Sea Grant
Law Center

To: Jesse Schomberg, University of Minnesota Sea Grant Program; Melanie Perello, Minnesota Lake Superior Coastal Program

From: Terra Bowling, Research Counsel II, National Sea Grant Law Center, University of Mississippi School of Law

Re: Liability for MN Program providing advice for managing coastal erosion (NSGLC-20-04-03)

Date: April 13, 2020

Advisory Summary

The Minnesota Lake Superior Coastal Program asked whether its coastal program or one of its partners could be liable for suggesting specific types of shoreline protection, particularly in the event of failure.[1] The program asked three specific questions: 1) Would legal liability differ given the type of outreach, whether it be an educational public meeting or a written property owner's guide? 2) If consultations with a coastal engineer were part of the outreach, would the funding or sponsoring agency risk any liability or would any liability fall under the engineer's license? 3) Are there specific steps that our program and partners should take to reduce liabilities when addressing shoreline protection with either individual property owners or local governments? The information below is intended as advisory research only and does not constitute legal representation of the University of Minnesota Sea Grant Program or its constituents. It represents our interpretations of the relevant laws and regulations.

The memo provides a discussion regarding potential liability from providing outreach materials for shoreline protection. The programs would likely be immune from suit under the Minnesota Tort Claims Act and case law. If the programs did not qualify for this immunity, a landowner would have to show that the programs did not exercise "reasonable care" in developing outreach materials. Presumably, the programs would meet this standard and the tort claims would fail. The specific questions are discussed below, along with suggestions for providing disclaimers in materials produced by the programs.

---

[1] This product was prepared by the National Sea Grant Law Center under award number NA18OAR4170079 from the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. The statements, findings, conclusions, and recommendations are those of the author and do not necessarily reflect the views of NOAA or the U.S. Department of Commerce.

Sea Grant
Law Center

Potential Tort Claims

Most likely, any liability claim would be based in negligence. Common law defines negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[2] To prove negligence, a plaintiff must prove three elements: 1) that the defendant owed a duty to the plaintiff; 2) the defendant breached that duty; and 3) the breach proximately caused injury to the plaintiff.

If a landowner brought a negligence claim against the state, the landowner would have to prove that the state owed her a duty, breached that duty, and proximately caused the damage. A duty arises if an injury is foreseeable.[3] It may be foreseeable that a landowner would rely on erosion control advice provided by a state agency. In this instance, the state would have a duty to exercise "reasonable care" to prevent its conduct from harming others.[4] Reasonable care means the "degree of care which a reasonably prudent person would exercise under the same or similar circumstances."[5] Reasonable care would likely require the state programs to provide information developed using standard research techniques and best available resources. If the programs use reasonable care in providing outreach information, a court would likely find the programs have met their duty and a negligence claim would fail.

Another potential tort claim could be negligent misrepresentation. Minnesota courts have adopted the definition of negligent misrepresentation set forth in Restatement (Second) Torts § 552 (1976):

> *One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.*[6]

To prevail on a negligent misrepresentation claim, the plaintiff must establish: 1) a duty of care owed by the defendant to the plaintiff; 2) the defendant supplies false information to the plaintiff; 3) justifiable reliance upon the information by the plaintiff; and 4) failure by the defendant to exercise reasonable care in communicating the information.[7] For a negligent misrepresentation claim, a duty arises when there is a professional, fiduciary, or

---

[2] Restat. 2d of Torts § 282.
[3] *Moorhead Econ. Dev. Auth. v. Anda*, 789 N.W.2d 860, 888 (Minn. 2010).
[4] *Domagala v. Rolland*, 805 N.W.2d 14, 26 (Minn. 2011).
[5] *Id*. at 28.
[6] *Williams v. Smith*, 820 N.W.2d 807, 815 (Minn. 2012).
[7] *Id*.

special legal relationship in which one party had superior knowledge or expertise.[8] Assuming a court could find this type of relationship existed between a landowner and one of the state programs, the plaintiff would have to show that the program supplied false information to the landowner. Minnesota courts have held that those taking due care to provide complete and adequate information are not supplying false information.[9] A court would likely find that a program taking due care to prepare outreach materials would not be supplying false information.

If the state programs make a reasonable effort to provide complete and accurate outreach materials, both of these negligence claims would likely fail. Regardless, the programs would likely be shielded from liability under the doctrine of sovereign immunity.

Immunity from Liability

Generally, a state is immune from tort suits under the doctrine of sovereign immunity. Many states, including Minnesota, have tort claims acts waiving that immunity; however, they also provide exceptions to the waiver, meaning they retain immunity in certain circumstances. The Minnesota Tort Claims Act applies to state subdivisions, including departments and the University of Minnesota.[10] This would include the Minnesota Lake Superior Coastal Program or Minnesota Sea Grant Program.

Under the Minnesota Tort Claims Act, "the state will pay compensation for injury to or loss of property or personal injury or death caused by an act or omission of a State employee while acting within scope of employment under circumstances where the State, if a private person, would be liable to the claimant, whether arising out of a governmental or proprietary function."[11] Essentially, the state would be liable for the negligent performance of governmental or "proprietary" tasks. These are generally day-to-day "operational level" tasks rather than tasks that require decisionmaking. The Minnesota Tort Claims Act specifically identifies exceptions to this immunity waiver, including discretionary functions.[12]

Under the discretionary function exception, the state is immune from suit from decisions made by state employees or agencies that require the exercise of discretion or judgment. Minnesota courts have considered what conduct falls under the discretionary function exception. "Whether consequences of a planning decision are immune from liability depends on whether the consequential conduct itself involves the balancing of public policy

---

[8] *Id*. at 817.
[9] *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992).
[10] MINN. STAT. ANN. § 3.732.
[11] MINN. STAT. ANN. § 3.736.
[12] *Id*.

considerations in the formulation of the policy."[13] Providing information on coastal erosion techniques would likely be deemed a discretionary function. In this case, deciding what information to provide on erosion control techniques would likely require a balancing of cost of those techniques with the environmental and economic impacts of erosion; therefore, the state would likely be immune from suit.

Type of Outreach

The requesting programs asked whether liability would be dependent on the type of outreach, either a presentation or a written guide. Immunity would likely apply whether the advice given is written or oral. "Nothing in the statute or the cases interpreting statutory immunity indicates that a governmental unit's statutory immunity is contingent on whether a policy has been reduced to writing."[14] However, a written document explaining a policy may make it easier to prove a discretionary decision. "The absence of a written policy may make it more difficult for a governmental entity to sustain its burden of proof, but a written policy is not essential."[15] Therefore, it may be useful to have written outreach materials accompanying any oral presentation of the material.

Third Party Liability

The next question focuses on liability implications of having a coastal engineer as part of the outreach regarding shoreline protection. Minnesota law recognizes common law official immunity for individual government actors.[16] "In general, official immunity 'turns on: (1) the conduct at issue; (2) whether the conduct is discretionary or ministerial ...; and (3) if discretionary, whether the conduct was willful or malicious.'"[17] Therefore, as long as a state official's actions are not willful or malicious, he would be entitled to official government immunity. The question then becomes whether a contract engineer would be considered a state official. Contractors, such as an engineer providing erosion advice, may have derivative government immunity.

Generally, the label of "public official" is limited to government employees; however, if there is a special relationship between the contractor and the entity and not merely a contract, a contractor may be considered a "public official."[18] In one Minnesota case, the court ruled that a private engineering firm qualified as a "public official" eligible for common law official immunity for its design of a storm-water drainage system.[19] The court found that the engineer's design of the drainage system was a governmental function

---

[13] *Pletan v. Gaines,* 494 N.W.2d 38, 44 (Minn.1992).
[14] *Bloss v. Univ. of Minnesota Bd. of Regents*, 590 N.W.2d 661, 667 (Minn. Ct. App. 1999).
[15] *Id*.
[16] *Kariniemi v. City of Rockford*, 882 N.W.2d 593, 599 (Minn. 2016).
[17] *Id*. at 600, *quoting* Vassallo ex rel. Brown v. Majeski, 842 N.W.2d 456, 462 (Minn. 2014).
[18] *Id*.
[19] *Id*.

requiring the exercise of judgment and discretion, and the engineer worked in close coordination with the city in the design of the drainage system.[20] Likewise, an engineer working closely with a state entity to develop erosion control advice could be considered a public official and official government immunity would apply. In the event it does not apply, it may be advisable to ensure that the contractor has a professional liability insurance policy or a general insurance policy in place prior to beginning work with a state entity.

Disclaimers

Minnesota state entities are unlikely to incur liability. Governmental immunity likely applies since providing erosion control information is a discretionary function. Although programs would not be required to post a disclaimer in any publications, it is acceptable to do so. Examples of language that could be used include:

The data contained herein is for informational purposes only. The Minnesota Lake Superior Coastal Program does not endorse the content of this publication and does not guarantee the accuracy, completeness, or usefulness of the information. Minnesota Lake Superior Coastal Program does not accept liability for any injuries or damages caused by those acting upon or using the content contained in this publication.

Or,

These tips have been provided as general information for addressing coastal erosion. The [title] is provided for information purposes only. Minnesota Lake Superior Coastal Program does not accept any liability to any person for the use of the information or advice contained in herein.

Conclusion

Programs providing outreach on coastal erosion would likely be immune from suit under the Minnesota Tort Claims Act and case law. Contracting with an outside engineer would not impact immunity. Further, whether the outreach efforts are written or oral, immunity would apply. In the event the programs do not qualify for this immunity, programs should exercise "reasonable care" in developing outreach materials.

[20] *Id*.