim decision reached, and the procedural consequences of that.

5. **Decision**

5.1 The relief requested by the submitter Marlborough District Council seeking additional Floodway zonings in submissions numbered 91.264 - 310 is rejected.

Dated in Blenheim this 10<sup>th</sup> day of July 2018



Commissioner T Hook  
Chair of the MEP Hearing Panel



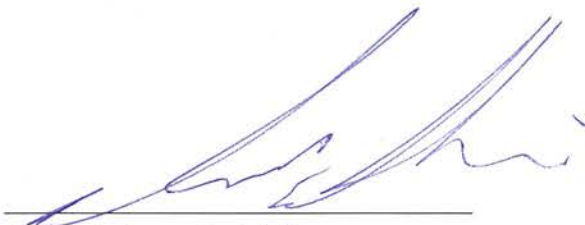
Commissioner R Crosby



Commissioner R Faulkner



Commissioner L Shenfield



Commissioner D Oddie



Commissioner J Arbuckle