

Module 2: Negligence and Professional Responsibility

LEGAL IMPLICATIONS OF CLIMATE CHANGE
FOR PROFESSIONALS
WORKSHOP

**Hosted by: Fraser Basin Council &
Engineers and Geoscientists BC**

February 22, 2018

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Agenda

11:00- 3:00

- Introduction to Common Law (Nuisance and Negligence)
- Role of Professionals and Potential for Negligence
- Class Actions
- Sector-Specific Examples
- Professional Responsibility
- Procurement Documents
- Professional Implications and Strategies for Adaptation

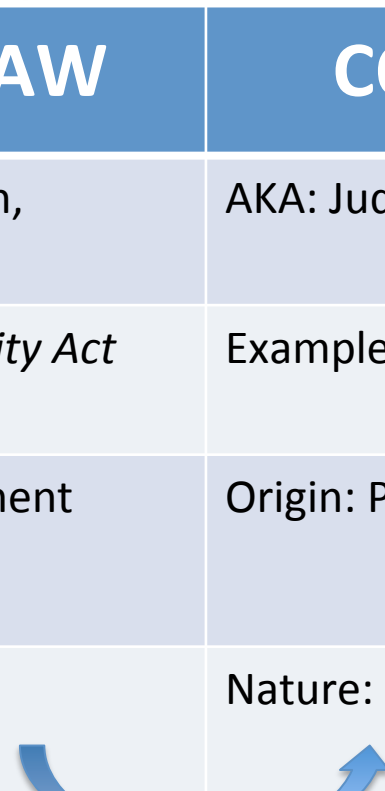
The Common Law

- Judge-made law
- Tort: civil wrong that causes a person to suffer loss/harm, possible legal liability and damages award
- Examples: negligence, nuisance, strict liability, riparian rights



"As precedent your Honor I offer the entire legal history of western civilization on CD ROM."

Common law interprets statutory law where the nature of a requirement is unclear.



STATUTORY LAW	COMMON LAW
AKA: Written law, legislation, regulations	AKA: Judge-made law, case law
Example: <i>Water Sustainability Act</i>	Example: Negligence, nuisance
Origin: Legislature, government agency	Origin: Precedent, judiciary
Nature: Prescriptive	Nature: Instructive

Statutory law informs common law (e.g. a statutory requirement may inform the common law standard of care in a negligence claim)

Stormwater-Related Legal Obligations

- Not one clear set of legal requirements for local governments:
 - Statutory requirements are not complete legal obligations
 - Common law (judge-made law) also interprets legislation and imposes legal requirements when issue not dealt with by statute
- No prescribed “level of service”
 - Lack of legislative requirements/comprehensive prescriptive guidance (e.g. how systems should respond under certain conditions)
 - Governed by provincial approvals but not consistent
 - In light of the statutory gap, we turn to the common law for guidance on what is required (determined on a case-by-case basis)

Nuisance

Nuisance can be private or public

Private nuisance: unreasonable interference with property owner's use and enjoyment of land

- Focus is on harm, not on conduct--lack of negligence is not a defence
- What is unreasonable? Interference with use and enjoyment that is intolerable to an ordinary person
- Physical damage to property must occur



Nuisance

Local governments are potentially vulnerable to nuisance claims as a result of public infrastructure failures...

Local Government Act provides statutory immunity regarding nuisance claims related to a sewer system, a water or drainage facility or system, a dike, or a road;

BUT ONLY IF the damages arise from a breakdown or malfunction.

BC Court of Appeal says NO IMMUNITY if failure due to inadequate design (*Medomist Farms*: increased upland development led to downstream flooding)

Suggests that local governments may be exposed to nuisance claims related to infrastructure failures occurring as a result of climate change (e.g. extreme weather events)



Negligence



Negligence

- Injury to person(s) or property because another failed to take reasonable care
 - Duty
 - Standard of Care
 - Causation, Foreseeability, Damages
- Possible Defendants:
 - Owner or occupier (including government)
 - Government entities
 - Engineers, architects and other design professionals
 - Contractors and service providers
 - Community members and residents



Special Test for Government Defendants

- Special test for establishing government duty
- Government policy decisions generally immune from liability
- Recent case law has opened up this discussion, but law still stands

Policy vs Operational

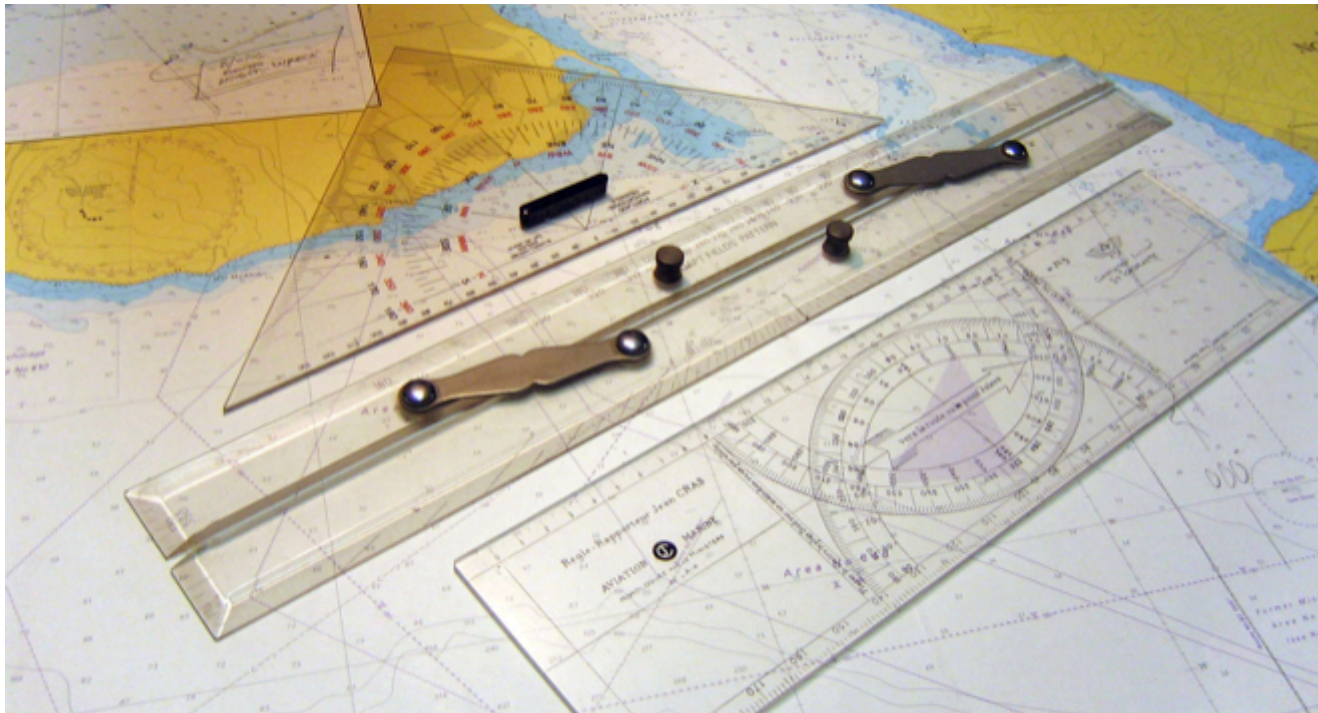
- Potential Policy Decisions
 - Development of a by-law
 - Budgetary decisions
 - Must have made a conscious decision to act, or not act based on social, political and economic factors
- Potential Operational Decisions (subject to negligence claim)
 - How a policy is carried out (the act)
 - Implementation of a work plan to address flooding
 - Enforcement (or non-enforcement) of by-laws

→ Key message: governments must turn their minds to climate issue. Failing to deliberate / putting head in the sand is unlikely to be a policy decision.

Standard of Care

- Factors to determine standard of care:
 - Industry standard of practice is key (including best practices, but not when "fraught with obvious risks")
 - Statutory requirements considered, not determinative
 - Standard "at the time" of act that is being claimed as negligent
 - Guided by reasonableness in the circumstances
- Relying on outdated standards/processes can be negligent if new info suggests they should be reconsidered

Role of Professionals and Potential for Negligence



Class Actions

- A real and present threat
 - City of Muskoka (2016, \$900M)
 - City of Thunder Bay (2012, \$300M)
 - City of Stratford (2010, settled for \$7.7M)
- Uses traditional causes of action (e.g. negligence)
- Efficient and improved access to justice
- Representative plaintiff for similarly situated, defined class
- Common issues decided together

Farmers Insurance Class Action

- Chicago area April, 2013 flood
- Municipal & local public entity defendants
- Referenced climate change – rainfall reasonably foreseeable in light of climate change models
- Complaint withdrawn – issues remain valid



BC Cases

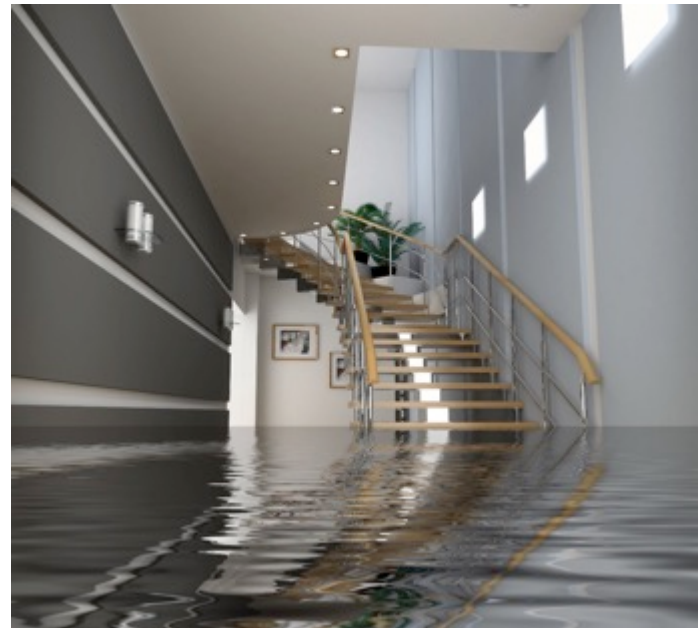
- Vancouver Public Library Lawsuit (2012)
 - October 2010 flood at the Kensington branch of Vancouver Public Library
 - Defendants: developer, construction company, professional services/design consulting firm, contractor company
- Maple Ridge Class Action (2010)
 - Fifteen households filed a class action lawsuit after 2010 flood
 - Defendants: municipality, developer, contractor, engineering firms

Inspections, Permitting and Enforcement

- Inspection schemes can be both policy or operational based on facts of the case
 - Inspections must be carried out non-negligently
 - Negligent conduct of owner/occupier doesn't absolve municipality
- Permitting could be negligent
 - Little case law, but some guidance that if authority knew or should have known there was a risk before issuing permit could be negligent
- Enforcement could be negligent
 - Decision not to enforce a by-law could be negligent

Oosthoek v. City of Thunder Bay (1996)

- 200 basements flooded as result of city sanitary and storm sewer backup
- **Failure to enforce** bylaws was operational (vs policy) decision and defendant was negligent

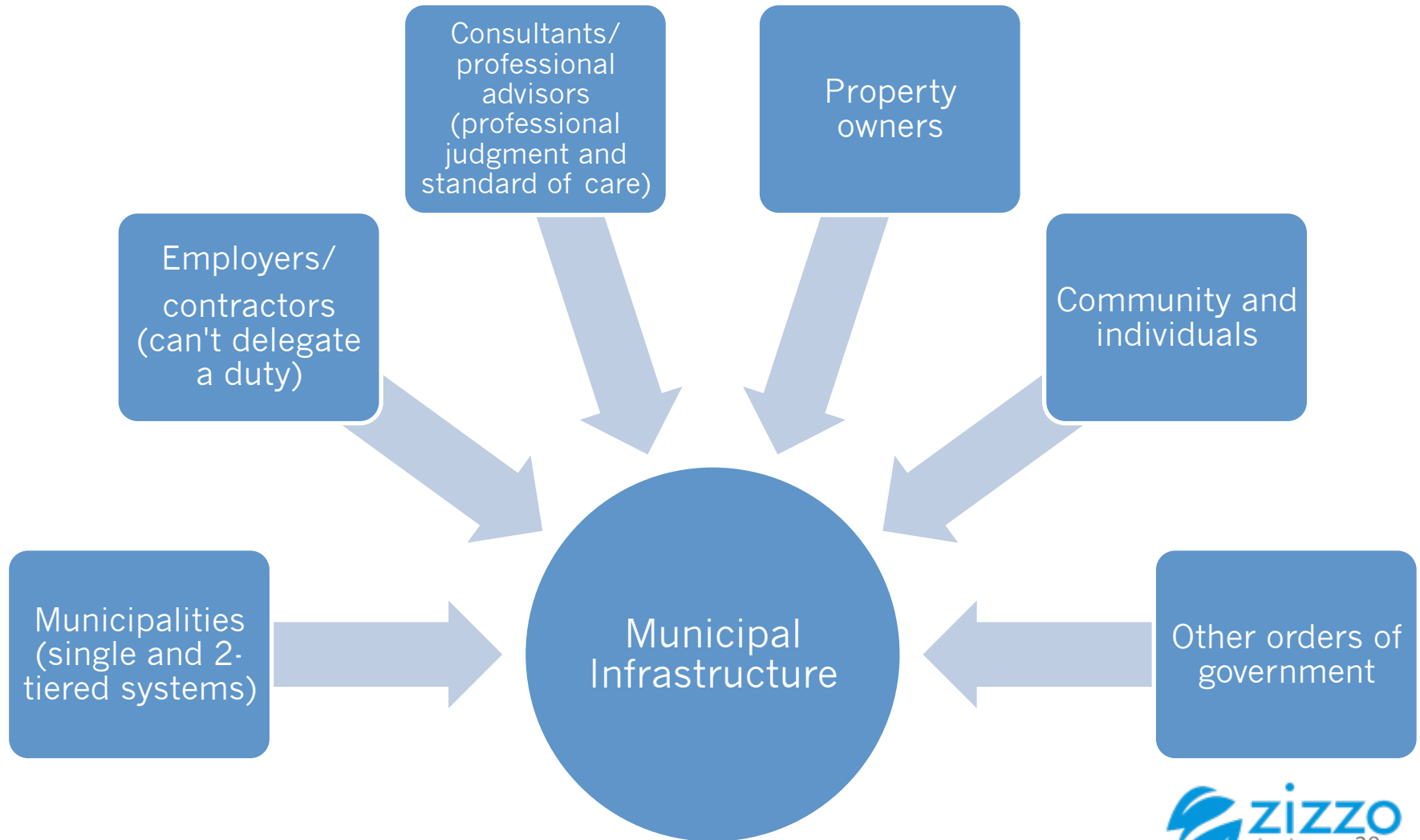


Defenses

- Defenses are limited
- Statutory immunity
- Contributory negligence
- Voluntary assumption of risk
- Act of God
- Limitation periods



Shared Responsibility



Roads & Highways

- Plan, design, maintenance and repair of roads and highways to ensure they are safe for use
- Potential liability could increase as result of predicted rise in intense rain events, freeze-thaw cycles and climate variability
- *Montani v. Matthews*
 - Ministry of Transportation liable for plaintiff's harm caused by formation of black ice on highway bridge



Electricity

- Deliver electricity safely
- Protect against hazards from electrical infrastructure
- Properly inspect, repair and replace equipment and infrastructure
- Have adequate emergency response systems in place
- *Furlong Estate v. Newfoundland Light & Power Co (2005)*
 - Utility company liable for damage when electrical malfunction caused fire because company failed to properly inspect and replace electrical equipment



Stormwater

- Extreme weather events increase the likelihood of flooding, sewer back-ups and critical infrastructure disruptions
- *Cerra v. City of Thunder Bay* (2013)
 - Plaintiffs allege negligence in repair, inspection and maintenance of the Water Pollution Control Plant plus lack of diligent operation and supervision at time of flood
- *Pearson v. Fort Frances (Town)* (2012)
 - Court held that known physical manifestations of weakness in the sewer system upon inspection should have prompted town to take action



Drinking Water

- Increased threats to water quality and availability due to changes in precipitation
- Increased temperatures and risks of flooding must be responded to diligently



Drinking Water

- *Cianchino v Ontario and Regional Municipality of Peel (2014)*
 - Claim for \$500K for failure to ensure safety of municipal drinking water
- *Ernst v EnCana Corp (2014)*
 - Court held that province may have duty to protect water supply and respond to complaints of contamination risks

Evolving Standards

- Historical data can no longer adequately predict the future
- Need for better vulnerability assessment tools:
 - E.G.
 - PIEVC
 - Green Building Standards/Building Code Evolution
 - New standards of care
 - Application of climate models
 - Risk management frameworks

Professional Responsibility



Heightened Standard of Care

Professionals Test: Standard of average practitioner of the class to which s/he belongs

Power Contracting Inc v Falby
(Ont CJ) (1995)

“The standard of care required is not perfection but the standard of reasonable care of a competent engineer in the world of work.”

Reliance on Professionals

- Due diligence defences of other defendants may offload responsibility to experts or other professionals relied upon
- In BC professional reliance model has been used extensively (e.g. forestry legislation, qualified professionals in local government regulation)—currently under review by provincial government, but seems likely to continue

Industry Standard Could be Negligent



- Custom, use or industry standard is helpful but not determinative
- Possible that industry standards themselves could be found negligent if they are “fraught with obvious risks”

Trimarco v Klein

- Plaintiff was injured when fell through shower door.
- Was custom to be using shatterproof glazing materials so glass door no longer conformed to accepted safety standards.
- Custom, usage or industry standard is highly relevant to the standard of care but does not per se define the scope of negligence.
- “Even so a common practice or usage is still not necessarily a conclusive or even a compelling test of negligence. The jury must still be satisfied with the reasonableness of the behaviour which adhered to the custom or the unreasonableness of that which did not.”

ter Neuzen v Korn

“Conformity with general practice, on the other hand, usually dispels a charge of negligence. It tends to show what others in the same ‘business’ considered sufficient, that the defendant could not have learnt how to avoid the accident by the example of others, that most probably no other practical precautions could have been taken, and that the impact of an adverse judgement (especially in cases involving industry or a profession) will be industry-wide and thus assume the function of a ‘test case’. Finally it underlines the need for caution against passing too cavalierly upon the conduct and decision of experts. All the same, **even a common practice may itself be condemned as negligent if fraught with obvious risks.**”

Professional Code of Conduct

- Another source of professional responsibility
- Establishes standards of qualification and practice for professionals
- Intended to aid engineers in performing their engineering role in accordance with applicable laws and regulations



Example: Professional Engineers Ontario

“This guideline is not intended to establish a ‘one method of practice for all’ approach to the practice of professional engineering. This guideline is not intended to replace a practitioner’s professional judgment when providing professional engineering services. Subject to provisions in the guideline that incorporate professional conduct requirements or legal requirements, a decision by a practitioner not to follow the guideline will not, in and of itself, indicate that a member has failed to maintain an acceptable standard of work. **Following the guideline may not ensure that a member has provided services conforming to an acceptable standard** established by such other criteria as contracts or particular industry standards. **Determining whether a practitioner has provided quality service will depend upon the circumstances of each case.**”

Professional guidance

- “APEGBC registrants...are expected to keep themselves informed about the changing climate, and consider potential impacts on their professional activities.”
 - APEGBC Position Statement on Climate Change, 2014
- “Professionals are required to use the best available science in making our decisions, and so we... recognize that climate change is occurring and it has fundamental impacts on British Columbia’s communities and ecosystems...[we] Expect our members to build upon their current science-based, knowledge-driven approaches to better incorporate the best available climate-science into professional decisions.”
 - Joint Statement from PIBC, ABCFP, CAB, APB, BCSLA

ABCFP Code of Ethics – Guidelines for Interpretation

Bylaw 11.3

The responsibility of a member to the public is:

Bylaw 11.3.1

To advocate and practise good stewardship of forest land based on sound ecological principles to sustain its ability to provide those values that have been assigned by society.

This is both a land ethic and a social ethic. The land ethic (“good stewardship of forest land based on sound ecological principles”) is explained by bylaw 12.6.1 Stewardship Standard “Members demonstrate stewardship by balancing present and future values against the capacity of the land¹ to provide for those values.”

Ecological principles mean the natural processes which govern the development of an ecosystem and its response to disturbance.

Bylaw 11.3.2

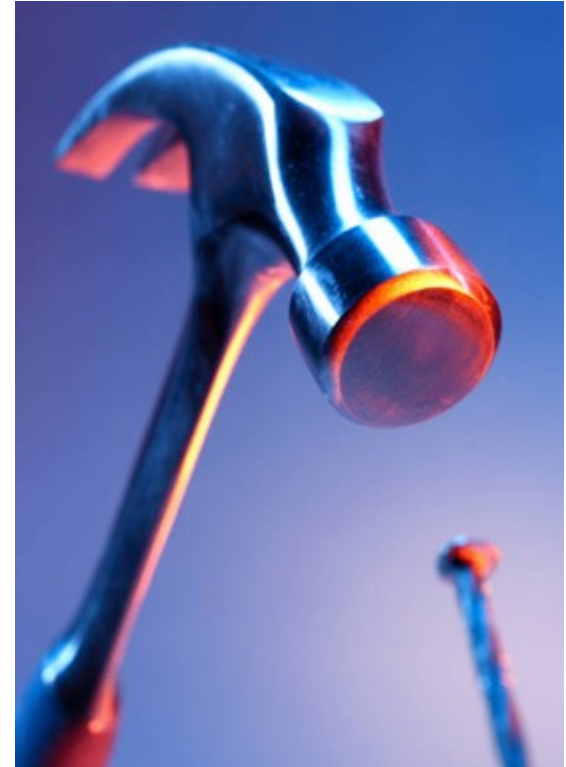
To uphold professional principles above the demands of employment.

Members, clients and employers must understand that while professionals have certain obligations as employees or consultants, they are independent from their employers or clients. This is a cornerstone of professionalism. Reconciling

Foresters Act: primary duty of the ABCFP is “to serve and protect the public interest”.

Procurement Documents

- Common complaint:
 - Procurement document does not require consideration of climate change
 - It's outside of the scope or budget
- Must consider all relevant factors in providing professional services. If climate change considerations are relevant, they should be considered.



Updated Terms and Specifications are Coming



*“Organization X’s facilities and infrastructure will be designed with **consideration of future climate conditions and vulnerabilities.** Available **climate change projections** shall be used to inform approaches to adapt to a changing climate.”*

-BC Public Sector organization’s internal policy

*“Design must be suitable for **climatic design parameters projected out to 2050**, in addition to current BC Building Code values”*

-excerpt from specific RFP

BCMoTI Circular Design Criteria Sheet

BCMoTI Design Criteria Sheet for Climate Change Resilience

Highway Infrastructure Design Engineering and Climate Change Resilience

Ministry of Transportation and Infrastructure

(Separate Criteria Sheet per Discipline)

Project: *(i.e. Project Name and Number)*
 Type of work: *(i.e. Capital/Rehab/Reconstruction, Bridge Structures, Culverts, Interchange/Intersection/Access Improvement, Corridor Improvement, etc.)*
 Location: *(i.e. LKI Segment and km reference, Road Names (Major/Minor), Cardinal Directions, Municipality, Electoral District, etc.)*
 Discipline:

Design Component	Design Life or Return Period	Design Criteria + (Units)	Design Value Without Climate Change	Change in Design Value from Future Climate	Design Value Including Climate Change	Comments / Notes / Deviations / Variances
e.g. Culvert <3m	50yr	Flow Rate (M ³ /S)	20	+10%	22	- See Work including climate projections
e.g. Culvert >3m						

Explanatory Notes / Discussion:

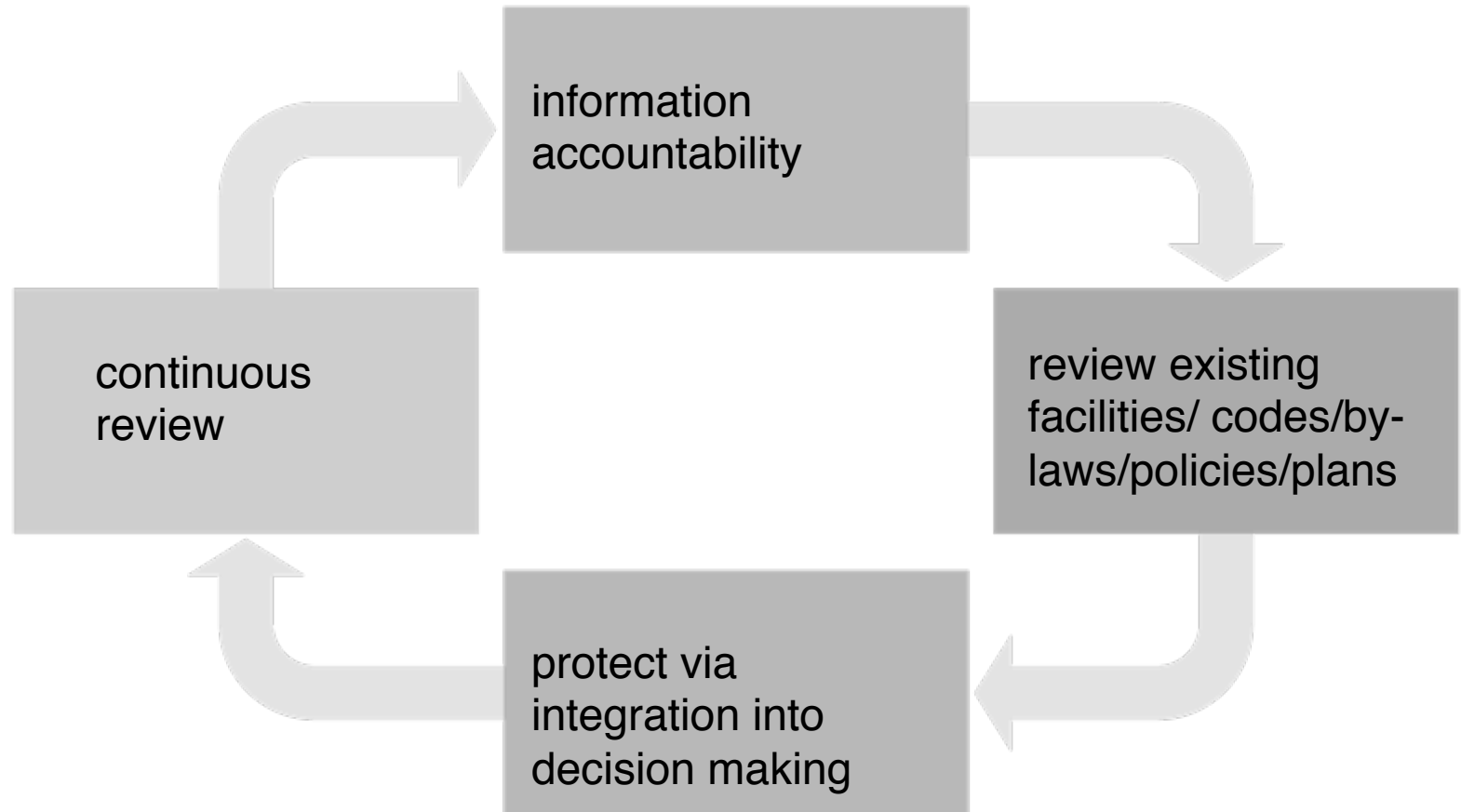
(Provide brief scope statement, purpose of project and what is being achieved. Enter comments for clarification where appropriate and provide justification and evidence of engineering judgment used for items where deviations are noted in the design parameters listed above or any other deviations which are not noted in the table above.)

Recommended by: Engineer of Record: _____
 (Print Name / Provide Seal & Signature)

Key Takeaways

- Climate change is re-defining risk management and legal liability
- Risk of common law liability significant
- Can reduce risk through conscious policy decisions
- Actively assessing risks and coordinating best practices will be valuable in demonstrating both appropriate standard of care and that it was met
- Role for standards, education, all in context of what is “reasonable”

Risk Minimization







Nature-based approaches can “take the edge off risk”

Bowker Creek study: green infrastructure measures could address 22% increase in precipitation

Nature-based approaches require professional collaboration



- E.g. coastal flood management: engineers & biologists
- E.g. Louisiana Coastal Protection and Restoration Authority
- Also need to manage interjurisdictional issues

Professional Implications

What can you do?

- Promote up to date information
- Consider current levels of climate change preparedness in projects and planning
- Work to ensure standards and practices are consistent and updated
- Draw on technical expertise to develop strategies
- Push for updated procurement document terms
- Integrate climate change considerations into day-to-day business



Questions?

Thank You



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