Preliminary Comments on Policy Directions for the Ontario Drainage Act
This is a second submission – the first named the writer, and that identification has now been removed, and a few minor edits have also been done.
February 2020

Introduction

The Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) has issued a Drainage Act Discussion Paper and requested input by February 18, 2020 on proposed amendments to the Act.

OMAFRA has aimed their own consultation process at four specific questions, and I will return to those at the end of this paper.

It helps to first review some principles that should be observed in this legislation:

- There should be balance between fiscal accountability, progressive social policy and individual rights and responsibilities.
- The democratic process is a basic requirement.
- Responsible government must be fiscally prudent and should be limited to those responsibilities which cannot be discharged reasonably by the individual or others.
- The quality of the environment is a vital part of our heritage to be protected by each generation for the next.
- The future sustainability of rural Canada comes through flexible, innovative policy, based on principles of realistic economic profitability.
- As the agricultural base of the rural economy has declined, so too has infrastructure in small communities. To preserve the social fabric of rural Canada, we encourage the government to foster diversity and responsible development in small towns and villages by encouraging innovation in the development of small businesses that keep these communities alive.
- Agricultural production must be both economically and environmentally sustainable.
- It is the responsibility of government to ensure that the sometimes competing values of preserving the environment and creating jobs are maintained in proper balance.
- Regarding the Great Lakes and St. Lawrence River basin, where so many Drainage Act projects are located:
    - address the threats to our shared resource, including water levels, invasive species, pollution and other threats to the tourism industry and the living conditions and economic well-being of area residents;
    - provide adequate funding to fulfill its commitment to this region, which is home to 16 million Canadians and is a crucial source of clean air, drinking water, food, shelter, health, employment and recreation, as well as Canada's highest concentration of industry; and
    - establish long-term outcomes; translate them into real plans for the basin; apply a consistent basin-wide approach for issues that span the entire basin; clarify responsibilities of federal and provincial governments; and recognize constitutional authority of the provinces.
- Development of a long-term plan in cooperation with the provinces and territories to create an inventory that could define significant and key aquifers and establish policy to protect the quality and sustainability of Canada's major aquifers. With the threat of groundwater resources becoming depleted in Canada we will face increasing need to understand the extent and replenishment of aquifers.

The importance of the Ontario Drainage Act

Media coverage on the Drainage Act grossly under-represents its importance. There are thousands of municipal drains in Ontario, amounting to over 45,000 km, with something like 1200 km in Ottawa alone. Visible costs are substantial. Drainage projects in Ontario are costing about $25 million and maintenance of existing drains is costing around $15 million annually. The cost for the network of municipal drainage superintendents runs to about $6 million and the associated program costs for ADIP costs the Ontario taxpayer something like $12 million annually.

The purpose of the Drainage Act

The consolidated statutes have lost any preamble or purpose statement for the Act, and that is lamentable. One should be provided. For reference, here is some text from the Act in 1869:

> Whereas considerable tracts of land situated in certain Counties of the Province of Ontario, are now lying in a state of comparative unproductiveness for want of drainage; and the productiveness and value of such land is capable of being greatly increased by drainage; and whereas, the extension of the operation of drainage is calculated to promote the employment and to increase the effectiveness of agricultural labour; and tends also to prevent disease and to improve the general health of the community; and whereas it is expedient to facilitate works of drainage by advances of public money to a limited amount on the security of the land to be improved ...

Without the Drainage Act (or its various predecessors) landowners would be sorting out drainage projects according to the Common Law on drainage, which does not always lead to cooperation. The primary purpose of the Drainage Act is to provide a fair and democratic process under which a group of landowners can install a drainage system for their mutual benefit, and receive assistance from the municipality at the same time.

History of the Ontario Drainage Act and its agricultural context

- Common Law on drainage goes back centuries and still underpins policy and legislation
- 1835 - An Act to Regulate Line Fences and Watercourses was the first legislative ancestor of the Ontario Drainage Act
- In 1835 the context was entirely agricultural. At that time most rural families in Ontario operated farms.
- In 1859 Upper Canada had the first Drainage Act, so-named.
- 1892 a Commission was appointed to review drainage laws in Ontario, this was followed by the Municipal Drainage Act in 1894.
- While farming has always been important, it became evident early on that a more comprehensive view of the local environment was required. For example, the Conference of Federal and Provincial Game Officials adopted this resolution in January 1937 "that no drainage project requiring government assistance, permission, or co-operation should be proceeded with in Canada without thorough investigation and consideration, in advance, of all the important

economic, scientific, and scenic results that will be involved". This is an early example of the recognition that poorly-designed drainage schemes can and do have detrimental impacts on natural resources.

- The number of farms in Canada peaked in about 1940. Since then the business of farming has changed dramatically, the number of farms has gone down and the size has increased. From 1871 to 2016 the average size of farms increased by over 800%.
- Another Ontario Commission, in 1948, stated “in order to safeguard watersheds from the development of unwise drainage schemes, there should be some overall neutral authority with power to review drainage schemes from the standpoint of the whole watershed involved.”
- In 1972 a Select Committee on Land Drainage was established to review a large number of concerns about agricultural drainage in Ontario (see below).
- In 1975 the Drainage Act had some significant amendments, notably in establishing the Drainage Tribunal.

The Select Committee on Land Drainage which operated from 1972 to 1974 made many recommendations, but several important ones, especially those dealing with environmental values, were ignored.

The Report by the Environmental Commissioner of Ontario in 2018 made a number of relevant points that should lead to amendments to the Drainage Act. In particular these statements come from that report:

- ...one recent study found that leaving wetlands intact rather than draining them for agriculture reduced the costs of flood damage from severe storms by up to 38%
- Agriculture caused 43% of the wetland loss in Ontario from 2000 to 2010
- ...agricultural drainage can reduce or destroy both wetland area and function if environmental impacts are not properly assessed and avoided. Even relatively small changes to natural water levels can impair wetland functions
- Despite the fact that agricultural activities are responsible for the majority of recent wetland loss, the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) does not monitor the impacts of drainage works on wetlands, and was unable to provide the ECO with data on how many hectares of wetlands have been lost or disturbed due to drainage activities.....
- ...lack of publicly accessible information on the impacts of agricultural drainage on wetlands in southern Ontario is especially troubling as drainage enclosures and tiling are now making up the majority of new agricultural drainage systems.
- ... in several cases tile drains may have been installed directly within provincially significant wetlands
- ...lack of clear language and direction in the Conservation Authorities Act creates uncertainty for conservation authorities ... in terms of: their ability to regulate all threats to wetlands, including from agriculture drainage
- One of the fundamental obstacles to wetland protection in southern Ontario is the province’s continuing lack of action to address the primary threat of wetland destruction: drainage for agriculture
- ...conservation authorities hold one of the very few potential tools to protect wetlands from agricultural drainage. However, the province will need to clarify and strengthen this tool to confront wetland loss in a meaningful way
- Neither the Drainage Act nor the Tile Drainage Installation Act contain specific prohibitions for wetland interference. In fact, wetlands are not even mentioned in either Act

In 2018 there was a new publication - **A Guide for Engineers working under the Drainage Act in Ontario - OMAFRA Publication 852**. This is constrained by the current legislation and yet it has a wealth of information that should help shape the amendments to the Act.

The Modern Context

The Drainage Act is important legislation whose antecedents were established to provide a cooperative mechanism among a local group of landowners who share a common interest in drainage to improve agriculture. In those days farming was by far the predominant source of income for the families living on the affected properties. The conservation of water resources and wetlands was not a concern.

Today farms are much larger and much more mechanized. Farming has declined in proportion as a source of rural employment. Lands previously considered unsuitable for agriculture can now be profitably drained and brought into production for intensively managed crops, so the passive protection of environmental values on "marginal lands" often falls away. Society now recognizes that watershed management needs to operate in a multi-purpose landscape with consideration for diverse water, land and biodiversity components. Unfortunately, when the Drainage Act in its present form is brought to operate in the modern context it often fails, precisely because in its design it is geared towards a small project for cooperation on tile drainage among a few farm producers.

- In 2016 the rural population of Ontario was 1,828,555 and the rural farm population was 139,625, or 7.6 %
- The Drainage Act now operates in a rural Ontario that is very different from that of 1835. Notably, watershed issues and environmental values are now seen in new ways and the Drainage Act has not been amended to improve its relationship to environmental management, despite numerous specific recommendations for such changes.
- Projects under the Drainage Act remain controversial. A large proportion, around 10%, of projects proceed to Drainage Tribunal hearing.

Problem Areas

Given the above background, and in consideration of the reports mentioned, and decisions by Referees and Tribunals, it is clear that there are many problem areas and areas of confusion in the Drainage Act and its associated polices and programs:

- insufficient voice for landowners assessed only for outlet liability.
- insufficient controls on invocation of Section 78.
- there are few effective constraints on the powers and duties of the Engineer.
- both policy and legislation have drifted from the original intention.
- the Act does not have good mechanisms for addressing competing societal objectives.
- the Act operates in an area with perhaps 20 other applicable laws – a highly overlapping regulatory framework.
- there is widespread confusion between stormwater management and municipal drains.
- there is wide scope for arbitrary decisions on lands with depressional areas, woodlots, etc.
- there is penalization of up-stream properties who pay a disproportionate cost for basin-wide management.
- there is a maze of appeal alternatives, processes and deadlines for appeal.

- with the existing framework the overall cost of engineering is expanding.
- with the existing framework phosphorus runoff is an un-assessed environmental cost – as is also the case for nitrogen and persistent pesticides.
- there is no standard provided for the naming of "Municipal Drains", even though they do become named parts of the rural landscape.
- outlet liability is a confusing aspect, not well-grounded in its roots in Common Law, and so there is wide variety in how it is defined and assessed.
- injuring liability is a poorly-understood and rarely-used concept that was retained even though the 1972 Select Committee recommended its removal.
- the concept of "water artificially caused to flow" may be well-grounded in Common Law but it is blithely ignored by engineers who – without consequence – expand the assessment schedules to properties with no Common Law liability.
- current land use is too easily ignored and engineers proceed to charge for hypothetical future uses however unlikely they may be.
- whereas the 1972 report recommended simpler procedures for "minor" improvements the limitation to "minor" cases was ignored and Section 78 may now be used for massive redesigns.

Suggested amendments to consider

- The preamble and purpose of the Act should be redrafted / reinstated.
- The definition of benefit should take into account environmental costs.
- The confusing maze of appeal mechanisms should be redesigned, for example by directing the entire process after the Court of Revision to the Tribunal rather than have the confusing split between the Tribunal and the Referee. In which case, reserve the Referee for final appeals.
- Improve the independence of the Court of Revision from conflict of interest by the project proponents which can in effect include implicated municipal councillors and the engineer. The 1972 recommendations tried unsuccessfully to address this problem by limiting attendance by the engineer.
- Appeals never split as cleanly as the legislation drafters might contemplate, and so if the same processes are retained, improve and provide clarity on how the Tribunal and Referee may consult on overlap without invoking unnecessary process.
- Modernize definitions for injuring liability, outlet liability and sufficient outlet, or remove those concepts which are no longer useful.
- Restore a democratic voice to non-benefitting landowners assessed for outlet liability, if the concept of outlet liability is retained.
- Give a voice to watershed owners on the decision about environmental assessments, if they remain optional. At present the municipality seldom does one.
- Make the benefit - cost analysis a consideration for the engineer even if no formal statement is requested.
- Make the environmental impact a consideration for the engineer even if no environmental impact assessment is formally done.
- Provide that benefits and costs include environmental costs and benefits.
- Improve the public record – the appointment decision and statement of work for the engineer should be subject to public scrutiny.
- Establish criteria for qualification of engineers – make a requirement that the engineer use current professional standards and maintain appropriate training.
- The determination by the engineer of the need for drainage should consider wide societal values

including as appropriate the impact on the environment e.g. identified groundwater recharge areas and significant wetlands.

- Generally review the legislation in the context of the current "Guide for Engineers Working Under the Drainage Act in Ontario" which does identify areas of confusion around concepts like “outlet liability”, self-draining lands, and “water artificially caused to flow”.
- Clarify that the natural flow of water does not introduce liability.
- Clarify that natural water seeping to the aquifer is a societal benefit, not a liability.
- Repeal 23 (4) or define a fair approach for those landowners.
- Provide a penalty for connection to the municipal drain without permission.
- Section 34, prior assessments MUST be taken into consideration.
- Sections 40-42 if the report was initiated through a Section 78 process, information must be sent to assessed landowners to include background and rationale for why Section 78 was used, rationale for whether there is a benefit cost analysis being done, and rationale for whether there is an environmental assessment being done. Also, give the rationale for the selection of the engineer, and provide the instructions to the engineer.
- Section 78 should be limited to MINOR IMPROVEMENTS ONLY to provide fairness and observe the democratic underpinnings of the Act. In particular, Section 78 projects must:
    - NOT substantially change the proportionate assessment to individual landowners.
    - NOT substantially change the area included, or assessed for the drainage works.
    - NOT substantially change the (adjusted for year) total cost of the project.
    - review and update the previous rationale for including or not including an explicit benefit/cost assessment.
    - review and update the previous rationale for including or not including an explicit environmental assessment.
    - BE fully documented, with Council publicly recording the reasons for producing a new engineer report.
- In other words, the Act could separate MINOR improvements under a streamlined Section 78 from MAJOR improvements that require a new petition or other process
- Section 79 – there should be no liability to the Municipality when non-repair is in accordance with a revised by-law.
- Section 79 – there should be no liability to the Municipality when non-repair is in accordance with a determination by the Tribunal or Referee.
- Requirements should be made regarding the naming of the project, and the public registry of relevant bylaws, minutes, contracts.
- Section 84 Abandonment – Add text in this spirit .....Council shall, by bylaw, identify which parts of the project are abandoned. Council shall determine whether an engineer's report on abandonment is required or not. Notwithstanding the specified process for advising landowners, and whether or not other requirements are met, the council may by by-law abandon all or part of the drainage works, and thereafter the municipality has no further obligation with respect to the identified parts of the drainage works. (This section is subject to quash under the Municipal Act.)
- Section 85 grants should not be payable for any work that compromises the function of a provincially significant wetland.
- Preliminary engineer's reports should be in the public record.
- Clarify the relationship to the Ontario Environmental Assessment Act including the current broad exemption under EAA Regulation 334 – that exemption should not apply to major projects.

- Establish penalties for pollution of the drains, (perhaps appropriately exempting allowed agricultural discharge with reference to other legislation).
- In view of the comment by the Environment Commissioner, at least mention wetlands in this Act. There are many opportunities to do this in the context of environmental benefits, groundwater security, flood abatement, pollution management and so on.
- Clarify that water discharged into certain stormwater management systems is considered to have sufficient outlet under the Drainage Act. This would include stormwater management that is external to the municipal drain project under consideration, and notably any system that is paid for by ratepayers under a tax levy.

Now to the comments requested for the February 18 2020 deadline. OMAFRA's specific questions for consultation are the four that follow. I answer them in the light of what I have said above. The OMAFRA questions show in **bold**, and they are followed by my response.

i. **Beyond the DART Protocol, what additional protocols could be established to help streamline approvals?**
   1. At present, noting for example the Environment Commissioner's report, DART is failing to properly protect wetlands. Rightly or wrongly it is seen as an override so that OMAFRA and in particular the Municipality can ignore environmental approvals. It is the fox guarding the chickens. The most important improvement would be to ensure that the DART sign-off be the Minister responsible for natural resources and forestry, and the Conservation Authorities and / or the Minister responsible for environment, conservation and parks.
   2. Ensure that DART does not eliminate the requirement for compliance with other legislation and it should avoid any tendency to introduce officially-induced error.
   3. No DART regulations should reduce the applicability of other legislation, especially that for protection of wetland and endangered species.

ii. **What projects should be included in the definition of minor improvements? What else would you like a minor process to achieve?**
   1. A minor project should NOT substantially change the proportionate assessment to individual landowners from the original bylaw
   2. A minor project should NOT substantially change the area included, or assessed for the drainage works
   3. A minor project should NOT substantially change the (adjusted for year) total cost of the project
   4. These could all be % changes, for example 10% or 20%

iii. **Do you have any specific concerns with any of the items discussed in the paper?**
   1. The discussion paper was woefully short on details. What constitutes a minor project? What sections of the Act would be amended?
   2. The paper assumed only one kind of change – streamlining – which often only benefits a small group of people.
   3. The discussion paper was silent on the role agricultural drainage plays in the Ontario environment.
   4. The conclusion to vest power over environmental decisions with OMARFA is very troubling.

iv. **Do you have any additional suggestions to reduce burden or contribute to additional opportunities for your business?**
   1. Yes absolutely – see above my list of suggested amendments to consider for the Drainage

Act.

In submitting comments to the Registry, I found that they requested summary points for the website, for example to make comments more searchable. The summary points that I used for posting comments for the Registry using their code 019-1187 are these:

- Section 78, if retained, should be limited to minor projects which do not significantly change the assessments to individual properties, or the overall assessed area, or the project cost.
- Signoffs for environmental aspects should be reserved for Ministers responsible for natural resources and the environment.
- The Drainage Act is in serious need of overhaul to reflect the realities of the modern rural landscape.
- Fairness and democratic decision-making should be restored in Drainage Act processes.
- Currently, Drainage Act projects can and do significantly harm the natural environment and the Act should be amended to help manage such risks.