

Raindrops Keep Fallin' on My Head (and infrastructure)

By Jason Barney

With summer winding down and fall and wintertime on the horizon, the raindrops will surely follow. With it, we again turn our attention to stormwater management and preventing or responding to claims arising after significant rainstorm events resulting in flooding of private lands. A real-world example along with some practice pointers will help keep you prepared for the wet season.

Recently a citizen brought a claim against a member alleging that heavy rains would collect on the member road, enter his driveway, and flood his garage. His home was located halfway down a hill—about 200 feet from the local high point about a quarter mile away. The roadway was crowned but otherwise unremarkable, and the citizen's home was markedly below grade from the road.

The claimant's characterization that the member was artificially collecting and channeling the water on his property was unpersuasive and the claim was denied. While some water was undisputedly entering his property from the member's road, the water was not collected and channeled in a manner different than the natural flows. The topography—that the citizen lived on a hillside and was on the downhill side of the member road—the natural consequence was that the property would be receiving uphill flows.

Now, some practice pointers.

First, implement and follow reasonable maintenance procedures for stormwater drainage facilities, including catch basins, pipes, ditches and similar features. Regular inspections and maintenance reduces the likelihood that debris accumulations, collapsed pipes, or other defects will go undetected and cause difficulties during the next storm event. Document in writing who performed the maintenance, what was done and retain evidence of the maintenance as you would any public document.

Two, familiarize yourself with the concept of the "common enemy doctrine." This concept allows landowners to treat surface water as a common enemy, and drain the water toward lower lands. There are exceptions including (1) blocking a natural drain or waterway, (2) collecting or discharging water in a manner different than the natural flow, and (3) failing to exercise "due care" in preventing damage to other property.

Three, be mindful in your role responding to citizen drainage inquiries or complaints, because your promises or assurances may create additional grounds for liability. Promising a drainage solution or reassuring an affected citizen that a drainage fix will avoid another loss is likely to provide a basis for a damage claim if a second storm damages the property. Storm sewer complaints or action items should be logged, prioritized, and fulfilled as part of the member's duty to the general public—not any particular citizen or landowner.

In summary, the member should implement and follow maintenance procedure for all of its drainage and stormwater facilities, and keep evidence of this maintenance in writing. Be aware of the common enemy doctrine and its exceptions. And, be thoughtful when responding to citizen inquiries about what the member has done or is going to do about responding to drainage complaints at their property—avoiding making any statements that can be construed as an assurance or promise of future action.