

Proposal to Amend the Canterbury Regional Council Flood Protection and Drainage Bylaw 2013

Officers' Reply to the Hearing
21 September 2018

Prepared by

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and

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1. Introduction

1. The following report is prepared in response to matters raised during the hearing on 17 September 2018.

2. River Engineering Guiding Documents and Enabling Legislation

2. During the hearing, the Panel requested that a flowchart be prepared and further information provided to clarify the different processes involved in Council River Engineering practice and to identify the opportunities for public input. This is discussed below and, together with Appendix 1, provides an overview of key River Engineering documents, the processes to which these relate, timeframes between reviews, and opportunities for consultation and input from the public.
3. The Canterbury Regional Council (CRC) has responsibilities under a number of Acts. Directly relevant to issues of flood and erosion are the Soil Conservation and Rivers Control Act 1941 and the Land Drainage Act 1908. These Acts assign to the Council the statutory functions of managing land use within the region to prevent and mitigate damage caused by floods and erosion, and to construct and maintain drains and watercourses. Rating districts are established under these Acts for communities prepared to pay to receive the benefits of this function.
4. Each rating district has an Asset Management Plan setting out the objectives and performance standards for the scheme. Flood protection and flood control work for these rating districts, including stopbanks, groynes, vegetation plantings, floodways and drainage schemes, has been developed to achieve the objectives set out in the Asset Management Plan.
5. Asset Management Plans are kept by the Council in consultation with rating district liaison committees. These committees meet once a year with the Area Engineer and Engineering Officer to discuss the effectiveness of the scheme. A public meeting is also held every three years to hear from the wider community and to elect the Liaison Committee. The Liaison Committee meetings are the primary forum for consultation, though area engineers and field staff also work closely with community members and maintain an open dialogue.
6. Work carried out by the Council to build or maintain the schemes is determined by the Asset Management Plan. How the work is carried out is determined in one or more of the following documents: Engineering Specifications (June 2017), Code of Practice for Defences Against Water (July 2015), Resource Consents.
7. The Engineering Specifications (June 2017) specify design requirements and the methodology required for specific jobs such as construction of drains, stopbanks, anchored tree protection etc.
8. The Code of Practice for Defences Against Water and Drainage Schemes (July 2015) sets out standards and guidelines for undertaking works within the riverbed and for drainage network maintenance activities. The Canterbury Regional Council Land and Water Regional Plan (LWRP),

Rule 5.138, allows for local authorities or network utility operators to install, maintain, use, or remove defences against water, as a permitted activity if undertaken in accordance with this Code.

9. Where Council work is not a permitted activity under any plan the Council applies for resource consents from the relevant authorities. Work is then carried out in accordance with the granted consent conditions.
10. The purpose of the Flood Protection and Drainage Bylaw 2013 is to manage, regulate and protect the flood protection and flood control works (including drainage schemes) developed under the instruments referenced above. The Bylaw specifies what activities may have adverse effect on these assets and requires persons who wish to carry out such activities to obtain an authority under the Bylaw.
11. The purpose of a Bylaw Authority is, in practice, to place controls on the methodology by which persons may undertake activities, or mitigate these activities, so that they do not have an adverse effect on the flood protection and flood control works. A total of two applications have been declined since the Bylaw was made operative (please note: this number does not include applications declined because they required resource consent).

3. Improved wording to clarify Section 5.1(b)(ii)

12. During the hearing, the Panel directed officers to consider further refinement to the wording of Section 5.1(b)(ii). The following wording is proposed to remove the reference to defences against water which may confuse readers. The section is purely intended to capture activities that may adversely affect the drain or small watercourse.
13. Section 5.1(b)(ii) should read as follows:

within 7.5 metres of the top of the bank of any drain or small watercourse that may interfere with access for inspection or maintenance purposes, affect bank stability, or have the effect of stopping, diverting, controlling, restricting, or otherwise regulating the flow or spread of water, including floodwaters, in or out of a drain or small watercourse.

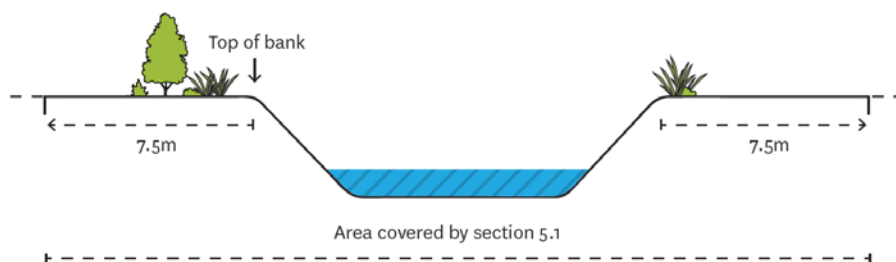
4. Improved wording to clarify Subsections 5.3(d),(e),(g),(h)(iii)

14. During the hearing, the Panel directed staff to further refine the wording of subsection (iii) to sections 5.3(d), (e), (g) and (h). It is considered that the term 'adjoining' does not provide sufficient certainty where there may additional watercourses adjacent to a defence against water.
15. The term 'adjoining' is intended to exclude secondary and tertiary stopbanks which are not adjacent to the watercourse. However, this does not take into account other watercourses that run near to the stopbank but for which the stopbank is not specifically designed. One example of this is the Otukaikino Creek which runs between a primary and secondary stopbank system designed for the Waimakariri River.

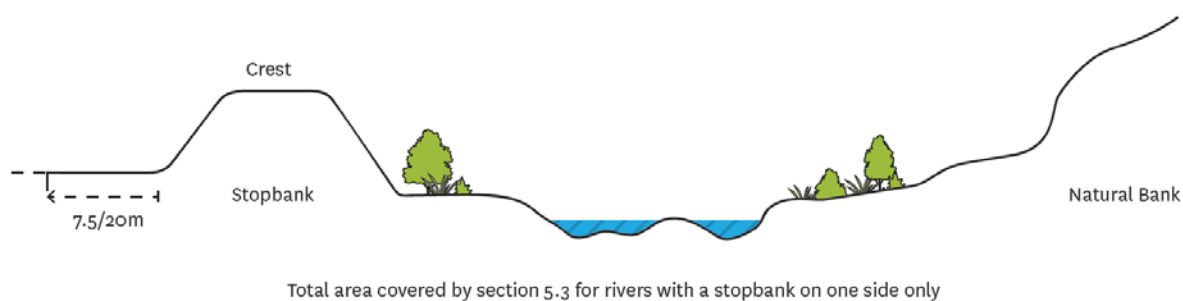
Appendix 2

Note: These diagrams are for illustrative purposes only.

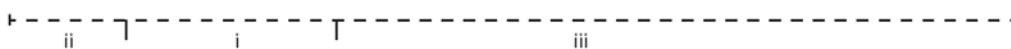
5.1 Drains and small watercourses



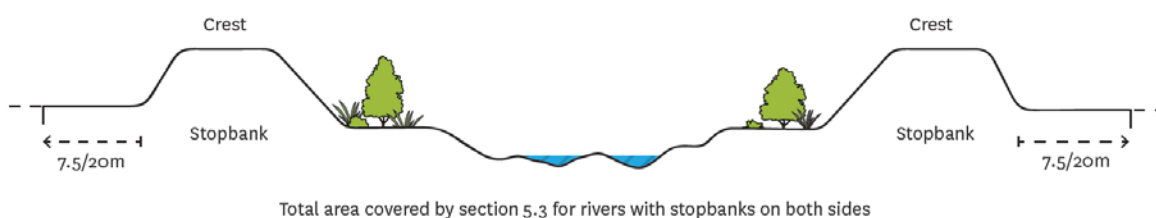
5.3 Defences against water



Subsections



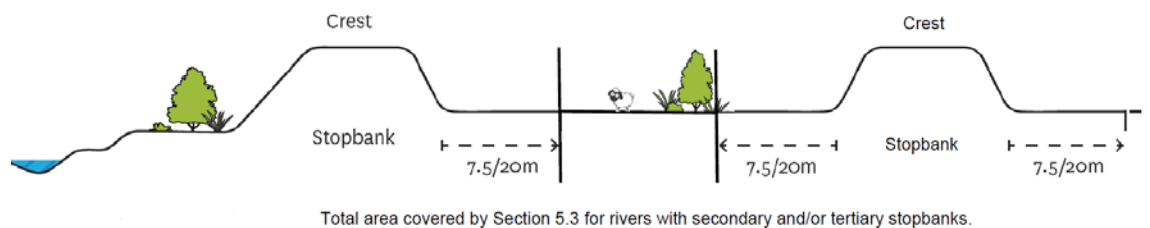
Subsections



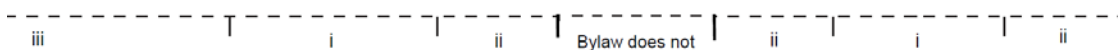
Subsections



Subsections



Subsections



Subsections

5. Reply to Erralyn Farms

The appropriateness of the proposed flood protection vegetation line

19. The legal submissions presented by Mr Williams included some inaccuracies. These are addressed below with Mr Williams' comments in italics.
20. *With respect to the 'Triangle Paddock', "water has not ever flowed across this area"*. Included below as Figure 2 is a copy of a photograph taken 15 November 2006 when the river had a peak flow of approximately 5,100m³/s. Although this is a large flow, it has been exceeded on two more occasions since 2006. It clearly shows water flowing through this area.



Figure 2: November 2006 Flood Event.

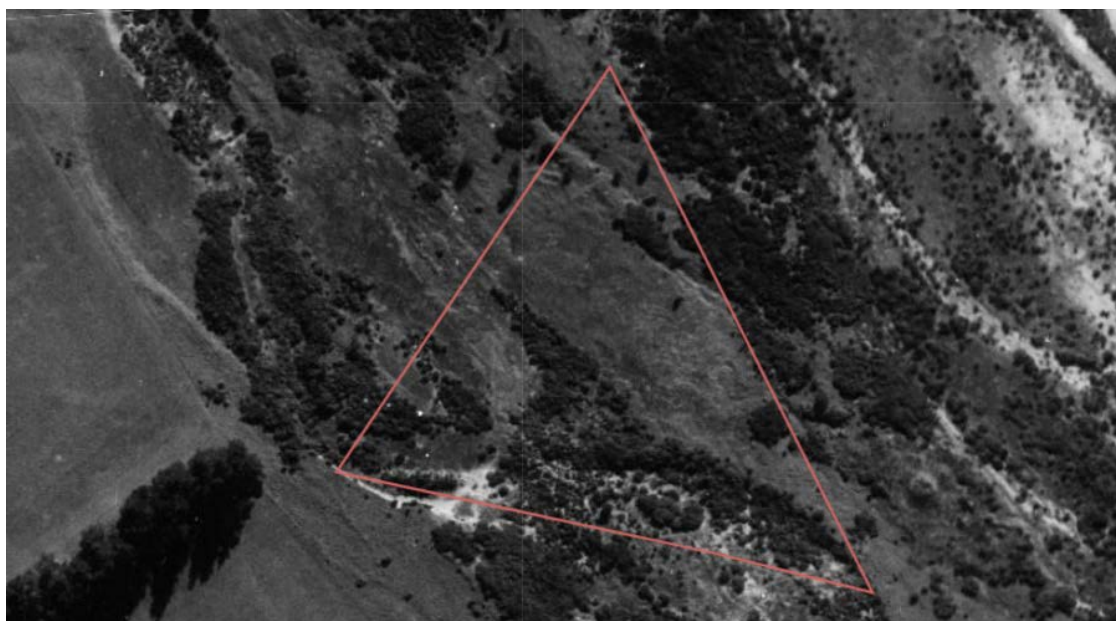


Figure 3: Triangle block, 1942. Exposed gravel visible

21. As shown in Figure 3 above, early aerial photographs taken in October 1942 also show exposed gravel in this area; an indication that the river has been active in this zone. Dr Mabin considered information from 1943 onwards (Mabin evidence, page 2, paragraph 3). Figure 4 below shows that this exposed gravel is connected to a braid of the river upstream.



Figure 4: Triangle block with upstream braid visible.

22. *Farming Land Use Resource Consents apply to the whole of the property (referring to the cadastral title).* This is not correct. While a resource consent for the use of land for a farming activity (as regulated by the LWRP) can apply to a land title, it could also apply to only part of a land title, or equally may apply to multiple land titles. Generally, the area to which the consent applies is set out on a map which forms part of the consent.
23. *Land located on the riverward side of the Flood Protection Vegetation Line is considered 'Dead' or 'Sterilised'.* This is not correct. Under the Bylaw, the land can still be farmed provided flood protection vegetation is not damaged. We acknowledge that the LWRP imposes further regulations, including not being able to intensively farm within this area, but it does not mean it cannot be grazed. Fire risk can continue to be managed by non intensive grazing. It is noted that the landowner's obligations under the LWRP are already in existence and the Proposal to amend the Bylaw does not impact on these existing obligations.
24. The Panel requested the date of the original aerial imagery used to determine the flood protection vegetation lines for the current Bylaw. The date varies across the region – in this location the imagery was flown on November 2nd, 2004.
25. Below are copies of the images provided to the Panel at the hearing. Within these maps;

Pink line – Current Bylaw Flood Protection Vegetation Line

Green Line – Dr Mabin's proposed Flood Protection Vegetation Line

Orange Line – Original Flood Protection Vegetation Line, as notified in 2012
Black Lines – Property Boundaries



Figure 5: Nov 2004 Imagery used in 2012 Bylaw Maps



Figure 6: November 2004 Imagery, Triangle Block



Figure 7: January 2018 Imagery



Figure 8: January 2018 Imagery, Triangle Block

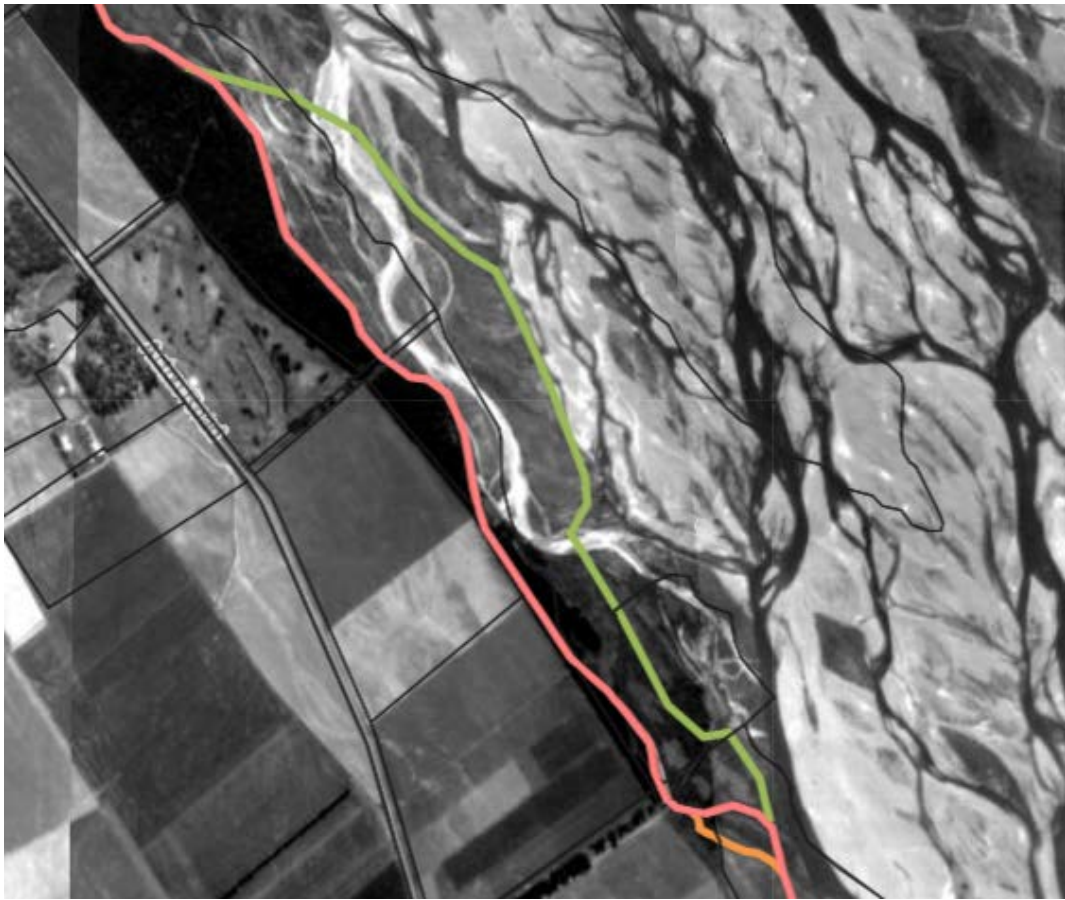


Figure 9: November 1985 Imagery

26. Figures 5 and 6 show the clear difference in vegetation type that was used to classify the area as Flood Protection Vegetation when the original maps were drawn.
27. The orange line shown on these images shows the location of the originally notified line, which was subsequently amended in the 2013 Bylaw as a result of the submission from Erralyn Farms.
28. Figure 5, when zoomed in, shows that none of the willow planting currently in place on the edge of the active channel was in place in 2004. This did not mean that the existing 'scrubby vegetation' was not valued from an erosion control perspective, it was, and therefore the line was drawn at the interface of cultivated and non cultivated land.
29. Figure 9 shows a main braid of the river through the upstream portion of the overall site. The purpose of showing both Figure 9 and Figures 3 and 4 is not to try and classify this land as riverbed. The Flood Protection Vegetation Lines have not been drawn with this purpose in mind. The purpose of looking at the riverbed in this context is to demonstrate that the river has been active in this area in the past and from this, we can reasonably expect that it may be active here again in the future. We acknowledge that our river engineering efforts will be focused on keeping the active braids within the current extent, but note the reality of dealing with a powerful river over a long period of time in this manner is difficult.

30. The Panel was also presented images of a property located 4.5km downstream of the Triangle Block. For completeness these are included in Figures 10 and 11 below with the pink line being the current Flood Protection Vegetation Line.



Figure 10: Griggs Road Site, November 2004



Figure 11: Griggs Road Site, January 2018

31. The approach proposed by Dr Mabin to define the line location is akin to the approach taken at the Griggs Rd site in 2012 where there was no 'scrubby' vegetation present. The erosion experienced at this site demonstrates the power of the river and the vulnerability of the land even with some vegetation present. If we accept Dr Mabin's approach upstream, we would be eliminating any possibility to protect future planting should the river erode those trees in a similar manner.
32. The paddock that has been eroded here is at an elevation of 2-3m higher than the active channel. The fact that it is high does not mean that it cannot be eroded. This is similar to the Triangle Block.
33. Overall, the alternative line proposed by Dr Mabin is not recommended to be accepted from an erosion control perspective.

Interaction with the LWRP

34. The Proposal does not include amendments to the Flood Protection Vegetation lines in this area. Therefore the Proposal will not have an impact on the landowner's existing obligations under the LWRP. On that basis, for the purposes of this hearing, the relevant consideration is whether

the Flood Protection Vegetation lines in question are appropriate for the purposes of this Bylaw. The utilisation of the Flood Protection Vegetation and Stopbank lines in the definition of 'bed' in the LWRP is a matter to be addressed in consultation on any subsequent changes to the LWRP, not this Proposal to amend the Bylaw. We have sought legal advice from Counsel on this matter and have included this as Appendix 2 to this report.

35. We agree with Mr Williams that any existing resource consents will form a 'deemed authority' under the Bylaw. Consequently, any activities which would otherwise contravene the Bylaw remain permitted until the expiry of those consents at which time the activity would be re-assessed.
36. There was some discussion between the Panel and Mr Williams regarding the distinction between *active farmland* and *active riverbed*. We reiterate that the Flood Protection Vegetation lines were not drawn with the intent of defining the riverbed, rather the extent of existing flood protection vegetation and where possible including where future vegetation might be required.

Flood protection vegetation line crossing 'active farmland'

37. Mr McCracken was asked to comment on whether there were other cases in the region where the Flood Protection Vegetation line crossed active farmland. His answer was that it was uncommon. Mr McCracken still holds the view that it is uncommon, but by way of clarification, there are examples of this situation occurring elsewhere particularly on the other major braided rivers such as the Waitaki, Waiau and Rangitata Rivers.

The status of the advice note to Section 5.4

38. The proposed amendments included the addition of an advice note to Section 5.4 of the Bylaw. The advice note was intended to clarify that, as stock can damage flood protection vegetation, keeping stock within flood protection vegetation lines will require bylaw authority.
39. Mr Williams asserted that such a note has uncertain legal status. We agree with Mr Williams that the note leaves a level of uncertainty as to when authority under the Bylaw must be sought. Consequently, we recommend that the note be included in the primary text of Section 5.4.

5.4 Flood Protection Vegetation

No person shall, without the prior authority of the Council,

(a) Remove, or damage; or ~~allow stock to damage~~

(b) Allow stock to graze within

any flood protection vegetation that is managed, or has been planted adjacent to, on the banks, or within, a river by the Council or its predecessors.

The extent of this vegetation is defined as the area between the Flood protection vegetation lines as shown in Schedule 1 and any other areas of vegetation outside these lines that is specifically identified in Schedule 1.

6. Definition for Occupier

40. The term 'Occupier' is defined in Section 4 of the Bylaw. However, as demonstrated during Ms Hindmarsh's submission, it may not be immediately apparent to whom this applies. The intent, and our implementation over the last 5 years, has been to only include those persons who have a legal right to occupy the property.
41. The High Court considered the definition of occupier and the term 'inhabitant occupier' in *Anderson v Auckland Council* [2014] NZHC 1480. The High Court considered that the words "inhabit" and "occupy" impart the concept of actual habitation. The Court stated that the combination and juxtaposition of the two words indicates that an inhabitant occupier of a property is a person who while not necessarily living there all the time, can be seen as the person exercising actual dominion and control over the property at the relevant time. We have received legal advice confirming that dominion and control cannot be exercised over a property without lawful authority and that a person grazing stock in Ms Hindmarsh's circumstances would not qualify as an 'inhabitant occupier' (refer to the legal advice attached as Appendix 2).
42. As the current definition also includes "persons who have legal right to undertake activities on that property", any proposed amendment to the definition must continue to include those persons such as utility operators who do not own or lease land but have a legal right to maintain their infrastructure.
43. For clarity, we propose the following amendment to the definition of Occupier;

Occupier: In relation to any property, means the **lawfully authorised** inhabitant occupier of that property **and including** persons who have legal right to undertake activities on that property.

44. In Ms Hindmarsh's case, the land in question is Selwyn District Council Road Reserve, not 'Queens Chain'. It is our understanding that Ms Hindmarsh did (and does) not have a licence or any other legal right to occupy the land. Consequently, the landowner, Selwyn District Council, was considered the only party required to provide approval for the Bylaw Authority to proceed. This approval was provided and the Bylaw Authority was granted.
45. Section 9.5 of the Bylaw allows owners and occupiers to object to a decision or authority given in relation to the Bylaw. When Ms Hindmarsh approached Council officers with an objection to the decision, her application was declined on the understanding that she is neither an occupier nor owner of the land.

7. The objection process

46. In response to the submission by Ms Hindmarsh the panel asked that staff look at the objection process provided for within the Bylaw and provide an assessment as to whether this is sufficient to avoid the sort of frustration created in the case of Ms Hindmarsh.
47. We consider that the objection process is sufficient and that in the case of Ms Hindmarsh the problem arose due to lack of clarity about who is considered an 'Occupier'.

48. However, we do consider that the objection process could benefit from one small amendment and that is to include the applicant as a party who may object. The objection process was originally written on the presumption that the applicant would be the owner or occupier of the land. However, as is the case with Ms Hindmarsh, the authority was granted to Mr Fraser who was neither owner nor occupier but clearly had an interest in whether or not his application was granted.
49. We consider it fair and reasonable that only owners, occupiers, and applicants are able to object to decisions or authorisations made under the Bylaw. The Bylaw is there to protect flood protection and flood control works, if the activities warranted wider concern we consider it likely they would breach plan rules or some other legal requirement. For clarity, adjacent landowners are not considered affected and are not able to object.
50. The following amendments are proposed to Section 9.5:

9.5 Objections process

- (a) Any person who applies for authority under this Bylaw, or owner or occupier of land subject to this Bylaw, within 14 days of receiving any decision or authority in relation to this Bylaw, may object in writing to the Council in regard to that decision or authority, and has the right to be heard in support of that objection.
- (b) The Council considering an objection under clause 9.5 (a) above, may uphold or amend or rescind the decision or authority, and in making its determination must have regard to:
- i. The evidence on which the decision or authority was based;
 - ii. The matters presented in support of the objection; and
 - iii. Any other relevant matters.
- (c) The Council must, as soon as practicable, give written notice to the applicant, owner, or occupier of its determination, including the reasons for that determination.

8. Ability for the Council to invalidate a Bylaw Authority

51. During the hearing, the panel requested that staff look at the ability to invalidate an authority granted under the Bylaw.
52. Section 9.1 of the Bylaw sets out the when and how an authority may be revoked. Currently, the Bylaw only allows for an authority to be revoked where the holder of the authority contravenes or fails to comply with any condition of the authority. This further demonstrates that the original Bylaw was written on the assumption that the only interested parties would be the applicant and the Council. Upon consideration, especially considering the objections process, the scope of this provision is too narrow.
53. We are of the belief that the Council ought to be able to revoke an authority under the Bylaw where the information made available to the consent authority contained inaccuracies which materially influenced the decision made on the application.
54. The following wording is recommended:

9.1 Revocation of authority

- (a) The Council may, ~~in accordance with this clause,~~ revoke any authority granted under this Bylaw only where:
- i. ~~if~~ the holder of that authority contravenes or fails to comply with any condition of the authority.; or
 - ii. if the information made available to the consent authority by the applicant for the authority for the purposes of the application contained inaccuracies which materially influenced the decision made on the application.
- (b) Where the authority is to be revoked in accordance with clause 9.1(a)(i), ~~the~~ Council shall not revoke any such authority without giving to the holder a notice in writing which:
- i. Sets out the respects in which the holder has contravened or has failed to comply with any condition of the authority; and
 - ii. If the breach or failure is capable of remedy, gives the holder a reasonable time within which to remedy it; and
 - iii. Warns the holder that the Council may revoke the authority if the holder does not either:
 - 1. Remedy the breach or failure within the time specified or within such further time as the Council may allow on application; or
 - 2. Make, within a time to be specified in the notice, a written submission to the Council setting out reasons why the authority should not be revoked.
- (c) On receipt of a request by the holder for further time pursuant to clause 9.1(b)(iii)(1), or of a submission pursuant to clause 9.1(b)(iii)(2), the Council may at its sole discretion grant the further time sought or accept the submission made (as the case may be), or revoke the authority.

9. Halswell Drainage Scheme Review

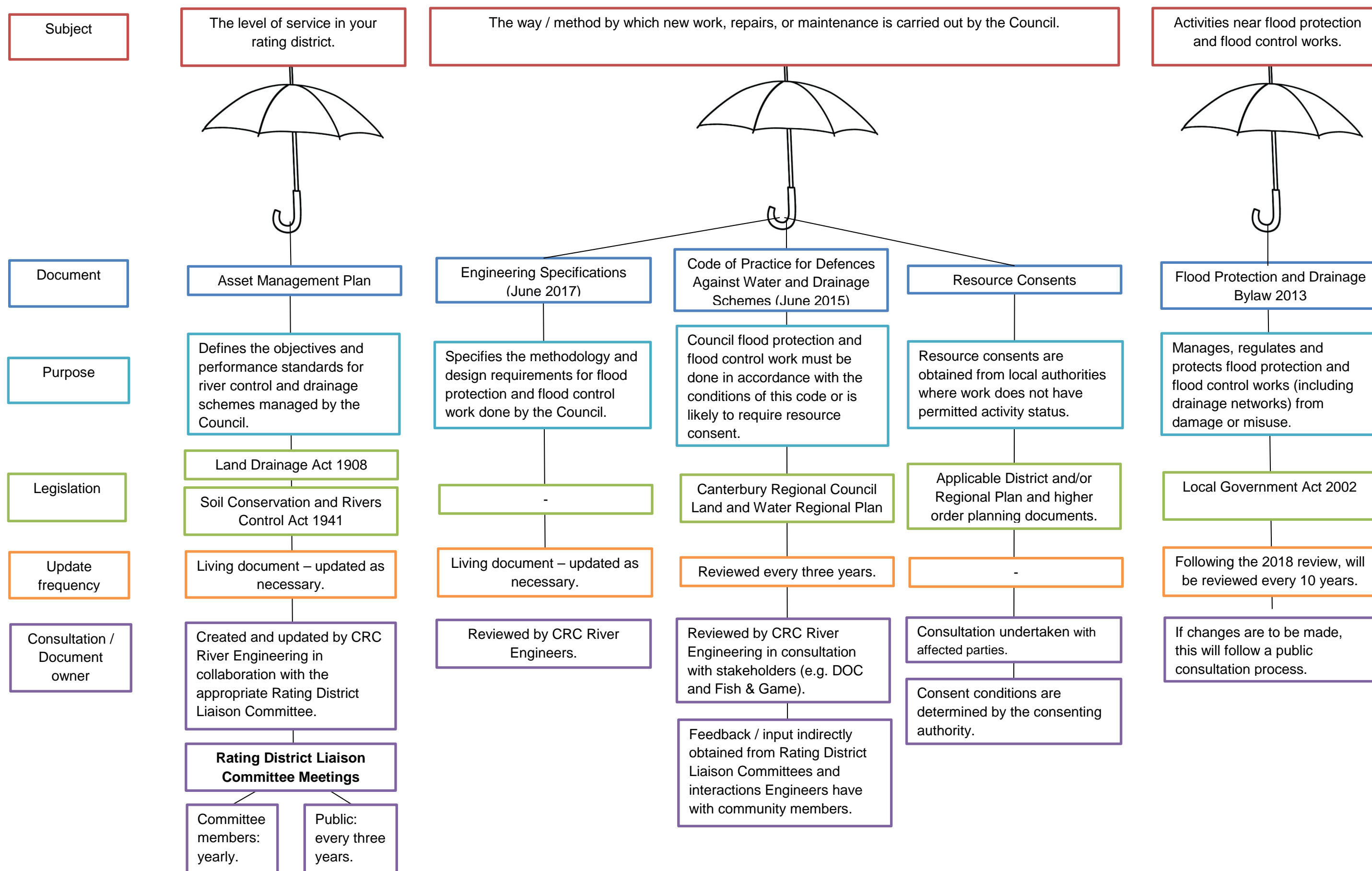
55. For clarity, Ms Parkinson in her submission referred to 'the review'. She was infact referring to the Halswell Drainage Scheme Review which is incomplete. This is a separate process to the Bylaw which is looking at the level of service provided in the Drainage Scheme and may recommend changes for the future.

Attachments

Appendix 1: CRC River Engineering Guiding Documents

Appendix 2: Legal Advice (Wynn Williams)

Appendix 1: CRC River Engineering Guiding Documents



MEMORANDUM

Date: 24 September 2018

To: Amy Bennetts and Shaun McCracken

From: Michelle Mehlhopt

CANTERBURY LAND AND WATER REGIONAL PLAN

1. As part of the Council's Officer Reply Report on the Proposal to amend the Canterbury Flood Protection and Drainage Bylaw (**Bylaw**) you have asked us to consider the following matters:
 - a. The interaction between the Canterbury Land and Water Regional Plan (**LWRP**) and the Proposal to amend the Bylaw; and
 - b. The definition of occupier in the Bylaw.

Interaction between LWRP and the Proposal to amend the Bylaw

2. You have provided us with a copy of the Legal Submissions of Counsel for Erralyn Farms which discuss the interface between the Bylaw and the LWRP.
3. Erralyn Farms has proposed alternative flood protection vegetation lines. Counsel for Erralyn Farms has submitted that the real motivation for Erralyn is ensuring that the line is set fairly and reasonably – and so that it has certainty for its position re the LWRP.¹
4. In our view, whilst this might be the real motivation for Erralyn Farms in lodging a submission on the Proposal to amend the Bylaw, what is of relevance to this Proposal to amend the Bylaw, is whether the flood protection vegetation lines are appropriate for flood protection purposes.
5. The LWRP uses the flood protection vegetation lines in the Bylaw to help determine the bed of the river. The definition of 'bed' includes reference to "any flood protection vegetation, as shown on the maps which form part of the CRC Flood Protection and Drainage Bylaw 2013" and Rule 5.68A refers to the "outer edge of any flood protection vegetation" when determining the bed of a braided river for the purposes of Rules 5.68 to 5.71.
6. The use of flood protection vegetation lines to define the bed of the river for the purposes of the LWRP rules, and the impact of these lines on how farming activities are regulated under the LWRP, has been considered as part of the LWRP process.
7. The Proposal to amend the Bylaw does not affect how farming activities on the Erralyn Farms property are regulated under the LWRP, as there are no changes proposed to the flood protection vegetation lines.

¹ Legal Submissions (providing an outline of Erralyn Farms' interest in the Bylaw) dated 17 September 2018 at [22].

8. The purpose of the Bylaw is to manage, regulate and protect flood protection and flood control works (including drainage networks) belonging to or under the control of the CRC from damage or misuse. The Bylaw only controls activities that may affect the integrity or effective operation and maintenance of the flood protection and flood control works. Therefore, farming activities that do not affect the integrity or effective operation and maintenance of these works are not controlled by the Bylaw, and any regulation of these activities through the LWRP, is a matter to be considered as part of consultation on the LWRP.
9. We agree that it is important that the flood protection vegetation lines are set correctly.² However, what is of most relevance to this Proposal to amend the Bylaw is that the line is set correctly for flood protection purposes. We understand that the appropriateness of the flood protection vegetation line has been addressed in the Officer's Reply Report.

Definition of 'occupier'

10. You have asked us to consider the definition of occupier in the Bylaw and whether it is fit for purpose or requires amendment to clarify its application.
11. This matter has been raised in the context of Ms Hindmarsh's submission. Ms Hindmarsh grazes stock on a Selwyn District Council road reserve and considers that she should have been notified as an occupier of an application for Bylaw Authority for planting in the road reserve.
12. Occupier is defined in the Bylaw as:

In relation to any property, means the inhabitant occupier of that property including persons who have legal right to undertake activities on that property.
13. The term 'inhabitant occupier' is also used in the Resource Management Act 1991 (RMA) definition of occupier which states:

Occupier means –

 - (a) The inhabitant occupier of any property; and
 - (b) Repealed.
 - (c) For the purposes of section 16, in relation to any land (including any premises and any coastal marine area), includes any agent, employee, or other person acting or apparently acting in the general management or control of the land, or any plant or machinery on that land.
14. The High Court has considered the definition of occupier in the RMA and the term "inhabitant occupier" in *Anderson v Auckland Council*³ where it considered that the words "inhabit" and "occupy" impart the concept of actual habitation. The Court stated that the combination and juxtaposition of the two words indicates that an inhabitant occupier of a property is a person who, while not necessarily living there all the time, can be seen as the person exercising actual dominion and control over the property at the relevant time.

² Legal Submissions (providing an outline of Erralyn Farms' interest in the Bylaw) dated 17 September 2018 at [22].

³ *Anderson v Auckland Council* [2014] NZHC 1480.

15. The High Court referred to the Environment Court decision of *Manukau City Council v Murray*.⁴ In that case, Mr Murray was found to be an occupier, as he had lived on the site at various times, taken steps to clean up the property, represented himself to the Court through his affidavit as occupying the site, and had on at least one occasion prevented other people from entering the site. In all the circumstances, the Environment Court concluded that Mr Murray exercised sufficient control over the site and carried out activities on the site sufficient to come within the term of “inhabitant occupier” (despite not being the owner).
16. The *High Court in Kwarau Jet Services Holdings Ltd v Queenstown Lakes District Council*⁵ applied the reasoning in *Anderson v Auckland City Council* in relation to the exercise of actual dominion or control at the relevant time in the context of the use of surface water. In that case, Justice Nason stated that:⁶

The permission which a council grants under the RMA that allows an operator to sail or drive a boat over a lake or river does not bestow on the operator any of the property rights which the owner or legal occupier of land would normally have. An operator with such permission would not be able to exclude others from using the area. They would not have any obligations of occupation which often accompany occupation of the land in a conventional sense.
17. In relation to the grazing of the road reserve, I understand that Ms Hindmarsh does not have a lease or a license to undertake these activities. Therefore, she does not fall within the second part of the definition of ‘occupier’ in the Bylaw as she does not have a legal right to undertake activities on the property.
18. In relation to the first part of the definition we do not consider Ms Hindmarsh to be an inhabitant occupier of the property. She does not live on the road reserve and while stock are grazing she does not have any property rights in relation to the road reserve. She does not have any authority to exclude others from the site. Nor does she have any obligations of occupation. Therefore, we do not consider Ms Hindmarsh to be exercising actual dominion or control over the road reserve and therefore do not consider her to be an occupier as defined in the Bylaw.
19. Whilst we consider that the definition of “occupier” may be applied in these circumstances, the definition could be amended as follows to provide further clarity:

Occupier

In relation to any property, means the lawfully authorised inhabitant occupier of that property and including persons who have legal right to undertake activities on that property.
20. This would make it clear that any habitation must be lawful in order to meet the definition of occupier.

Wynn Williams

⁴ *Manukau City Council v Murray* EnvC Auckland A36/2002, 22 February 2002.

⁵ *High Court in Kwarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343

⁶ *High Court in Kwarau Jet Services Holdings Ltd v Queenstown Lakes District Council* [2015] NZHC 2343 at [129].