Ontario Ministry of Agriculture, Food and Rural Affairs

Drainage Act Regulation Proposal

Indigenous Community Outreach

February, 2021

Ontario

Agenda

- Welcome and Introductions
- Background
- Proposed Changes
  - Discussion & Feedback
- Next Steps and Closing Remarks

What is the Drainage Act?

- Drainage is critical for supporting agricultural food production. It can provide environmental and economic benefits such as improved crop productivity and flood control, help reduce nutrient loss and soil erosion and support wildlife.
- Three Acts regulate drainage in rural communities:
  - *Drainage Act,*
  - *Agricultural Tile Drainage Installation Act,*
  - *Tile Drainage Act.*
- The Drainage Act regulates municipal drains - shared community infrastructure often built on private land. Municipal drains provide benefits to many property owners within a watershed, and the costs of building and maintaining them are shared among those property owners.
- The construction of these drains must be done in a way that prevents flooding and supports agricultural production but does not have negative environmental impacts.
- OMAFRA administers the Drainage Act but does not approve drainage projects.
- Municipalities are responsible for implementing the Drainage Act process, approving and charging the costs of drainage construction, improvements, maintenance and repair.

What is Being Proposed?

- Amendments to the Drainage Act to reduce regulatory burden were included in Bill 197, COVID-19 Economic Recovery Act which was introduced on July 8, 2020 and passed on July 21, 2020.
- The amendments enabled a new regulation to implement the following changes:
  - A simplified process for minor improvements to municipal drains;
  - A simplified process for approving updates to Engineer's Reports for changes to the design made during construction; and
  - Adoption of the Drainage Act and Conservation Authorities Act Protocol (DART Protocol) by reference in regulation.
- This is the beginning of a consultation process on the proposed new regulation. We are seeking your input to ensure that the proposed regulation considers indigenous and treaty-protected rights and traditional knowledge so that the benefits of municipal drains are experienced by all communities.
- The new regulation is intended to support benefits of:
  - **economic competitiveness** by making it easier and more cost effective to ensure existing drains perform well
  - **increased opportunity for collaboration** in the development of protocols to ensure environmental protections are maintained
  - **enhanced climate resiliency** by encouraging the uptake of new technologies and approaches to manage water flow

Minor Improvements to Drains

Minor Improvements: Proposed Approach

Purpose

- Create a simpler process for minor improvements to existing drains. Including;
  - Setting out criteria that a 'minor improvement' would have to meet;
  - Enabling environmental improvements or green infrastructure as minor improvements; and
  - Maintaining all environmental protections.

Proposed New Process

- The municipality would assess if a proposed project meets established criteria that would be outlined in the regulation.
- Timelines in the process would be shortened (and some requirements could be reduced). For example, the engineer would have 90 days to complete a report versus 1 year which the current improvement process requires. A shorter site meeting would also be required.
- Existing requirements for environmental permits would remain.

Outcome:

- Fewer municipal resources spent processing low risk improvements to drains, freeing up resources for the completion of higher risk projects.
- More timely minor improvements that have flood management and environmental benefits.
- Potential increase in drain improvement projects in the short term to support infrastructure recovery and agricultural productivity.

Minor Improvements: Proposed Eligibility Criteria

The following are proposed criteria which an eligible minor improvement project would have to meet to be considered for the streamlined process.

- The property owner initiates the improvement which is only on the one property.
- The property owner is paying the full construction cost for the minor improvement.
- There is no need for construction access on neighbouring properties or the property owner has already obtained agreement from applicable neighbouring properties.
- The minor improvement will not impact future repair and maintenance costs and how they are shared among other property owners in the watershed.
- The minor improvement does not change how much water the drain can handle.

Example: A property owner may want to widen a drainage crossing which could be considered a minor improvement if it meets the above criteria.

Figure B10–3. Farm equipment on a private crossing.

Minor Improvements: Proposed Process

Environmental Protections: Existing role of MECP, Conservation Authorities, DFO and other agencies in requirements for environmental approvals and/or issuing permits will stay the same.

Property Owner requests a Minor Improvement

- Municipal council determines proposed improvement meets the criteria
- The municipality sends a notice to the conservation authorities or the Ministry of Natural Resources and Forestry (if there is no CA) and any nearby municipalities impacted by the drain.
- If Municipal council doesn't agree it meets the criteria, the property owner must use existing improvement process.

Municipal Council appoints an Engineer*

- An external or municipal engineer is appointed.
- Engineer visits the site and prepares a report within 90 days.
- The Municipal Clerk provides a notice of a municipal council meeting within 10 days of receiving the Engineer's Report.

Municipal Council Meeting

- Municipal council decides if project as designed still meets criteria for a minor improvement .
- Municipal Clerk mails the provisional by-law and notice for appeals.
- Appeals must be filed within 10 days.
- If there are no appeals, the municipal council must pass the by-law.

PROJECT CONSTRUCTION

* For some types of minor improvements it may be possible to shorten this step with acceptance of a pre-approved design, when a suitable technical protocol is developed. See Slide 9.

Minor Improvements: Pre-Approved Engineered Design Protocol

Considerations for a new Protocol for Pre-Approved Minor Improvement Designs

- A team of engineers would develop the pre-approved designs for straightforward minor improvement projects for inclusion in the protocol.
- The protocol should be developed collaboratively if intended to streamline approvals of other regulatory agencies issuing approvals under their legislation.
- The protocol would need to ensure the drain function and capacity is maintained.
- An administrative process would be required to incorporate the changes in the Engineer's Report for legal and future maintenance purposes.

Discussion Points

- Do you have any questions on the proposed minor improvement process?
- Are there any specific concerns on what is being presented?
- Do you need any additional information to help you understand the proposed changes?

Engineer’s Report Updates

Engineer's Report Update: Proposed Approach

Purpose

- Create a process to update the Engineer's Report for changes made during construction. Including;
    - Who decides if the construction changes are required
    - What types of changes can be included in the engineer's report update;
    - How are additional costs related to the changes determined and if future maintenance is affected whether landowners need to be consulted;
    - Who pays for updating the report.

Proposed New Process

- The streamlined process for updating an Engineer's Report is only available as a result of eligible construction activities. For example, if the field site conditions (e.g. soil conditions) or a conservation authority permit required a change to the drain design.
- Includes how any additional engineering costs would be charged back to those impacted by the drain.

Outcome:

- More effective maintenance and repair activities carried out on municipal drains due to access to the correct design information
- Ongoing cost savings for municipalities and property owners

Updating the Engineer's Report: Eligibility Criteria

Proposed Criteria

A) Unforeseen Construction Issues

- The design changes are as a result of unforeseen and unavoidable circumstances
- Current approvals (CAA, DFO, etc.) support the required changes
- The required changes do not exceed 10% of the total project cost.

B) Change due to Permitting Requirements

- The design changes were unforeseen because another agency required them as a result of their permit process (CA, DFO).

Example: An engineer or contractor realizes during construction that soil conditions are different than expected and the drain route needs to be shifted or made wider than designed.

New Process for Engineer's Report: At a Glance

Environmental Protections: Existing role of MECP, Conservation Authorities, DFO and other agencies in requirements for environmental approvals and/or issuing permits will stay the same.

Engineer Determines Design Changes are Needed

- If design changes are required due to unforeseen construction circumstances or permitting requirements (which comply with Criteria A, B or both), the engineer submits a request to modify the design to the municipality.

Municipal Council Determines if Changes meets Criteria for Report Update

- If the municipality decides the changes meet the criteria the engineer is authorized to use the streamlined approach.
- If the municipality do not meet the criteria (e.g. are too significant), the engineer would have to use the existing process to update the report (appeal to the Tribunal).

After Construction Municipal Council Updates the Engineer's Report

- The engineer submits the design changes to the municipality within 30 days after the certified completion date.
- The municipality must amend the Engineer's Report with the new as-built drawings.
- The updated Report would govern future drain maintenance.
- All of the costs resulting from the design changes are paid for by the property owners.
- The municipality would notify property owners.

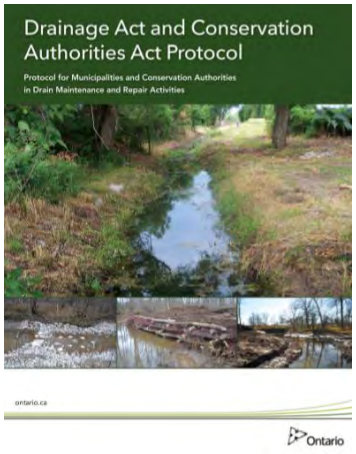
UPDATED REPORT AVAILABLE FOR FUTURE MAINTENANCE AND REPAIR

Discussion Points

- Do you have any questions on the proposed process to update an Engineer's Report?
- Are there any concerns on what is being presented?
- Do you need any additional information to help you understand the proposed changes?

Technical Protocols

Incorporating Technical Protocols: Proposed Approach



Purpose

- Stakeholders identified a role for technical protocols to create a consistent multi-agency approach to drain construction and maintenance and environmental protection. Specific recommendations included:
  - A collaborative process for developing new protocols (multi-agency and external groups);
  - Ensuring environmental protections that are balanced with the need for drainage in a streamlined manner.

Proposed Incorporation of Protocols

- The proposed regulation would incorporate the Drainage Act and Conservation Authorities Act Protocol by reference.
- This Protocol was developed by the Drainage Act and Regulations Team (DART), including MNRF, OMAFRA, conservation authorities, drainage engineer professional associations, farm organisations, and the Rural Ontario Municipal Association
- Additional new protocols would be considered at a later date (could include new protocols related to minor improvements, other utilities and an expansion of the DART Protocol).

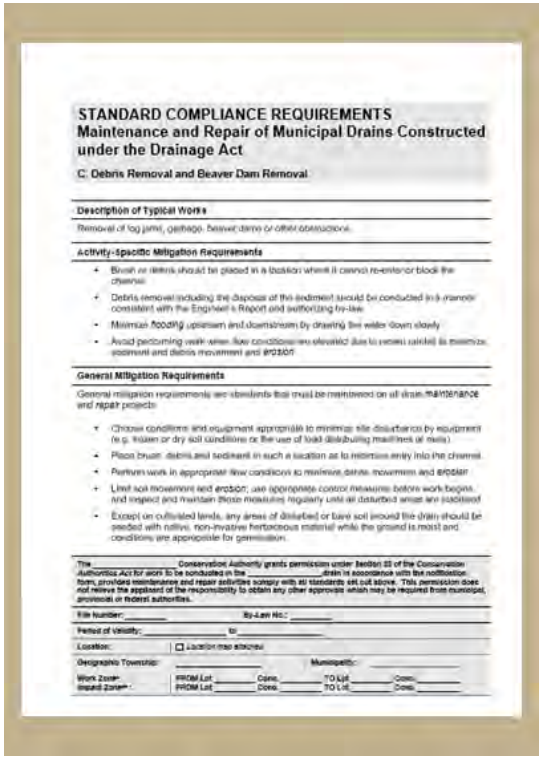
Outcome:

- Shared expectations among agencies leading to innovation and better drainage projects with environmental and agricultural benefits

Incorporating Technical Protocols: New Protocol Development

- Protocols such as the DART Protocol have demonstrated reduced project delays and project costs while maintaining environmental protections.

Example: Debris and beaver dam removal is an eligible maintenance activity under the DART Protocol. The Protocol requires flooding upstream and downstream to be minimized by drawing the water down slowly. It also requires the work to be performed to minimize debris and erosion.



STANDARD COMPLIANCE REQUIREMENTS
Maintenance and Repair of Municipal Drains Constructed under the Drainage Act

C. Debris Removal and Beaver Dam Removal

Description of Typical Works

Removal of log jams, garbage, beaver dams or other obstructions.

Activity-Specific Mitigation Requirements

- Brush or debris should be placed in a location where it cannot re-enter or block the channel.
- Debris removal including the disposal of the sediment should be conducted in a manner consistent with the Engineer's Report and authorizing by-law.
- Minimize flooding upstream and downstream by drawing the water down slowly.
- Avoid performing work when flow conditions are elevated due to recent rainfall to minimize sediment and debris movement and erosion.

General Mitigation Requirements

General mitigation requirements are standards that must be maintained on all drain maintenance and repair projects:

- Choose conditions and equipment appropriate to minimize site disturbance by equipment (e.g. frozen or dry soil conditions or the use of load distributing mats/mesh or mats).
- Place brush, debris and sediment in such a location as to minimize entry into the channel.
- Perform work in appropriate flow conditions to minimize debris movement and erosion.
- Limit soil movement and erosion; use appropriate control measures before work begins, and inspect and maintain those measures regularly until all disturbed areas are stabilized.
- Except on cultivated lands, any areas of disturbed or bare soil around the drain should be seeded with native, non-invasive herbaceous material while the ground is moist and conditions are appropriate for germination.

The _____ Conservation Authority grants permission under Section 28 of the Conservation Authorities Act for work to be conducted in the _____ drain in accordance with the notification form, provided maintenance and repair activities comply with all standards set out above. This permission does not relieve the applicant of the responsibility to obtain any other approvals which may be required from municipal, provincial or federal authorities.

File Number: _____ By-Law No.: _____

Period of Validity: _____ to _____

Location: ☐ Location map attached

Geographic Township: _____ Municipality: _____

Work Zone*: FROM Lot _____ Conc. _____ TO Lot _____ Conc. _____

Impact Zone*: FROM Lot _____ Conc. _____ TO Lot _____ Conc. _____

- Development of new protocols could take place collaboratively through the existing DART framework or through an expanded framework including municipal stakeholders, Indigenous communities and partners, the Federal Department of Fisheries and Oceans and other agencies.

- Potential new protocols could include:
  - Expansion of the current DART Protocol (for drain construction and improvement projects)
  - Protocols for meeting the requirements of the Endangered Species Act, the Fisheries Act and other possible legislation
  - A protocol for work across transportation corridors

Discussion Points

- Do you have any questions on the development of new technical protocols?
- Are there any concerns on what is being presented?
- Do you need any additional information to help you understand the proposed changes?

Next Steps

- We are hoping to work with you in designing the approach to improving the drainage process.
- A regulatory proposal has been posted for public consultation on the Environmental Registry ww.ero.Ontario.ca and the Regulatory Registry.
- Webinars will be held during the posting period for interested indigenous communities.
- Feedback gathered will be used in finalizing the regulation which is expected spring 2021.

Thank you for your participation

Appendix

What would be new?

Current Improvement Process Requirements	New Minor Improvement Process
Engineer has 1 year to complete report	Engineer has 90 days
A site meeting is required with all affected parties.	A site meeting is required with the property owner requesting the minor improvement project.
Municipal Clerk must provide notice of a Council meeting within 30 days of receiving report	Clerk must provide notice within 10 days of receiving report
Property owners have 40 days to file appeals	Property owners have 10 days to file appeals
Process allows for appeals to the Drainage Referee, Court of Revision and the Tribunal	Process only allows appeals to the Tribunal

What stays the same?

Current Improvement Process Requirements	New Minor Improvement Process
Municipal Council approves design and costs and implements through a bylaw	✓
Conservation Authorities/Ministry of Natural Resources and Forestry (in the case of no CA), OMAFRA and other affected municipalities are notified	✓
The municipality sends out a provisional by-law and a notice which outlines appeal rights	✓
Environmental approvals are required which include CA and DFO permits, etc.	✓

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**
- Includes a council meeting to consider the preliminary report	- No requirement for a preliminary report
- Engineer has up to 1 year to complete the report	- The engineer has 90 days to complete their report
- Requirement for an on-site meeting for approval agencies, all affected landowners, etc.	- The engineer inspects the site with the landowner
- 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	- The clerk provides notice of a Council meeting within 10 days of receiving the Engineer's Report
- 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.	- Up to 90 days to modify the Engineer's Report (if needed).

- Once the municipal clerk sends outs 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.	- 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.

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: Sara.Peckford@ontario.ca