

BEFORE THE INDEPENDENT HEARING PANEL

IN THE MATTER OF the Resource Management Act 1991

AND of the proposed Timaru District Plan

Legal Submissions (regarding scope)
on behalf of the Director-General of Conservation *Tumuaki Ahurei*
Hearing F: Hazards and Risks (Natural Hazards only) – Other District-wide
Matters
Submitter No. 166 Further Submitter No.166
Dated: 29 April 2025

Department of Conservation | *Te Papa Atawhai*

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MAY IT PLEASE THE HEARING PANEL

Introduction

1. Counsel for the Director-General of Conservation (the **Director-General**) filed a Memorandum of Counsel dated 16 April 2025. The memorandum recorded that at the point of filing, there were no specific legal matters that required legal submissions for Hearing F.¹
2. The expert evidence filed on behalf of the Director-General includes evidence from Dr Clement Lagrue and Ms Elizabeth Williams relating to the Director-General's submission points on the Activities on Surface Water Chapter (**ASW**). Specifically, Dr Lagrue's evidence addresses the effects of motorised craft/jet boats on braided river birds. Dr Lagrue identifies the bird breeding season for relevant braided river specialist birds present on the Timaru District's rivers as being from August – January (inclusive).² Ms Williams' planning evidence draws on Dr Lagrue's evidence and makes recommendations for amendments to the relevant rules (ASW-R3, ASW-R4, ASW-R5, ASW-R6) to ensure that the temporal restrictions on motorised craft in the relevant permitted activity rules align with Dr Lagrue's evidence.³ ASW-R3 relates to the Rangitata River.
3. The s42A report writer for the Activities on Surface Water chapter (Mr McClellan) has now prepared his s42A summary statement. In relation to Ms Williams' recommended amendments to ASW-R3, Mr McClellan states:⁴

In my view, given the submissions on ASW-R3 supported the rule as notified and the only amendment sought was to fix a minor error to refer to the correct schedule, **I do not think there is scope to amend ASW-R3 as sought by Ms Williams.**

4. Counsel understands, therefore, that the question of whether the relief sought by the Director-General in respect of these amendments is within the scope of the Director-General's submission is in issue for Hearing F. In order to assist the Panel, Counsel has prepared legal submissions to address this issue.

¹ Memorandum of Counsel on behalf of the Director General of Conservation, Hearing F, 16 April 2025.

² Statement of evidence Clement Lagrue, Hearing F, dated 9 April 2025, in particular paragraphs 22, 28 and 42.

³ Statement of evidence Elizabeth Williams, Hearing F, dated 9 April 2025, paragraphs 38 and 54, and Appendix 1.

⁴ Section 42A summary statement – Hearing F – Public Access, Activities on the Surface of Water, and Versatile Soil, 23 April 2025, paragraph 7.

5. Counsel also notes that evidence has now been filed on behalf of Jet Boating New Zealand (JBNZ).⁵ That evidence is referred to below where relevant.

Applicable case law

6. Counsel for the Director-General has read the various legal submissions and Memorandum of Counsel filed on behalf of the Timaru District Council that consider generally the issue of whether an amendment is within the scope of an original submission.⁶
7. Counsel agrees with the summary of the relevant case law provided and therefore does not repeat that here. Counsel emphasises in particular the summary of key principles provided by Whaata J in the case of *Albany North Landowners v Auckland Council*.⁷ While this case was decided in the context of the Auckland Unitary Plan, Counsel for the Director General agrees that the following quote from the judgement (Whaata J) 'neatly summarises'⁸ the applicable case law on scope in the context of a Schedule 1 plan change:

[115]A Council must consider whether any amendment made to a proposed plan or plan change as notified goes beyond what is reasonably and fairly raised in submissions on the proposed plan or plan change. To this end, the Council must be satisfied that the proposed changes are appropriate in response to the public's contribution. **The assessment of whether any amendment was reasonably and fairly raised in the course of submissions should be approached in a realistic workable fashion rather than from the perspective of legal nicety. The "workable" approach requires the local authority to take into account the whole relief package detailed in each submission when considering whether the relief sought had been reasonably and fairly raised in the submissions.** It is sufficient if the changes made can fairly be said to be foreseeable consequences of any changes directly proposed in the reference. [Emphasis added.]

⁵ Statement of evidence of Malcolm Smith, dated 28 April 2025.

⁶ Legal submissions on behalf of Timaru District Council (30 April 2024), paragraphs [28] – [30]; Memorandum of counsel on behalf of Timaru District Council – Response to Minute 10 (1 July 2024), at paragraphs [9]– [13]; Memorandum of Counsel on behalf of Timaru District Council, Response to Minute 19, 18 December 2024, paragraphs [32] – [37].

⁷ *Albany North Landowners v Auckland Council* [2017] NZHC 138, at [115].

⁸ Memorandum of Counsel on behalf of Timaru District Council, Response to Minute 19, 18 December 2024, paragraph [32].

Amendments sought by Director-General to ASW-R3 to reflect bird breeding season

Context

8. The Director-General's submission points on the ASW chapter included a submission point (#168.85, #168.86) on the objective (ASW-O1) and policies (ASW-P1, ASW-P2, ASW-P3, AWS-P4, ASW-P5, ASW- P6) and a submission point (#166.88 – #166.91) on Rules ASW-R3, ASW-R4, ASW-R4, ASW-R5, ASW-R6, as follows:

ASW – Activities on the Surface of Water PLAN PROVISION	SUPPORT/OPPOSE	REASON	RELIEF SOUGHT
ASW-O1, ASW-P1, ASW-P2, ASW-P3, ASW-P4, ASW-P5, ASW-P6	Support	The D-G supports the objective and policies which seek to protect the values of the districts rivers, avoid adverse effects of motorised craft and manage the effects of surface water activities on fish spawning areas, habitat of breeding birds and on flora and fauna within riparian margins. The objective and policies are consistent with the RMA Part 2, Section 6c and Section 31(1)(e).	Retain the objectives and policies as notified.
Rules ASW-R3, ASW-R4, ASW-R5, ASW-R6	Support with amendment	The D-G supports the provisions that limit the recreational use of motorised craft on specified rivers and ecosystem values at appropriate times of the year. Reference to the SCHED-Schedule of Fishing Area needs to be amended to reflect the correct schedule number.	Retain as notified. Amend Rule ASW-R3 PER 3 as follows: <i>The use is not within any of the fish spawning areas identified in SCHED14</i> 13 <i>Schedule of Fish Spawning area.</i>

9. Other relevant submissions and further submissions were received from various other submitters including JBNZ (submitter #48), Ronald Clearwater (submitter #243), Rod Gerard (#40) and Forest and Bird (submitter #156).

Analysis of scope

10. In accordance with the case law referred to above, the Director-General's position is that the amendments sought to ASW-R3 as recommended in Ms Williams' evidence were fairly and reasonable raised by, and within the scope of, the Director-General's submission.
11. Counsel acknowledges:
 - that in relation to Rules AWS-R3, R4, R5 and R6, (i.e. including ASW-R3), the relief in the Director-General's submission sought was for all rules to be retained as notified, and that the only amendment sought was a minor technical amendment to Rule ASW-R3 (updating the schedule reference from Schedule 14 to 13). To that extent, the relief now sought in respect of ASW-R3, as recommended in Ms Williams' evidence, differs from the relief specified in the Director-General's submission; and
 - that no other submitters have sought amendments to ASW-R3.
12. Counsel submits, however, that the relief sought in the Director-General's submission needs to be considered (to use the words from the *Albany* decision), taking into account the 'whole relief package' detailed in the submission.
13. The reasons provided in the Director-General's submission (#166.68) for the Director-General's support of the retention of the objective and policies in the ASW chapter is set out above:

The D-G supports the objective and policies which seek to protect the values of the districts rivers, avoid adverse effects of motorised craft and manage the effects of surface water activities on fish spawning areas, habitat of breeding birds and on flora and fauna within riparian margins. The objective and policies are consistent with the RMA Part 2, Section 6c and Section 31(1)(e).

14. Likewise, the Director-General's submission (#166.88) in relation to the relevant rules refers specifically to the Director-General's support being based on the provisions that: "...*limit the recreational use of motorised craft on specified rivers and ecosystem values at **appropriate times of the year***" [Emphasis added].

15. A key focus of the DG's submission therefore, which is clear on the face of the submission, is to protect bird breeding habitat by limiting jet boat use at 'appropriate times' – read as a whole it is clear that the intention of the submission is for jet boating to be limited over bird breeding season.
16. The relief specified in the Director-General's submission in relation to AWS-R3 is therefore predicated on the temporal restriction specified in ASW-R3 being the appropriate period to avoid the bird breeding season. The expert evidence now prepared by Dr Lagrue demonstrates that it is not.
17. In those circumstances, the Director-General submits that there is scope for the Panel's decision to reflect the relief now sought by the Director-General – i.e. for the temporal restrictions in ASW-R3 to apply within the bird breeding season of August – January (inclusive).
18. Counsel acknowledges that natural justice considerations underpin the process provided in the RMA for notification and submissions and are directly relevant to issues of scope. This is confirmed in the case law referred to above at paragraphs 6 and 7. In addition to the analysis provided as to the scope of the Director-General's submission, Counsel also notes that the amendments sought by the recommendations in Ms Williams' evidence relate directly to the use of motorised craft. JBNZ is a representative organisation that represents the key affected stakeholders⁹ and is already an active participant in this process.

Other points

19. Counsel acknowledges the other 'considerations' raised in Ms Williams' evidence as relevant to ASW-R3 (relating to the issues arising from the cross-boundary nature of the Rangitata River - see paragraphs [50] – [52]). The Director-General's position is that while these are matters for consideration by the Panel, they are separate to the scope issue raised by the s42A Officer. In other words, the Director-General's position is that there is scope for the Panel to consider the relief sought by the Director-General, while acknowledging that these other considerations may have a bearing on whether that relief will be granted by the Panel.

⁹ The statement of evidence filed from Mr Smith confirms that JNBZ is a national organisation that represents recreational jet boaters in New Zealand (paragraph 8) and that it has approximately 3,500 members (paragraph 9).

20. More generally, Counsel submits that not making the amendments sought to ASW-R3 would result in a significant internal inconsistency within the Plan, given that the other rivers within the District would specify a different temporal restriction that *does* align with the relevant bird breeding season. This would be a perverse outcome given the importance of the Rangitata River as habitat for the identified threatened species.¹⁰ Counsel submits that the planning analysis undertaken by Ms Williams in her evidence in terms of the higher order documents and other relevant plan provisions¹¹ supports the recommended amendments. Counsel emphasises the conclusion reached by Ms Williams in her evidence at paragraph 53.¹²

Overall, as I have set out above, the need to protect areas of significant habitats of indigenous birds along braided rivers is provided for through the RMA Sections 6(a) and (c), the NPS-IB, the NPS-FM, the Canterbury RPS, the Water Conservation (Rangitata River) Order 2006 and through the proposed plan ECO chapter objectives and ASW-O1. Currently, and in light of the evidence presented by Dr Lagrue, I consider there is a gap in the Plan for protecting this habitat under the current proposed rule ASW-R3.

Amendments sought by Director-General to ASW-R4, ASW-R5, ASW-R6 to reflect bird breeding season

21. For completeness, Counsel notes the other amendments recommended by Ms Williams in her evidence to rules ASW-R4, ASW-R5 and ASW-R6, in response to the amendments proposed by the Section 42A Officer. In summary, Ms Williams recommends minor changes to the temporal restrictions specified in these rules to align with Dr Lagrue's expert evidence as to when the relevant bird breeding occurs. This would require a change to Per-2 in each of these rules, so that the specified period within which motorised craft use could occur would be February to July (inclusive) rather than March – August (inclusive).
22. Counsel for the Director-General understands that the s42A reporting officer's position is that there is scope to make amendments to Per-2 of these rules, on the basis of JBNZ's submission points and those of individual submitters. In summary, the JBNZ submission sought the performance standards for these rules be amended to remove

¹⁰ Statement of evidence Clement Lagrue, paragraph 23.

¹¹ Statement of evidence Elizabeth Williams, paragraphs 29 – 31.

¹² Statement of evidence Elizabeth Williams, paragraph 53.

any temporal restrictions and impose a minimum flow rate. Two individual submitters¹³ also sought amendments to the performance standards. The evidence now filed on behalf of JBNZ accepts that a temporal restriction can apply to these rules, although seeks that the exclusion period is September – December (inclusive).

23. For the reasons set out above at paragraphs 10 – 18, Counsel for the Director-General considers the Director-General's submission provides scope to make the amendments identified by Ms Williams, but also considers the amendments could be made within the scope of the JBNZ and individual submitters' submissions.



Alice McCubbin-Howell
Counsel / Rōia for the Director-General

29 April 2025

¹³ Ronald Clearwater (#243) and Rob Gerard (#40).