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Bureau of Highway Instructional Memorandum 2010-05
Processing Sewage/Storm Water Damage Claims

Public Act 222 of 2001 amended Public Act 170 of 1964 Governmental Immunity Act ("the Act") to include provisions for damage claims against the department resulting from sewage disposal system events under certain circumstances, including a storm water or sewage backup. As with other system condition issues covered by the Act, this amendment requires staff to exercise reasonable diligence to identify and take the necessary steps to remedy a defect in the drainage system before the damage occurs.

The primary purpose of this instructional memorandum is to emphasize the statutory time frames and the required internal and external contacts that must occur from the time of notice through the resolution of a claim. The investigation and determination of the outcome of a claim related to an event must be coordinated with the Operations Environmental Engineer or the Supervising Engineer of the Design Division’s Utilities Drainage and Roadsides Section.

This instructional memorandum describes the steps necessary for responding to and investigating damage claims related to sewage/storm water system events, while ensuring due process for complainants. Time is of the essence for the individual submitting a damage claim and for the department in responding to an initial drainage complaint, or a damage claim related to a sewage disposal system event. The Act includes specific time frames for providing information to an individual who believes they may have a valid damage claim, and for the individual to submit a claim. A copy of the applicable portion of the Act is attached to this instructional memorandum, and cross-references to the Act are included throughout the memo.

While the Act refers to sewage disposal systems, these systems are defined to include storm water and storm water drainage systems (ref: MCL 1416 Sec 16(1)(j)). The Act further defines sewage disposal systems event to mean the overflow or backup of a sewage disposal system onto
real property (ref: MCL 1416 Sec 16(1)(k)). As a result, a storm water backup, either alone or in conjunction with a combined sewer system overflow, may be construed as a sewage disposal system event (“event”).

The TSCs or region offices will receive most drainage complaints. This contact could be via telephone, fax, e-mail or through direct contact with an individual in the course of construction or maintenance activities. If the central office in Lansing receives a drainage complaint or damage claim, the appropriate region and TSC will be contacted to discuss next steps. Copy the Operations Environmental Engineer and Supervising Engineer of Utilities Drainage on all correspondence and e-mails, beginning with the initial drainage complaint and continuing through resolution of any ensuing damage claim, to ensure all required steps are documented.

Document the following actions as you complete each step. Note that the actions may need to be taken concurrently. Where applicable, the statutory time frames are provided and are shown in boldface type.

- **Verify Timeliness of a Claim**

  The claimant must file a sewage/storm water damage claim within 45 calendar days of the event; or within 45 calendar days of discovery of the damage or physical injury; whichever is later (ref: MCL 1419 Sec 19 (1)).

- **Provide Information on How to File a Claim**

  Once an initial inquiry is made, the Act requires that you provide the individual sufficient information to submit a damage claim (ref: MCL 691.1419 Sec 19 (2)). MDOT Form 1968, *Sewage Disposal System Events Information*, contains the following, which meets this requirement:

  - Receipt for Required Claimant Information
  - Sewage Disposal System Event - Filing Claims Against MDOT
  - Sewage Disposal System Event – Damage Claim Notice
  - Reproduction of the Statute

  Provide Form 1968 to the individual as soon as practical. Failure to provide the information to the individual expeditiously may affect the department’s ability to successfully defend against a claim or civil action under the Act (ref: MCL 691.1419 Sec 19 (3)).

Regardless of the method of delivery, instruct the individual to fill out, sign and return the receipt included with the required claimant information to document they received the required claimant information. If the individual refuses to sign the receipt, fill out the receipt and note on the signature line that the information was provided and the individual refused to sign the receipt. If the required claimant information is not hand delivered to the individual, provide a stamped envelope addressed to the appropriate TSC manager for return of the receipt. Document when and how the initial notice was received, and when and how the required claimant information was provided to the individual.
• Verify System Ownership and Notify Appropriate Governmental Agency

The “appropriate governmental agency” is defined in the Act as the owner or operator of the storm sewer or sanitary system from which the damage claim arises (ref: MCL 691.1416 Sec 16(1)(b)). In most cases, MDOT both owns and operates its drainage systems. However, the ownership of a portion of a drainage system may not be readily apparent to a private citizen. Therefore, it is important to verify ownership and to notify the appropriate governmental agency (county road commission, county drain office, local agency, etc.) within 15 business days of receipt of the claim in accordance with the Act (ref: MCL 691.1416 Sec 19(4)). It is not necessary to wait until an actual claim is received to make this notification. In fact, a damage claim against MDOT may be averted by verifying ownership and notifying the potential claimant and the appropriate agency.

If the alleged damage resulted from an event related to a drainage system that is not owned or operated by MDOT, refer the claim to the appropriate agency. If the claim resulted from an event related to a drainage system that is not owned or operated by MDOT, but into which MDOT drainage discharges, refer the claim to the appropriate agency and coordinate further investigation with the owner/operator. Conversely, another agency may notify MDOT that a damage claim they received is being referred to MDOT in accordance with the Act. Since the notification may constitute the initial notice to MDOT of a damage claim or potential for a damage claim, all further correspondence should reference this agency notification.

Provide written notice to the claimant when referring a claim to another agency, or when a claim is received from another agency.

• Document Site Conditions

When a drainage complaint or possibility of a damage claim is made known, it is advisable to review the area and document the drainage patterns and system conditions. Photographs and as-built construction plans will be helpful if a claim is submitted at a later date. As appropriate, take the necessary actions to remedy the defect or otherwise prevent further problems. Document any such action taken with the appropriate reference to a related damage claim.

• Resolve the Claim

If a complete damage claim form is submitted and the claim is determined to be valid under the Act, attempt to resolve the claim within 45 calendar days of receipt. Damage claims resulting from sewage disposal system events may easily exceed $1000 dollars. If an agreement cannot be reached to resolve the claim within 45 calendar days, the claimant may institute a civil action (ref: MCL 691.1416 Sec 19(6)). If the claim is not resolved, document the reasons, outline the next steps, and advise the claimant. This determination and resolution will be reached in consultation with the Design Division, the Operations Environmental Engineer, and possibly the Assistant Attorney General – Transportation.
Direct questions related to the information in this instructional memorandum to the Operations Environmental Engineer at 517-322-5698, or the Supervising Engineer of the Design Division’s Utilities Drainage and Roadsides Unit at 517-335-2171.

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<tr>
<th>Chief Operations Officer</th>
<th>Engineer of Delivery</th>
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Attachment

BOHD:C/T:JR:kab

Index: Damage Claims, Environment

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MCL 691.1416 Definitions.

Sec. 16.

As used in this section and sections 17 to 19:

(a) “Affected property” means real property affected by a sewage disposal system event.

(b) “Appropriate governmental agency” means a governmental agency that, at the time of a sewage disposal system event, owned or operated, or directly or indirectly discharged into, the portion of the sewage disposal system that allegedly caused damage or physical injury.

(c) “Claimant” means a property owner that believes that a sewage disposal system event caused damage to the owner's property, a physically injured individual who believes that a sewage disposal system event caused the physical injury, or a person making a claim on behalf of a property owner or physically injured individual described in this subdivision. Claimant includes a person that is subrogated to a claim of a property owner or physically injured individual described in this subdivision.

(d) “Contacting agency” means any of the following within a governmental agency:

(i) The clerk of the governmental agency.

(ii) If the governmental agency has no clerk, an individual who may lawfully be served with civil process directed against the governmental agency.

(iii) Any other individual, agency, authority, department, district, or office authorized by the governmental agency to receive notice under section 19, including, but not limited to, an agency, authority, department, district, or office responsible for the operation of the sewage disposal system, such as a sewer department, water department, or department of public works.

(e) “Defect” means a construction, design, maintenance, operation, or repair defect.

(f) “Noneconomic damages” includes, but is not limited to, pain, suffering, inconvenience, physical impairment, disfigurement, mental anguish, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, humiliation, and other nonpecuniary damages.

(g) “Person” means an individual, partnership, association, corporation, other legal entity, or a political subdivision.

(h) “Serious impairment of body function” means that term as defined in section 3135 of the insurance code of 1956, 1956 PA 218, MCL 500.3135.

(i) “Service lead” means an instrumentality that connects an affected property, including a structure, fixture, or improvement on the property, to the sewage disposal system and that is neither owned nor maintained by a governmental agency.

(j) “Sewage disposal system” means all interceptor sewers, storm sewers, sanitary sewers, combined sanitary and storm sewers, sewage treatment plants, and all other plants, works, instrumentalities, and properties used or useful in connection with the collection, treatment, and disposal of sewage and industrial wastes, and includes a storm water drain system under the jurisdiction and control of a governmental agency.
“Sewage disposal system event” or “event” means the overflow or backup of a sewage disposal system onto real property. An overflow or backup is not a sewage disposal system event if any of the following was a substantial proximate cause of the overflow or backup:

(i) An obstruction in a service lead that was not caused by a governmental agency.

(ii) A connection to the sewage disposal system on the affected property, including, but not limited to, a sump system, building drain, surface drain, gutter, or downspout.

(iii) An act of war, whether the war is declared or undeclared, or an act of terrorism.

(l) “Substantial proximate cause” means a proximate cause that was 50% or more of the cause of the event and the property damage or physical injury.

MCL 691.1417 Damages or physical injuries caused by sewage disposal system event; compliance of claimant and governmental agency with relief provisions.

Sec. 17.

(1) To afford property owners, individuals, and governmental agencies greater efficiency, certainty, and consistency in the provision of relief for damages or physical injuries caused by a sewage disposal system event, a claimant and a governmental agency subject to a claim shall comply with this section and the procedures in sections 18 and 19.

(2) A governmental agency is immune from tort liability for the overflow or backup of a sewage disposal system unless the overflow or backup is a sewage disposal system event and the governmental agency is an appropriate governmental agency. Sections 16 to 19 abrogate common law exceptions, if any, to immunity for the overflow or backup of a sewage disposal system and provide the sole remedy for obtaining any form of relief for damages or physical injuries caused by a sewage disposal system event regardless of the legal theory.

(3) If a claimant, including a claimant seeking noneconomic damages, believes that an event caused property damage or physical injury, the claimant may seek compensation for the property damage or physical injury from a governmental agency if the claimant shows that all of the following existed at the time of the event:

(a) The governmental agency was an appropriate governmental agency.

(b) The sewage disposal system had a defect.

(c) The governmental agency knew, or in the exercise of reasonable diligence should have known, about the defect.

(d) The governmental agency, having the legal authority to do so, failed to take reasonable steps in a reasonable amount of time to repair, correct, or remedy the defect.

(e) The defect was a substantial proximate cause of the event and the property damage or physical injury.

(4) In addition to the requirements of subsection (3), to obtain compensation for property damage or physical injury from a governmental agency, a claimant must show both of the following:

(a) If any of the damaged property is personal property, reasonable proof of ownership and the value of the damaged personal property. Reasonable proof may include testimony or records documenting the
ownership, purchase price, or value of the property, or photographic or similar evidence showing the value of the property.

(b) The claimant complied with section 19.

**MCL 691.1418 Economic damages; grounds for noneconomic damages; available defenses.**

Sec. 18.

(1) Except as provided in subsection (2), economic damages are the only compensation for a claim under section 17. Except as provided in subsection (2), a court shall not award and a governmental agency shall not pay noneconomic damages as compensation for an event.

(2) A governmental agency remains subject to tort liability for noneconomic damages caused by an event only if the claimant or the individual on whose behalf the claimant is making the claim has suffered death, serious impairment of body function, or permanent serious disfigurement.

(3) In an action for noneconomic damages under section 17, the issues of whether a claimant or the individual on whose behalf the claimant is making the claim has suffered serious impairment of body function or permanent serious disfigurement are questions of law for the court if the court finds either of the following:

(a) There is no factual dispute concerning the nature and extent of the claimant's or the individual's injuries.

(b) There is a factual dispute concerning the nature and extent of the claimant's or the individual's injuries, but the dispute is not material to determining whether the claimant or the individual has suffered a serious impairment of body function or permanent serious disfigurement.

(4) Unless this act provides otherwise, a party to a civil action brought under section 17 has all applicable common law and statutory defenses ordinarily available in civil actions, and is entitled to all rights and procedures available under the Michigan court rules.

**MCL 691.1419 Notice of claim; requirements.**

Sec. 19.

(1) Except as provided in subsections (3) and (7), a claimant is not entitled to compensation under section 17 unless the claimant notifies the governmental agency of a claim of damage or physical injury, in writing, within 45 days after the date the damage or physical injury was discovered, or in the exercise of reasonable diligence should have been discovered. The written notice under this subsection shall contain the content required by subsection (2)(c) and shall be sent to the individual within the governmental agency designated in subsection (2)(b). To facilitate compliance with this section, a governmental agency owning or operating a sewage disposal system shall make available public information about the provision of notice under this section.

(2) If a person who owns or occupies affected property notifies a contacting agency orally or in writing of an event before providing a notice of a claim that complies with subsection (1), the contacting agency shall provide the person with all of the following information in writing:

(a) A sufficiently detailed explanation of the notice requirements of subsection (1) to allow a claimant to comply with the requirements.
(b) The name and address of the individual within the governmental agency to whom a claimant must send written notice under subsection (1).

(c) The required content of the written notice under subsection (1), which is limited to the claimant's name, address, and telephone number, the address of the affected property, the date of discovery of any property damages or physical injuries, and a brief description of the claim.

(3) A claimant's failure to comply with the notice requirements of subsection (1) does not bar the claimant from bringing a civil action under section 17 against a governmental agency notified under subsection (2) if the claimant can show both of the following:

(a) The claimant notified the contacting agency under subsection (2) during the period for giving notice under subsection (1).

(b) The claimant's failure to comply with the notice requirements of subsection (1) resulted from the contacting agency's failure to comply with subsection (2).

(4) If a governmental agency that is notified of a claim under subsection (1) believes that a different or additional governmental agency may be responsible for the claimed property damages or physical injuries, the governmental agency shall notify the contacting agency of each additional or different governmental agency of that fact, in writing, within 15 business days after the date the governmental agency receives the claimant's notice under subsection (1). This subsection is intended to allow a different or additional governmental agency to inspect a claimant's property or investigate a claimant's physical injury before litigation. Failure by a governmental agency to provide notice under this subsection to a different or additional governmental agency does not bar a civil action by the governmental agency against the different or additional governmental agency.

(5) If a governmental agency receives a notice from a claimant or a different or additional governmental agency that complies with this section, the governmental agency receiving notice may inspect the damaged property or investigate the physical injury. A claimant or the owner or occupant of affected property shall not unreasonably refuse to allow a governmental agency subject to a claim to inspect damaged property or investigate a physical injury. This subsection does not prohibit a governmental agency from subsequently inspecting damaged property or investigating a physical injury during a civil action brought under section 17.

(6) If a governmental agency notified of a claim under subsection (1) and a claimant do not reach an agreement on the amount of compensation for the property damage or physical injury within 45 days after the receipt of notice under this section, the claimant may institute a civil action. A civil action shall not be commenced under section 17 until after that 45 days.

(7) This section does not apply to claims for noneconomic damages made under section 17.