

Recently, from several different sources, I've heard arguments and disagreements about the type of work that can and cannot be done as maintenance under the Drainage Act. Arguments are being presented that items such as bank seeding, sediment traps, minor bank stabilization cannot be completed unless it is specifically identified in the engineer's report for that drain.

At the Drainage Engineer's Conference in October 2000, I presented a paper on Drain Maintenance and Repair and I repeated the presentation at the January 2001 LICO/DSAO convention. Copies of the presentation were included in the Proceedings of the Drainage Engineers Conference and individual copies were handed out at the January 2001 presentation. I spent some time researching for this presentation and also consulted our Ministry solicitor on some of the issues. More importantly, I used the 1974 report of the Select Committee on Land Drainage as a key information source.

A copy of this paper is attached and I think it addresses these questions. Please read it carefully and share it with your Chapter members. If you disagree with the content of the paper, I would appreciate your comments.

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THE DRAINAGE ACT

MAINTENANCE AND REPAIR

Municipalities are assigned the responsibility of maintaining and repairing drainage systems that have been constructed under the *Drainage Act*. The physical activities associated with these responsibilities are well known and include sediment removal, brushing, spraying, bank stabilization, culvert repair, tile repair, beaver dam removal, and many more. However, there are other aspects of drain maintenance and repair that have received very little attention in the past, and the purpose of this presentation is to explore the following topics in more detail:

- "Maintenance" And "Repair": What's The Difference?
- The Role Of The Drainage Superintendent
- Administrative Aspects Of Maintenance And Repair

"Maintenance" And "Repair": What's The Difference?

The activities of "maintenance" and "repair" are both performed under the supervision of the drainage superintendent, often require entry onto private property and are assessed to the landowners in the watershed. Both activities are equally eligible for the available grants from the province. For these reasons, it is common to combine both activities into the single term of "maintenance". In addition, the *Drainage Act* also permits the council to authorize the drainage superintendent to perform minor improvements to a drainage works. It is important to be able to distinguish between these various activities. Section 1 of the Drainage Act provides some definitions for these terms:

1. **Maintenance** means the preservation of a drainage works;
2. **Repair** means the restoration of a drainage works to its original condition;
3. **Improvement** means any modification of or addition to a drainage works intended to increase the effectiveness of the system.

These activities were not distinguished or defined prior to the 1975 *Drainage Act*.

In order to explore the differences between these activities, it is important to examine the reason why these activities were distinguished in the 1975 *Drainage Act*. In 1972, a "Select Committee on Land Drainage", chaired by Mr. L. C. Henderson, M.P.P. was appointed by the provincial government. This Committee held a number of meetings across the province and performed a significant amount of research and investigation into land drainage. The final report of the Committee, entitled "Agricultural Land Drainage in Ontario", was tabled in the Legislative Assembly in June 1974. As a result of this report, significant changes were made to the *Drainage Act* in 1975. Chapters X of this report covers "The Drainage Superintendent" and Chapter XI deals with "Maintenance, Repair and Improvement". A reprinting of these chapters are attached for reference.

The following are excerpts from Chapter XI of this report:

"An analogy might be drawn between the maintenance of a car, which is generally considered to involve oil changes, lubrication, etc., and the repair of a car, which might mean rebuilding the motor due either to lack of maintenance or to its age."

"...the Committee viewed maintenance as taking steps to avoid the need for repair work..."

"Maintenance procedures, then, generally involve operations that are intended to retard or prevent the growth of vegetation ... and to remove such growth or other debris.... These operations could also include planting appropriate types of vegetation on channel banks or in natural runs above tile drains to stabilize the soil conditions and inhibit erosion. As a preventative measure, erosion

protection by the use of riprap, piping, or other structural means might be regarded as maintenance under certain circumstances."

"Repairs are steps that must be taken to restore a drainage works to its original condition when it has deteriorated to the extent that the system is not operating effectively."

"Repairs involve removing sediment and other debris that has washed into the open channel or tile drain due to erosion or that has built up over the years and also repairing washouts and erosion on these drains."

"In short, repair work is intended to make a drainage installation comparable to that originally installed and is the appropriate treatment to be undertaken when the original installation is still adequate for the needs of the drainage area."

So what do all of these excerpts from this report mean?

It means that "repairs" must be done in accordance with the plans, profiles and specifications in the engineer's report for a drain. Since "repair" involves the restoration of a drainage works to its original condition, you must have the plans, profiles and specifications in order to ascertain what the original condition actually was. Therefore, sediment removal from an open ditch municipal drain, repair or replacement of a tile municipal drain, repair or replacement of a culvert and many more activities are all considered as "repairs".

However, it also means that "maintenance" is not bound by the plans, profiles, and specifications in the engineer's report, provided the work is for the "preservation" or "well-being" of that drain. Therefore, "maintenance" quite clearly includes activities such as the removal of brush, spray vegetation control and seeding disturbed bank slopes. I believe it would also include the video inspection of a tile municipal drain. The removal of beavers from a municipal drain, performed in compliance with the *Game and Fish Act*, would also be considered "maintenance". Finally, I also believe that "maintenance" would include the installation of silt fences and sediment traps to avoid sediment being deposited in lower reaches of a municipal drain. In summary, using the words from the Select Committee's report, maintenance is taking steps to avoid the need for repair work.

The Role Of The Drainage Superintendent

The position of "drainage superintendent" was introduced into the Drainage Act as a result of the Select Committee's report entitled "Agricultural Land Drainage in Ontario". The following are excerpts from Chapter X of this report:

"It is anticipated that the superintendent would systematically organize and implement programs to maintain and undertake repairs to all the municipal drains

under his jurisdiction. In the case of improvements made without the necessity of an engineer's report the drainage superintendent should provide guidance to council as to the advisability of such a step in addition to subsequently arranging for and supervising the work."

"The Committee recommends that the drainage superintendent be required to report to the municipal council periodically on the condition of all drains within the municipality. It would be necessary for the superintendent to maintain contact with landowners as to the condition of local drains, particularly in municipalities where there is a great deal of drainage activity and where it would be impossible for the superintendent to physically inspect all drains."

"The superintendent must be capable of interpreting plans, profiles, and other related documents such as the engineer's report and the specifications. He should have a working knowledge of the engineer's level and should be able to set and check grades in the field. He should have some knowledge of financial matters so that he will be able to control costing.... He should have ... a general knowledge of basic drain design, erosion control, and in some cases pumping operations."

From this, it is obvious that the Committee envisioned the drainage superintendent to be the local "in-field" manager of the network of municipal drains located within the boundaries of the municipality. They also expected the superintendent to be a "hands-on" person that inspected drains periodically and maintained contact with the local landowners.

Now, much of this seems obvious and is practiced by drainage superintendents in most municipalities today. So why do I mention it? Well, with municipal amalgamation, there seems to be a trend to make the drainage superintendent more of an "office" manager as opposed to a "field" manager. These types of drainage superintendents handle the complaints and do the paper work, but have little time to go and view the actual site, do the survey and talk to the landowners. These jobs are assigned to others. It is obvious from the Select Committee's report that this is not the type of drainage superintendent recommended.

With the larger municipal organizations, it may be more difficult for the "field manager" drainage superintendent to actually report to council. The superintendent may be required to report to a department head such as a "Works Manager", and the department head would then be required to report to council on that department's activities. However, to manage drainage systems effectively, it is important that the drainage superintendent continues to maintain a "hands-on" approach with the drains and the landowners located in the municipality.

Administrative Aspects Of Maintenance And Repair

Sections 74 and 75 of the *Drainage Act* assign the local municipality with the responsibility for maintenance and repair of "drainage works", better known as "municipal drains". Many of these duties and responsibilities are clearly identified in these sections, but the procedures to be used to assess the maintenance or repair cost are vague. There are also some misconceptions about some aspects of maintenance and repair. The next part of this paper intends to provide some specific interpretation and direction to municipalities for undertaking maintenance and repair projects and for assessing the costs of these projects.

Listed below is the actual wording of these two sections of the *Act*.

74 Any drainage works constructed under a by-law passed under this Act or any predecessor of this Act, relating to the construction or improvement of a drainage works by local assessment, shall be maintained and repaired by each local municipality through which it passes, to the extent that such drainage works lies within the limits of such municipality, at the expense of all the upstream lands and roads in any way assessed for the construction or improvement of the drainage works and in the proportion determined by the then current by-law pertaining thereto until, in the case of each municipality, such provision for maintenance or repair is varied or otherwise determined by an engineer in a report or on appeal therefrom. R.S.O. 1980, c. 126, s. 74.

75(1) The council of any local municipality undertaking the repair of a drainage works without the report of an engineer, shall, before commencing the repairs,

(a) give two readings to a by-law for undertaking such repairs, which by-law shall recite the description, extent and estimated cost of the repairs to be done and the amount to be contributed therefor by each local municipality affected by the drainage works and shall be known as a provisional by-law; and

(b) serve upon the head or clerk of any municipality liable to contribute any portion of the cost of such repairs a copy of the provisional by-law,

and the council of any municipality so served may, within forty days thereafter, appeal from such by-law to the Tribunal on the ground that work provided for in the by-law is unnecessary or that such drainage works has never been completed through the default or neglect of the municipality whose duty it was to do the work.

75(2) The council of every municipality served with a copy of the provisional by-law shall, forthwith after the time for appealing from such by-law has expired and there are no appeals or after all appeals have been decided, pass a by-law to raise the amount assessed against lands and roads in the municipality, as stated in the provisional by-law or as determined on appeal therefrom, and shall pay over such amount within a reasonable time to the treasurer of the initiating municipality.

75(3) The council of any municipality shall not be required to assess and levy the amount charged for maintenance or repair of a drainage works more than once in every five years if the total expense incurred does not exceed the sum of \$5,000, in which case sections 65 and 66 of the *Ontario Municipal Board Act* do not apply. R.S.O. 1980, c. 126, s. 75.

Several issues or misconceptions concerning the maintenance or repair of drains, and the assessing of these costs are addressed below in the form of questions and answers:

Q. Is the total value of maintenance and/or repair work on a municipal drain limited to \$4,500?

A. No, there is no limit on the value of maintenance or repair work that can be performed by a municipality on a municipal drain under the authority of Section 74. Some municipalities have mistakenly assumed that the \$4,500 limit for "minor improvements" contained within Section 77(1), also applies to maintenance and repair under Section 74 and 75. This is incorrect.

Q. Subsection 75(1) directs a municipality to pass a provisional by-law for a repair project and serve it on the head of any other municipality liable to contribute any portion of the cost of the project. Is a by-law of this nature only required for "repair" projects and not for "maintenance" projects? Is it only required when another municipality is liable to contribute a portion of the cost of the project? When should third reading be given to this by-law?

A. The wording of subsections 75(1) and 75(2) implies that the purpose of this "authorization" by-law is to notify any other involved municipality that they will be expected to contribute towards a project in another municipality and to give them an opportunity to appeal to the Drainage Tribunal. The instructions in these subsections of the Act do not make sense if only one municipality is involved in the project. Therefore, it is our opinion that:

a) this procedure should be followed (by-law passed) for both maintenance and repair projects where another municipality is expected to contribute towards the project. Although not stated in this section of the Act, the third reading of the by-law should be given after the time for appealing to the Drainage Tribunal has expired.

b) This procedure does not have to be followed (authorization by-law is not required) for a maintenance or repair project that does not affect any other municipality.

Please note that, as of January 1, 2000, this process has not been tested in the court of the Drainage Referee. When it is tested, this paper will be updated with the benefit of a court interpretation. It may be prudent for a municipality to pass a

general by-law concerning minor maintenance and repair (e.g. cleaning catchbasins, removing beaver dams, etc.) at the start of the year and serve it on adjacent municipalities setting out how that municipality will be notified of projects over a certain amount, e.g. \$2000.

Q. Is a municipality required to pass a "levying" by-law after a maintenance or repair project is performed in order to levy the assessments upon the appropriate landowners?

A. The answer is "yes". While Section 74 is silent on the subject of a "levying" by-law, Subsection 75(2) does state that every involved municipality must pass a by-law to raise the amount assessed in that municipality. Subsection 61(1) also gives a similar instruction:

"The council of each local municipality that is required to raise the whole or any part of the cost of the drainage works shall by by-law impose upon the land assessed for the drainage works the assessment with which it is chargeable..."

Some may argue that Section 61 only applies to construction and improvement projects, but in fact, Section 61 is a general section that applies to all activities under the *Drainage Act*. This statement is supported by Subsection 61(4), which states:

"The assessments and rates imposed under this Act shall be deemed to be taxes, and the provisions of the Municipal Act as to the collection and recovery of taxes, and that proceedings that may be taken in default of payment thereof, apply."

Many municipalities use this subsection to collect their maintenance and repair assessments in the same manner as taxes.

Q. How soon after a maintenance and repair project is completed should the cost be assessed to the landowners?

A. The *Drainage Act* does not specifically state how soon after a maintenance or repair project is completed that the cost should be assessed to the landowners. However, we get an indication of the intent in Subsection 75(2) where it indicates that another municipality "...shall forthwith...pass a by-law to raise the amount assessed..." It seems that the intent of the legislation was to levy the costs as soon as possible after the project is completed.

Q. How should Subsection 75(3) be interpreted or used?

A. If maintenance and repair costs are supposed to be levied "forthwith", or as soon as possible after the project is completed, then Subsection 75(3) is

providing an exception to that rule. It indicates that a municipality may accumulate costs on a single municipal drain for up to five years or \$5,000 before assessing those costs to the landowners.

Q. What should a municipality do if it accumulates drain maintenance or repair costs on a single municipal drain for longer than five years or for greater than \$5,000? Can these costs still be assessed to the landowners?

A. The *Drainage Act* does not clearly state what should be done with, or who is responsible for these costs. Good arguments can be made both, that the costs can still be assessed to the landowners or that the council of the municipality should absorb these costs. Councils should ensure that the costs of maintenance or repair are assessed as soon as possible after the project is complete or before the five years or \$5,000 have accumulated on a single municipal drain. In this way, they will avoid any potential challenge.

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