

BEFORE THE GORE DISTRICT COUNCIL

IN THE MATTER of the Resource Management Act 1991

AND

IN THE MATTER of the Activities on the Surface of Water Chapter of
the proposed Gore District Plan

SUBMITTER **JET BOATING NEW ZEALAND INCORPORATED**

LEGAL SUBMISSIONS OF JET BOATING NEW ZEALAND

25 October 2024

FLETCHER VAUTIER MOORE
LAWYERS
PO BOX 3029
RICHMOND 7050

Telephone: (03) 543 8301
Facsimile: (03) 543 8302
Email: cthomsen@fvm.co.nz
Solicitor: CP Thomsen

LEGAL SUBMISSIONS ON BEHALF OF JET BOATING NEW ZEALAND

Overview

1. Jet Boating New Zealand Incorporated (**JBNZ**) is a well-established organisation with nine branches nationwide. JBNZ is dedicated to fostering a community of safe jet boaters, and to maintaining access to New Zealand waterways for recreational jet boating, while sharing the resource with other users.
2. Jet boating on the Mataura River is a valuable pastime for a range of people who want to enjoy the scenery of the Gore District, and to create lasting memories with their family and friends. The purpose of JBNZ's submission was to ensure jet boating on the Mataura was provided for in the Gore District Plan (**the pGDP**) as a permitted activity subject to reasonable requirements, conditions, and permissions.¹
3. Environment Southland's Navigational Safety Bylaw (**the Bylaw**)² regulates when and how (including speed) jet boats can travel on the Mataura to ensure the safety of all river users. A temporary uplift is required to travel faster than 5 knots outside of 1 August – 30 September. This is significant, as most jet boats need to reach 16 knots (around 30 km/h) to get on the “plane” to navigate parts of the Mataura at typical flows.
4. The need for sufficient flow, as highlighted on page 14 of the Section 32 Report, also tends to limit the extent of jet boating on the Mataura.³ Nathan Barker has provided an estimate of how frequently jet boating occurs on the Mataura:
 - (a) JBNZ host one event in the Gore District during the August-September window, and around three events during the rest

¹ Refer Resource Management Act 1991 (**RMA**), s 87A(1).

² Navigation Safety Bylaws 2009 (revised 2015), Southland Regional Council.

³ Section 32 Report, p 14 states “the Mataura River is the only water body currently used for motorized activities in the district, although river geomorphology and low summer flows limit safe navigation”.

of the year. Each event will typically involve 20-30 boats on the water.⁴

(b) Outside of the August-September window, JBNZ estimates that a few individuals/ smaller groups will boat the river each week when conditions are suitable. However, adverse weather and low flows tend to restrict jet boaters from the Mataura for large parts of summer and winter.⁵

5. JBNZ estimate there is an increase in casual boating during the August-September window, although conditions can be more variable and restrictive during Spring.
6. JBNZ's case is about whether jet boating the Mataura creates resource management effects that mean regulation is, in a s 32 sense, appropriate and, if so, whether the proposed ASW-R7 is the most appropriate way achieve the objectives of the pGDP.
7. JBNZ's position is that jet boating has co-existed alongside other activities and indigenous biodiversity on the Mataura for many years, and there is no evidence of any adverse effects before the Council – only stated concerns, for birds and fish spawning. This is despite the Director-General of Conservation (**DOC**) being a submitter, and Southland Fish & Game (**Fish & Game**) being involved in the enforcement of the Bylaw.⁶
8. As Mr Barker explains, JBNZ are not ignorant of the contended risks to birds. JBNZ are involved in plan-making across the country and try to remain up to date so they can engage in these issues in a constructive manner. On that basis, Mr Barker has some observations about the behaviour of the identified birds, based on his years of experience, along with some relevant research papers.⁷
9. There is also clear evidence that jet boating promotes a matter of national importance under s 6(d) of the RMA by enhancing access

⁴ Evidence of Nathan Barker, 18 October 2024, at [25]-[27].

⁵ Evidence of Nathan Barker, at [36]-[37].

⁶ Environment Southland and Fish & Game both consider the safety plans filed as part of applications for temporary speed uplifts on the Mataura.

⁷ Evidence of Nathan Barker, at [58] onwards.

along rivers, and that many kiwis gain a real benefit from being able to jet boat on the Mataura. The evidence also shows that, contrary to some popular belief, jet boaters share the same values as many other river users who enjoy the scenery and comradery of time spent in nature.⁸

10. Overall, it is submitted that a careful assessment of the contended risks does not justify the proposed ASW-R7, which would require a resource consent for any jet boating outside of a short window between 1 August – 30 September each year. The proposed rule, as Mr Barker explains, will likely have the effect of banning most recreational jet boating on the Mataura outside of this window.⁹
11. We submit the appropriate response to the contended risks is not require jet boaters to apply for a resource consent for 10 months of each year, particularly when they have already invested significant resources into their pastime. That would overlook the significant and legitimate values that jet boating promotes for a variety of river users, which the RMA also requires Council to maintain and enhance, and the objectives of the proposed ASW chapter.
12. However. JBNZ acknowledge the need to protect trout fishing and the place some limits on the extent of jet boating on the Mataura throughout the trout fishing season. In the circumstances, JBNZ submits in favour of a modified ASW-R7:¹⁰

ASW-R7 Sport and Recreation Activity

Mataura

Activity Status: Permitted

Where:

1. The activity does not utilise any motorised watercraft; or
2. The activity uses motorised watercraft within that part of the Mataura River shown on the District Plan Maps within the area of water 300 metres long and 100 metres wide, 4.8 kilometres downstream from Gore at Beattie's Beach; or
3. The activity uses ~~of~~-motorised watercraft at a speed of less than 5 knots on any part of the Mataura River, (excluding its tributaries); or

⁸ Evidence of Nathan Barker at [40], citing the Galloway Report at Exhibit B.

⁹ Evidence of Nathan Barker at [47]-[55].

¹⁰ A "clean" copy of this modified ASW-R7 is at **Tab 1**.

4. The activity uses motorised watercraft travelling at more than 5 knots, on any part of the Maitava River (excluding its tributaries and that section identified at ASW-R7) where:
 - (a) the activity, including casual boating and events organised by member clubs of the NZ Jet Boating Association Jet Boating New Zealand Incorporated or member clubs or branches, occurs during the period 16 August March to 30 September 14 December, and
 - (b) Environment Southland has granted a temporary or permanent speed uplift on the run of the Maitava River where the activity occurs.
5. The use of motorised watercraft as part of one event organised and run by Jet Boating New Zealand Incorporated during the period 15 December to 15 March (inclusive).

Except that:

~~Within that part of the Maitava River shown on the District Plan Maps within the area of water 300 metres long and 100 metres wide, 4.8 kilometres downstream from Gore at Beattie's Beach; the activity may be undertaken at any time.~~

13. This modified ASW-R7 is within scope of with JBNZ's submission that sought a link between the rule and functions of Environment Southland to make bylaws and grant uplifts under the Maritime Transport Act 1994. However, the modified ASW-R7 grants lesser relief to avoid potential adverse effects during the peak of the trout fishing season – regardless of whether a speed uplift has been granted by Environment Southland or not. This will also lessen the risk of other effects by removing jet boats from the Maitava for a significant period each year, which would likely coincide with lower flows.
14. JBNZ also observes the proposed ASW-R4 may not allow for the use of motorised craft for key "community good" activities, such as scientific research and LandSAR, and other volunteer rescue efforts. The relief sought by JBNZ goes some way to addressing this issue but there would be parts of the year where use of motorised craft would be unlawful and the solution to this may be out of scope of JBNZ's original submission.¹¹

¹¹ See for instance the Proposed Queenstown Lakes District Plan at rule 21.15.2 which allows for "the use of motorized craft for the purpose of emergency search and rescue, hydrological survey, public scientific research, resource management monitoring or water weed control, or for access to adjoining land for farming activities".

The Context of the operative Gore District Plan and the Section 32 Report

15. JBNZ agrees with the Section 32 Report's observation that the Operative District Plan (**ODP**) lacks clarity, as there are no rules in relation to non-commercial activities on the surface of the water.¹²
16. JBNZ acknowledges the importance of trout fishing, as recognised in the Water Conservation (Mataura River) Order 1997,¹³ which recognises the impact of flow,¹⁴ water quality¹⁵ and damming¹⁶ of the Mataura and Waikaia Rivers on the outstanding values of the trout fishery. However, those three things are not impacted by jet boating – it is the potential for conflict between users, such as jet boaters and anglers, which creates one potential effect under the RMA.
17. Counsel emphasises the Section 32 Report's finding that no complaints have been received about motorised activities on the surface of water for over 10 years,¹⁷ and that no regulation has been proposed to restrict/ control the noise from jet boating. However, counsel is aware of the proposed rules focusing on noise from other sources during events, such as loudspeakers.
18. The Section 32 Report's finding that current use is "legitimate and sustainable" aligns with Mr Barker's evidence of a strong relationship between jet boaters and anglers.¹⁸ In fact, many JBNZ members are anglers themselves and some believe the passing boats enhance their fishing prospects, rather than having any adverse effects.¹⁹
19. Nevertheless, JBNZ accept that some regulation may be required to ensure future use does not create adverse effects. The basis for JBNZ's proposed rule is set out in the following section of these submissions.

¹² Section 32 Report, p 18.

¹³ Under the RMA, s 75(4)(a).

¹⁴ Water Conservation (Mataura River) Order 1997, cl 4.

¹⁵ Water Conservation (Mataura River) Order 1997, cl 5.

¹⁶ Water Conservation (Mataura River) Order 1997, cl 6.

¹⁷ Section 32 Report, p18.

¹⁸ Section 32 Report, p 18.

¹⁹ Evidence of Nathan Barker, at [35].

20. In terms of the Statutory Acknowledgement for the Maitara River, that recognises the descendants and history of events in the area and the fact the river was important for its indigenous fishery²⁰ – including the taking of kanakana (lamprey) at the Maitara Falls, which is impassable and not used for jet boating.²¹ The Statutory Acknowledgement also promotes the life force of all things in the natural environment, and the Mauri of the wai.²²
21. The Section 32 Report does not identify any conflict between JBNZ's interests and the Statutory Acknowledgement. That is a conclusion JBNZ would adopt, and counsel submits the contended effects on indigenous biodiversity can be assessed in the usual way. The Section 32 Report does so by considering whether the proposed ASW-O1 and O2 are appropriate to achieve the purpose of the Act by reference to, among other things:²³
- (a) s 6(c) protection of habitats,
 - (b) s 7(d) ecosystems; and
 - (c) s 7(f) quality of the environment.
22. The proposed ASW-O1 then provides:
- ASW-O1 Activities on the surface of *water* and associated facilities and *structures*:
- 1. contribute to sustainable recreational, social and economic opportunities for the community;
 - 2. maintain and enhance the values associated with waterbodies on which surface water activities take place; and
 - 3. are resilient to the effect of climate change.
23. JBNZ adopts the Section 42A Report's endorsement of the balance within the proposed ASW-O1 which promotes "sustainable recreational, social and economic opportunities for the community".²⁴

²⁰ Ngai Tahu Settlement, 14 October 1998. Attachment 12.27, at [3.1]-[3.3].

²¹ At [3.3].

²² At [3.4].

²³ Section 32 Report, p 35.

²⁴ Section 42A Report, at [47].

24. Similarly, the Section 42A Report correctly identifies a submitted directive to “avoid” adverse effects on wildlife habitats and indigenous biodiversity goes beyond the scope of the guiding national policy statements and is not appropriate at the objective level of the ASW Chapter.
25. As proposed, ASW-P4 and ASW-P5 form the policy basis for ASW-R7:

ASW-P4

Manage the *effects* of activities undertaken on the surface of *water* to maintain or enhance:

1. the natural character, landscape values and amenity of the *waterbody* and its margins;
2. water quality and quantity;
3. aquatic and riparian ecosystems, wildlife habitats and indigenous *biodiversity*;
4. public and customary access, customary rights, use and enjoyment of that locality; and
5. Ngāi Tahu cultural values including those listed in MW-2.3.

ASW-P5

Limit commercial surface *water* activities to those that are compatible with:

1. the values of that *waterbody*, including:
 - (a) the natural values and amenity of the *waterbody* and its margins;
 - (b) wildlife habitats and indigenous *biodiversity*;
 - (c) public use and enjoyment of that locality; and
 - (d) Ngāi Tahu cultural values including those listed in MW-2.3.
2. the surrounding land uses and established infrastructure; and
3. protected customary rights and Māori cultural practices and activities.

26. ASW-P6 focuses on the Water Conservation Order and maintaining a safe environment for surface water activities, including the navigation of watercraft. However, JBNZ submits Council should not regulate for those health and safety purposes. That is the role of the Regional Council, which has a statutory role relating to navigation safety through the Bylaw, and under the Maritime Transport Act 1994.²⁵

²⁵ Including the making of Maritime Rules that apply to craft on surface water.

27. Counsel highlights the distinction between the treatment of commercial and non-commercial activities within the policy framework:
- (a) ASW-P5 only allows commercial activities – motorised or not – to the extent they are compatible with the values of the waterbody, including wildlife habitats and indigenous biodiversity; whereas
 - (b) ASW-P4, which concerns all activities on the surface of the water, simply requires Council to manage effects to “maintain or enhance” those same things. This is more permissive wording.
28. We submit this distinction recognises the important values promoted by non-commercial activities on the surface of water. The fact that jet boating promotes those values is also in evidence, through the Galloway Report.²⁶
29. The Section 32 Report falls short of carrying out a complete cost/benefit analysis of the proposed ASW-R7 in two ways:²⁷
- (a) by focusing on the cost of a resource consent for “operators of new commercial activities”, and not recreational jet boaters, the Section 32 Report does not consider financial and time cost for recreational jet boaters who currently rely on temporary uplifts granted by Environment Southland; and
 - (b) similarly, the Section 32 Report does not consider the social cost of the proposed restrictions on jet boating on the Maitai, which Mr Barker suggests would create an effective ban outside of the August – September window.
30. Counsel encourages the Panel to keep these matters in mind when considering the key issues behind the formulation of ASW-R7:

²⁶ Counsel notes JBNZ were not consulted when the pGDP was being drafted, see Section 32 Report, bottom of p 30 – 31.

²⁷ Section 32 Report, p 37 – 38.

- (a) whether, and if so, to what extent should jet boating be regulated to preserve trout and trout fishing?
 - (b) whether, and if so, to what extent should jet boating be regulated to preserve the identified birds?
31. Counsel also refers to the Environment Court's guidance in favour of imposing the least restrictive regulation required to achieve the objectives of a plan, as observed in *Forest & Bird v Whakatane District Council*:²⁸

[59] In considering what rule may be the most appropriate in the context of the evaluation under s 32 of the Act, we consider that notwithstanding the amendments that have been made to that section in the meantime, the presumptively correct approach remains as expressed in *Wakatipu Environmental Society Inc v Queenstown Lakes District Council*: that where the purpose of the Act and the objectives of the Plan can be met by a less restrictive regime then that regime should be adopted. Such an approach reflects the requirement in s 32(1)(b)(ii) to examine the efficiency of the provision by identifying, assessing and, if practicable, quantifying all of the benefits and costs anticipated from its implementation. It also promotes the purpose of the Act by enabling people to provide for their well-being while addressing the effects of their activities.

The contended effects on trout and trout fishing

32. The first question raised by DOC's submission is whether motorised activities (such as jet boating) adversely affect fish spawning areas on the Maitara, within the Gore District.²⁹
33. JBNZ has advised counsel that brown trout migrate upriver on their spawning runs from April/ May, and that the fishing season on most of the Maitara runs from 1 October to 30 April to minimise fishing during their reproductive period.
34. Brown trout tend to end their spawning runs and tend to congregate at features of the river which they cannot ascend, such as the Maitara Falls, or in side streams. These features would also tend

²⁸ *Royal Forest & Bird Protection Society of New Zealand Inc v Whakatane District Council* [2017] NZEnvC 51.

²⁹ DOC Submission, page 34.

to be impassable by jet boat, subject to flow rates. Mr Barker can speak to these points at the hearing if that would assist the Panel.

35. On this basis, JBNZ submits there is a limited risk of jet boats on the Mataura, within the Gore District, disturbing fish spawning areas or spawning activity. It is therefore unnecessary for the proposed rule to contain protections of fish spawning sites.
36. In terms of trout fishing, it is accepted that anglers and jet boaters do share an interest in accessing the Mataura, although counsel refers to Fish & Game's recently promoted "Beat System" on the Mataura.³⁰ This allows anglers to park in front of a sign at a 'hot spot' and be the only fisher there until they depart. Significantly, all the 43 sites within this system are upriver from the Keowns Road Bridge, meaning they are outside of the Gore District. This is relevant to the contended level of conflict between river users within the Gore District.
37. In any case, JBNZ endorses the Section 32 Report's finding that current use is "legitimate and sustainable" while agreeing that regulation may be appropriate to limit the potential for jet boating to conflict with trout fishing in future.³¹ JBNZ also acknowledge the significant recreational and economic benefits trout fishing provides to the Gore District.
38. In the circumstances, JBNZ has proposed a modified ASW-R7 which would significantly limit jet boating within the lengthy peak of the trout fishing season: from 15 December to 15 March each year.
39. Allowing for one JBNZ event as a permitted activity during that period will ensure that local families are still able to access what the Mataura has to offer jet boaters during the warmer months, while promoting trout fishing for almost the entire season. We submit that one event across those three months is unlikely to have a significant effect on fishing values, while promoting shared enjoyment of the Mataura.

³⁰ Fish & Game New Zealand, *Beat System: Upper Mataura River* (2023). <www.fishandgame.org.nz/freshwater-fishing-in-new-zealand/where-to-fish/regional-info/southland/beat-system-upper-mataura-river/>

³¹ Section 32 Report, p 18.

40. The modified ASW-R7 promoted by JBNZ would also allow for casual and organised jet boating between 16 March and 14 December each year, outside of the period that most trout fishing takes place, provided that a speed uplift has otherwise been granted by Environment Southland.
41. Based on the evidence before the Panel, counsel submits this will create a lower risk of conflict between river users, as well as a lower economic, social and cultural cost for the same people. It must be a more appropriate means of achieving the objectives of the pGDP, including ASW-O1, as it creates and shares recreational opportunities on the River, and enhances the values for a broader group of river users.

The contended effects on birds

42. It is for Council to assess the risk that jet boating poses to the birds identified at pp 33-34 of DOC's submission, including:
 - (a) Black-billed gulls, which breed from August to March each year,
 - (b) Banded dotterel, which nest from July to January each year; and
 - (c) Black-fronted terns, which breed from October to January each year.
43. It is not known where these birds breed or nest on the Maitava within the Gore District (or up/ down river).
44. However, counsel notes the modified ASW-R7 above would remove jet boats from the Maitava during significant parts of the breeding/ nesting periods submitted by DOC. This would significantly reduce any risk of the contended effects on these birds, to the extent counsel submits they would be less than minor.
45. In terms of adverse effects arising from jet boating between 16 March and 14 December each year, JBNZ acknowledges [21] of the

Section 42A report which identifies requirement for Council to adopt a precautionary approach under the NPS-IB.

46. However, it is important to consider the entirety of cl [3.7] of the NPS-IB, which states:³²

3.7 Precautionary approach

- (1) Local authorities must adopt a precautionary approach toward proposed activities where:
- a. the effects on indigenous biodiversity are uncertain, unknown, or little understood; but
 - b. those effects could cause significant or irreversible damage to indigenous biodiversity.
47. Clause [3.7] sets out two pre-conditions before a precautionary approach must be adopted. It does not require Council to treat submitted concerns as it would treat expert evidence as to the effects of an activity. Even then, hypotheses are not expert evidence – for an expert opinion to be probative, there must be some evidence supporting it.³³
48. Clause [3.7] also requires some basis to suggest the contended effects may cause “significant or irreversible damage” *before* adopting a precautionary approach.
49. Finally, a precautionary approach does not require Council to be inherently conservative in its assessment of actual and potential effects. As stated in *Greenpeace New Zealand Inc v Ministry of Fisheries*:³⁴
- The fact that a dispute exists as to the basic material upon which the decision must rest, does not mean that necessarily the most conservative approach must be adopted. The obligation is to consider the material and decide on the weight which can be given to it with such care as the situation requires...
50. The issue at hand concerns the effects of an activity on mobile species found elsewhere, while they have presumably co-existed with jet boating on the Maitara for several decades.

³² (Underline added by counsel).

³³ *Shirley Primary School v Christchurch CC* [1999] NZRMA 66 at [142].

³⁴ *Greenpeace New Zealand Inc v Ministry of Fisheries* CP492/493 HC Wellington, 27 November 1995, p 32.

51. Absent an ornithologist, Mr Barker has offered the observations he has made as an active and informed member of JBNZ over the past 15 years, both in terms of his personal experience and what recent research has shown.
52. Counsel submits Mr Barker's assessment of the contended effects is realistic and demonstrates the potential effects of jet boating between 16 March and 14 December would be less than minor, particularly when the frequency of jet boating is also constrained by the need for speed uplifts and sufficient flow.
53. Absent any challenge, we suggest Mr Barker's evidence should be relied on to conclude that regulation is not required to avoid potential effects on the identified bird species, and ASW-R7 should be modified as suggested by JBNZ.

25 October 2024

The image shows two handwritten signatures in blue ink. The first signature on the left is 'C Thomsen' and the second signature on the right is 'K Simonsen'. Both are written in a cursive, flowing style.

C Thomsen/ K Simonsen

Counsel for JBNZ

Tab 1

Modified ASW-R7 from JBNZ

ASW-R7 Sport and Recreation Activity

Mataura

Activity Status: Permitted

Where:

6. The activity does not utilise any motorised watercraft; or
7. The activity uses motorised watercraft within that part of the Mataura River shown on the District Plan Maps within the area of water 300 metres long and 100 metres wide, 4.8 kilometres downstream from Gore at Beattie's Beach; or
8. The activity uses motorised watercraft at a speed of less than 5 knots on any part of the Mataura River, (excluding its tributaries); or
9. The activity uses motorised watercraft travelling at more than 5 knots, on any part of the Mataura River (excluding its tributaries and that section identified at ASW-R7) where:
 - (a) the activity, including casual boating and events organised by Jet Boating New Zealand Incorporated or member clubs or branches, occurs during the period 16 March to 14 December, and
 - (b) Environment Southland has granted a temporary or permanent speed uplift on the run of the Mataura River where the activity occurs.
10. The use of motorised watercraft as part of one event organised and run by Jet Boating New Zealand Incorporated during the period 15 December to 15 March (inclusive).