

# Minimum Maintenance Standards 2018 Amendment

## Frequently Asked Questions

**Q** Is there a definition for “if practicable”?

**A** No, this is not defined. It is a question of judgment and available resources, amongst other factors. This will be a local decision based on your knowledge of your road system, traffic speed and volumes, municipal staffing and resources, and how your network will react to a given type of winter event, e.g. wind-blown snow. The intention of the regulation is to determine what is or is not practicable, which is not to be second-guessed later by the Court.

**Q** How should “substantial probability” be applied?

**A** Substantial probability is a judgment call by a municipality to determine if an action is required. The definition in the regulation is meant to express the idea that it is clearly more than just a mere possibility, much more than a 51% chance, and closer to being a near certainty. The fundamental concept here is not to be tied to any fixed percentage or “possibility of precipitation” i.e. “P.O.P.”, but to instead describe a point at which the municipal decision maker is very confident that action is appropriate. Similar to “if practicable”, the intent is for this judgment call not to be second-guessed later by the Court.

**Q** How does the clause “deemed in a state of repair” assist my municipality?

**A** A person cannot sue a municipality for something that is in a state of repair. A municipality can only be sued for non-repair, (a.k.a “a state of disrepair”) which causes an alleged loss.

**Q** Several sections of the regulation include the phrase “if deemed practicable”. Can budget limitations be used to determine what is or isn’t practicable?

**A** Yes, a decision made in good faith after thoughtful review could use budget limitations to help define what is practicable and acceptable. Indeed, when it comes to winter road maintenance, budget limitations frequently form part of the consideration of “if” and “when” to deploy resources to address a particular situation.

**Q** If Environment Canada issues an alert under its Public Weather Alerting Program, is a municipality obligated to declare a significant weather event?

**A** No, an alert from Environment Canada does not obligate the municipality to declare a significant weather event. A municipality is free to determine on its own if an approaching or occurring winter event locally meets the criteria (see examples below) for a weather hazard and, in its judgment, poses a significant danger to users of the highway.

Alerting parameters Environment Canada uses can be found at <https://www.canada.ca/en/environment-climate-change/services/types-weather-forecasts-use/public/criteria-alerts.html#snowFall>.

**Q** How frequently should ADT be determined?

**A** There is no timeframe set out for determining traffic volumes. The timeframe will vary depending on the municipality and variables impacting traffic, such as growth, will need to be considered when determining the frequency of traffic counts. A municipality may also want to consider following the Transportation Association of Canada's Traffic Monitoring Practices Guide for Canadian Provinces and Municipalities (2017) that recommends a short duration count at least once every five years.

**Q** When a municipality has a Class 6 road, does that mean it did not have to do anything to these roads?

**A** The duty of care set under s.44(1) of the *Municipal Act, 2001*, applies to all municipal highways, including Class 6 highways. So, while such low volume roads fall outside of the scope of the regulation, a municipality should seek to establish, preferably in policy, a level of service of some kind for Class 6 roads and seek to ensure that the level of service is reasonable in all of the circumstances.

**Q** Should a patrol record contain information that is not related to the patrol? For example, picked up parts for truck 1 or met with Ms. Jones to review her request for service.

**A** No, extraneous information should not be recorded in the patrol log, and should be recorded, if at all, elsewhere.

**Q** If wind blown snow covers the road again within an hour of plowing and the municipality is not able to keep the road open to traffic or comply with the table in section 4, what are my options?

**A** The municipality should consider closing the road temporarily, (see s16.8 of the regulation), and perhaps also declare a significant weather event if conditions warrant.

**Q** Does section 4 regarding snow accumulation or section 5 regarding ice formation on roadways and icy roadways apply to bicycle lanes or paths outside of the roadway?

**A** No, sections 4 and 5 only apply to bicycle lanes that are within/on the roadway. The definition in the regulation exactly mirrors those for conventional and separated bicycle lanes in Book 18 of the Ontario Traffic Manual.

**Q** How can a municipality that plows snow off the travelled portion of the roadway used by motor vehicles onto the bicycle lane, then addresses snow on the bicycle lane with specialized equipment comply with the table timelines?

**A** You seem to have 3 options: 1) Timing is crucial and you will need to rely on section 4.2(1)(b). Time the operation so that after the road operations have been completed the bicycle lane plowing will commence; 2) in policy set a level of service that may be less than MMS, knowing that a defence under s.44(3)(b) is then your most likely recourse if sued, and be prepared to justify to the Court that this level of service is reasonable in the circumstance; or 3) use section 16.8 to temporarily close the bicycle lane.

**Q** Is a maintenance hole cover or catch basin grate that has sunken considered a pothole?

**A** No, it would be considered a deficiency and addressed in accordance with the local level of service policy.

**Q** Is there a different standard for potholes or cracks in bicycle lanes?

**A** No, if a bicycle lane is within the highway, then the MMS for cracks or potholes applies.

**Q** If a snow packed condition exists on a sidewalk and should ruts form in the snow pack as snow melts, is a response required to address the ruts?

**A** Yes, this would be considered a state of non-repair if the ruts pose a hazard to pedestrians or other users of the sidewalk.

**Q** If a municipality decides not to pre-treat as per section 5(1) for the prevention of ice formation, does the municipality need to record reasons for why it didn't pre-treat?

**A** Yes, ideally the decision would be recorded in a log. Sometimes there are winter events that do not impact a road surface or make the road surface icy. In those cases where a decision not to act is made, the daily log (diary) should record the reasons.

**Q** How should a municipality handle a utility appurtenance that does not comply with section 16.1 and does not belong to the municipality and the owner refuses to repair?

**A** The initial step is to place the owner on notice of the deficiency, and to make clear that the municipality expects that they will address it. Obviously, if it is a hazard, it should be marked or blocked off from pedestrian access pending rectification. If the owner refuses to repair it, then legal counsel may need to be engaged to take all appropriate steps to force them to do so. If a claim were to occur, you would need to include the owner of the appurtenance as a 3<sup>rd</sup> party to the claim.

**Q** When a sidewalk on an upper tier road is a lower tier responsibility, is the area adjacent to the sidewalk a lower tier or upper tier responsibility to inspect?

**A** Absent of an agreement with the lower-tier, this area (which is not part of the sidewalk but rather part of what is often called the “boulevard”) is the responsibility of the upper- tier to inspect, as it remains under their jurisdiction. The upper-tier municipality should consider making arrangements with the lower tier municipality with legal responsibility for the sidewalk adjacent to an upper-tier highway, to inspect the adjacent area, (during the annual sidewalk inspection process) and report the findings to the upper-tier municipality for them to decide what action to take.

**Q** Why was section 16.2 added to the regulation?

**A** There have been occasions where a person has stepped off the edge of a sidewalk and tripped, fallen and suffered personal injury. The addition of section 16.2 helps to ensure that the area immediately adjacent to the sidewalk (the first step – 45 cm) is in a state of repair, and that public safety is thereby enhanced.

**Q** Who determines what is a highly unusual encroachment?

**A** The municipality makes this determination. Only a very small percentage of encroachments are likely to meet the high threshold requirements for action set under this section.

**Q** Does the area adjacent to the sidewalk apply to the side of the sidewalk adjacent to private property?

**A** Yes, it applies to both lateral sides, to the limit of the municipal highway or 45cm, whichever is less.

**Q** Is a municipality required to address hydro pole guide wires that are in the area adjacent to the sidewalk?

**A** Only if the guide wire encroachment is considered highly unusual or present a significant hazard to pedestrians, by the policy of the municipality, would the municipality be required to address the encroachment in accordance with section 16.2(6).

**Q** What if the owners of land abutting the sidewalk through their actions or inactions have created a potential hazard in the area adjacent to the sidewalk, is the municipality required to address this potential hazard?

**A** First the municipality will need to determine if the hazard falls within the limits of the public highway, and then second, if it constitutes a *significant* hazard. If it does not meet these tests, then no further action is required. If it is determined by the municipality that a significant hazard to pedestrians does exist within its highway; in accordance with sections 16.2(5) and (6) treat the encroachment within 28 days either permanently or temporarily. The municipality, may depending on the type of encroachment require the abutting owner to make the permanent repairs to the satisfaction of the municipality.

**Q** If a person slips and falls on a sidewalk and council has approved a level of service policy that sets out sidewalk winter maintenance priorities for which sidewalks are to be addressed 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and so on and the municipality meets the snow accumulation requirements and timeframe of section 16.3 for all sidewalks, is a valid defence of a claim still available?

**A** Yes, you can set local priorities.

**Q** If a sidewalk is maintained in a snow packed condition, does the depth of snow on a sidewalk include the depth of the snow pack plus the new fallen snow?

**A** No, section 16.3 only applies to the new fallen snow in such an example.

**Q** Have pedestrian counts on sidewalks ever been considered for setting sidewalk standards?

**A** The idea of using counts was discussed/debated by the MMS Task Force, however based on the maturity of active transportation in Ontario, there was not enough data to support developing a Class structure like roads.

**Q** Can section 16.8 be used to close a sidewalk or bicycle lane for the winter from November to April?

**A** Yes, the municipality would need to pass a bylaw to close the sidewalk or bicycle lane and post the bylaw in accordance with the municipality's notification bylaw. A municipality should consider whether or not signing of the closure is warranted.

**Q** A significant weather event has been declared, but the event was not as severe as reported in the Environment Canada Advisory. If the municipality decides not to declare an end to the significant weather event and do nothing to address the minor event that has occurred could I be found negligent?

**A** Yes, and a court could determine that you were also not acting in good faith. It depends on the circumstances. What is important to remember is that it is ok to make the wrong call, but that there is always a requirement to act reasonably.

**Q** What should I do if I declare the beginning of a significant weather event and it does not occur?

**A** Declare an end to the event. There is no penalty for declaring an event that did not materialize. Indeed, if the threshold criteria for the declared event failed to materialize, then there was no "significant weather event" and the exception under the MMS and deeming provision will not apply, rather, the ordinary sections for things like snow, ice, etc., will apply.

- Q** Who, within a municipality, should make a declaration of a significant weather event?
- A** The municipality, via policy, should identify the person responsible for making a declaration of a significant weather event. It is expected that this will be someone such as supervisor or lead hand who oversees the road maintenance activities on a particular shift.
- Q** Does MMS apply to unopened road allowances?
- A** No, however, the municipality will need to comply with the appropriate sections of the *Occupiers' Liability Act* <https://www.ontario.ca/laws/statute/90o02>.

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