

DATE: June 24, 2010

SUBJECT: Storm Water Facility Maintenance Responsibility relating to Highway Occupancy Permits (HOPs)

TO: District Executives
R. Craig Reed, Director, Bureau of Municipal Services

FROM: R. Scott Christie, P.E. /s/
Deputy Secretary for Highway Administration

This strike-off letter is time increasing and is intended to provide a consistent approach in identifying maintenance responsibility for the installation of new drainage facilities and/or modifications to existing drainage facilities under various scenarios that are encountered during the highway occupancy permitting (HOP) process. This policy will facilitate PennDOT reviews by providing guidance on who shall apply for modifications to existing drainage facilities or newly proposed drainage facilities within the State highway right-of-way.

A functioning drainage infrastructure is critical to support the movement of goods, people, and services on State highways. The responsibility for the maintenance and improvement of storm water facilities on State highway right-of-way can vary based on the type of drainage system, the roadway characteristics, and the municipal government where the facility is located.

The policy is effective immediately and includes any HOP not yet issued by PennDOT. The attached policy will be incorporated into Chapters 3.8 and 5.1 of the HOP Manual (Pub. 170) and Chapter 3.7 and Chapter 5.1 of the HOP Guidelines (Pub. 282) with the next revisions to these manuals. The following policy updates are attached:

- Pub. 170, Chapter 3.8, Construction of Sidewalk, Curb, or Drainage Facilities (Attachment A-1)
- Pub. 282, Chapter 3.7, Construction of Sidewalk, Curb, or Drainage Facilities (Attachment B-1)

The above construction updates recognize that a local government may impose additional requirements upon a property owner provided they do not conflict with Department standards.

- Pub. 170, Chapter 5.1, Storm Water Facility Maintenance – Responsibility (Attachment A-2)
- Pub. 282, Chapter 5.1, Storm Water Facility Maintenance – Responsibility (Attachment B-2)

The above stormwater facility maintenance updates require a local government or a local government and private applicant to be co-applicants for permits involving subsurface storm water facilities connecting to highway drainage facilities within the State right-of-way. Condition Code #389 should be included if there is a private co-applicant. Permits for subsurface facilities not connected to highway drainage facilities can be issued to public or private applicants if they can be defined as a utility facility under Pa Code, Title 67, Chapter 459 and the consent, permission or authorization from the downstream property owner is obtained. Permits related to new land development may be issued to private applicants if for surface storm water facilities.

These updates also recognize that the local government may collect a fee from the developer to pay for ongoing maintenance of the facility.

Both stormwater facility maintenance updates are based upon Section 421 of the State Highway Law, 36 P.S. § 670-421, which indicates: "It is unlawful for any person to discharge sewage or drainage, except surface drainage, on, or within the legal limits of, any State highway." PennDOT has historically interpreted the surface drainage allowed under this law to only be surface/sheet flow; concentrating water and directing it within a State highway has been considered illegal. An exception exists, however, for storm water facilities only draining a proposed driveway because landowners abutting non-limited access highways have a constitutional right of access that may be impeded if drainage at a driveway could not flow onto the highway. An exception also exists for municipalities and county governments due to their public nature and their review and approval of land development plans within their geographical boundaries. These reviews and approvals frequently include stormwater management.

It is recommended that every new land development project be designed to retain the site development storm water runoff or provide a design that does not require storm water to be directed to the State highway right-of-way. However, realistically, this is not always possible and PennDOT is faced with site development storm water designs that are directing and discharging storm water drainage toward and within the State highway right-of-way.

In addition, many municipalities, by ordinance, require, as part of the local land development process, the installation of curbing along the site frontage adjacent to a State highway. Often when curbing is introduced, there is a need to manage the storm water via the installation of subsurface facilities. PennDOT prefers the design of storm water drainage systems through the use of open ditches and cross pipes which reduces the cost of highway projects and future maintenance.

New land development should be designed to ensure that the rate and volume of storm water flow directed onto the State highway right-of-way is properly managed. PennDOT is not obligated to issue an HOP for the use of its right-of-way for storm water management, but may do so in such situations within its discretion for economy of maintenance as well as supporting land development.

In order to provide a consistent approach to permitting particular types of storm water facilities being proposed, the attached policy is being implemented as additional guidance in identifying maintenance responsibility. The additional guidance is intended to be consistent with the law and PennDOT's general policy on storm water maintenance within State highways.

This policy has been developed in cooperation with the Office of Chief Counsel. If you have any questions in regards to the attached policy, please contact Daryl St. Clair, P.E., Acting Director, Bureau of Highway Safety and Traffic Engineering, at (717) 787-7350.

Attachments

CC: Pennsylvania State Association of Township Supervisors
Pennsylvania State Association of Boroughs
Pennsylvania State Association of Township Commissioners
Pennsylvania League of Cities and Municipalities
Ron J. Cione, Director, Public Works Department, Whitpain Township
Ronald G. Wagenmann, Upper Merion Township
Daniele Spila, Director, Policy Office
William Cressler, Office of Chief Counsel
Thomas Haist, Office of Chief Counsel
Steven Roth, Office of Chief Counsel
All Highway Administration Bureau Directors
All Assistant District Executives
All District Permit Managers
All District RMS Coordinators
Stephen Heil, Paperwork Management Unit, Bureau of Office Services
BHSTE Division Chiefs
Bruce Harter, Division Chief, Bureau of Maintenance and Operations
Mike Dzurko, BHSTE

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4700/MJD/(3-6080)/lap/(7-3620)

BCC: Directors Correspondence File
TOD Read File

(Replaces Chapter 3.8, Page 80)

Construction of Sidewalk, Curb, or Drainage Facilities

Free Permits will be issued in the name of a municipality (i.e., borough, city, or township) for the construction or modification of sidewalk, curb or drainage facilities being installed at no additional cost or expense to PennDOT. The Department may also issue a permit to an individual property owner for the construction of such structures within its property frontage limits provided the permit is recorded. A local government may impose additional requirements upon a property owner for the construction of curbs and sidewalks provided that they do not conflict with the Department's standards. *(See Chapter 5.1 – Storm Water Facility Maintenance – Responsibility for additional guidance on who shall apply for certain drainage facility modifications).*

Curbs and sidewalks are to be designed and installed consistent with Sections 630, 676 and 694 of Publication 408, Roadway Construction Standards RC-64M and RC-67M, and Design Manual, Part 2, Chapter 6. Also see Section 416 of the State Highway Law.

Drainage facilities are to be designed and installed consistent with applicable provisions of Design Manual, Part 2, Chapter 2; the Maintenance Manual, Chapter 8.5; Publication 408 and Roadway Construction Standards RC-30M thru RC-46M. Also see Sections 417 and 421 of the State Highway Law.

Applications to construct or modify curb, sidewalk or drainage will be reviewed by District staff to determine the effects on safety, capacity, existing utility facilities and compliance with the Americans with Disabilities Act (ADA).

If the proposed sidewalk, curb or drainage would have an adverse effect on safety or capacity, the application will not be approved.

If the proposed sidewalk, curb or drainage facilities would have an adverse effect on highway drainage or change the rate, volume, or quality of storm water runoff, the Permittee will be required to (1) construct all remedial drainage facilities, (2) assume all future maintenance obligations of the drainage facilities, and (3) record the permit.

If the proposed sidewalk, curb or drainage will require the relocation of any utility facility, the applicant must submit written acknowledgment from all affected Utilities that the Utilities agree to relocate to the location designated on the plans at no additional cost to PennDOT.

Following are regulatory references relating to drainage. (Also see State Highway Law, Sections 417 and 421.)

1. Chapter 441:
 - a. 441.3 (g) – Drainage control plan...
 - b. 441.3(h) – Drainage release.

- c. 441.4 (f)(1) – Recording...
 - d. 441.6 (6) – Altering drainage prohibited.
 - e. 441.6 (12) – Maintenance.
 - f. 441.6 (15) – Damage to highway.
 - g. 441.10 – Penalties and enforcement actions.
2. Chapter 459:
- a. 459.1 – Utility facility definition.
 - b. 459.7 (5) – Altering drainage prohibited.
 - c. 459.7 (14) – Maintaining structure or facility.
 - d. 459.7 (16) – Damage to highway.
 - e. 459.11 – Penalties and enforcement actions.

(Replaces Chapter 5.1, Page 119, Pipe Maintenance – Responsibility)**Storm Water Facility Maintenance -- Responsibility**

Authority. PennDOT has statutory authority to maintain adequate highway drainage (State Highway Law, 36 P.S. Section 670 - 417) and to regulate the use of State highways (State Highway Law, 36 P.S. Section 670 - 420; 67 Pa. Code Section 441.2). Refer to Chapter 8 of the Maintenance Manual for additional information related to maintenance responsibilities.

Pipe culverts placed under a driveway to accommodate the property owner enables safe vehicular access without adversely affecting highway drainage. If the driveway did not exist, a pipe culvert would not be necessary to maintain highway drainage. Pipe culverts can become blocked and cause more potential problems than driveways with swales. Use swales, where feasible, across driveways. If swales are not feasible, pipes may be allowed.

Pipe culverts placed under a driveway benefit the property owner as well as the traveling public. A pipe culvert can reduce the property owner's cost of maintaining the driveway. Maintenance of a pipe culvert installed under an access is the property owner's responsibility (under Regulation 441.6(12)). Although PennDOT may initially install a pipe culvert under a driveway as part of a construction or maintenance project, it is primarily the *property owner's responsibility* to maintain the pipe culvert just as it is primarily the property owner's responsibility to maintain safe sight distance and to remove snow from the driveway. These responsibilities are not limited to "permitted" driveways; thus, whether or not a valid permit exists does not alter the fact that the owner is responsible for access maintenance.

Persons owning property abutting a State highway have a constitutional right of reasonable (i.e., safe and operationally sound) access to public roads. However, along with this right there is also a responsibility to provide continued safe and operationally sound access to motorists and a responsibility not to adversely affect the rights thru-traffic has to safe and operationally sound highway movement.

Of course, if a nonfunctioning pipe culvert is creating or has the potential to create a hazardous roadway condition, PennDOT may, after appropriate notice, take action to eliminate the hazard (and invoice the property owner for all costs under Program 612, using the applicable Object Codes). Under Regulation 441.10, PennDOT has the authority to remove, sever or block drainage structures constructed or altered without a permit or in violation of the regulations.

Where drainage structures (other than a pipe culvert under a minimum use driveway) are permitted in PennDOT right-of-way or are permitted to connect to PennDOT drainage facilities, the Permit shall state that the permittee is responsible for future maintenance of the drainage structures being installed (see Permit Condition Code #388). Permits that allow the above types of drainage need to be recorded.

It is recommended that every new land development project be designed to retain the site development storm water runoff or a design that does not require storm water to be directed to

the State highway right-of-way. However, this is not always possible and PennDOT is faced with site development storm water designs that are directing and discharging storm water drainage toward and within the State highway right-of-way.

In addition, many municipalities, by ordinance, require, as part of the local land development process, the installation of curbing along the site frontage adjacent to a State highway. Often when curbing is introduced, there is a need to manage the storm water via the installation of subsurface facilities. PennDOT prefers the design of storm water drainage systems through the use of open ditches and cross pipes which reduces the cost of highway projects and future maintenance.

New land development should be designed to ensure that the quantity and volume of storm water flow directed onto the State highway right-of-way is properly managed. PennDOT is not obligated to issue a highway occupancy permit for the use of its right-of-way for storm water management, but may do so in such situations within its discretion for economy of maintenance as well as supporting land development. Permits related to new land development may be issued to private applicants if for surface storm water facilities. Subsurface storm water facilities connecting to highway drainage facilities may be issued to a local government or a local government and the private owner of the new land development as co-applicants. Condition Code #389 should be used if there is a private co-applicant. Permits for subsurface facilities not connected to highway drainage facilities can be issued to public or private applicants if they can be defined as a utility facility under Pa Code, Title 67, Chapter 459.

Additional guidance, broken into five different scenarios, indicating who the permit applicant shall be for a particular type of proposed drainage facility within PennDOT right-of-way is as follows:

- 1. Storm water facilities draining or conveying drainage under a proposed driveway or local road.**
 - a. Permittee – driveway/local road applicant.
 - b. Examples – driveway pipes, culverts, ditches, swales and/or associated surface and subsurface facilities under or directly adjacent to the driveway or local road that serve only to drain the driveway or local road or convey drainage under the driveway or local road.

- 2. Surface storm water facilities draining more than a proposed driveway or local road, whether connected to a highway drainage facility or not.**
 - a. Permittee – driveway/local road applicant.
 - b. Examples – ditches, curbing, swales and inlets servicing development of the land in general and typically not under or directly adjacent to the driveway or local road.
 - c. Local government approval is required if a local ordinance addressing storm water exists. If a local ordinance does not exist, county government should be consulted to determine if there are any county imposed requirements for which

approval must be obtained from the county. [As a matter of policy for local coordination purposes.]

- d. PennDOT is not required to allow use of its right-of-way for this general land development storm water; but may do so within its discretion for economy of maintenance as well as supporting land development.
- 3. Subsurface storm water facilities draining more than a proposed driveway or local road and physically or hydraulically connected to an existing or new highway drainage facility.**
- a. Permittee – local government *or* local government and private applicant as co-permittees. [The local government may pass responsibility onto developer through land development process.]
 - b. Examples – pipes servicing development of the land in general and typically not under or directly adjacent to the driveway or local road.
 - c. PennDOT is not required to allow the use of its right-of-way for this general land development storm water; but may do so within its discretion for economy of maintenance as well as supporting land development.
 - d. The following conditions shall be added to the permit if there is a private co-applicant (Condition Code #389):
 1. DRAINAGE INSTALLED BY THIS PERMIT IS THE PRIMARY RESPONSIBILITY OF THE LOCAL GOVERNMENT TO CONTINUALLY MAINTAIN OR REPLACE.
 2. PRIVATE CO-PERMITTEE IS RESPONSIBLE FOR PROVIDING FUNDING TO THE LOCAL GOVERNMENT TO OFFSET FUTURE MAINTENANCE COSTS ASSOCIATED WITH THE PERMITTED DRAINAGE FACILITY(IES).
 - e. Maintenance responsibilities under the permit only apply to the drainage facilities installed as part of the permit.
- 4. New or modified subsurface storm water facilities draining the highway and/or adjacent properties.**
- a. Permittee – local government *or* local government and private applicant as co-permittees. [The local government may pass responsibility on to developer through land development process.]
 - b. Examples – subsurface drainage facilities created due to the installation of curbing along the highway. [This scenario is different from scenario three because the facility is draining the highway and/or adjacent properties rather than the applicant's property.]
 - c. PennDOT is not required to allow the use of its right-of-way for this general land development storm water; but may do so within its discretion for economy of maintenance as well as supporting land development.
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Maintenance responsibilities under the permit only apply to the drainage facilities installed as part of the permit.

5. **Subsurface storm water facilities not connected to a highway drainage facility.**
 - a. Permittee - private applicant or local government. [These are utility facilities under Pa Code, Title 67, Chapter 459.]
 - b. Examples – pipes servicing the development of the land in general that are totally independent of highway drainage facilities.
 - c. The system must be deemed to directly or indirectly serve the public or any part thereof. §459.1(definition of utility facility). [This is an easier determination if the permittee is the local government.]

The above scenarios have been developed in view of several circumstances: Section 421 of the State Highway Law, 36 P.S. § 670-421, which indicates: “It is unlawful for any person to discharge sewage or drainage, except surface drainage, on, or within the legal limits of, any State highway”; the constitutional right of access held by landowners abutting non-limited access highways; Pa Code, Title 67, Chapter 441 and Chapter 459; and the Department’s Maintenance Manual, Department Publication 23, Chapter 8.

Ownership of Cross Pipes

Drainage ownership will be recorded in the Roadway Management System (RMS) along with other Systematic Techniques to Analyze and Manage Pennsylvania Pavements (STAMPP) inventory and condition data as defined in Publication 73, the Drainage Condition Survey Field Manual. Use a “0” for non-PennDOT owned, and a “1” for PennDOT owned cross pipes. This will allow the pipe ownership to be plotted on the straight-line-diagrams. Ownership field data is expected to be available in the RMS database for input after January 2010.

New cross pipe information shall be provided to the District RMS Coordinator when other highway occupancy permit (HOP) pavement related data is provided through the Pavement History Update Policy implemented in March 2009.

(Replaces Chapter 3.7, Page 80)

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Of course, if a nonfunctioning pipe culvert is creating or has the potential to create a hazardous roadway condition, PennDOT may, after appropriate notice, take action to eliminate the hazard (and invoice the property owner for all costs under Program 612, using the applicable Object Codes). Under Regulation 441.10, PennDOT has the authority to remove, sever or block drainage structures constructed or altered without a permit or in violation of the regulations.

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