

Otago Regional Council

Statement of Proposal

To make the

Flood Protection Management Bylaw 2022



16 March 2022
Accompanying ISBN

Statement of Proposal

Proposed Flood Protection Management Bylaw 2022

This Statement of Proposal is prepared pursuant to sections 83, 86 and 156 of the Local Government Act 2002 (LGA 2002).

1. Introduction

The Otago Regional Council has undertaken a review of its Flood Protection Management Bylaw 2012 (2012 Bylaw) as required by s159 of the LGA 2002.

As part of the review, a Proposed Flood Protection Management Bylaw 2022 (Proposed Bylaw) has been prepared and is provided as Appendix 1 to this Statement of Proposal.

The purpose of the Proposed Bylaw is to manage, regulate and protect the effective operation and integrity of flood protection works owned by, or under the control of Council.

Flood protection works can include scheduled drains, overland flow paths, defences against water, floodways, groynes, cross-banks, training lines and flood protection vegetation.

The objectives of the Proposed Bylaw are to:

- Replace the 2012 Bylaw (if appropriate);
- Enable asset management;
- Enable appropriate mechanisms to ensure the effective operation and integrity of Council's flood protection works;
- Ensure that the Proposed Bylaw 2022 is concise, consistent, effective, efficient and relevant.

Special Consultative Procedure as defined by Section 83 and modified by section 86 of the LGA 2002 requires the preparation of this Statement of Proposal to guide the Bylaw review.

This Statement of Proposal includes a copy of the Proposed Bylaw, the reasons for the proposal and reports on the relevant determinations made by Council.

2. Council's Current Role in Relation to Flood Protection Works / Schemes

Council provides flood protection and land drainage to approximately 43,000ha of rural and urban land throughout Otago. These flood protection works are designed to protect people and minimise damage to property, livestock and infrastructure from flood events. This is achieved through managing infrastructural assets that include 218km of floodbanks, 12 pumping stations, 55 bridges, culverts, and various other

assets, across the region's rivers and a total of seven flood protection and/or drainage schemes.

Different types of assets are situated within our rivers to maintain river and stream channel capacity, and bank stability in targeted areas, as well as satisfying environmental needs. These assets may include rock buttresses, groynes and floodbanks, outside of those within Council's flood protection and drainage schemes.

It is of critical importance that flood protection works function properly, and the integrity or operation of the flood protection works is not compromised.

The integrity or operation of flood protection works can be compromised by various activities, including but not limited to alteration of the works; removal or interference with machinery or equipment; planting of trees; placing of structures; dumping and deposition of materials; obstruction of drains and flow paths; excavation; and damage by livestock and machinery.

Flood protection works are currently controlled and protected by the 2012 Bylaw. A key role of Council is to ensure the effective operation and integrity of Council's flood protection works / schemes. Additional protection is provided by Designations in the Dunedin City Council district plans and will be sought from other territorial authorities as plan reviews occur.

The Bylaw remains a necessary part of the approach to flood protection and control due to the overarching protection it provides to critical assets being those protecting urban areas, high value areas or those critical to effective operation of the schemes. The Bylaw is supported by other approaches such as district authority planning, education, arrangements with landowners and communities.

The 2012 Bylaw is operating effectively but some improvements and additions are proposed. Anecdotal evidence from ORC staff is that landowners adjacent to the works subject to the Bylaw are aware of the fact and consequence of the Bylaw. Approximately 20 to 25 applications for Bylaw approval are received annually. The large majority are approved on a basis which is acceptable to ORC and to the applicant reflecting the purpose of the Bylaw and the outcomes of the applicant as agreed in the granting of the Bylaw with conditions.

3. The Proposal

Council has prepared a replacement bylaw to enable it to continue to ensure the effective operation and integrity of Council's flood protection works / schemes

The Proposed Bylaw lists activities which require written approval (authority) from the Council before those activities are undertaken on or near flood protection works, as they could adversely affect the operation or integrity of these works. These activities include, but are not limited to:

- Alteration of flood protection works

- Tree, shrub or hedge planting
- Removal of trees, in some locations
- Construction of structures
- Dumping and depositing material
- Obstruction of flood protection works
- Removal, interference or operation of machinery and equipment
- Earthworks

The proposed changes to the 2012 Bylaw can be summarised in Table 1:

Table 1: Summary of Bylaw sections reviewed

Item	Section of Bylaw reviewed	Proposed Change	Review Comment
1	3.2.i Defences Against Water and Excavation - sensitive Areas	Expanding the land disturbance restrictions to include all earthworks.	The excavation provisions in the 2012 Bylaw are difficult to apply. Use of "excavation" in conjunction with "cultivation" makes it easier to identify what sort of earthworks or excavation may require bylaw approval.
2	3.2.i Defences Against Water and Excavation-sensitive Areas), 3.4.g Groynes and Cross-banks, and 2 Definition of Cultivation	Allowing cultivation within 20m of a defence against water (such as a floodbank, spillway or retaining wall) and within 50m of a groyne or cross-bank.	This provision means that landowners are not restricted from undertaking usual farming activities as a result of the alteration of the excavation and earthworks provisions.
3	3.0 Activity Requiring Bylaw Authority	Recording that the Proposed Bylaw does not apply to Council employees, or persons authorised by Council, who are carrying out maintenance or emergency works on its flood protection assets.	Under the 2012 Bylaw it has the unintended consequence that ORC must apply for Bylaw approval to undertake most maintenance activities such as rabbit hole repairs, drain cleaning, spraying and other day to day activities.
4	3.1.c Scheduled Drains and Overland Flow Paths, 3.2.c Defences Against Water and Excavation-Sensitive Areas, and 3.3.c Floodways	Adding restrictions around the planting or growing of shrubs, hedges or trees within specified areas.	Under the 2012 Bylaw, the planting of trees in some areas is restricted. Tree root systems can damage flood protection works. The same risks arise with hedges and shrubs, and it is proposed to extend the restriction.

Item	Section of Bylaw reviewed	Proposed Change	Review Comment
5	Schedule 2	Adding Albert Town rock buttress to the maps in the schedule	The Albert Town rock buttress has been added to Schedule 2 to ensure adequate protection of the works. It is to be subject to the restrictions in section 3.2.
6	3.2.d Defences Against Water and Excavation - Sensitive Areas	Adding restrictions around removing trees on or near defenses against water.	As with the planting of trees, shrubs and hedges, the removal of trees, particularly the root system, can detrimentally affect the flood protection work.
7	3.2.f Defences Against Water and Excavation - Sensitive Areas	Adding restrictions around removing or altering structures between the bank of a river and any associated defence against water.	While few structures are situated or likely to be situated in this area, the addition of this provision ensures proper consideration is given to the removal of such structures if the issues arise.
8	Schedule 4	Adding Shotover Training Line to the maps in the schedule	The Shotover Training Line has been added to Schedule 4 to ensure adequate protection of the works.
9	3.4 Groynes, Cross-banks and Training Lines	Adding reference to training lines which are to be subject to the provisions in this section	The Shotover Training Line is proposed to be subject to the provisions in section 3.4.
10	3.4 Addition of Shotover Delta Training Line and Albert Town rock buttress	Restrictions on activity extended to these structures.	The Shotover Delta Training Line and the Albert Town rock buttress are relatively recent additions to Council flood protection works. The restrictions provide protection to the works so the integrity of the structures is retained.
11	3.5 Flood Protection Vegetation 2 Definition of Flood Protection Vegetation	Combining 'plantings' and 'anchored tree protection' under 'flood protection vegetation' and implementing specific rules (e.g., restricting stock grazing) within these areas.	The combination of different forms of "live" structures reflects the environment in the Waitaki District where the plantings and tree protections are intermingled throughout the areas identified on the Maps.
12	5.3 Objections process	Making provision for an objections process.	Currently the only avenue for objection to the Bylaw process is a judicial review application to the High Court. An objection

Item	Section of Bylaw reviewed	Proposed Change	Review Comment
			process allows applicants to air their concerns.
13	Amendment made to 6.1 (Revocation of Authority)	Additional details on the revocation process (when authorities are cancelled) including the ability of Council to revoke an authority immediately where flood protection works are compromised.	Further assurance to applicants/approval holders that a clear process is in place which will be followed.
14	Amendment made to add Appendix 1 (Diagrams Referencing Activities Requiring Bylaw Authority)	Adding diagrams of drains, overland flow paths and defences against water in Appendix 1.	
15	Amendment made to Appendix 2 (Bylaw Approval Application Form)	Expanding the details required in the application form.	
16	Schedule 1: Tokomairiro scheduled drains. Schedule 2: Alexandra defences against water. Schedule 2: Lower Taieri defence against water, sheet 5. Schedule 1: Lower Clutha scheduled drains Schedule 1: East Taieri scheduled drains and overland flow paths.	Updating maps in the Schedule.	Most amendments are to remedy errors in previous maps or where works have been disposed of.
17	2 Definitions: Cultivation, Drains, Earthworks, Flood Protection Works, Flood Protection Vegetation, Occupier, River, Scheduled Drain, Training Line	Adding or amending definitions to support changes in the Proposed Bylaw.	

The Council encourages anyone who is interested in the Proposal to review the proposed amendments set out in full in Appendix 1.

4. Reasons for the Proposal

Under the LGA 2002, bylaws must first be reviewed no later than 5 years after the date on which they were made. The Flood Protection Management Bylaw 2008 (2008 Bylaw) came into force on 1 July 2008. It was reviewed and replaced by the 2012 Bylaw, which came into operation on 1 September 2021 after a Council Decision dated 8 August 2012.

Further reviews of a bylaw are required under the LGA 2002 no later than ten years after it was last reviewed. This review is a 'further review' of the Flood Protection Management Bylaw.

This Statement of Proposal includes the Proposed Bylaw which is intended to ensure that Council can continue managing, regulating and protecting flood protection works owned by, or under the control of Council in order to ensure their effective operation and integrity.

Changes to the 2012 Bylaw are proposed to ensure that activities that could cause adverse effects are managed, and that flood protection works are appropriately mapped and controlled in order to ensure Council's flood protection schemes continue to operate effectively.

5. Statutory requirements for reviewing a bylaw

The LGA 2002 sets out the process for reviewing a bylaw:

- Section 158(1) states that bylaws must first be reviewed no later than five years after the date it was made. The 2008 Bylaw was reviewed on 8 August 2012 and replaced by the 2012 Bylaw.
- Section 159 states that a further review of bylaws must occur no later than ten years after the bylaw was last reviewed under section 158. The current review is a 'further review' of the bylaw.
- Section 160 outlines the procedure and nature of bylaw reviews required under sections 158 and 159. It requires the Council to make determinations under section 155, firstly as to the appropriateness of a Bylaw, and then whether it is the most appropriate form of bylaw and whether it gives rise to any implications under the New Zealand Bill of Rights Act 1990. These determinations were made by Council on 23 March 2022 and are summarised in sections 5.1 – 5.3 below.
- Section 160 then goes on to outline that where Council considers the bylaw should be amended (as is the case), it must act under section 156 (consultation requirements - which includes using the special consultative procedure as modified by section 86). The public notification, request for submissions and hearing (as outlined in section 7 of this Proposal) comply with the requirements of section 156.

5.1 Is a bylaw the most appropriate way of addressing the perceived problem?

The 'perceived problem' is that the risk of damage to property, livestock and infrastructure assets is increased if a mechanism such as a bylaw is not in place for

management of the flood protection works. These assets are protected by flood protection works, and to ensure their operation and integrity, the Bylaw is considered the most appropriate management mechanism.

Section 149 states that regional councils may make bylaws in relation to the matters listed (which include 'flood protection and flood control works undertaken by, or on behalf of, the regional council'), for the purpose of 'managing, regulating, against, or protecting from, damage, misuse, or loss, or for preventing the use of property owned or controlled by the regional council'. This indicates that this Bylaw was anticipated by the LGA. The use of a bylaw also provides the Council with an enforcement tool should unauthorised actions be undertaken.

Taking into consideration all other options below, Council consider that a bylaw is the most appropriate method for addressing the perceived problem. It is a tried and tested method, common among other Councils, and has been proven to work well for this Council to date. It provides a means for enforcement actions to be taken if the integrity or operation of the flood protection works are at risk. The decision-making process for reviewing and amending a Bylaw under the LGA is a robust and comprehensive process, which appropriately reflects the significance of the matter and includes an opportunity for the public to provide input into the preparation and adoption of the rules that will be applied.

Alternative methods to using a bylaw that were considered and not thought to be appropriate include:

- Doing nothing - If nothing is done, the current Bylaw will expire on 8 August 2024. If this was to occur, there would be no mechanism in some cases for ensuring that the flood protection works are maintained, and their integrity is not challenged. Council would not have any powers for enforcing appropriate behaviours, and damage or misuse could result in significant flooding outcomes and/or significant costs for repair.
- Designations - ORC currently hold designations from Dunedin City Council for the protection of flood protection works within the Dunedin City Boundary, which affords them a further degree of legal protection. Under section 176(1) of the Resource Management Act 1991 ("RMA") no person may, without the prior written consent of the requiring authority (namely the Council), do anything in relation to the land that is subject to the designation that would prevent or hinder a public work or project. Designations have, to date, not been sought from the other territorial authorities. The designation only applies to the flood protection works within the designation and will not authorise activities that require consent under sections 13, 14 or 15 of the RMA. The designation cannot control activities outside of the designation. While a designation is a useful tool, the constraints identified above means it is not considered an appropriate option for the full management of the assets. ORC is due to commence consultation associated with seeking designation of flood protection works in the Waitaki District Council region.

- Adding rules to the Regional Plan - The regional plans are prepared under the RMA to assist the regional council in carrying out its functions under that Act. These functions relate to the sustainable management of natural and physical resources, which does not include the protection of flood protection assets. As the purpose of the regional plan is not asset protection, this is not considered to be an appropriate option.
- Developing strategy/agreements with landowners - A strategy or collective agreement between landowners/occupiers and the Regional Council could be prepared with guidelines for the landowners/occupiers. This would require public consultation to determine roles and responsibilities of the parties, and there would need to be a large number of parties involved due to the extent of the flood protection works. It would be a non-regulatory tool, relying on goodwill, and would not be enforceable. Due to the significance of the assets, it is considered there should be some means of approval of works and enforcement available to ensure their integrity and operation is maintained, and as such this is not considered an appropriate option.
- Education - An educational campaign to increase community awareness of the assets and their importance could be used. Due to the significance of the assets, it is considered there should be some means of approval of works and enforcement available to ensure their integrity and operation is maintained, and as such this is not considered an appropriate option as a sole means of management but could be beneficial in conjunction with another measure.
- For completeness, the final option considered is the transference of responsibility to the relevant territorial authorities. This would require consultation under the LGA. It is considered more appropriate to retain these responsibilities as the regional council is the manager of the flood protection schemes and has the necessary experts employed. Splitting the management across districts could result in inconsistent management, or the prioritisation of the interests of the district above the region. For example, some Taieri flood protection works are included in both the Dunedin City Council and Clutha District Council districts. This is not considered to be an appropriate option for these reasons.

5.2 Is the Proposed Bylaw the most appropriate form of Bylaw?

A standalone bylaw is considered by Council to be the most appropriate form of bylaw, rather than consolidation with other bylaws.

The form of the Proposed Bylaw is considered by Council to be appropriate, noting that the 2012 Bylaw has been in force and effective in this form for some time. It is also of a very similar format and content to bylaws used by other regional councils in the protection of their flood management assets (namely being Environment

Southland, Environment Canterbury, Bay of Plenty Regional Council and Taranaki Regional Council).

5.3 Does the Proposed Bylaw give rise to any implications under the New Zealand Bill of Rights Act 1990?

Council must determine whether the Proposed Bylaw gives rise to any implications under the New Zealand Bill of Rights Act 1990.

The New Zealand Bill of Rights Act 1990 affirms, protects and promotes human rights and fundamental freedoms in New Zealand; and affirms New Zealand's commitment to the International Covenant on Civil and Political Rights. It details rights and freedom in relation to life and security of people; democratic and civil rights; non-discrimination and minority rights; search, arrest, and detention; criminal procedure and right to justice.

The purpose of the Proposed Bylaw is to manage, regulate and protect the effective operation and integrity of flood protection works owned by, or under the control of Council. As such, Council consider that the Proposed Bylaw does not give rise to any implications under, nor is it inconsistent with the New Zealand Bill of Rights Act 1990.

5.4 Approval for Consultation

On Wednesday 23 March 2022, Council approved the Proposed Bylaw be released for consultation in accordance with the LGA 2002.

6. Public Notification, Submissions and Hearing

The Council is inviting submissions on the Proposed Bylaw. Any person or organisation can make a submission on the proposal.

Submissions close at 12pm, Monday 2 May 2022.

The Proposed Bylaw, Statement of Proposal, Summary of Information, Council report dated March 23 2022 and the submission form can be viewed at:

- ORC offices, (open Monday to Friday 8.00am to 1.00pm; 2:00pm to 4:30pm, closed on public holidays):
 - Dunedin Office
 - Philip Laing House
 - Level 2
 - 144 Rattray Street
 - Dunedin 9016
 - Queenstown Office
 - Alta House
 - Level 1
 - Terrace Junction
 - 1092 Frankton Road

- Queenstown 9300
- City and District Council offices
- Public libraries throughout Otago
- www.orc.govt.nz/floodbylawreview and www.yoursay.orc.govt.nz/flood-bylaw-review

Copies can be obtained from:

- ORC offices
- www.orc.govt.nz/floodbylawreview and www.yoursay.orc.govt.nz/flood-bylaw-review
- By phoning 0800 474 082
- By emailing floodbylawreview@orc.govt.nz

Submissions can be sent to:

- Post: ORC, Private Bag 1954, Dunedin
- Deliver: ORC Offices
- Fax: (03) 479 0015
- Email: floodbylawreview@orc.govt.nz

In addition to written submissions, there will be opportunity to present your views at a Council Hearing.

8. Timeline

Public notification:	Thurs 31 March 2022
Submissions close:	Mon 2 May 2022, 12.00pm
Hearing:	4 May 2022
Council Decision:	22 June 2022

If you have any questions, please contact:

Email: floodbylawreview@orc.govt.nz

Phone 0800 474 082

APPENDIX 1: PROPOSED FLOOD PROTECTION MANAGEMENT BYLAW 2022