Managing Legal Liability in Work Zones

Arch Insurance Group - Construction
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Greg Stefan – AVP Risk Control

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What’s this Session About?

- Reality of Work Zone Liability
- Pre-Incident Inspection and Documentation
- Post-Accident Info Gathering – what will the Lawyers focus on?
- Real Life Accident Review
REALITY = $6 Million Dollar Settled GL Claim

40 mph Work Zone

Approximate Accident Location
General Liability Claims

- You have caused or have been “alleged” to have caused damage to another party.
  - Property Damage
  - Bodily Injury
- Work Zone Incident involving public driver
  - Damage to their vehicle/equipment
  - Damage to the occupants
    - Serious Injury
    - Fatality
Because sometimes the end result is very bad...
And it can keep getting worse...
What Happens Next??

In no particular order...

- Emergency response – injured parties, HAZ MAT
- Get roadway opened ASAP – difficult to investigate
- Internal communications – mgmt, safety, legal, claims
- External communications – carrier, family, legal, media
- Immediate investigation
What Happens Next??

- **LAW SUIT??**

- What you do **PRI OR** to an incident can be more critical than what you do **AFTER** an incident.
Who will be sued?

- DOT, Owner, or other “Authority Having Jurisdiction”
- All General and Prime Contractors
- Subcontractors and Suppliers
- Material Haulers (may not be on a “true” contract)
- Engineers, Designers, Consultants
- Other “potentially involved” parties
  - Equipment and Device Manufacturers
  - Other drivers
  - Equipment Rental Companies
  - Surrounding businesses
Common Allegations in Lawsuits

- Lack of Compliance with Work Zone Standards
  - MUTCD – Federal and State
  - Written Traffic Control Plan
- Improper or Ineffective Signage/TCD’s/Striping
  - Failure to effectively warn
- Improper placement of vehicles and equipment
- Improper posted speed for conditions
- Failure to inspect
- Poor visibility
- Standing Water
- Drop-Offs
Civil Citation Review

- Fatality accident occurred in March, 2006
- Suit papers received by contractor in Nov. 2006
  - How long could this delay have been?
  - Why wait?

- Florida Statute of Limitations
  - 4 years – Bodily Injury
  - 2 years – Wrongful Death
Civil Citation Review

- Review Damages and Alleged Negligence
- Review Interrogatories

**NOTE** – This contractor has had 15 fatal accidents occur in or near their work zones since January 1, 2006. 5 in litigation.
IV.

FACTS

The plaintiffs would show that on March 28, 2006, the defendant was driving his white 2001 pickup truck in the eastbound lane of M-15 just east of the River Bridge, in County. Plaintiff was a front seat passenger in the vehicle. They were using their seatbelts. Due to road construction being conducted in this area, the left lane on the interstate was closed. Defendant INC. was the contractor working on the construction site. No warning signs or visible markings were present to warn the deceased driver that the left lane was going to be closed. A large piece of construction equipment was parked in the left lane. Any warning cones that may have been present prior to the approach to the road were either not present, or had been moved out of the way so that a large piece of construction equipment could be parked in the closed lane. There was either no warning to, or inadequate warning that the left lane was closed. The vehicle collided with the piece of construction equipment. The plaintiff was killed as a result of the collision, and plaintiff was seriously injured.

V.

NEGLIGENCE

The death of and the injuries to
proximately caused by the negligence of Defendant was negligent in at least the following ways:

1) Failing to warn of the lane closure;
2) Improperly parking a large piece of construction equipment in the left lane;
3) Using inadequate warning devices to warn of the left lane being closed;
4) Other acts and omissions which may be added as discovery progresses.

Discovery documents are being served with this suit, and the acts of negligence will be spelled out in a petition to be filed at a later date, after discovery is conducted.

VI.

DAMAGES

is the mother of , a minor son of and brings this suit as the next friend of . Plaintiffs and are
2. Describe all warning signs, lights, strips, reflective buttons, barricades, speed limit markers and/or other traffic control or warning devices of whatever nature which were in place on March 28, 2006, within one mile west of said accident site immediately prior to the accident. "Identify" in this question means to fully describe each item including any writing which may appear on that item; to state the location of that item; to state the date on which the item was placed in that position and to state the orientation of the item relative to the location of the accident site.

ANSWER:

3. With regard to your answer to Interrogatory No. 2 above, please state the name, address and employer's name and address of the person(s) who determined the number, type and placement of the warning devices and traffic control devices referred to in the preceding interrogatory, and what said person's relationship is to defendant.

ANSWER:

4. Describe all warning signs, lights, strips, reflective buttons, barricades, speed limit markers and/or other traffic control or warning devices of whatever nature which were struck and/or hit and/or moved by the vehicle driven by a result of the accident on March 28, 2006. "Identify" in this question means to fully describe each item including any writing which may appear on that item; to state the location of that item; to state the date on which the item was placed in that position and to state the orientation of the item relative to the location of the accident site.

ANSWER:
5. Describe all contracts, agreements, and other written documents which set forth any and all plans, specifications, and/or regulations regarding the placement of warning devices of any kind on the road within five miles west of and including the accident site by stating the type of document and where said document is located.

ANSWER:

6. Did the actual placement of such warning and traffic control devices conform to the plans, specifications or regulations referred to in Interrogatory No. 5, above and if not, specifically state how they differed?

ANSWER:

7. Describe any and all changes that were made in traffic control devices or warning devices on the road for one mile west of and including the accident site after the date of the accident made the basis of this lawsuit, and give the date such changes took place.

ANSWER:

8. Describe any other accidents or near accidents that occurred near or at the accident site prior to the accident made the basis of this lawsuit during the period
July, 2007 – Analysis of Liability Factors

- The modified plan for the area where the accident occurred establishes that the changes were effective as of March 7, 2006 and five days before the accident. **The DOT found no deficiencies in the area where the accident occurred.** The experts we have retained concur.

- The police report indicates that the factors contributing to the accident were that **Mr. XXX failed to drive in a single lane and failed to control his speed** in wet, rainy weather.

- The Autopsy and Toxicology Report reveals that **Mr. XXX had a number of drugs in his system which would impair his driving ability** and this is confirmed by our Toxicology expert.

- This is all favorable for the contractor, right?
Counsel’s Assessment
- Defense counsel is confident that a reasonable jury will place all or an overwhelming majority of the liability on Mr. XXX. At this point, he believes that there is approximately a 70% chance the jury will attribute 0% liability on ABC Construction. Alternatively, he believes that there is a 30% chance that ABC will be assessed with 51% or more of the liability in this case.
January, 2009 Claim Status

- Case has been settled via mediation.
- $242,000 Indemnity Payments
  - Passenger and surviving dependants (4)
- $213,000 Expense – Legal, Experts, etc.
- $455,000 - All on a case we “won”...
Another Recent Example

Claim Description: MULTIPLE CAR ACCIDENT UPON TRUCK ENTRANCE FROM THE CLIENT'S DRIVEWAY INTO A WORK ZONE.

Part of Body: 0090 Multiple Body Parts

Financial Information Valued As Of: 27-Feb-2009

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<th>BI</th>
<th>EXPENSE</th>
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<td>Payments</td>
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<td>1,756,752.22</td>
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<td>Recoveries</td>
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<td>1,756,752.22</td>
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<td>Remaining Reserve</td>
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<td>40,747.78</td>
<td>40,747.78</td>
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<tr>
<td>Total Experience</td>
<td>297,500.00</td>
<td>1,500,000.00</td>
<td>1,797,500.00</td>
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</table>
REALITY

- Workzones ARE dangerous
- 835 people DIED in highway work zones in 2007.
- Over 40,000 injuries.
- 1 WZ Fatality every 10 Hours
- 1 WZ Injury every 13 Minutes
- 85 % Motorists! – GL Claims
- 2009-2010 Stimulus
Critical Liability Issues

- Compliance with Standards and Written Plans
- Sovereign Immunity
- Contractual Issues
- Limitation of Liability Statutes
Work Zone Standards???

- THE work zone standard is the Federal MUTCD, Part VI.
- The Manual on Uniform Traffic Control Devices (Part VI) sets National Standards for the TEMPORARY control of traffic in a work zone.
- National Standard = LAW
North Carolina – Adopted Federal with State Supplement
West VA – Adopted Federal. State Currently Developing Part VI Supplement
But the State gives us the plan...

- **Contractors** are generally held responsible for traffic control in their project.

- If a plan is defective, or is not working, YOU will be held responsible.
Typical DOT Contract Language

Safety: Accident Prevention

“In the performance of this contract the contractor shall comply with all Federal, State, and local laws governing safety, health, and sanitation. The contractor shall provide all safeguards, safety devices and protective equipment and take any other needed actions as it determines, or as the SHE contracting officer may determine, to be reasonably necessary to protect the life and health of employees on the job and the safety of the public and to protect property in connection with the performance of the work covered by the contract.”
Sovereign (Governmental) Immunity

- Applies to governmental agencies
  - State, City, Municipality, DOT, etc.
- Cap the maximum contribution regardless of the actual % of liability (e.g. design and approval of TCP’s)
- Caps range from state to state:
  - $100,000 to $1,000,000 per person
  - $200,000 to $5,000,000 per occurrence
- Who pays the rest?
Sovereign Immunity

- Georgia
  - State:
    - $1 million per person
    - $3 million per occurrence

- South Carolina
  - State and political subdivisions:
    - $300,000 per person
    - $600,000 per occurrence
Sovereign Immunity

Florida
- State and political subdivisions:
  - $100,000 per person
  - $200,000 per occurrence
  - No punitive damages
Joint and Several Liability

“The theory of Joint and Several Liability allows that each defendant in a legal action is responsible for the entire amount of damages that a plaintiff is seeking, regardless of their relative degree of responsibility for the damages involved. This has come to be known as the “deep pocket” rule because it has had the effect of turning lawsuits into all out searches to find the most financially lucrative defendants. The search for deep pocket defendants has created a “lottery” atmosphere within the legal system in this country.”

Ref: National Association of Mutual Insurance Companies
Florida Joint and Several Liability

Prior Florida law allowed deep-pocketed defendants to pay more than their fair share of jury awards in cases where there are multiple defendants. **H.B. 145** eliminates this system of joint liability and replaces it with a system in which **each co-defendant is proportionately liable only for his or her share of the plaintiff’s harm.**

You need to minimize your potential proportion of Liability!!
Contractual Issues

- Indemnification, Additional Insured, and Limits of Insurance
  - In place prior to entry onto project
  - Hauling contractors, vendors, suppliers
- Subcontractor oversight and management.
- Traffic control (MOT) oversight.
Indemnification

9.1 Indemnification. To the fullest extent permitted by law, Contractor shall indemnify, defend and hold harmless the Owner, Architect/Engineer... from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work.....
Typical Contract Language

**Insurance:**

10.1 **Insurance.** The Owner and Architect/Engineer, and others as provided in the Contract Documents, **shall be named as Additional Insured on** each of these policies except for Worker's Compensation. **Contractor's insurance policies shall state that they are primary and not additional to,** or contributing with, any other insurance carried by, or for the benefit of the Additional Insured.
Potential Governmental Help

- Limitation of Liability Statutes
- DOT projects only
- Designed for potential liability protection for contractors working under DOT contracts
- Don’t assume this will work...
Recent Florida Liability Legislation

A contractor who constructs or repairs a highway, road, or street, bridge or other transportation facility for the Department of Transportation is not liable to a claimant for personal injury, property damage, or death arising from the performance of the construction or repair if, at the time of the personal injury, property damage, or death, the contractor is in compliance with contract documents material to the condition or defect that was the proximate cause of the personal injury, property damage, or death.
Recent Florida Liability Legislation

- Very similar to Texas, plus...
  
  “The limitation on Liability... *does not apply when the proximate cause* of the personal injury, property damage, or death *is a latent condition, defect, error, or omission that was created by the contractor* and not a defect, error, or omission in the contract documents; *or when the proximate cause... was the contractor’s failure to perform, update, or comply with the maintenance of the traffic safety plan as required by the contract documents.*”

- How well will this hold up?
- How will a contractor demonstrate compliance?
- It comes down to documentation...
Inspect the Work Zone: PRE-INCIIDENT

“If you didn’t document it...it didn’t happen”
Owner Mandated Inspections?

- Most public work defers to State DOT requirements.
- State DOT’s vary substantially as to what documentation is required of the contractor.
- What does the State of Florida require?
  - DOT
  - County
  - City
  - Municipality
FDOT MOT Inspection Requirements

FORM INSTRUCTIONS:
The **WTS** will submit the original **Initial** MOT Review Report to the Project Administrator for the first drive-through inspection on each phase of work and the original **Comprehensive Weekly Report** that will cover daily daytime and weekly night time inspections for daytime projects, and daily night time and weekly daytime inspections for night time projects. (Specs. 102-3.2)
### AREA NO. 1 - TRAFFIC CONTROL PLAN

<table>
<thead>
<tr>
<th>Item</th>
<th>Y/N</th>
<th>N/A</th>
<th>DC</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. TCP/ALTERNATE TCP/Modifications Approved</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Signed &amp; Marked According to Plan</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. Side Streets Signed Properly</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. Speed Limit Reduction Necessary with Sign Located Properly</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E. Needed Turn Lanes in Place</td>
<td></td>
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### AREA NO. 2 - GENERAL

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</thead>
<tbody>
<tr>
<td>A. Signs Correct Height &amp; Offset</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Sidewalk Closed/School Marking/Crosswalk Signs Placed Properly</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. Driveway &amp; Median Access Adequate</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. Signal Timing/Phasing Adequate</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E. Sufficient Warning Signs in Place</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>F. Existing Signs Not in Use Removed or Covered</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>G. Sufficient Devices to Guide Traffic Through the Work Area</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>H. Roadway Surface Maintained Satisfactorily</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>I. Message Boards Convey Concise Message to Motorists</td>
<td></td>
<td></td>
<td></td>
<td></td>
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### AREA NO. 3 - NIGHT WORK

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<tbody>
<tr>
<td>A. Lighting Plan Approved</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Variable Message Sign Warning Lighted Work Zone Ahead</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. Equipment Has Flashing Lights and/or Reflective Sheeting</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. Pilot Vehicle with Flashing Lights and Message Board</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>E. Lighting Aimed Not to Impede Traffic</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### AREA NO. 4 - CLEAR ZONE/HAZARDS

<table>
<thead>
<tr>
<th>Item</th>
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<th>N/A</th>
<th>DC</th>
<th>Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. No Equipment/Materials/Hazards Stored in Clear Zone</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. No Unprotected Drop-Offs &gt;3'</td>
<td></td>
<td></td>
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</table>

### AREA NO. 5 - TEMPORARY PAVEMENT MARKINGS

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</thead>
<tbody>
<tr>
<td>A. Correct Applications and Width</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Reflectivity Condition Satisfactory (Tape/Paint/Messages)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. Conflicting Markings and Pavement Debris Removed</td>
<td></td>
<td></td>
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</table>

### AREA NO. 6 - TEMPORARY BARRIER WALL

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</thead>
<tbody>
<tr>
<td>A. Is Wall Connected and Anchored Per Appropriate Rdwy or Structures Index</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>B. Is Transition Per Index</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>C. Has Proper End Treatment Been Installed Correctly</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>D. Proper Position and Lights Maintained</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The Resident Engineer is ALWAYS inspecting our work zones.

WE have to correct any deficiencies.

- Do you maintain documentation of all corrections?
- How about deficiencies and corrections the RE does not identify?
**Sample DOT Daily Inspection Log**

<table>
<thead>
<tr>
<th>Inspector Name</th>
<th>Estimate #</th>
<th>Auth.</th>
<th>High</th>
<th>Low</th>
<th>AM Conditions</th>
<th>PM Conditions</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>0034</td>
<td>Y</td>
<td>69</td>
<td>60</td>
<td>Cloudy</td>
<td>Rain</td>
</tr>
</tbody>
</table>

**CONTRACTOR WK HRS**

All crews 7:00 a.m. to 5:30 p.m.

**GENERAL**

Phase 2 w/ Ramps E, F, and J closed. Two eastbound through lanes and an exit only lane open on the phase.

1. Worked on removal of Bridge C Phase 2.
2. Wrecked forms on bents @ Bridge B Phase 2.
3. Worked on slopes east of Bridge D.
4. Placed concrete curb and gutter at Church Street.
5. Placed concrete pavement eastbound at Bridge E Phase 2.

**OTHER**

Safety Meeting a.m.

**TRAFFIC**

There was an accident on the Bridge eastbound. A vehicle struck the concrete rail placer in the work area. All traffic control signs in this area were up and functioning.
Frequent Inspections of Everything!

- EVERY DAY - maybe more than once
- What about weekends, nights, and Holidays?
- Damaged, dirty, displaced, or missing TCD's
- DOCUMENT all your inspections – CRITICAL
- DOCUMENT corrective actions taken and when
- DOCUMENT push-back from Owner or AHJ
- Verify proper completion of forms and record retention
- Consider photos, video, etc.
- TAKE CREDIT FOR THE GOOD THINGS YOU DO!!
How do you document inspections?

- **Written**
  - Who, What, How Often, What Type, Storage, Retrieval

- **Photo**
  - When, Identifiers, Storage and Retrieval
  - Written descriptions
  - Date/Time stamp

- **Video**
# Daily Traffic Control Inspection Report

Date: ____________________________  Day: S M T W T F S
(Circle One)

Inspector (TCS) and/or Assistant: ________________________________

Project Number and Location: ________________________________

Ambient Conditions: Sunny – Partly Cloudy – Cloudy – Foggy – Rain – Temp _____
(Circle all that pertain during day)

Wind: Calm – Light – Strong  Posted Speed: _____  Traffic Speed: _____
(Fast – OK – Slow)

Traffic Control Plan: MUTCD – Contract Plans – Combination

## Traffic Control Devices

<table>
<thead>
<tr>
<th>Type</th>
<th>#</th>
<th>Condition</th>
<th>In Place</th>
<th>Time &amp; Cor. Action</th>
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<tbody>
<tr>
<td>Arrow Boards</td>
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<td></td>
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<td></td>
</tr>
<tr>
<td>Message Board</td>
<td></td>
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</tr>
<tr>
<td>Construction Signs</td>
<td></td>
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</tr>
<tr>
<td>Warning Signs</td>
<td></td>
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</tr>
<tr>
<td>Flagger Sign</td>
<td></td>
<td></td>
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<tr>
<td>Truck Mounted Attenuators</td>
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</tr>
<tr>
<td>Vertical Panels</td>
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</tr>
<tr>
<td>Drums</td>
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</tr>
<tr>
<td>Cones</td>
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<tr>
<td>Type I Barricade</td>
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<tr>
<td>Type II Barricade</td>
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<tr>
<td>Type III Barricade</td>
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<tr>
<td>Direction Indicators</td>
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<tr>
<td>Tube Traffic Markers</td>
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<tr>
<td>Concrete Wall Barriers</td>
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</tr>
<tr>
<td>Shadow Vehicle</td>
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</tr>
<tr>
<td>Police Vehicle</td>
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<tr>
<td>Other</td>
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Describe any major actions taken to repair/replace devices and any photos taken:
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
### Daily Traffic Control Inspection Report

<table>
<thead>
<tr>
<th>DATE</th>
<th>(mm/dd/yyyy)</th>
<th>AREA / LOCATION(S) INSPECTED</th>
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</thead>
<tbody>
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<table>
<thead>
<tr>
<th>DAY</th>
<th>S M T W T F S</th>
<th>PROJECT</th>
<th>ADDRESS / INTERSECTION</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td>PROJECT #</td>
<td>DIRECTION OF TRAVEL</td>
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<tr>
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<td>COUNTY</td>
<td>ADDITIONAL NOTES</td>
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<td>OTHER</td>
<td>ADDITIONAL NOTES</td>
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<thead>
<tr>
<th>TRAFFIC CONTROL PLAN</th>
<th>INSPECTION TIME(S):</th>
<th>WEATHER:</th>
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<tbody>
<tr>
<td>Sheet No.</td>
<td>Morning</td>
<td>Temp</td>
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<tr>
<td>Sheet No.</td>
<td>Midday</td>
<td>High</td>
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<td>Alternate TCP</td>
<td>Evening</td>
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<td>Modifications</td>
<td>Night</td>
<td>Sky</td>
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<td>Approval Ref.</td>
<td>Other</td>
<td>Sunny / Pt. Cloudy / Cloudy / Rain / Snow / Ice</td>
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<tr>
<td>Other</td>
<td>Night</td>
<td>Wind</td>
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<tr>
<td></td>
<td>Other</td>
<td>Calm / Light / Strong / Direction:</td>
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**REVIEW CRITERIA:** Number, Color, Size, Position, Spacing, Reflectivity, In Conformance to Standards and Plans

**RATING CRITERIA:** N/A = Not Applicable  A = Acceptable  D = Deficient  ** = Requires Corrective Action Notations

<table>
<thead>
<tr>
<th>#</th>
<th>REVIEW ITEMS</th>
<th>N/A</th>
<th>A</th>
<th>D*</th>
<th>CORRECTIVE ACTION TAKEN</th>
<th>Time</th>
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<tbody>
<tr>
<td>1</td>
<td>Advance Signs / Barricades</td>
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<td>Other:</td>
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</tbody>
</table>

**Inspection Made By (Print):**  
**Signature:**  
**Supervisor Name (Print):**  
**Signature:**  

See Reverse Side for Additional Notes
NEW MDP3
- New Smaller remote
- Mounts to any Vehicle
- Record directly to Memory Stick or DVD
- $1895.00 Each

2.4GHz Transmitter
Post Accident Video/Photo Considerations

- What did the driver see or should have seen?
- What TCD’s are still in place?
- What TCD’s were displaced due to accident?
- Any damage to TCD’s?
- DON’T focus just on immediate crash site.
- You also need everything that leads up to the crash site.
5 Parts of the Workzone

- Advance Warning Area
- Transition Area
- Buffer Space
- Work Space
- Termination Area

Which 2 are generally the most critical??
Summary Large Loss Discussion

- Work Zone Description
- Accident Facts / Injuries Sustained
- Accident Cause Theories
- Initial Demand and Damage/Loss Estimates
- Outcome
- Case Strengths and Weaknesses
$6 Million Dollar Settled Claim – 40 mph WZ

Approximate Accident Location
END CONSTRUCTION