

Drainage Act Regulatory Proposal Discussion Paper

Summary of Proposal

Drainage is critical for supporting agricultural productivity and the production of food. It also enables agri-food sector growth by delivering environmental and economic benefits such as improved crop productivity, nutrient loss reduction, reduced soil erosion, habitat protection and flood control. Though mostly unnoticed, it is an essential part of the rural Ontario landscape with more than 45,000 kilometers of municipal drains servicing approximately 1.75 million hectares of cropland.

It also positively impacts the economy as over \$100M is privately invested in drainage annually which has created 800-900 jobs and supports over 100 independent businesses.

To permit the construction and maintenance of municipal drains and private agricultural drainage systems, the agricultural sector has relied on drainage legislation for over 150 years. The Ministry of Agriculture, Food and Rural Affairs (OMAFRA) administers three pieces of agricultural drainage legislation: they are: (1) the *Drainage Act*, (2) the *Tile Drainage Act* and (3) the *Agricultural Tile Drainage Installation Act*.

The *Drainage Act* is one of the Province's oldest pieces of legislation. It is also unique in many ways. It establishes a process for resolving property right disputes involving water flow and drainage. It is also premised on a system where costs are fairly assessed to the property owners within the watershed.

Through collaboration between private landowners, a drainage Engineer's Report has helped address broader societal benefits such as flood control within Ontario's rural communities. The Engineer's Report provides the design and allocation of project costs for a municipal drain that involves multiple private properties.

Until recently, there had not been any significant changes to the Act since 1975. This led to stakeholder requests for reducing burden while maintaining environmental standards. Some stakeholders indicated there are too many steps and agencies involved for drainage construction, maintenance and improvements to be approved in a timely and less costly way. Others suggested that additional protocols could help with streamlining approvals.

The concerns raised above ultimately resulted in the *Drainage Act* being amended by Schedule 4 of the *COVID-19 Economic Recovery Act, 2020* (formerly known as Bill 197), which received Royal Assent on July 21, 2020. The amendments will come into force and effect upon being Proclaimed. The amendments were, however, only enabling in nature. As such, a Minister's Regulation is required to operationalize the

amendments. The amendments, which are part of the Ontario Government's broader approach to cutting red tape and reducing regulatory burden for businesses, to lower business operating costs and improve Ontario's competitiveness, will, once Proclaimed and fully operationalized:

- Create a streamlined *Drainage Act* process for minor improvements to drainage systems;
- Enable a simplified process to update the Engineer's Report to account for changes to the design made during construction; and,
- Provide the authority for the Minister of Agriculture, Food and Rural Affairs to adopt the Drainage Act and Conservation Authorities Act Protocol (DART Protocol) by reference.

Just as OMAFRA asked for public feedback on the proposed amendments to the *Drainage Act*, OMAFRA is seeking feedback on the regulatory proposal for a new Minister's Regulation, which is described below. Your feedback will be considered during the development of the new regulation which would, if passed, come into effect Spring 2021.

1) Minor Improvement Process

Currently, the process to obtain municipal approval for drainage works is complex and can be lengthy even for straightforward drain improvement projects that have a minimal impact on other properties. A new Minister's Regulation would establish a streamlined process for minor improvements that would help projects be completed in a less costly and more efficient way while maintaining environmental protections. Approvals under other legislation [e.g. Department of Fisheries and Oceans and local Conservation Authority (CA) permits] will continue to be required for all improvement projects. The proposed new Minister's Regulation would define what minor improvements would be eligible.

The eligibility criteria could include the following:

- The improvement would be initiated by the property owner
- The improvement would take place on an individual property
- The property owner would pay the full cost of construction for the minor improvement
- There would be no need for construction access on neighbouring properties or the property owner has already obtained consent from applicable neighbouring properties

- The proposed minor improvement would not lead to changes as to how future repair and maintenance costs are allocated to other property owners in the watershed
- The minor improvement project would maintain the existing drainage capacity

Property owners and municipal council would have to agree that a project meets the criteria. If the project doesn't meet the criteria, the landowner would be re-directed to complete a section 78 *Drainage Act* improvement process.

If the project meets the criteria, it would be able to follow one of two streamlined processes.

Proposed Streamlined Process

The proposed new Minister's Regulation would describe the process for approving minor improvements. This could include the following steps.

- The municipality would send a notice to the conservation authority and other prescribed persons.
- The municipality would appoint an engineer to prepare a report in 90 days. The regulation may permit a municipality to rely on a municipal staff engineer who has P.Eng credentials.
- The municipality would provide notice of a council meeting.
- Council would decide if the project can proceed. If Council decides the project should proceed, the clerk would send out a provisional by-law. Appeals would have to be filed within 10 days.
- After the appeals are heard or the time for the appeals process has expired, the municipality would pass the bylaw and the project tendering would proceed.
- The project would be constructed, and the typical administrative work would occur.

Refer to the flow chart in Appendix A or B for more detailed information.

Key Differences with the Current and Proposed Streamlined Process

Some key differences between the current improvement process (section 78 *Drainage Act process*) and the proposed streamlined process are:

- The current improvement process requires the engineer to complete the report within 1 year whereas the proposed minor improvement process would require a report within 90 days.

- The current improvement process requires an on-site meeting for approval agencies and affected landowners whereas the proposed minor improvement process would require a site inspection with the engineer and landowner.
- The current improvement process provides property owners with 40 days to file appeals whereas the proposed minor improvement process would provide 10 days to file appeals.
- The current process allows appeals to the Drainage Referee, Court of Revision and the Agriculture, Food and Rural Affairs Appeal Tribunal (Tribunal) whereas the proposed process would allow appeals only to the Drainage Referee.

Figure 1: Key Differences Between the Current and Proposed Minor Improvement Process Requirements

Current Improvement Process Requirements (which will remain for projects that aren't considered minor improvements)	Proposed Minor Improvement Process Requirements
<ul style="list-style-type: none"> - Includes a council meeting to consider the preliminary report 	<ul style="list-style-type: none"> - No requirement for a preliminary report
<ul style="list-style-type: none"> - Engineer has up to 1 year to complete the report 	<ul style="list-style-type: none"> - The engineer has 90 days to complete their report
<ul style="list-style-type: none"> - Requirement for an on-site meeting for approval agencies, all affected landowners, etc. 	<ul style="list-style-type: none"> - The engineer inspects the site with the landowner
<ul style="list-style-type: none"> - The municipal clerk must provide notice of a Council meeting to the conservation authorities and other agencies within 30 days of receiving the Engineer's Report 	<ul style="list-style-type: none"> - The clerk provides notice of a Council meeting within 10 days of receiving the Engineer's Report
<ul style="list-style-type: none"> - Timeframe to modify the Engineer's Report (if needed) is within the 1-year requirement. For example, if there is 6 months left in the process- the engineer would have up to 6 months to modify the Report. 	<ul style="list-style-type: none"> - Up to 90 days to modify the Engineer's Report (if needed).

<ul style="list-style-type: none"> - Once the municipal clerk sends out the provisional bylaw and notice, property owners have 40 days to file appeals - The process allows for appeals to the Drainage Referee, Court of Revision and the Tribunal. 	<ul style="list-style-type: none"> - 10-day time frame for appeals. For example, once the municipal clerk sends out the provisional bylaw and notice, the property owner (who initiated the minor improvement) has 10 days to file an appeal. - Appeals would go to the Drainage Referee.
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Proposed Streamlined Process – pre-approved design (best paired with the above streamlined process)

This proposal would also allow for the municipality and landowner to use a pre-approved engineered design for certain minor improvement projects. This would reduce the amount of time an engineer would need to spend on an individual project.

- Some minor improvements (for example straightforward farm crossings or erosion protection) may be amenable to development of a pre-approved design.
- Other minor improvement projects can be quite complex, requiring special knowledge, skills and experience. Complex projects (e.g. an engineered wetland or non-standard crossing) would not be included in this process.

The pre-approved designs for straightforward minor improvement projects would be developed through a collaborative process for inclusion in a future protocol that could be incorporated by reference. It would take time for the ministry to develop a protocol for the second process. In the meantime, the first process would be available.

2) Process to Update an Engineer's Report

Drainage systems built under the *Drainage Act* can sometimes deviate from the design plans because of unforeseen site conditions in the field. For example, the engineer or contractor may realize during construction that the soil conditions are different than expected and the drain routes need to change or widen. Currently, any changes to the design are not made in the Engineer's Report which is the legal description of the Municipal Drain. This can lead to a lack of clarity for municipalities who are maintaining the drain.

The proposed new Minister's Regulation would establish a new process for reflecting changes to a drain design in an Engineer's Report.

Draft Eligibility Criteria

The process would include eligibility criteria and would allow updates to the Engineer's Report as a result of unforeseen circumstances during construction or due to permitting requirements.

For changes due to construction, additional criteria would include the following:

- Current agency approvals would support the required changes to the drain design
- The required changes would not exceed 10% of the total project costs
- The municipal drainage superintendent agrees with the design changes and confirms they would not impact the drain function.

Design changes may also be permitted because of an environmental approval or permitting requirement. For example, sometimes an approval agency requests permitting requirements after the Engineer's Report is approved by Council. This process would allow the Report to be updated.

If the criteria are met, the streamlined process would take effect.

Proposed Streamlined Process

The proposed new Minister's Regulation would set out the process for making the changes to the drain design and Engineer's Report which could include:

- The engineer would submit the design changes to the municipality within 30 days after the drain completion.

- Municipal council would agree to amending the Engineer's Report with the new drawings. The updated Engineer's Report would then govern all future drain maintenance.
- Any additional costs would be assessed out to the drain.
- All property owners would be notified of the changes however there would be no additional appeal rights.

Refer to the Flow Chart in Appendix C and Appendix D for more detailed information.

3) Protocols

Currently, projects under the *Drainage Act* typically require approvals from multiple agencies adding costs and project delays. The proposed new Minister's Regulation would enable a more collaborative approach by incorporating the *Drainage Act and Conservation Authorities Act Protocol* that may allow for approvals to be issued more efficiently by other agencies.

The Protocol streamlines permitting under section 28 of the *Conservation Authorities Act* for municipal drain repair and maintenance projects in order to support compliance with *Drainage Act* requirements. For example, specific drainage maintenance and repair activities that follow environmental mitigation measures recommended in the Protocol are provided with a streamlined permit approval where conservation authorities have adopted the Protocol.

OMAFRA would like to build on the success of the DART Protocol by developing an additional protocol related to pre-approved engineered designs for minor improvements.

OMAFRA would work in collaboration with other ministries, regulatory agencies, conservation authorities, municipalities, farming organizations and indigenous organizations to develop the new protocol.

Future approval processes for municipal drains will benefit from consistent expectations across approving agencies, leading to faster approvals of drain construction projects.

4) Prescribed Persons

The changes to the *Drainage Act* also allow for the regulation to prescribe persons that must be notified in sections 5 (1) (b), 6 (1), 10 (2), 10 (8), 41 (1) of the *Drainage Act*. For example, in prescribing persons in the proposed regulation, the Ministry of Natural Resources would be replaced by the Ministry of Natural Resources and Forestry for each relevant section. It is proposed that other prescribed persons in the regulation would remain as the list of persons to be notified in the relevant sections of the *Drainage Act*. Moving the list of persons to be notified to a regulation would make it easier to update the lists in future.

Discussion Questions

- 1) Do you agree with the proposed minor improvement criteria?
- 2) What types of improvements do you foresee fitting under the minor improvement process?
- 3) What potential pre-approved designs do you foresee for being possible under a protocol for minor improvements?
- 4) Are there other opportunities to further reduce burden for minor improvements?
- 5) Are the proposed criteria for updating an Engineer's Report appropriate?
- 6) What new protocols would you prioritize?

Discussion Paper Comments

OMAFRA is seeking comments on the regulation from December 9, 2020 to February 7, 2021.

To provide comments on the proposal via email, please email Sara Peckford:
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