



**PRELIMINARY ANALYSIS OF SCHEDULE 4, BILL 197:
PROPOSED AMENDMENTS TO THE *DRAINAGE ACT***

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OVERVIEW

On preliminary review of Schedule 4, Bill 197, COVID-19 Economic Recovery Act, 2020, CELA concludes that the proposed provisions will delegate new and additional discretion for the Minister of Agriculture, Food and Rural Affairs to make regulations related to determining who receives notices, streamlining approvals of “minor improvements” to drainage works, simplifying the process to amend engineer’s reports, and adopting/updating guidelines, protocols and procedures (and requiring compliance with such regulated policies). These proposed amendments are “enabling” and there is no detail as to the timing and content of any future regulations. Without such detail, it is not possible to completely assess the impact of the proposed changes.

As indicated in an earlier submission, CELA strongly encourages the Ministry to conduct “meaningful, comprehensive consultation process be established in order to determine how best to modernize policies and laws to address the biodiversity crisis and need for climate action.” Specifically, CELA suggests that multi-stakeholder sessions be hosted, including relevant ministries; municipalities; First Nations and Métis communities; environmental organizations; scientific community; industrial, agricultural, recreational and tourism sectors; and conservation authorities. It is most effective to have a mix of sectors at any particular session, in order to encourage sharing of perspectives and seeking solutions in the public interest.

As well, CELA recommends that there be a clear mechanism established that permits “minor improvement projects” to be “elevated” to “major improvement projects” under circumstances that are warranted. If a project is mis-categorized, there must be some means to correct course.

Further, CELA notes that this modernization effort (to date) has not considered how drainage infrastructure contributes to water pollution, particularly as a conduit for nutrient contamination. It is an opportune time to seek to understand such impacts, on a watershed-scale and with an ecosystem approach, in order ensure pollution prevention measures are considered.

BACKGROUND

Earlier this year, the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) consulted on the Drainage Act Discussion Paper (<https://ero.ontario.ca/notice/019-1187>); the

comment period commenced on Jan 17, 2020 and ended on Feb 18, 2020. In addition to the Environmental Registry of Ontario (ERO) notice, OMAFRA hosted workshops with “key stakeholders” – invitations were extended to municipalities, conservation authorities, drainage industry, and general farm organizations.

The ERO notice states:

OMAFRA is proposing changes to the *Drainage Act* that would:

- provide the minister with legislative authority to develop and sign off on technical protocols such as the *Drainage Act* and *Conservation Authorities Act* Protocol
- create a new streamlined *Drainage Act* process for minor improvements
- enable a simplified process to update the engineer’s report to account for changes to the design made during construction

OMAFRA is moving ahead with the legislative amendments, as proposed in Schedule 4, Bill 197, COVID-19 Economic Recovery Act, 2020 (<https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-197>) introduced for first reading on July 8, 2020.

It is CELA’s understanding that the proposed amendments are broad in nature and the details will be further developed within regulations. Before moving ahead with any regulations, OMAFRA intends to conduct further public consultations. CELA further understands that the intention of the proposed amendments is to:

1. simplify the process for minor improvements to drainage works (to be prescribed in regulations), such minor improvements could include an emergency situation (such as a culvert caving in) that requires immediate attention or addressing wear and tear
2. ensure a swifter process regarding updating an engineer’s report when something unexpected happens (such as coming across unanticipated soil type or boulder than cannot feasibly be removed); currently the process can take a year and it is likely that there will be a reduction in number of required meetings and amount of time to 90 days
3. provide authority to update/adopt protocols (such as the [Drainage Act and Conservation Authorities Act Protocol](#) developed by the inter-agency Drainage Act & Section 28 Regulations Team, aka DART Protocol); and OMAFRA is interested in what additional guidance, procedures, protocols will be needed

PRELIMINARY ANALYSIS

Upon review of the proposed amendments to the *Drainage Act*, the following preliminary analysis is provided. References to the Minister below (unless otherwise specified) are the Minister of Agriculture, Food and Rural Affairs. Updated and/or additional analysis may follow. A detailed summary of the proposed Schedule 4 amendments is provided in the Appendix below.

1. Notice provisions

Many provisions that currently detail who will be sent notices will be replaced with Minister’s discretion to prescribe such persons. In several such provisions, this involves notice to local

municipalities and/or conservation authorities. It is possible that those currently entitled to notice will not be in the future.

2. Two categories: major and minor improvements to drainage works

There will be two categories for improvements to drainages works: major and minor. Some “major improvement projects” are to be listed within the legislation. Otherwise, unless something is “prescribed” as “minor” it will be “major”. Notice of “major improvement projects” will be sent to conservation authorities (in addition to any other “prescribed persons”). Any process for approving “minor improvements” is at the discretion of the Minister (to be made by regulation).

3. New process for amendments to engineer’s report

A new process for amendments to an engineer’s report is enabled. Details will need to be set out in regulations, at the discretion of the Minister.

4. New discretion to adopt/amend guidelines, protocols, procedures

New discretion will be delegated to the Minister to adopt and amend regulated “guideline, protocol or procedure” (and require compliance with the same). It isn’t clear how such compliance will be enforced (eg, there are no new offence provisions). As well, it is unclear if or how the *Environmental Bill of Rights* will apply to proposals for any new “guideline, protocol or procedure”. The *Drainage Act* is not currently prescribed for the purposes of Part II of the EBR (s3(1), [O Reg 73/94](#)), although the Ministry is prescribed (s1, s2).

Generally, the proposed amendments are enabling. Without information about the specific language to be included in any future regulations, the full impact of the changes cannot be assessed. As such, CELA reiterates our response to the earlier ERO notice (see submission dated February 18, 2020, <https://cela.ca/proposed-changes-to-drainage-act/>). These comments continue to apply, as there will need to be further work done to develop regulations, if the proposed amendments to the *Drainage Act* are enacted.

Canadian Environmental Law Association (CELA) is writing to encourage the Ontario Ministry of Agriculture, Food and Rural Affairs (OMAFRA) to work with other ministries, agencies, and the interested public to develop legal and policy reforms which will create climate resilient communities. Piecemeal reforms, aimed primarily at reducing alleged “red tape”, will not enable Ontario to address the biodiversity crisis and climate change urgency that we are currently facing.

The proposed changes, to provide OMAFRA with legislative authority to authorize technical protocols, must be done in a manner that enables and encourages ministerial and agency collaboration. OMAFRA’s role must be one of partnership, not holding authority over another ministry’s jurisdiction (eg, the Ministry of Natural Resources and conservation authorities’ roles in wetland protection and restoration). Further, any authority to establish technical protocols must continue

to require public participation in advance of decision-making, pursuant to Ontario's *Environmental Bill of Rights, 1993* (EBR).

CELA encourages OMAFRA to establish reasonable limitations to what can be dealt with by a streamlined process, so that there are no unintended consequences. Drainage works regulated under the *Drainage Act* have already been wholly exempted under the *Environmental Assessment Act* (see s5(2)(c), [O Reg 334](#)). Agricultural drainage projects have historically caused wetland losses throughout southern Ontario (see Estrin & Swaigen, *Environment on Trial* (3rd ed.) (1993: Emond-Montgomery, Toronto), at page 336). Consequently, a comprehensive and coordinated inter-agency approach is needed to fully utilize all applicable provincial authority to ensure that Ontario's remaining wetlands are not adversely impacted or degraded by further drainage activities. Seeking consensus among partner ministries, agencies and others is a possible mechanism to ensure the proposed processes and any associated technical guidance will achieve the desired outcome. The [Drainage Act and Conservation Authorities Act Protocol](#) developed by the inter-agency Drainage Act & Section 28 Regulations Team (DART) is an example of jointly developing policies. If it is not possible to achieve consensus, then it would be inappropriate to allow OMAFRA to impose policy on other jurisdictions.

CELA recognizes the importance of well-maintained drainage infrastructure and the various efforts to incentivize ecosystem services on agricultural lands (eg, [ALUS Canada](#)). With respect to ensuring drainage infrastructure is properly maintained, repaired, and operated, there needs to be adequate resources committed/raised for this purpose. Investment in such preventative maintenance for flood management purposes is becoming increasingly important.

Further, there needs to be meaningful public participation in government decision-making. Webinars were offered by OMAFRA for "key stakeholders" only – invitations to municipalities, conservation authorities, drainage industry, and general farm organizations. To avoid unintended consequences and ensure consistency with the EBR, broader participation is strongly encouraged.

Finally, OMAFRA consultations are separate and disconnected from the on-going conservation authorities consultation being conducted by the Ministry of the Environment, Conservation and Parks.

CELA recommends that a meaningful, comprehensive consultation process be established in order to determine how best to modernize policies and laws to address the biodiversity crisis and need for climate action. Creating resilient communities which are protected from floods and droughts requires broad cooperation and coordination. Consultations should include: relevant ministries; municipalities; First Nations and Métis communities; environmental organizations; scientific community; industrial, agricultural, recreational and tourism sectors; and conservation authorities.

If the amendments are enacted as proposed, CELA recommends that there be a clear mechanism established that permits “minor improvement projects” to be “elevated” to “major improvement projects” under circumstances that are warranted. If a project is mis-categorized, there must be some means to correct course.

Finally, CELA notes that this modernization effort (to date) has not considered how drainage infrastructure contributes to water pollution, particularly as a conduit for nutrient contamination. It is an opportune time to seek to understand such impacts, on a watershed-scale and with an ecosystem approach, in order ensure pollution prevention measures are considered.

APPENDIX: Detailed summary of proposed amendments

If enacted, Schedule 4, Bill 197 will result in changes to the *Drainage Act* as follows:

- Notice of decision to proceed with drainage works construction on petition (s5(1)) will be sent to “prescribed persons” [currently notice sent to municipalities affected & conservation authorities with jurisdiction or Ministry of Natural Resources if no conservation authority]
- Notice that an environmental appraisal is required for drainage works constructed on petition (s6(1)) can be initiated by “prescribed persons” that received notice [currently can be initiated by local municipality, conservation authority or Ministry of Natural Resources that received notice]
- A filed preliminary report (by an engineer, at request of initiating municipality) is to be sent to “prescribed persons” with the date of the council meeting at which the preliminary report will be consider (s10(2)) [currently all owners of land within area requiring drainage, public utility or road authority that may be impacted, local municipality or conservation authority entitled to notice (or Ministry of Natural Resources, if none), and the Minister]
- A referral of an environmental appraisal to the Tribunal (s10(8)) can be made by the Minister (drainage intended for agricultural purposes) or “prescribed persons” (drainage for other purposes) [currently same for agricultural purposes, as well as by the Minister when a conservation authority or regional Ministry office reports that the environmental appraisal is unsatisfactory]
- Notice of proceeding with drainage works (s41(1)) to be sent to “prescribed persons” [currently land owners and municipalities for which compensation or allowances have been provided, conservation authorities with jurisdiction over lands affected, Minister of Natural Resources when public lands affected, and the Director]
- Removing ability for an initiating municipality to correct a “gross error in the report” on application to the Tribunal during specified time (s58(4))
- Removing ability to deepen, widen or extend drainage works without engineer’s report (s77(1)) and removing ability move drainage works off road with engineer’s report (s77(2)) or engineer’s opinion (s77(3))
- Defining “major improvement projects” [currently listed as “projects” under s78(1.1)]
 - replacing “otherwise improving, extending to an outlet or altering the drainage works” with “extending the drainage works to an outlet” and “improving or altering the drainage works if the drainage works is located on more than one property”
 - adding any other works *not* prescribed as a “minor improvement”
- Notice of intent to undertake “major improvement project” (s78(2)) will continue to be sent to conservation authority with jurisdiction, as well as to “prescribed persons”
- Minister will have discretion to prescribe a process for approving minor improvements to a drainage works (s78(5))
- Enabling provisions for amendments to engineer’s report (s84.1) for the purpose of section 4 petition or the purpose of section 78
- Adding discretion for the Minister to make regulations for anything described as being “prescribed” (s125(c))

- Adding provisions for the Minister to adopt (s125(1)) or amend (s125(2)), and require compliance with, a regulated “guideline, protocol or procedure”, including when such regulated “guideline, protocol or procedure” comes into effect (s125(3))