



16 March 2021

Expert Consenting Panel  
Waitohi Picton Ferry Precinct Redevelopment  
BY EMAIL TO:  
[waitohifasttrack@epa.govt.nz](mailto:waitohifasttrack@epa.govt.nz)

Dear Expert Consenting Panel,

## Comments on the Waitohi Picton Ferry Precinct Redevelopment Fast Track Application

<b>Organisation Name</b>	Marlborough District Council
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1. In response to the Waitohi Picton Ferry Precinct Redevelopment Expert Consenting Panel (the panel) request for further information dated 2 March 2021.
2. The request has caused Council to carefully consider the overall situation in relation to what has been called the *Waitohi Culvert*.
3. As a result of the further investigation which Council has undertaken, it is respectfully contended that the information request needs to be reconsidered. Council will endeavour to explain why this should be so. The focus in this submission is on the Waitohi Awa, its status, the works that have been undertaken in relation to it, its diversion, its current state and where it fits in the proposed Redevelopment.

### Some Historical Background

4. For as long as is known, the Waitohi Awa gathered the waters of its catchment and carried them down across its estuary and to the sea. The mana whenua lived on the lower banks of the stream in the Waitohi Pā. The Waitohi Stream takes its name from a baptismal ritual where waters of the stream were cast onto warriors before they went into battle. The awa is of significance to Māori and the waters of the Waitohi have been described by the Applicants as the *sacred waters* of Te Āti Awa.
5. Then, European settlement came to the region and Waitohi became an important port for settlers and whalers. The area around the Waitohi Stream was purchased from Māori and the mana whenua relocated to Waikawa. The area became known as Picton. I attach in **Appendix 1** a Deed of settlement which acknowledges the ongoing status of Te Atiawa in relation to the Waitohi River.

6. In the late 19th century a railway was established to run between the developing wharf infrastructure in the harbour of Picton and Blenheim. That line was later extended to connect with other South Island lines.
7. The apron of land around the Port was substantially owned by the Marlborough Harbour Board and the New Zealand Railways Department (NZR).
8. In 1962, NZR established the first Interislander ferry service between Picton and Wellington. For this purpose it established some new infrastructure to allow for the loading and unloading of vehicular rail and passenger traffic.
9. By the late 1960's pressure for further Port development resulted in a proposal to contain the waters of the Waitohi River at the point where they flowed into the sea. The purpose of the containment was to allow traffic, activities and infrastructure to operate and be placed above and across the flow of the stream. The proposal was to construct a 300 metre long triple box reinforced concrete structure. This took the waters of the Waitohi beneath those areas where Port activity was to be undertaken. Undoubtedly, the containment of the Waitohi amounted to a diversion.
10. The Water and Soil Conservation Act 1967 (**WSCA**) came into force on 1 April 1968. In summary its Long Title described it as an Act to promote a national policy in respect of natural water and to make better use of water and prevent damage by flood and erosion.
11. The functions and responsibilities under the WSCA were given to Regional Water Boards. In areas where there were Catchment Boards these were designated to be the Regional Water Boards. In Marlborough there was the Marlborough Catchment Board which became known as the *Marlborough Catchment and Regional Water Board*. By Order in Council of 9 July 1970 the Picton District within Marlborough became included in the areas under the jurisdiction of the Marlborough Catchment and Regional Water Board.
12. In terms of Section 21 of the WSCA –
  - (1) *Except as expressly authorised by or under this Act or any other Act, the sole right to dam any river or stream, or to divert or take natural water, or discharge natural water or waste into any natural water, or to use natural water is hereby vested in the Crown subject to the provisions of this Act.*

In terms of sub-Section (3) Regional Water Boards were authorised on application, to grant rights in respect of natural water on such terms as the Board specified. Therefore, at about the same time as extensive engineering works were being designed to divert the Waitohi Stream the obligation on any party who was intending to undertake such a diversion became consolidated and entrenched.
13. The physical works in relation to the Waitohi Culvert would have been commenced in the early 1970's and would have been completed some years later. The view of Council is that such works involving a diversion required consent first to be obtained in terms of Section 21.

### **Was a Diversion Consent Granted**

14. An investigation of archive records initially failed to disclose the existence of any permit granted for the diversion of water in the manner which was proposed and then later effected through the culvert structure under the WSCA. Council raised this issue with the Applicants who have provided Council with documentation recording that a right in respect of natural water was granted to the Marlborough Harbour Board on or about 5 March 1970 (**Permit**). The Permit is expressed in various places within the documentation as being granted for a term of ten years, with an expiry date of 25 February 1980. There is, however, some ambiguity about the term of the Permit which ambiguity arises from the expression in one part of the documentation that the term of the Permit is:

“for a period of 10 years from 25 February 1970 (and thereafter at the pleasure of the regional water board).”

15. If the Permit was subsisting at the commencement date of the Resource Management Act 1991 (**RMA**) the Permit would have status as a deemed resource consent under Section 386 (2) of the RMA and such deemed resource consent would come to an end on the 35th anniversary of the date of commencement of the RMA (1 October 2026).
16. Council considers, however, that at the commencement date of the RMA the Permit had expired. Council understands the Applicants' position to be that the Permit subsisted on 1 October 1991.
17. The issue of whether the Permit is a deemed resource consent for purposes of the RMA is, in Council's submission, critical to the issues before the EPA and of and incidental to the EPA's request of the parties on 2 March 2021. If the Permit expired on 25 February 1980, sections 13(1) and s14(2) of the RMA required, and require, resource consent to be obtained by the Applicants for the placing of structures such as the Waitohi Culvert in a river bed and for the consequential diversion of river water, unless there are rules in a regional plan which permit the placement of the structure and the diversion.<sup>1</sup> There is no rule in either the Marlborough Sounds Resource Management Plan (**MSRMP**) or the Proposed Marlborough Environment Plan (**MEP**) under which the Waitohi Culvert and the consequential diversion of river water is permitted without a resource consent. I attach at **Appendix 2** historically photos of the Waitohi River prior and post diversion after the culverts where installed.
18. What this means is that the issue of the authority for the Waitohi Culvert to remain in place and to divert water on an existing and ongoing basis would need to be addressed now, in terms of the current legislative and regulatory requirements. Moreover, as is noted below, there are also Common Law imperatives which make it necessary that the issue of the lawful establishment and ongoing operation of the Waitohi Culvert to be addressed now and as part of this process
19. In simple terms the position that is taken by Marlborough District Council and one that it is obliged to take is:
  - It is questionable whether there is authority under the RMA for the continued diversion of the Waitohi Stream by means of and through the Waitohi Culvert by the Applicant; and
  - Even if the historical authority is a deemed resource consent, that authority will come to an end in the near future and that ending of authority needs to be planned for now especially given the major construction works that are being programmed to take place in the immediate vicinity.
20. The works which are planned to commence as soon as the necessary consents are obtained are the subject of various applications before the Authority. The Applicants have proceeded on the basis that the applications that have been made cover all of the authorities that will be needed but, that is considered by Council not to be so as the issue of the diversion of the Waitohi Stream has not been properly addressed.

### **Where do Responsibilities Fall**

21. On 31 August 2020 KiwiRail produced a document *Waitohi Culvert High Level Summary* I attach at **Appendix 3**. This document addressed the issues and options in relation to the culvert. At page 5 it identified the ownership of different units of the culvert. The culvert was divided into 160 units. Of these it appears that 70 of the units lie within the Port Marlborough land and 90 within the KiwiRail land. For practical purposes it may be seen that costs and other responsibilities fall equally on Port Marlborough and KiwiRail as the successors of the Marlborough Harbour Board and NZR from whom such responsibilities have devolved.
22. The *High Level Summary* gave four options for dealing with what were described as *remedial options*. Consideration of these options arose in the consideration of the structural capacity and hydraulic capacity of the culverts. The options ranged from doing nothing to a full replacement. In the end, it appears that the Applicants KiwiRail and Port Marlborough elected to run with option 2.

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<sup>1</sup> There are certain statutory exceptions to the requirement to obtain a resource consent for the diversion of river water but those do not apply here.

This option was said to marginally increase the hydraulic capacity of the culverts and increase their structural capacity. Council contends that the correct option to be adopted was option 3 which was to build a new span over the culverts at a higher level thereby achieving adequate hydraulic capacity and adequate structural strength.

### **Functions of EPA**

23. It is respectfully contended that it is the responsibility of the Authority to deal with the Applications before it and determine whether or not the Applications can be granted with appropriate conditions. In determining whether the Applications can be granted the Authority will need to be satisfied that the Applications cover the full range of authorities that will be needed in order for the Redevelopment Project to be completed. Alternatively, the Applicants will need to assume the risk of obtaining consents through this process for works which will not be able to undertaken unless and until consents are required for the works required to deal with the Waitohi Culvert.
24. Consents should not be sought piecemeal nor granted piecemeal. The reason for this is that consents are inevitably linked with each other to some extent and the decision maker needs to see the whole picture.
25. In these circumstances Council is obliged to ask the Authority to require Port Marlborough and KiwiRail to focus on the Waitohi Culvert and diversion issues and for there to be appropriate engagement about and a resolution of the issue of the consents required for the Waitohi Culvert, as part of this process and not outside of it.
26. Council signals that in its view Option 2 of the options considered by KiwiRail would be unacceptable. The reasons include:
  - It does not address the existing inadequate capacity of the culvert to absorb flood waters;
  - It does not give recognition to the inevitability of the problem being exacerbated by climate change and rising sea waters;
  - Its adoption would make future remedial works more difficult and more expensive;
  - It fails to recognise the economic damage caused by Waitohi catchment flooding which results from the constriction of the culvert.

### **Common Law Principles**

27. The point has already been made that the Applicants, in order to meet their statutory requirements, are obliged to address the issue of the diversion of Waitohi Stream t. There is also a Common Law pressure which requires the Applicants to remove the constriction brought about by the presence of the Waitohi Culvert.
28. Council has been advised that it is long settled Common Law in New Zealand that waters which have fallen on or issued out of higher land are allowed to flow to and across lower land without the owners or occupiers of lower land impeding such flows to the detriment of the owners or occupiers of the higher land. The principle has been expressed in this way:

*Where two contiguous fields, one of which stands upon higher ground than the other, belong to different proprietors, nature itself may be said to constitute a servitude on the inferior tenement, by which it is obliged to receive the water which falls from the superior. Gibbons v Lefestey (1915) 84 LJPC 158*

29. If it is the case that the Waitohi Culvert currently and in the future impedes the natural flow of water so as to cause accumulation and flooding in the higher grounds, then, Council has been advised, it is the Common Law responsibility of KiwiRail and Port Marlborough to alleviate that problem.
30. As noted, the Waitohi Culvert lies within the lands of Port Marlborough and KiwiRail. They are the successors of the Marlborough Harbour Board and NZR. The assets and liabilities and rights and

responsibilities of the Marlborough Harbour Board and NZR have devolved upon Port Marlborough and KiwiRail.

31. There is a history of the effects of the constriction having been addressed and Council wishes, in an open way, to refer KiwiRail and Port Marlborough to this material.
32. There was some addressing of the issue in 1969 by Mr C.C. Davidson, Consulting Engineer to the Picton Borough Council (and a former Marlborough Catchment Board Chief Engineer). Mr Davidson was interacting with Ian Macallan & Co who were Consulting Engineers to the Marlborough Harbour Board. Then in 2004 there was a comprehensive review of Picton flooding issues by Council's Rivers and Drainage Engineer. In his report (paragraph 9 page 16) he noted that the flood hazard in certain parts of Picton arises from –

*The triple culvert under the wharves being too small to carry the full Waitohi flood flows.*

The 2004 Report contemplated that there would be a continuing evaluation of the Waitohi triple culvert issues. Then, as part of the current Redevelopment, WSP have undertaken work for Council. All of this work and analysis indicates that there is a current problem brought about by the constriction and it will get worse. I attach these reports in **Appendix 4**.

### **Who Carries the Cost**

33. Again, in an open way, Council wishes to signal what its views are in relation to the responsibility for the costs of upgrading the Waitohi Culvert.
34. Council has extensive permissive powers in relation to land drainage and rivers control. Council does not have a positive obligation to intervene and carry the cost of upgrading the Waitohi Culvert. On the other hand, Port Marlborough and KiwiRail own the culvert. They want to undertake extensive redevelopment in and around the culvert. If costs accrue from the owners of the culvert having to increase its capacity to avoid upstream flooding then that has to be accepted as a consequence of their ownership and control of the constriction which they have inherited.

### **Conclusion**

35. The Authority was seeking submissions on whether conditions were required in relation to the Waitohi River issues and for submissions on the status of any such conditions. Council's respectful view is that it is premature to be trying to address conditions in circumstances where there are fundamental issues which need to be addressed first.
36. Council sees little alternative to the Authority having to require the Applicants KiwiRail and Port Marlborough to address these issues and if necessary submit appropriate applications, if as Council considers to be the case, the Permit has expired.
37. This is a very important matter which has so far, not received adequate attention. It is a matter which goes to the heart of the Mauri of the Waitohi. It may well need to be further addressed by Iwi. It raises issues of economic, environmental, cultural and economic significance.
38. Council is open to persuasion that the views it has formed are wrong but it believes that these issues require careful consideration.
39. Please contact me should you require any further information concerning the above matters.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Gina Ferguson', with a long horizontal flourish extending to the right.

Gina Ferguson  
Consents and Compliance Group Manager