

Manitoba Ombudsman

REPORT UNDER

THE OMBUDSMAN ACT

CASES 2013-0297 and 2013-0298

MANITOBA SUSTAINABLE DEVELOPMENT

(formerly MANITOBA CONSERVATION AND WATER STEWARDSHIP), and

THE RURAL MUNICIPALITY OF FRANKLIN

REPORT ISSUED ON JULY 13, 2016

SUMMARY

A property owner in the Rural Municipality of Franklin (the RM) claimed that overland flooding of his property was due to illegal drains and inappropriately sized culverts. He alleges that Manitoba Sustainable Development, Water Stewardship and Biodiversity Division (WS) has failed to enforce licencing requirements and drain maintenance. The complainant also believes that the RM has not properly maintained drains adjacent to his property which he says has contributed to the flooding of his land.

Based on our investigation, Manitoba Ombudsman did not find evidence to support the allegation that WS is not meeting its obligations for licencing and maintaining drains, as set out in legislation, procedure and policy. Nor did Manitoba Ombudsman find evidence to support the complaint that the RM is not meeting its obligations for maintaining drains as set out in legislation, by-laws and policy.

OMBUDSMAN JURISDICTION AND ROLE

Manitoba Ombudsman is an independent office of the Legislative Assembly of Manitoba, reporting to the assembly through the Office of the Speaker. Under the Ombudsman Act, Manitoba Ombudsman investigates administrative actions and decisions made by government departments and agencies, municipalities, and their officers and employees. Investigations may be undertaken on the basis of a written complaint from a member of the public, or upon the ombudsman's own initiative.

Ombudsman investigations typically assess actions taken or decisions made against a benchmark established by government. Sometimes that benchmark is provincial legislation or a municipal by-law. On other occasions, it is written policy or established procedures implemented to give effect to legislative purpose.

The goal of administrative investigations is to determine the validity of complaints and to identify areas requiring improvement. If a complaint is supported by a finding of maladministration, the ombudsman may make recommendations pursuant to section 36 of the Ombudsman Act. Administrative investigations can also identify areas where improvements may be suggested to a government body without a finding of maladministration. In cases concerning an impact on individual rights or benefits we also examine the fairness of the action or decision.

THE COMPLAINT

On September 26, 2013, a landowner in the RM of Franklin filed a complaint with our office contending that there are inappropriately sized culverts and unlicensed drains adjacent to the section of land wherein his property is located, and that WS is not enforcing licencing requirements and drain maintenance in this area. The complainant further alleges that improvements made to upstream sections of the municipal ditches increase the volume and speed of the water flowing downstream, and that existing culverts cannot handle this increase of water which contributes to the flooding of his property.

The complainant is also of the view that the increase in surface water impacting his property is partially due to the RM's alleged lack of drain maintenance near his land.

KEY ISSUES

- 1. Did WS meet its obligations for licencing and maintaining drains as set out in legislation and policy?**
- 2. Did the RM meet its obligations for maintaining drains as set out in legislation, by-laws and policy?**

SCOPE OF OUR REVIEW

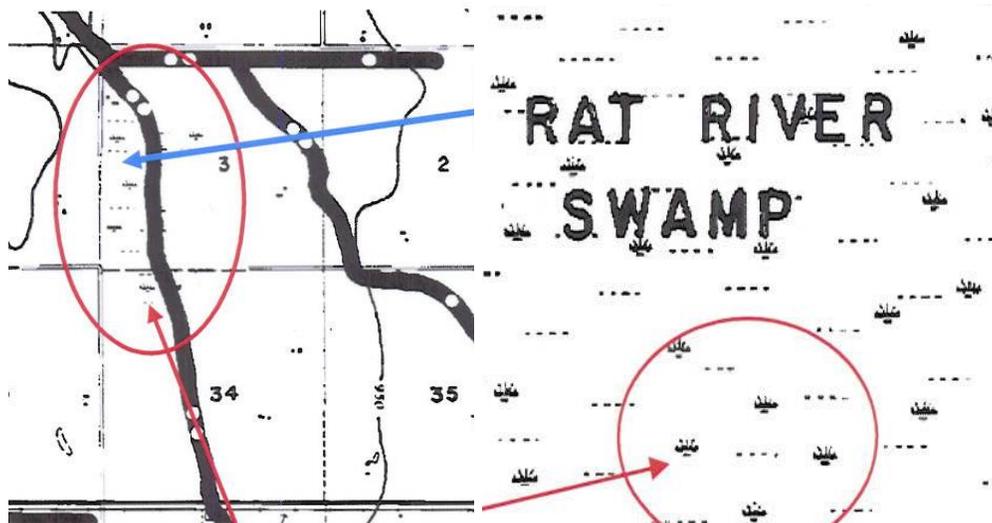
Our investigation of this complaint included the following:

- Review of the Municipal Act, the Water Rights Act, the Water Rights Regulation and the Water Resources Act.
- Review of the RM Drainage Policy Procedures and Standards, the RM's Drainage By-law no. 12-11 and the Water Stewardship Water Control Works and Drainage Licensing policy and procedures.
- Review of documentation received from the complainant;

- Interview with complainant and on-site attendance to his property;
- Review of documentation received from WS;
- Interviews with representative from WS;
- Review of the documentation received from the RM; and
- Interviews with representative from the RM.

HISTORY OF AREA

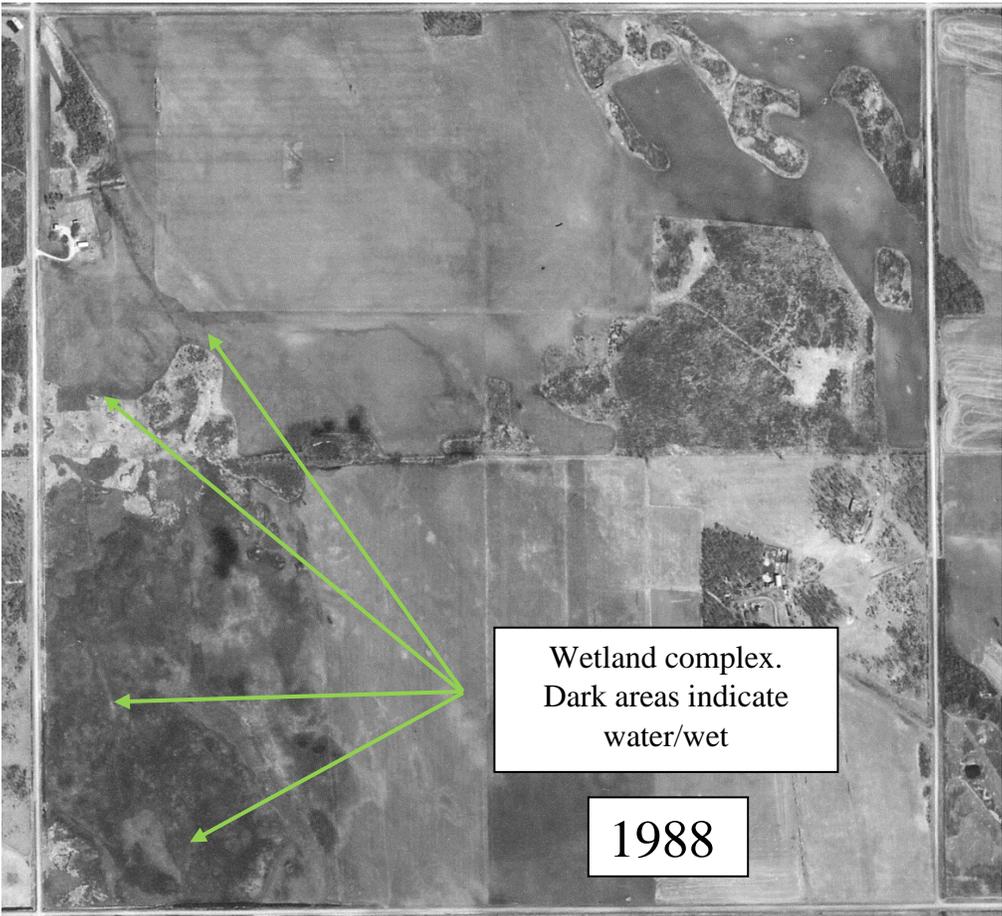
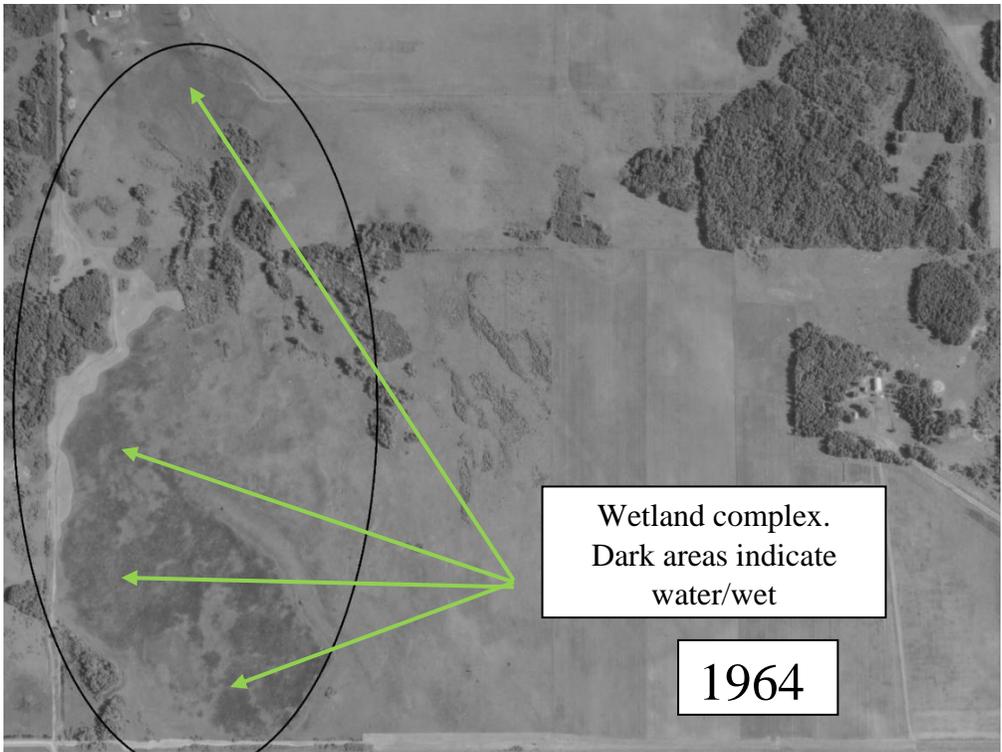
The complainant's property in the Lower Roseau River Watershed is located in the northwest quadrant of section 3-2-5E adjacent to the Rat River Swamp which is identified as historical swampland. This watershed was plotted and mapped by provincial government staff in 1966, with subsequent revisions and updates in 1974, 1986, and 2001. The map identifies the locations of drains, bogs, marshes, wetlands, lakes and artesian wells. According to the map, the area surrounding the complainant's property is categorized as a low lying swampy area.



According to WS, the majority of the drainage infrastructure (culverts, ditches, etc.) was installed as the roads were built in the 1960's and 1970's and has not been altered.

WS advised that much of the drain portion of the drainage system in this area exists largely in its natural state. Some of the drainage channels have steeper slopes and are well defined, where others have a lesser grade creating catchment areas, causing water from the drainage system to spread out forming marshes and wetlands along the channel.

The two aerial photographs provided to our office by WS and shown on the next page reflect wet low lying areas dating back to 1964 in the western portion of this section of land:



CURRENT DRAINAGE SITUATION



Drains for NW1/4 3-2-5E (source: Manitoba Sustainable Development)

<i>Culvert</i>	<i>Approved Size (in inches)</i>	<i>Actual Size (in inches)</i>	<i>Water Rights Licence #</i>
A	54 x 38	54 x 38	14-WCW-0484
B	30	30	no licence
C*	36	36	no licence
D	18	18	14-WCW-0484
E	24	24	14-WCW-0484
F	30	30	14-WCW-0484
G	30	30	no licence
H	30	30	no licence

* WS advised that culvert “C” was mistakenly referenced as a 24 inch culvert in a letter from the assistant deputy minister of WS to the complainant dated March 14, 2012. This culvert is actually 36 inches and has been in place for many years.

There is also a natural drain flowing east of the complainant’s yard site which is located adjacent to an upstream branch of the Jordan River.

ANALYSIS

1. Did WS meet its obligations for licencing and maintaining drains as set out in legislation, and policy?

In Manitoba, water regulation and management is carried out by Manitoba Sustainable Development. The Water Rights Act (the Act) defines water control works as follows:

"water control works" means any dyke, dam, surface or subsurface drain, drainage, improved natural waterway, canal, tunnel, bridge, culvert borehole or contrivance for carrying or conducting water, that

- (a) temporarily or permanently alters or may alter the flow or level of water, including but not limited to water in a water body, by any means, including drainage, or*
- (b) changes or may change the location or direction of flow of water, including but not limited to water in a water body, by any means, including drainage.*

Clauses 3(1)(a)(b) and (c) of the Act outline the parameters for the use of water in the province as follows:

- 3(1)** *Except as otherwise provided in this Act or the regulations, no person shall*
- (a) in any manner whatsoever use or divert water, unless he or she holds a valid and subsisting licence to do so; or*
 - (b) construct, establish, operate or maintain any works, unless he or she holds a valid and subsisting licence to do so; or*
 - (c) control water or construct, establish, operate or maintain any water control works, unless he or she holds a valid and subsisting licence to do so.*

WS's Water Control Works and Drainage Licensing policy and procedures outlines that anyone wanting to change or alter the drainage of his or her land must submit an application for a licence to construct works to WS's Drainage and Water Control Licensing Section. The water control works must also be proven acceptable to municipal or provincial government if the works affect the location of flow of water on municipal or provincial property. Additionally, the works must not alter the natural state of seasonal, semi-permanent or permanent marshes including classes III, IV, and V according to the Stewart and Kantrud marsh classification system which is utilized by WS in Manitoba to classify wetlands. The wetland classifications that cannot be altered are defined as follows:

- *Class III: Seasonal ponds are characterized by shallow marsh vegetation, which generally occurs in the deepest zone. They are usually dry by mid-summer.*
- *Class IV: Semi-permanent ponds and lakes are characterized by marsh vegetation, which dominates the central zone of the wetland, as well as coarse emergent plants and submerged cattails, bulrushes and pond weeds. These wetlands frequently maintain surface water throughout the growing season.*

- *Class V: Permanent ponds and lakes have open water in the central zone, which is generally devoid of vegetation. Plants in these wetlands include cattails, red swamp fire and spiral ditch grass.*

The information we received designates the land south of the complainant's property as a Class IV semi-permanent wetland, whose natural state cannot be altered.

Unlicensed drainage

WS advised our office that in response to the complainant's allegations regarding unlicensed drainage, it reviewed the drainage system for section 3-2-5E where the complainant's property is situated. WS also indicated that both the unlicensed and licensed culverts for this drainage system existed in their present condition prior to the complainant purchasing his property in 2008.

As part of the drainage regulatory history of Manitoba, WS advised that large numbers of drains throughout the province were constructed prior to or without knowledge of the licencing requirements of the Water Rights Act proclaimed in 1988. As of 2008, WS updated its policies and its focus on water licencing enforcement for individuals or public entities, to ensure a water rights licence was obtained prior to installing, reconstructing, or maintaining a drain as follows:

*It is Water Stewardship's intention to have any new or maintenance projects in Franklin or any other municipality licenced once work is anticipated for new or existing drains. Water Stewardship staff are attempting to address the drains that come to our attention that are an issue to downstream or upstream landowners. **It is important to recognize that not all unlicensed drains are illegal, they are simply unlicensed.** If a drain is an issue, we will either ask to have it altered or mitigated in some fashion where it could be licenced, or it may have to be closed all together. [emphasis added]*

WS indicated that some of the unlicensed drainage works predate licencing requirements and are not subject to enforcement or closure simply due to their existence.

WS further advised that its enforcement approach to unauthorized drainage works is not automatically punitive, if the drainage work is licensable it will attempt to bring the individual into compliance and may licence projects after the work has already been completed. WS also indicated that since the complainant purchased the property in 2008:

There has been some maintenance to the drainage system – meaning some culverts were replaced for like culvert sizes, and some existing drains were cleaned out, but the overall watershed remains intact. One drain has been constructed in the watershed, but it has been licenced by Conservation and Water Stewardship.

WS further advised that water rights licence 14-WCW-0484 was issued for specific infrastructure improvements the RM applied for and that the approved works do not include, identify or licence any further infrastructure within section 3-2-5E. (Note: a licence issued by WS will not encompass or identify all water control works for the area surrounding a licensed project.)

Inappropriate culvert size

WS advised that in response to the complainant's allegations regarding inappropriate culvert size, it reviewed the size and location of all culverts for section 3-2-5E where the complainant's property is situated.

The complainant believes that the volume of water flowing through the 18, 24 and 30 inch culverts located upstream from his property produces a higher volume of water in the municipal roadside ditch than can be accommodated by the 30 inch culvert through his driveway. WS's hydraulic assessment of this ditch specifies that the complainant's driveway:

...culvert does take some flows from the municipal drain, but the roadside drain is higher than the wetland located to the south of the [complainant's] yard site. Water that does flow from the three upstream culverts...does not make it to [the complainant's] driveway culvert – as it travels the lowest route via the swamp and natural drain around the yard site by-passing the 30 inch culvert through [the complainant's] driveway.

This drain may move some water in high flow events, but the majority of the water in this section follows the natural drainage route through the swamps and natural drainage channel.

The data we reviewed reflects WS's assessment of the existing culvert sizes and hydraulic functionality for section 3-2-5E as follows:

Culverts inletting surface water into section 3-2-5E

<i>Culvert</i>	<i>Culvert Location</i>	<i>Size (in inches)</i>	<i>Culvert Flow-Cubic Feet per Second (cfs)</i>
C	NE 3-2-5E	36	30.0 cfs
D	SW 3-2-5E	18	5.3 cfs
E	SW 3-2-5E	24	11.0 cfs
F	SW 3-2-5E	30	19.0 cfs

Culverts outletting surface water from section 3-2-5E

<i>Culvert</i>	<i>Culvert Location</i>	<i>Size</i>	<i>Culvert Flow-Cubic Feet per Second (cfs)</i>
A	NW 3-2-5E	54" x 38"	113.0 cfs

Total culvert inflow capacity for section 3-2-5E: 65.3 cfs

Total culvert outflow capacity from section 3-2-5E: 113.0 cfs

Given the hydraulic function of the culverts servicing water flows within the municipal drainage system for section 3-2-5E, WS is of the opinion that the culvert capacities, sizes and locations are more than adequate and do not contribute to flooding on the complainant's property. In our view, this conclusion is supported by the culvert capacity as identified in the above table.

WS's assessment of water flows for this area also identified that the complainant's property has historically been prone to flooding during spring runoff and after heavy rains. The information we reviewed shows that the southern portion of the complainant's property borders a large historic wetland which at times of high flow has elevated water levels that affects adjacent properties.

South drain

The complainant also expressed concern regarding a drain constructed south of his property near Tolstoi. He believes this drain increases the amount of water entering the drainage system downstream which subsequently affects his property.

The data we received from WS outlines that this licensed drain was constructed to improve flood protection. It reroutes existing surface water around a group of residences and has, according to WS improved the drainage system for the watershed from a hydraulic perspective by collecting and controlling overland water runoff rather than letting water flow uncontrolled through the drainage system. WS further advised that this drain does not introduce more water to the watershed, but rather redirects and controls the water that already enters the drainage system upstream and downstream from the complainant's property. A measurable increase in flows cannot be attributed to these works.

Natural drain

WS acknowledged that there is a natural drain located immediately east of the complainant's yard site which contributes to the flooding on the complainant's property during periods of high water levels, as it is physically lower than the provincial drain located west of the complainant's property. The information supplied by WS outlines that the portion of the natural drain to the east of the complainant's property has a lesser grade and non-defined borders, creating catchment areas which causes water from the drainage system to spread out when water levels are high. WS advised that most of the excess surface water for this catchment area is conveyed through this drain and at times of high flow is susceptible to intermittent flooding.

This natural drain is an upstream branch of the Jordan River, which has remained largely unaltered from its natural state. Portions of the Jordan River Drain are provincially owned and designated as provincial waterways, while other parts of the drain are located on private land.

These provincial waterways are recorded on watershed maps by the province. WS advised that according to the Manitoba provincial waterways watershed 2 map, the portion of the drain in section 3-2-5E which affects the complainant's property is not categorized as a provincial waterway. This drain is located on private land and flows from the southwest to the northwest quarters of this section. As the regulators of water for the province, WS advised:

Ownership is determined solely by where the drain sits physically on the landscape. If the drain rests on municipal property, it is the responsibility of the RM to maintain. If the drain rests on private property, it is the responsibility of the landowner to maintain.

WS advised that if a landowner wishes to maintain a natural drain located on private land, brush clearing and grass mowing can occur as long as it is simply vegetation removal without excavating or altering the depth or capacity of the drain itself. If excavation work is being considered, the landowner would need to apply for a water rights licence in accordance with the Act.

Information we reviewed indicates that WS advised the complainant that he can maintain the natural drainage channel by removing brush or mowing the area to facilitate drainage.

2. Did the RM meet its obligations for maintaining drains as set out in legislation, by-laws and policy?

The complainant expressed concerns regarding the RM's lack of maintenance of the drains adjacent to his property, as he believes it contributes to flooding on his property.

The complainant believes that WS is at fault for not enforcing the RM's obligation to undertake this drain maintenance. Although the Water Rights Act provides WS with the authority to issue water rights licences in Manitoba, WS outlined its authority to enforce licensed drainage works as follows:

Water Rights Licence 14-WCW-0484 was issued to the RM of Franklin to undertake the works under the auspice of The Water Rights Act, however the licence does not compel the RM to undertake the works it simply allows them to undertake the works outlined in the licence should the municipality choose to do so.

The actual undertaking of the works is entirely at the discretion of the municipality – the municipality sets its own priorities related to drainage and other infrastructure expenses, and Conservation and Water Stewardship is not in a position to dictate which projects a municipality moves forward with. Our role is to ensure that any proposed project is licenced in accordance with The Water Rights Act – which this project is. Conservation and Water Stewardship cannot “force” the municipality to undertake this project for reasons explained above.

The correspondence, emails and records we reviewed reveal that the RM has been in communication with the complainant regarding the various drainage issues he raised and has provided regular updates regarding its abilities and limitations to address the complainant's concerns.

The RM advised that its Drainage Policy Procedures and Standards is in place to ensure that any work conducted within the municipal right of way for purpose of drainage improvement is:

- *Designed and constructed to be safe for vehicular traffic;*
- *Constructed so as to not be of a nuisance for the municipality or adjacent/affected landowners; and,*
- *Conforms to provincial legislation and municipal by-laws.*

All proposed work on, over, or along a municipal right of way, that provides for the draining of surface water away from a property, requires an application form to be completed and filed prior to being reviewed and approved by council.

Any individual requesting drainage work, must submit a drainage application to the RM by April 1st to be considered for that year's drainage plan. Upon receiving a drainage application, council is tasked with evaluating the potential impact of the proposed drainage improvements to identify priority drainage projects and maintenance required, relative to the resources available to the municipality. Drainage applications are considered by council at monthly council meetings.

The complainant has at times experienced issues with flooding on his property from 2008 to present and has communicated his concerns to the RM regarding how the lack of maintenance to local drains affects his property. As such, the complainant submitted a drainage application to the RM in 2011, requesting maintenance to a municipal drain located west of his property.

Subsection 294.1(3) of the Municipal Act outlines that a municipality must maintain every drain within its boundaries to a standard that is appropriate for the use to which the municipality expects the drain to be put.

The RM advised it received an application requesting drainage work from the complainant on October 7, 2011, requesting the maintenance to the drain located west of his property. The RM denied his application in a letter to the complainant dated March 28, 2012, as follows:

Following the review of the application the Municipality feels that the drains within the application are appropriate for the use to which the Municipality expects the drain to be put and therefore the application was denied.

In 2014, the complainant submitted a drainage application to the RM again requesting maintenance to a municipal drain located west of his property and also to the Jordan River Drain located east of his property.

The complainant believes that the RM is obligated to maintain the drain located west of his property in accordance with water rights licence 14-WCW-0484, as this licence authorizes maintenance to this drain. The RM is of the view that:

...the Water Rights Licence gives that Municipality the authority to undertake the works outlined in the licence...however the licence itself does not obligate or compel the Municipality to undertake the works authorized by the licence.

The RM further advised that it is of the opinion that its obligations are being met in accordance with the Municipal Act, as the drain located west of the complainant's property is appropriate for the use to which the municipality expects the drain to be put.

The RM also maintains that it has the autonomy to decide how municipal resources for drainage are spent as follows:

The licences from Water Stewardship provide the Municipality with the legal authority to construct or maintain a ditch in accordance with the provisions of The Water Rights Act and regulations; The Municipality approves the drainage plan for municipal drainage work.

The complainant expressed further concerns regarding the RM not maintaining a portion of the natural drain located east of his property. The RM asserts that the municipality does not own the drain, nor is it designated as a provincial drain on the section of land where the complainant's property is situated. The RM indicated that the drain located east of the complainant's property is on private land and therefore it is not responsible for maintaining this drain.

In the correspondence and emails we reviewed, the RM does recognize that the drain in its natural state creates drainage issues affecting the complainant and some other landowners in the municipality. As part of its efforts to address these drainage concerns, the RM retained a surveying, geomatics and engineering firm on July 9, 2014, to investigate drainage issues associated with the Jordan River Drain. The firm assessed the existing condition of the drain and compiled its findings into a report dated December 30, 2014, as follows:

This area is best described as 22 sections of land southwest of the intersection of Highways #59 and #201. The drain has several branches and in some locations it is difficult to decipher its alignment as it degenerates into swamp/flood plain terrain. The Jordan Drain runs mostly south-north through this area.

The drain has been uncontrolled and unmaintained for an unprecedented amount of time. (...) No engineering has ever been undertaken for the drain and this is evident based on the natural alignment of the Jordan Drain. There is also a lack of maintenance throughout.

The RM also acknowledges that it mailed a letter on August 1, 2012, to all landowners along the Stewart and Jordan River Drains within the municipality as part of its efforts to lobby the province to maintain and improve provincial drains as follows:

Council is requesting your cooperation and permission to assist the Municipality to coordinate some of the required maintenance in the future. Council hopes to work with the Province to have these maintenance issues addressed. However, Council may decide to take action and aerial spray the overgrowth of brush along these drains. If you would like Council to initiate the process for this work to be completed your permission is necessary.

The RM advised that it did not receive many responses back from landowners granting permission for maintenance to these drains. Nor did it receive support from the province to maintain these drains.

In an attempt to assist its residents:

The RM remains committed in working with the Province to increase maintenance on Provincial drains and will continue making improvements to the Municipal drainage system as deemed appropriate. However both the Municipality and the Province have concerns related the drainage of wetland areas and the Province has advised that any

further work to drain the wetland would not be authorized as it would be inconsistent with The Water Rights Act.

Although the RM lobbied the province to maintain and improve the Jordan River Drain, it recognizes that portions of this drain are not considered provincial waterways and are located on private land. As such, the responsibility for the maintenance of those portions of the drain would be delegated to each landowner and contingent on appropriate licencing being obtained through WS.

FINDINGS

The complainant's property in the Lower Roseau River Watershed is located adjacent to an area identified as swampland by provincial staff in 1966. Historical aerial photos further support that wet low lying areas affected the western portion of this section of land dating back to 1964. Evidence also reveals that complaints regarding drainage for this area were received by WS prior to the complainant purchasing the property.

There is no evidence that WS has failed to adequately address specific concerns about culvert sizes, lack of maintenance to drains and illegal drainage in the complainant's area. While there is evidence that there has been some maintenance and upgrading activity to the drainage system, overall it appears that the watershed remains intact and there is no evidence that supports the complainant's concern that changes to existing drains resulted in an increase of water to his property.

Given the data we received from WS, the hydraulic function of the culverts servicing water flows within the municipal drainage system for section 3-2-5E, appear adequate with a total culvert inflow capacity of 65.3 cubic feet per second (cfs) and an outflow capacity of 113.0 cfs, and do not appear to contribute to overland flooding of the complainant's property.

Under the authority of the Municipal Act, municipal councils have significant autonomy to manage municipal affairs and to make decisions they believe will best meet the needs of their communities. Council is tasked with evaluating drainage projects and maintenance required, relative to the resources available to the municipality. The RM believes that the drain located west of the complainant's property is appropriate for the use to which the RM expects the drain to be put. In our view its decision is in accordance with subsection 294.1(3) of the Municipal Act which states that a municipality must maintain every drain within its boundaries to a standard that is appropriate for the use to which the municipality expects the drain to be put.

Our review of the provincial waterways watershed 2 map, shows that the portion of the Jordan River Drain in section 3-2-5E is not categorized as a provincial waterway. Nor did evidence reveal that this drain was owned by the RM. This drain flows from the southwest to the northwest quarters of section 3-2-5E and is located on private land.

As such, neither the province nor the RM is responsible for the drain's maintenance as responsibilities of drain maintenance are dependent on ownership of the land where a drain physically sits.

We note that evidence indicates that if a landowner wishes to maintain a natural drain located on private land, brush clearing and grass mowing can occur as long as it simply involves vegetation removal without excavating or altering the depth or capacity of the drain itself.

We are of the view that the RM's approach for dealing with the complainant's applications and drainage concerns appears to be consistent with the processes outlined in policy and legislation. The information we reviewed revealed regular contact between the complainant and the RM and we are satisfied with how the RM handled his concerns about drainage.

Based on our investigation and the evidence available, we cannot conclude that WS or the RM have failed to act in accordance with any legislative or policy requirement or with respect to the drainage issues affecting the complainant's property.

As a result, Manitoba Ombudsman concludes that there is no basis upon which our office can make a formal recommendation to the RM or WS regarding this complaint.

This report concludes our investigation into this complaint.

MANITOBA OMBUDSMAN