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Comments Regarding Proposed Changes to the Drainage Act Policies

i. Beyond the DART Protocol, what additional protocols could be established to help streamline approvals?

The DART protocol has been successful but there is no value in having it form part of the law unless it becomes the official criteria to meet in place of permitting from the various agencies. If this were the case we would suggest that DART and DAWG protocol should be further developed and merged. As suggested within the discussion paper, the merged protocol would become an OMAFRA policy that could be adjusted as required and referenced within the DA similar to the way ADIP is enacted. Requirements of the FA, ESA, CA, and any other relevant act should be dealt with at committee level and inserted into the OMAFRA policy on an ongoing basis. The policy shall be self-implemented and monitored by the proponent instead of permit implemented by multiple agencies. The appropriate authority still upholds enforcement and acts as the compliance authority.

Would ADIP grants be in jeopardy if the DART was made part of the Act and couldn't be reasonably implemented in certain circumstances?

The DA must limit the ability of CA policies to upend processes and projects under the DA. All CA concerns outside of DART protocol (ie. wetland or enclosure policies passed at local levels) must be addressed through Section 6 of the DA. The requirement for CA's to use Section 6 should be clearly stated in the DA whenever there are CA concerns outside of the DART protocol.

CK truly believes there is no other person or organization that has had the same level of experience attempting to follow both the DA and ESA simultaneously. We have more drainage projects and more SAR than any other municipality in the province. Conflicts between the two acts have been an overwhelming problem for our drainage department. Many conflicts have no workable solution. The result is the municipality either is under constant risk of prosecution under the ESA or carries liability under the DA. We have had countless meetings and conversations with MNR, legal staff, MPP's, OMAFRA staff, consultants, and other municipalities to try to sort through the many issues. We can confirm that there is absolutely no way to complete our drainage workload and operations while being completely ESA compliant. Leaving the municipality in a state of non-compliance and is simply unrealistic and unfair to both staff and the taxpayers. DA changes must consider and include an ESA exemption for works completed under the DA considering that the two provincial acts cannot be both met in many instances.

ii. What projects should be included in the definition of minor improvements?

The general sense of the suggested process for minor improvements is that it is not useful as proposed. It doesn't really add a new tool, just another process. The Act already states that the municipality 'may' repair damage to a drain. Currently, if an owner completes work at their own cost, entirely on their property and is not obstructing flows there is no problem. A process is not needed. As the engineering costs under the proposed minor improvement process would likely eat up most of the grant there is no benefit to the owner. The exception may be future maintenance. A grandfather clause that allows features of a drain to be maintained as a part of the drain, as long as they have been in place for at least

10 year without formal action against it, would resolve this issue. Some additional suggestions to streamline improvements is below.

Drain Crossing Creation and Modification – We recommend being able to assess culverts on a 50/50 cost split. The owner of the access assessed 50% of the cost and the other 50% to upstream lands according to the most recent appropriate assessment schedule. We also would like to see culvert sizing and other criteria be approved by qualified Certified Engineering Technologists (C.E.T) in addition to Professional Engineers (P.Eng.) An option to assess culverts 100% to a property should be reserved for land development on fringe areas at city/town outskirts or where severances have been completed.

Drain Relocation – Has no effect on upstream lands when the cross-section established in the relocated section matches dimensions as defined within the most current report. In many cases, relocations add length to the drain thereby increasing habitat potential. The municipality will reserve the right to add erosion protection to the realigned section and assess costs to the benefitting owner.

Drain Enclosure – Can be designed at the C.E.T. level when 100% of the costs are assessed to the benefitting owner (Does not require or need a new Sec 78 report!). CRITICAL TO THIS PROCESS IS TO NOT FORGET THE DEMOGRAPHIC OF DRAINAGE ENGINEER'S PRACTISING IN ONTARIO. NUMBERS HAVE BEEN DECREASING FOR 20 YEARS. ANY DA REVIEW MUST CONSIDER THIS VERY IMPORTANT FACT!

Buffer Strip Establishment – Can be established in agreement with any owner along a drain to a maximum of 10 metres with all costs assessed to the drain. Maintenance of the buffer strip should form part of the agreement with the owner and be consistent within the municipality.

On-line Addition of Wetlands – Where an owner wishes to build a wetland on-line with a municipal drain it should be allowed pending; the outlet capacity is equal to or greater than the inlet capacity, the project is on one property, the municipality reserves the right to remove obstruction of flow through the wetland, and cost of the project is 100% to the owner.

Addition of Catch Basins – Catch basins can be added to any tile drain at the expense of the landowner and when approved by the Drainage Superintendent.

Minor Pump Adjustments – Small adjustments to pump stations or other water control devices required for minor improvement to the scheme should be assessable to the drain when the Drainage Superintendent deems it necessary for efficient and safe operation of the pump.

What else would you like a minor process to achieve?

Changes to Assessment Schedules
Drainage staff/clerk should be able to proportionally divide outlet assessments according to area and benefit assessments based on length of drain frontage to address parcel severances. If a property that does not come in contact with a drain has a benefit assessment, the benefit assessment will be divided proportionally by acreage. This fair strategy will eliminate a massive need for Section 65 and 76 reports.

Paying Allowances
Allowances should be payable for maintenance. Where an owner can provide a fair estimate to the amount of property damage that occurs during a maintenance project, the municipality may compensate them. The municipality may add the compensation to the project costs and assess lands accordingly. Claims for compensation shall be submitted within the same year of project completion. The amount to be paid will be on a set amount per acre damaged. This should be kept very simple and not necessarily represent the actual cost of damage. An amount of $1000 per acre is our suggestion. This should be updated every 5 to 10 years. Landowners providing a map with measurements shown will be compensated upon approval of the Drainage Superintendent.

Obtaining Access and Working Corridors/ Switching Sides for Spoils
The DA currently has no means of obtaining access to a drain if not defined in a previous report or lost to natural forces (erosion). A common request from owners along a drain is to spread spoils on sides of the drain opposite to previously established working corridors to balance the surface grades. A simple process is needed to obtain working corridor rights. Paying allowances as described above would assist in this process.

Dike Establishment and Improvements
Rising lake levels and large frequent storm events has increased the need for diking in many areas. This work is often completed very urgently, difficult to scope in advance and is defined as work proceeds. We recommend a mechanism to assess costs of emergency diking be developed which can be completed by a Drainage Superintendent.

Pump Improvements
Similar to the section above, Pump improvements are unavoidable at times, whether it is to comply with safety regulations or to adapt to changing site conditions. Back up pumping or thawing techniques are implemented on an urgent basis. It needs to be made clear that these costs are assessable under the most current engineers report.

Changes to Drain Elevations and Gradient
Adapting to site conditions and erosion can mean that adhering to exact elevations and gradients in a previous report is impossible. Minor adjustments can usually correct the issues. Minor adjustments to previous report elevations should not be cause for the municipality to require an entirely new report.

Bank Reconstruction/Re-Sloping
The same principal of the above statements applies to this section. Re-sloping a drain requires taking of land. Payment of allowances under a simple process will aid bank reconstruction possibilities without the need to involve entire watersheds, engineers, and council. It is often urgent that slope/washout repairs be completed virtually immediately. As such, involving full on reports will not work and are simply unrealistic.

Creation of Water Retention Areas
Use of Newbury Weirs and other water control structures prevent erosion/scour and provide an environmental feature to the drain. These features are cost effective while having little or no impact on the drain. The Drainage Superintendent should be able to add these features to any drain where suitable. The costs of these features should be assessable to the drain and grantable under the ADIP policy without involvement of entire watersheds, engineers, and council. It is long overdue that the DA begin to consider the concept of storm water management. This is a first step. This concept is also an effective method of storm water quality management – another very important factor considering other Provincial mandates to control nutrients, particularly phosphorous into watercourses.

Upgrading Tile Capacity
Tile drains established as municipal drains may be upgraded to current capacity standards as outlined in OMAFRA publication 29 without a report. The guide clearly defines the design criteria and therefore engineering is not required. If assessments do not need to be addressed the upgrading can be conducted as a work of maintenance under Section 74 upon request of a landowner. Another alternative may be to distribute notice to lands assessed with the option of appeal by engineers report, similar to a Section 65 process.

iii. Do you have any specific concerns with any of the items discussed in the paper?

- A Tribunal ruling clarified that environmental based costs cannot be assessed to the drain. Municipalities cannot afford a 'carte blanche' to complete whatever a CA requires once a report has been

passed. It must be stressed that costs have escalated to the point where ratepayers are considering actions outside the defined DA process. This is NOT what any of us want and will be disastrous should it happen. This highlights the responsibilities of the CA under Section 6 of the DA. The CA has the ability to pass policies at the local level that directly conflict with DA projects and processes. It is only reasonable to make these policies subject to section 6 of the DA and therefore the costs born to comply with such policies an assessed cost directly to the CA. This allows drainage practitioners consistency in their business and forces CA's to be responsible in new policy adoption. The timing of this suggestion aligns with the Province's review of the CA's and what they should be responsible for.

- There is concern that Item 3 of the discussion paper will actually create more work. If 'as built' drawings become mandatory it would likely result in an increase in workload. Leave this as an option for municipalities and not a requirement.

- There is logistical problem that occurs between report passing and obtaining permits. If council passes a report that requires design changes to obtain permits there is a high potential for conflict. It is understood that allowing the Drainage Superintendent to vary from the design to obtain permits is the proposed process. This creates a problem if the engineers or landowners do not agree with the changes. CK has made changes at the time of construction in the past to suit permits and has found that it creates disputes that put the municipality in an unfavorable position. We suggest that the responsibilities and liabilities of any changes made to the design are clearly defined.

- Item 2 of the discussion paper. The moment an engineer becomes involved the project will become complicated. There will be no improvement if a process cannot be developed that can be managed 'in-house' by the municipality. It is critical that policy writers understand the needs of all municipalities if a strict process becomes a part of the DA. Engineer availability and regional challenges lend to the difficulty in developing one process. Would these improvements be grantable if they meet the ADIP policies while not being defined specifically in a report?

- Drainage Engineers are becoming scarcer yet drainage work is ramping up due to Climate Change. No real efficiencies provided to the drainage industry with these proposed changes. Given this shortage, it will be difficult for engineer's to keep to the shortened time frame. Alternatively, engineers will end up constantly pushing aside the major change projects to keep to the 90-day minor change time- frame. Engineers are taking longer to write reports because they have more projects per Engineer. Giving them less time to do work is not practical. OMAFRA has to look at providing other qualified drainage practitioners with the ability to do more minor improvements (e.g. CETs)

- Remove appeal times by having the Consideration of Report Meeting and the Court of Revision Meeting as one meeting. This would save time to get projects completed.

- We are setting ourselves up for grant ineligibility if Council decides we can streamline and then OMAFRA tells us it doesn't fit the criteria. Will this lead to pre-approvals before we do the work? Concerns with more responsibility on council. Does this mean more liability is placed on the council as well? Most of our decisions are based on how to keep the municipality out of court. This increased liability may be concerning.

- Many past Tribunal decisions have ruled against the municipality on the basis that work should have been completed under 'maintenance'. Will Section 78 reports become susceptible to these rulings on the basis that they should have been completed as Minor Improvements?

- It appears we are trying to solve issues with policy and legislation by adding more policy and legislation.

- We are the practitioners of the Act, it forms the basis of our jobs and guides the decisions we make everyday - so OMAFRA should pay close attention to what Drainage Superintendents are saying. These changes don't offer much to the Superintendents (or engineers) in the way of progress or reduction of red tape and bureaucratic burden. If anything, they muddy the waters further and risk blurring the lines between processes and timelines we already struggle to adhere to. We struggle to find common ground with other provincial statutes, I.e. Conservation Authorities, enshrining the DART protocol in law (or regulation) reduces the Superintendent's ability to be flexible and further dilutes the authority of the Drainage Act. Rather, clarification from the Province on realms of jurisdiction between The Acts would serve all parties more efficiently in meeting the common goal of protecting the Province from flooding and increasing the productivity of our Agricultural sector.

iv. Do you have any additional suggestions to reduce burden or contribute to additional opportunities for your business?

Remove the Appeal/Mailing Period between the Meeting to Consider and the Court of Revision
The meeting to consider the report and the Court of Revision are best kept as separate discussions. A suggestion to expedite the process is to allow the two to be held on the same day, back to back, without the appeal period between the two. Once the report is accepted, council announces the meeting to consider is closed and then immediately open the Court of Revision. The appeal/mailing period is not useful and adds a month to the process.

Increase the Penalty under Section 96
Environmental activism while conducting drainage work is a growing issue. Even when all permits are obtained and being followed some members of the public prefer to keep their own opinions regarding the impact of the work. Sometimes the public feels the best way for their opinions to be heard is to obstruct progress in various ways. Tougher penalties under Section 96 may influence activists to look deeper into details and be sure they are acting on accurate facts. This section should also be improved to give a process for laying this charge. We recommend a fine not less than $25,000.00 credited to the drain.

Improve Section 95 for Commissioners
Defined Process for hiring/firing commissioners is required. CK has struggled with the definition of a commissioner under the DA as it does not align with Occupational Health and Safety Act definitions. Are they employees? Are they contractors? Are they something else? The most accurate assessment by our legal team is that they are employees as defined in the OHSA.

C-K has hundreds of commissioners. They are necessary for the operation of our hundreds of pump systems in our area. If they are 'employees' as defined in the OHSA we will not be able to manage the training and other requirements afforded to regular employees. If they are contractors there will be conflicts with WSIB and HST problems. The duties of pump commissioners are very simple. They make sure that the pump is running and rake trash from the screen as required. Most commissioners make less than $1000 per year. The number of pumped drains petitioned for drives the number of commissioners required. One Drainage Superintendent in CK now oversees 180 pump commissioners. The roles often change without the municipality being aware and given geographic area, it is impossible for five Drainage Superintendents to manage 180 pump schemes all operating at once! The DA must make special provisions for commissioners to exist without being a contractor or employee of the municipality.

Remove Section 59 of the DA regarding the 133% Rule
Purchasing options available to most municipalities often mean that total actual project costs are not available at the onset of construction. Current understanding of this section of the DA is that it only applies when a project is subject to a secured bid process. The required meeting is another delay when costs exceed 133%. The DA does not define what is to be done at the meeting to consider the bid price. The by-law has been adopted by this stage of the process. The project cannot be cancelled without a liability remaining with the municipality. There is no criteria for whether to proceed with the project or not.

CK's experience is that landowners prefer the project always proceed even when bids are well beyond 133% of the estimate. Our recommendation is to remove this section of the DA on the basis that it is a redundant policy and contradictory to the basic principals of the DA. The DA is structured to give landowners the right to drainage where it is required. The cost is the cost. Only the distribution of cost is usually debatable (the exception to this is Section 48, discussed herein). The fairness of the contractor's payment is the purpose of municipal purchasing policy and not the DA. C-K position – Sec 59 only applies to Sec 4 drains, not Sec 78.

Failed Reports

When appeals against a Section 78 drainage report are cause to have a drainage report set aside by either council or the tribunal the municipality should have authority under the DA to assess costs occurred upstream of the proposed work in accordance with the most current schedule. There should also be direction given to the municipality for proceeding to correct a drainage issue once the report has been set aside. If property damage continues to occur, how can it be avoided when the municipality attempted to create a report and failed? Who is liable for damages when a report is set aside by the tribunal? RECENT DECISIONS ALONG THIS LINE HAVE LEFT MUNICPALITIES IN LIMBO, UNABLE TO DO ANYTHING. Starting the process all over again after having been slapped with huge engineering costs and no project, with the same ratepayers, is unrealistic.

Provide Rational for a Section 48(1)(a) Appeal – '*the benefits to be derived from the drainage works are not commensurate with the estimated cost thereof*'

An appeal based on the overall cost effectiveness is difficult to uphold or deny because it depends entirely on your perspective. CK Drainage believes that the source of most appeals to Tribunal begin with a disagreement of whether the project is cost worthy or not. If the DA could provide more criteria to base this type of appeal on, it may provide clarification to landowners, municipalities and the Tribunal. A statement as to considerations the engineer may have would be helpful. The cost of the land? The life expectancy of the improvement? The ability to change the use of the land?

Re-appointment of the Engineer

What happens when an engineer dies? What happens when the engineer refuses to follow DFO/CA? Can the process for re-appointment of an engineer be clarified and more power given to the municipality to re-appoint as it sees fit?

Post Adoption Permit Delays

Projects are often delayed by permit requirements that are not identified prior to passing a report. All utilities and agencies must come out of the woodwork before the report is adopted. If agencies that have been sent the report fail to appeal to council during the passing of the by-law, all cost of delays as well as damages occurred during the delay shall be the liability of the protesting agency. (ie. Railway companies requiring further engineering before allowing property access)

Adding Regulation Requirements to a Municipal Drain

As TSSA, OHSA, or other safety regulations are updated, the municipality may be required to make upgrades to a drainage facility to comply. This circumstance is most likely to occur at a pump station or other water control structure. These upgrades may be substantial and require a report. This opens necessary safety upgrades to landowner appeals. Should for some reason the report be set aside due to successful appeal, the municipality will remain noncompliant. The municipality must reserve the right to make any changes to a municipal drain under the maintenance provisions of the DA (section 74), when it is necessary to comply with safety regulations.

Section 30 Damages

Clarify if damages are paid if there is no disposal of material. Paying damage allowance to landowners whose property is damaged in anyway by construction is our recommendation.

Provide Municipalities the Ability to Pass Drainage Act Supported Policies

Our final recommendation is a solution to address many of the concerns stated herein. Municipalities should have the ability to develop and pass their own drainage policies backed by the DA. The process would involve consultation and approval from OMAFRA followed by public consultation and passing at council. Policies could include standard ways for assessing out minor improvements not covered in a report (pumps, dikes, culverts, etc.), assessment splitting between severed parcels, local CA agreements or any other issue that comes up at a local level. Our experiences with DSAO has shown us that different regions have different challenges under the DA. Development of a policy that focuses on a regional DA problem while considering appeal rights of landowners, adjacent legislations, ADIP policies and liability is best understood by the municipal level. Attempting to adjust the DA at the provincial level to catch all issues is not efficient. A section within the DA would define the exact process for passing a local policy. A municipal policy passed through the DA process will be an extension to the DA that is specific to that municipality and carry the same weight as provincial legislation. As a general example, a municipality may have a specific way to manage culverts. That municipality would draft a policy that fits regional needs while considering a set of OMAFRA guidelines (appeal rights, ADIP Policy, Engineering criteria, etc.). OMAFRA approves the draft policy providing the municipality the right to proceed. The DSAO has successfully established the highest level of networking between municipalities in a specific field. Drainage staff will have the opportunity to rely on fellow municipalities to collect and adjust policies to fit their needs through the DSAO.

These comments contain many concerns with the Drainage Act that place municipalities in conflicting circumstances. The risks associated with conflicts, which lead to legislative non-compliance, are born by the municipality. In reviewing the proposed changes it would seem that sections of the Act that need no adjustment have been further complicated and the issues that do need to be addressed have been overlooked. We request that suggestions made in these comments be reviewed again.

Sincerely,

Brigan Barlow Digitally signed by Brigan Barlow
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