

February 7, 2021

Agriculture, Food and Rural Affairs
1 Stone Road West
2nd Floor NW
Guelph, Ontario
N1G 4Y2

To: Agriculture, Food and Rural Affairs,

Re: Drainage Act Regulatory Proposal
Stakeholder Consultation
ERO Number: 019-2814

The OSPE Land Drainage Committee (LDC) is a committee representing practitioners providing engineering services under the Drainage Act. Our primary objective is to improve the practice of drainage engineering under the Drainage Act in Ontario. The LDC is a committee of six practicing land drainage engineers who are nominated by their peers.

Accordingly, and on behalf of the LDC, please find below our submission to the above noted Stakeholder Consultation. We have organized our comments following a similar order included in the proposal discussion paper.

1.0 Minor Improvements

We have separated our discussion on Minor Improvements into three categories: (1) Minor Improvement Criteria, (2) Minor Improvement Process and (3) Minor Improvement – General Discussion.

1.1 Criteria

The discussion paper included the below list of criteria. The LDC has included our comments as sub-bullets.

- The improvement would be initiated by the property owner
 - No additional comment from the LDC
- The improvement would take place on an individual property
 - No additional comment from the LDC
- The property owner would pay the full cost of construction for the minor improvement
 - Strike the words “~~construction for~~”. See below
 - The property owner would pay the full cost of 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
 - If the owner has obtained consent from a neighbouring property, the consent should be in writing
 - The LDC notes that the Engineer’s report should address the need to access the site by using a neighbouring property.

- 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 LDC suggests simplifying this to “Maintenance of the improvement shall be at the sole expense of the property until revised under a new drainage report.”
- The minor improvement project would maintain the existing drainage capacity
 - The LDC notes that an assessment of the existing and proposed drainage capacities must be made by the appointed Engineer.
 - We suggest an additional criterion which explicitly states that the minor improvement project cannot negatively affect or restrict another property in any way. OMAFRA has identified costs, maintenance considerations, physical construction works, and changes in drain capacity, but has not noted potential development restrictions affecting neighbouring properties. A generalized criterion will be more comprehensive.
 - One of the members of the LDC was able to share a real example of a project that would pass all the existing criteria for a ‘minor improvement’. In this case, a property which expected no work on their property, and no assessment, was negatively impacted through development restrictions caused by changes in proximity to a proposed open watercourse relocation on another property.
 - It is noted that the minor improvement is only appealable to the Referee by the requesting landowner. In the example noted above with the potential of minor improvements that could negatively affect a neighbouring landowner, the LDC feels that the landowners within the watershed should still have appeal rights to changes to a Municipal Drain.

1.2 Process

Please refer to the enclosed copy of Appendix B which includes notes and comments from the LDC. The comments on the attached Appendix B are numbered and coincide with following points for further detail.

1. The LDC notes that at the Engineer should test the proposed minor improvement project against the criteria. We suggest replacing the box with contents: “Council instructs Engineer... final report”, with a decision point box with action by the Engineer to confirm the criteria at the site inspection. If the project meets the criteria, in the opinion of the Engineer, then the project moves forward under the ‘Minor Improvement’ process. If the project does not meet the criteria, then the Landowner is directed to the Major Improvement process, or a Section 40 report by the Engineer is required.
2. The next box in the process notes a 90 day timeframe for completing a report. The LDC suggests noting Section 39 in reference to a time extension.
3. The LDC notes that the Environmental permitting step occurs after a by-law is passed. In practice, the sequence of activities noted in the flow chart does not typically occur in this order. It is more realistic (and often times

- more reassuring for the Engineer) to receive environmental permits (at least permission in principle) prior to completing a report.
4. The Engineer does not accept the tender; this is a duty of the Municipality.

1.3 General Discussion

The LDC views the new 'Minor Improvement' process with some uncertainty. We appreciate the time and effort that OMAFRA has invested into developing a simplified procedure as an alternative to the existing Section 78 process. It is a worthwhile objective to reduce the time and energy needed to produce a minor improvement to an existing municipal drain. The implementation of this new process will likely inspire types of projects that we cannot yet envision.

We understand that in developing a simplified improvement process, you must identify steps in the existing process to potentially eliminate. Once completed, you must then develop criteria for a project to realistically qualify for not including these 'extra' steps. Through eliminating common appeal opportunities to the Tribunal, and the Court of Revision, the only project that has any chance of being successful is a project where all the work is on one property, all the costs are accepted by that property, and no other property is affected (negatively) by the work. In this sense, we feel that OMAFRA has come very close to developing criteria to test future projects for 'Minor Improvement' reports.

Through significant discussion, and based on our experience, the LDC could not suggest many projects that would pass the 'Minor Improvement' criteria. We do not consider the few examples that we were able to brainstorm to be very realistic to occur.

Additionally, the LDC notes that the criteria set out in the regulation must be very clear and explicit. If there is excessive room for interpretation, there is potential incentive to persuasively qualify marginal projects to circumvent appeal rights offered under a 'Major Improvement' project. We emphasize the importance of including the Engineer's judgement in determining if a project passes the tests of the criteria.

2.0 Process to Update an Engineer's Report

The existing procedure to update an Engineer's report due to unforeseen circumstances at the time of construction are onerous; so much so that the procedures are typically not used unless absolutely necessary. The LDC supports a simplified procedure to properly, and legally amend the bylaw. In our opinion, the procedure should be to amend the bylaw and not the report.

Please refer to the enclosed copy of Appendix D which includes notes and comments from the LDC. The comments on the attached Appendix D are numbered and coincide with following points for further detail.

1. To generalize the second box from the bottom, we suggest removing the word "design".
2. In reference to the third point in the list of criteria under Scenario A, the LDC recommends changing the limit of exceedance from 10% to 33.3%. This suggested modification improves consistency with Section 59 of the Drainage Act, and offers more realistic use of this streamlined approach.

3.0 Protocols

The LDC considers the introduction of regulated protocols a great step forward to increase consistency, encourage collaboration, and provide clear expectations for all stakeholders involved in municipal drain projects. With drainage engineers being so heavily utilized in procedures under the Drainage Act, the LDC respectfully requests membership with any committee responsible for developing protocols that affect capital works.

The LDC suggests the following possible protocols:

- Protocols to ensure capital works comply with environmental legislation such as:
 - Endangered Species Act
 - Species at Risk Act
 - Conservation Authorities Act
 - Fisheries Act
- Ownership and property information sharing with Municipalities, Engineers and MPAC
- First Nations
- Excess Soil Management
- Environmental Compliance Approvals/Certificates

4.0 Prescribed Persons

The LDC supports the development of prescribed persons for various sections of the Drainage Act. Similar to developing regulated protocols, the LDC asks to be consulted when developing Prescribed Persons.

5.0 Conclusion

The Drainage Act is the primary tool that is used on a daily basis for drainage practitioners and superintendents in Ontario. Any significant changes to streamline its processes and to reduce burden is very impactful to this industry. We understand that these changes are initiated and controlled through a bureaucratic process. As a committee representing the drainage practitioners immersed in this legislation, we would appreciate an opportunity to have further consultation with OMAFRA prior to implementing the new regulations under this Act. The LDC appreciates the opportunity to participate in the Stakeholder Consultation and we look forward to the outcome.

Sincerely



Antonio (Tony) Peralta, P.Eng.
Chair of the LDC

LDC members: Brandon Widner, P.Eng. (Vice Chair)
 Jeremy Taylor, P.Eng. (Secretary)
 Stephen Brickman, P.Eng.
 Gerard Rood, P.Eng.
 John Kuntze, P.Eng.

Appendix B: Proposed Minor Improvement Process Flowchart

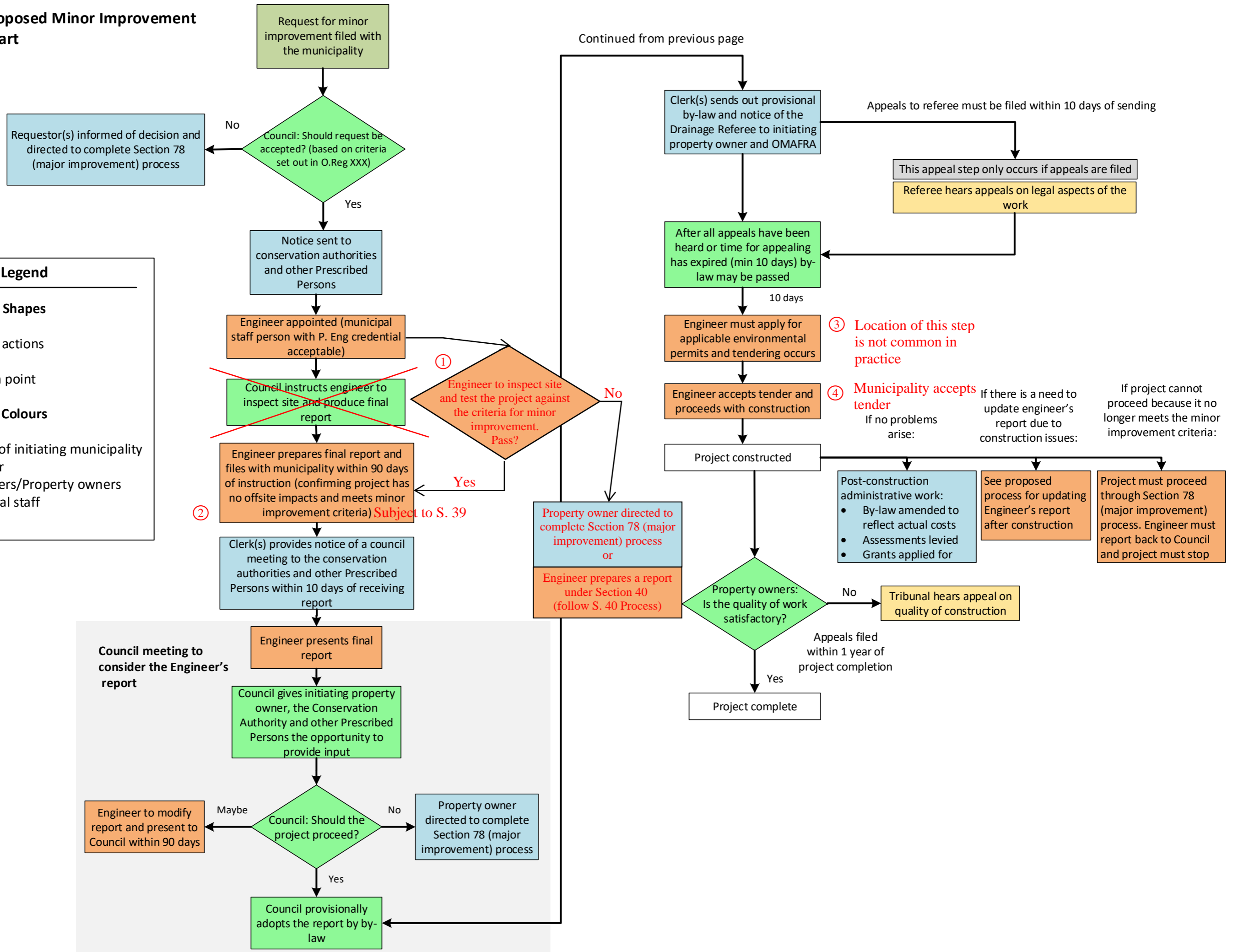
Legend

Shapes

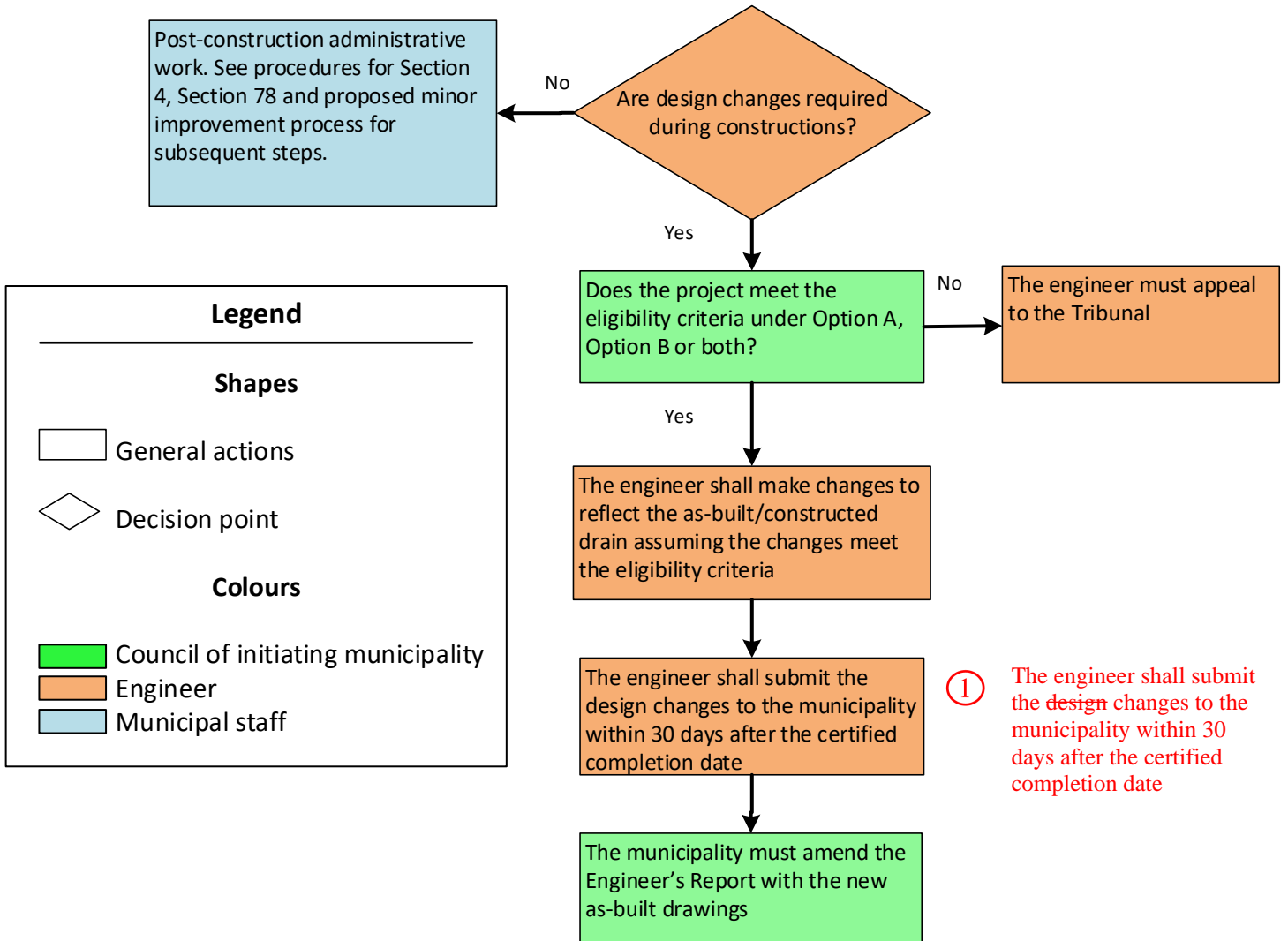
- General actions
- Decision point

Colours

- Council of initiating municipality
- Engineer
- Petitioners/Property owners
- Municipal staff
- Appeals



Appendix D: Proposed Engineer's Report Process Flowchart



Legend

Shapes

- General actions
- Decision point

Colours

- Council of initiating municipality
- Engineer
- Municipal staff

① The engineer shall submit the design changes to the municipality within 30 days after the certified completion date

Eligibility Criteria

Assumed to be CA instead of CAA

- A)**
- The design changes are as a result of unforeseen circumstances
 - Current approvals (CAA, DFO, etc.) support the required changes
 - The required changes do not exceed 10% of the total project cost ②
 - The municipal drainage superintendent agrees the construction design change is warranted which will not result in any material changes to the drain and approves that amending the Engineer's Report is appropriate
 - All landowners are notified of the changes however there are no additional appeal rights

33.3%

- B)**
- If it's because of a permitting requirement (CA, DFO), it's automatic that you use this process