



STATE OF MAINE
DEPARTMENT OF
ENVIRONMENTAL PROTECTION



JANET L. MILLS
GOVERNOR

MELANIE LOYZIM
COMMISSIONER

November 23, 2021

RE: Maine Pollutant Discharge Elimination System (MEPDES) Permit MER041000
Maine Waste Discharge License (WDL) W009170-5Y-E-M
Municipal Separate Storm Water Sewer System – General Permit
Final General Permit Modification

Dear Stakeholders:

Enclosed is the final MEPDES General Permit/WDL **modification**. The final permit modification is being issued by the Department to satisfy the appeal of the MS4 permit issued on October 15, 2020.

Any interested person aggrieved by a Department determination made pursuant to applicable regulations, may appeal the decision following the procedures described in the attached DEP FACT SHEET entitled “*Appealing a Commissioner’s Licensing Decision.*”

If you have any questions regarding the matter, please feel free to call me at 287-7693. The Department’s MS4 Stormwater Coordinator in the Bureau of Water Quality and the regional compliance inspectors have been copied on this final permit modification and can be utilized as a resource that can assist you with compliance. Please do not hesitate to contact them with any questions.

Thank you for your efforts to protect and improve the waters of the great state of Maine!

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0017
(207) 287-7688 FAX: (207) 287-7826

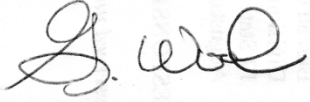
BANGOR
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1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04769
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If you have any questions regarding the matter, please feel free to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "G. Wood", with a stylized flourish at the end.

Gregg Wood
Division of Water Quality Management
Bureau of Water Quality

Enc.

cc:

William Hinkel, BEP Analyst
Laura Jensen, AAG
Lori Mitchell, MDEP/CMRO
Damien Houlihan, USEPA
Newton Tedder, USEPA
Nathan Chien, USEPA
Richard Carvalho, USEPA
Alex Rosenberg, USEPA
Stakeholder List



DEP INFORMATION SHEET

Appealing a Department Licensing Decision

Dated: November 2018

Contact: (207) 287-2452

SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner: (1) an administrative process before the Board of Environmental Protection (Board); or (2) a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S. §§ 341-D(4) & 346; the *Maine Administrative Procedure Act*, 5 M.R.S. § 11001; and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 C.M.R. ch. 2.

DEADLINE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed more than 30 calendar days after the date on which the Commissioner's decision was filed with the Board will be dismissed unless notice of the Commissioner's license decision was required to be given to the person filing an appeal (appellant) and the notice was not given as required.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017. An appeal may be submitted by fax or e-mail if it contains a scanned original signature. It is recommended that a faxed or e-mailed appeal be followed by the submittal of mailed original paper documents. The complete appeal, including any attachments, must be received at DEP's offices in Augusta on or before 5:00 PM on the due date; materials received after 5:00 pm are not considered received until the following day. The risk of material not being received in a timely manner is on the sender, regardless of the method used. The appellant must also send a copy of the appeal documents to the Commissioner of the DEP; the applicant (if the appellant is not the applicant in the license proceeding at issue); and if a hearing was held on the application, any intervenor in that hearing process. All of the information listed in the next section of this information sheet must be submitted at the time the appeal is filed.

INFORMATION APPEAL PAPERWORK MUST CONTAIN

Appeal materials must contain the following information at the time the appeal is submitted:

1. *Aggrieved Status.* The appeal must explain how the appellant has standing to maintain an appeal. This requires an explanation of how the appellant may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions, or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions regarding compliance with the law, license conditions, or other aspects of the written license decision or of the license review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the license decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific licensing requirements that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for public hearing must be filed as part of the notice of appeal, and must include an offer of proof in accordance with Chapter 2. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the application, the request and the proposed evidence must be submitted with the appeal. The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered in an appeal only under very limited circumstances. The proposed evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Specific requirements for supplemental evidence are found in Chapter 2 § 24.

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, and is made easily accessible by the DEP. Upon request, the DEP will make application materials available during normal working hours, provide space to review the file, and provide an opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed, the license normally remains in effect pending the processing of the appeal. Unless a stay of the decision is requested and granted, a license holder may proceed with a project pending the outcome of an appeal, but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge receipt of an appeal, and will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, any materials submitted in response to the appeal, and relevant excerpts from the DEP's application review file will be sent to Board members with a recommended decision from DEP staff. The appellant, the license holder if different from the appellant, and any interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. The appellant and the license holder will have an opportunity to address the Board at the Board meeting. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, the license holder, and interested persons of its decision.

II. JUDICIAL APPEALS

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court (see 38 M.R.S. § 346(1); 06-096 C.M.R. ch. 2; 5 M.R.S. § 11001; and M.R. Civ. P. 80C). A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452, or for judicial appeals contact the court clerk's office in which your appeal will be filed.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.

MODIFICATION

General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

DEPARTMENT ORDER

IN THE MATTER OF

MUNICIPAL SEPARATE STORM SEWER SYSTEM	)	MAINE POLLUTANT DISCHARGE
GENERAL PERMIT	)	ELIMINATION SYSTEM PERMIT
STATE OF MAINE	)	
MER041000	)	MAINE WASTE DISCHARGE LICENSE
W009170-5Y-E-M	)	MODIFICATION
APPROVAL		

Pursuant to the provisions of Federal law Title 33 USC, §1251, and Maine Law 38 M.R.S., Section 414-A et seq., and applicable regulations, the Maine Department of Environmental Protection (Department/DEP) is initiating a modification to Maine Pollutant Discharge Elimination System (MEPDES) General Permit (GP) #MER041000/Maine Waste Discharge License W009170-5Y-C-R. The GP was issued on October 15, 2020 for a five-year term with an effective date of July 1, 2022. With its supportive data, agency review comments and other related materials on file, the Department FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY

On November 13, 2020, the Friends of Casco Bay (FOCB) filed a timely appeal of the GP with the Maine Board of Environmental Protection (BEP). On June 17, 2021, the BEP took up the appeal by the FOCB at its meeting and issued a Board Order on the appeal on the same date. See Attachment A of the Fact Sheet of this permit modification for a copy of the Board Order - Findings of Fact and Order of Appeal for an in-depth discussion on the appeal and the BEP's decision. The Board Order concluded and ordered as follows:

“In consideration of FOCB’s arguments on appeal, responses from the EPA Region I, ISWG, SMSWG, BASWG and the CLF, information from the Commissioner, and review of applicable regulations, including the Remand Rule, the Board concludes that the Final Permit should be remanded to the Commissioner for further proceedings to modify Part IV.C.5 and Part IV.E of the Final Permit. The Board further concludes that the Response to Comments document accompanying the Final Permit must be modified to specify and give reasoned bases for the effective date of the Final Permit and the forthcoming modifications to Part IV.C.5 and Part IV.E of the Final Permit.

MODIFICATION

General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

1. PROCEDURAL HISTORY (cont'd)

Notwithstanding the Board's decision to remand the Final Permit and Response to Comments document for modification as described above, the Board affirms all other findings of fact and conclusions in the Final Permit and the associated Fact Sheet and Response to Comments document.

Therefore, the Board REMANDS to the Commissioner the Municipal Separate Storm Sewer System General Permit MER041000/W009170-5Y-C-R for further proceedings on only Part IV.C.5 and Part IV.E, and the Response to Comments document in accordance with this Order."

On September 14, 2021 the Department issued a proposed draft permit modification for a formal 30-day public comment period to satisfy the appeal of the MS4 permit issued on October 15, 2020. The proposed draft permit modification inadvertently included Table 10.2 in Appendix F. Appendix F was not intended to establish minimum numeric design standards as Table 10.2 does. The intent of Appendix F is to provide regulated entities with guidance regarding the minimum requirements of the ordinance, in that it must be "at least as stringent as" LID measures and techniques contained in Appendix F. The inclusion of the guidance responds to a concern raised by the municipalities on appeal and provides uniform guidance consistent with the order from the BEP and the Remand Rule. Appendix F was not intended to establish minimum numeric design standards as Table 10.2 does. Therefore, the Department modified Appendix F to remove Table 10.2 in the September 24, 2021 corrected proposed draft permit modification. All other terms and conditions of the proposed draft permit modification issued on September 14, 2021 for a 30-day public comment period remained the same.

2. MODIFICATIONS

Based on the comments received from stakeholders on the September 14, 2021 proposed draft permit modification and the September 24, 2021 corrected proposed draft permit modification (see Section 4 - Response to Comments of the Fact Sheet attached to this permit modification), the language is being modified as follows (with modifications emphasized in italics):

A. Low Impact Development

5. MCM5 - Post-Construction Stormwater Management in New Development and Redevelopment.

Each permittee must implement and enforce a program to address post construction stormwater runoff to the *maximum extent practicable* from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development that discharge into the MS4.

MODIFICATION

General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATIONS (cont'd)

- a. The permittee must *implement* strategies which include a combination of structural and/or non-structural BMPs appropriate to prevent or minimize water quality impacts as follows:

On or before September 1, 2022, each permittee must develop a Model LID Ordinance for stormwater management on new and redevelopment sites which establishes performance standards for each of the LID Measures contained in Table 1 of Appendix F. The Model LID ordinance should, at a minimum, refer to Appendix F for guidance.

The Model LID Ordinance shall be submitted to the Maine DEP for review by September 1, 2022. DEP will post the model ordinance for public comments and approve it, with or without modifications, on or before November 1, 2022.

On or before July 1, 2024 each permittee shall adopt an ordinance or regulatory mechanism that is at least as stringent as the required elements of the Model LID Ordinance or incorporate all of its required elements into the permittee's code of ordinances or other enforceable regulatory mechanism.

B. Impaired Waters

To resolve the appeal, Part IV.E is being modified as follows (with modifications emphasized in italics):

E. Discharges To Impaired Waters

1. If the waterbody to which a point source discharge drains is impaired and has an EPA approved total maximum daily load (TMDL), then the SWMP must *propose clear, specific and measurable actions to comply* with the TMDL waste load allocation ("WLA") and any implementation plan. This GP does not authorize a direct discharge that is inconsistent with the WLA of an approved TMDL. EPA approved TMDLs prior to the issuance date of this permit, can be found at <https://www.epa.gov/tmdl/region-1-approved-tmdls-state#tmdl-me>. This GP does not authorize a new or increased discharge of storm water to an impaired waterbody that contributes to the impairment at a detectable level.

MODIFICATION

General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

C. Response to Comments

Part 4(B) on page 4 of the June 17, 2021 BEP Order on Appeal, the BEP stated that “the Response to Comments document accompanying the Final Permit did not comply with 40 C.F.R. § 124.17(a)(1) because it did not specify and give reasoned bases for the three changes from the Final Draft to the final MS4 General Permit.” In accordance with the BEP Order on Appeal, the Response to Comments document accompanying this permit modification will comply with 40 C.F.R. § 124.17(a)(1). Additionally, the Fact Sheet accompanying this modification sets out the Department’s reasoning for these three changes that occurred between the final draft GP dated June 23, 2020 and the final permit dated October 15, 2020 that were challenged in the FOCB appeal.

MODIFICATION

General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

CONCLUSIONS

Based on the findings in this modification, the Department makes the following CONCLUSIONS:

1. The discharge(s) covered under this GP, either by itself or in combination with other discharges, will not lower the quality of any classified body of water below such classification.
2. The discharge(s) covered under this GP, either by itself or in combination with other discharges, will not lower the quality of any unclassified body of water below the classification which the Department expects to adopt in accordance with state law.
3. The provisions of the State's antidegradation policy, Maine law, 38 M.R.S. § 464(4)(F), will be met in that:
 - (a) Existing in-stream water uses and the level of water quality necessary to protect and maintain those existing uses will be maintained and protected,
 - (b) Where high quality waters of the State constitute an outstanding natural resource, that water quality will be maintained and protected/
 - (c) Where the standards of classification of the receiving water body are not met, the discharge will not cause or contribute to the failure of the water body to meet the standards of classification,
 - (d) Where the actual quality of any classified receiving water body exceeds the minimum standards of the next highest classification that higher water quality will be maintained and protected; and
 - (e) Where a discharge will result in lowering the existing water quality of any water body, the Department has made the finding, following opportunity for public participation, that this action is necessary to achieve important economic or social benefits to the State.
4. The discharge(s) covered under this GP will be subject to effluent limitations that require application of best practicable treatment as defined in 38 M.R.S. § 414-A(1)(D).

MODIFICATION

General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

ACTION

Based on the findings and conclusions as stated above, the Department APPROVES the modification of #MER041000/W009170-5Y-C-R, *General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems*, issued by the Department on October 15, 2020, SUBJECT TO THE ATTACHED CONDITIONS, including:

1. The terms and conditions included in Part I-IV of #MER041000/W009170-5Y-C-R, *General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems*, issued by the Department on October 15, 2020, not modified by this permit modification remain in effect and enforceable.
2. *Maine Pollutant Discharge Elimination System Permit Standard Conditions Applicable To All Permits*, revised July 1, 2002, attached to #MER041000/W009170-5Y-C-R, *General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems*, issued by the Department on October 15, 2020.
3. This permit modification becomes effective on July 1, 2022 and expires at midnight five (5) years after that date. If the GP is to be renewed, it will remain in force until the Department takes final action on the renewal.

DONE AND DATED AT AUGUSTA, MAINE, THIS 23 DAY OF November 2021.

COMMISSIONER OF ENVIRONMENTAL PROTECTION

BY:



for Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

Date of Public Notice September 14, 2021.

FILED

NOV 23, 2021

State of Maine
Board of Environmental Protection

This Order prepared by GREGG WOOD, BUREAU OF WATER QUALITY

MS4 Final Permit Modification

11/23/2021

APPENDIX F

Guidance

Low Impact Development (LID)

LID is a process of developing land that mimics the natural hydrologic regime. LID begins at the design phase of a new development or redevelopment, incorporating planning techniques that minimize site clearing and impervious surfaces to reduce impact and stormwater runoff generated from the site. By reducing the volume of water leaving a site, the pollutant loading is also reduced. Other techniques that will reduce the volume and peak flow rates of runoff from the development are then incorporated throughout the site. LID is an effective tool that reduces pollutant loading, thermal impacts, stream flows, and minimizes stream channel erosion.

LID is not a rigid set of standards, or a one size fits all approach and has many benefits:

- ✓ **Benefits to the Developer:** The owner and developer will see reduced costs for land clearing and grading, infrastructure, and stormwater management while seeing an increased aesthetic value in the development.
- ✓ **Benefits to the Municipality:** The local government and community will benefit from reduced infrastructure maintenance costs and reductions in property damage from flooding, while having more green space, protected natural resources, and increased water quality.
- ✓ **Benefits to the Environment:** The hydrologic cycle is preserved; streams are less prone to erosion, and stream flows are maintained which benefits fish and wildlife.

LID goals and objectives shall be incorporated into the site planning process as early as possible. The following steps serve as a guideline to use in the planning stage:

- ✓ Identify and preserve areas that will affect the hydrology of the site. Features that should be protected are sensitive areas and natural resources including down gradient waterways.
- ✓ Minimize site disturbance and impervious areas with an alternative layout for the development within the constraints of local development criteria.
- ✓ Minimize the impervious surfaces directly connected to drainage conveyance systems to reduce the time of concentration.
- ✓ Break the site into smaller drainage areas that can be handled using basic LID techniques.

PLANNING FOR LID

Minimize Site Clearing: Development typically involves new impervious surfaces such as roads and buildings, and landscaped areas for lawns. Avoid developing soils with high permeability where possible. Protect areas that are sensitive to disturbance and that will sustain groundwater recharge and reduce runoff. For example, developing a vegetated, tight clay soil area will have less impact on stormwater runoff than developing a forested area on sandy soils. Once the sensitive areas have been identified, the layout of the development should be aligned with the conservation of these areas.

Minimize Impervious Areas: The traffic distribution network (roadways, sidewalks, driveways, and parking areas) is generally the greatest source of site imperviousness and should be the focus for reducing impervious area. The following techniques may be considered, where appropriate and permitted by local land use codes and/or ordinances:

Alternative Roadway Layout: Alternative roadway layouts can be used to reduce total pavement, while allowing for the same amount of development. Cluster development, in accordance with and as allowed by local ordinances can decrease imperviousness.

- ✓ Narrow Road Sections: The width of pavement can be reduced by including the primary driving surface, a pervious base for the shoulders, and ditch drainage swale in place of curb and gutter as deemed appropriate. Use of this technique should be evaluated in accordance with site-specific conditions.
- ✓ Sidewalks: Sidewalks can be reduced to one side of the road or eliminated. The use of pervious materials can reduce runoff.
- ✓ On-Street Parking: Reduction to one side or elimination of on-street parking has significant potential to reduce overall site imperviousness. On-street parking may be a desirable practice in highly urbanized areas to reduce on-site disturbance.
- ✓ Rooftops: The number and size of buildings dictates the impervious area associated with rooftops. Vertical construction and/or the use of green roofs can minimize imperviousness.
- ✓ Driveways: Minimizing paved or impervious driveway area can be accomplished through the design of narrower driveways or by reducing the length of driveways. Shared driveways can also reduce imperviousness, where appropriate. In addition, the use of pervious materials can minimize runoff.

Minimize Connected Impervious Areas: The impacts from impervious surfaces can be minimized by disconnecting these areas from piped drainage networks and by managing runoff at the source.

- ✓ Paved driveways and roads can be directed to stabilized, vegetated areas.
- ✓ Flows from large, paved surfaces can be broken up to facilitate on-site management of smaller flows. Breaking flows up allows the flows to be directed to vegetation as sheet flow.
- ✓ LID techniques can be dispersed throughout the development, such as at individual house lots to obtain the most benefit. They can be incorporated into the landscaping of the property to provide a natural treatment system.

Maintain Time of Concentration: When development occurs, the time of concentration (T_c) is often shortened due to the impervious area, causing greater flows over a shorter period of time. LID practices can maintain the pre-development T_c by:

- ✓ Minimizing land disturbance,
- ✓ Detaining flows on site,
- ✓ Increasing the flow length,
- ✓ Increasing the surface roughness of the flow path,
- ✓ Creating flatter slopes, and/or
- ✓ Disconnecting impervious areas, which will decrease their travel rates.

Manage Stormwater at the Source: The impact from a development can be mitigated at the source by reestablishing a more natural hydrologic cycle that sustains a clean stream base flow. Typically, the most economical and simplistic stormwater management strategy is achieved by controlling runoff at the source with a variety of small treatment structures that will result in the reduction of stormwater discharge and more flexibility in the site design.

Soil Considerations:

Minimize Compaction: Compaction reduces the natural infiltrating ability of soils; thus, avoiding disturbance by heavy equipment can benefit infiltration. Designing development to situate impervious surfaces and development disturbances on the more impermeable soils of a site can leave more pervious soils to continue infiltrating runoff.

Increase Organic Content of Soils: When constructing many of the LID vegetated techniques, such as filtration Best Management Practices (BMP), a quality topsoil can optimize pollutant removal. In this case, the soil bed should consist of organic content as described in the relevant filtration BMP. This highly organic layer traps contaminants, absorbs more runoff and provides a medium for biological activity that helps break down pollutants. Planting soil provides a healthy growing medium for vegetation by encouraging strong root growth. In addition, microbes found in healthy soils transform nutrients for plant growth. Compost or other organic amendments can be added at the site preparation level, typically by the truckload. It is also available for little or no cost from many community leaf compost programs. For rain gardens and bioretention areas, organic content can also be valuable in absorbing and retaining moisture for plant life, filtering pollutants, and providing an active layer for microorganisms to reside and reproduce. A healthy microorganism population is key to the decomposition of many pollutants, whether in the home rain garden or in a parking lot.

- Avoid Pesticides/Herbicides: Healthy soil is alive with microorganisms that decompose and inactivate pollutants, but these may be killed by excessive chemicals. Although the soil microorganisms are not typically the target of these chemicals, many of them may fall victim to the use of pesticides. Additionally, insect species that prey on pests are also killed by pesticides. Since the predatory species tend to have slower reproduction than the pest species, a natural defense against insect pests may be lost.

LID TECHNIQUES

Many LID techniques rely on infiltration, retention, and evapotranspiration of stormwater to reduce runoff. When infiltration is not a possibility, the initial planning techniques described above should be the primary focus, followed by the use of small disconnected underdrained systems that rely on soil and vegetation to retain runoff. Examples of LID measures and techniques are shown on Table 1.

- Filters (Bioretention Cells and Rain gardens): Bioretention areas or rain gardens are built with a specific soil filter media (containing organic material and planted with vegetation that can handle wet and dry conditions) that will reduce the volume of runoff through absorption and evapotranspiration. A slight depression allows the ponding of stormwater as it filtrates through the soil media and into the groundwater or to an underdrain for surface discharge.
- Infiltration: Infiltration reduces runoff and mimics the natural hydrologic cycle by redirecting water into the ground rather than to a piped system. Runoff can be reduced by using smaller infiltration basins that fit into the natural landscape.
- Buffers: Vegetated buffers use soils and vegetation to remove pollutants from stormwater. Buffers can be used as a stormwater BMP for small developments by minimizing the amount of runoff generated through infiltration and evapotranspiration. Filter strips are typically used as pretreatment devices for bioretention cells and other infiltration practices.
- Collection Cisterns: In a commercial setting, the collection of rain runoff can be put to use in the building to off-set the cost of water supply. Cisterns can be located either above or below ground, and in out-of-the-way places that can easily be incorporated into a site design. Commercially available systems are typically constructed of high-density plastics and can include pumps and filtration devices. Rain barrels are inexpensive, effective, and easily maintainable when used in residential applications to capture roof runoff for later watering of lawns and gardens.
- Vegetated Rooftops: Vegetated rooftops provide three primary benefits: attenuation of stormwater runoff and peak flows, reductions of the heat island effects with an increase in building insulation, and a longer life expectancy for the base roof material. The stormwater benefit is that the smaller more common storm events are absorbed, which minimizes peak runoff and the net volume of runoff typically produced by roofs.

- ✓ Porous Pavement: Porous pavement is a permeable surface (pervious asphalt, concrete or pavers), a granular base, and subbase materials which allow the penetration of runoff into the underlying soils. The efficiency of pavement alternative systems depends on whether the pavement is designed to store and infiltrate most runoff, or only limited volumes of runoff (e.g., "first-flush") with the remainder discharged to a storm drainage system or overland flow. Maintenance is essential for long-term use and effectiveness. Pavement alternatives vary in load bearing capacities but generally can be designed for low traffic areas such as sidewalks, parking lots, overflow parking and residential roads. It is important to choose a material appropriate for the desired use (light, moderate or heavy use).
- ✓ Other Techniques: LID is about creativity. Multiple practices can be implemented and adapted into various sites and situations. However, they are mostly dependent upon the layout of the development and the disconnection of its individual elements.

Table 1 – LID Measures and Techniques*

LID Measure	Example Technique	Design
Minimize site clearing	• Promote compact development on the site • Place parking underneath or inside structures • Avoid developing in areas with high-permeable soils to retain natural infiltration • Align development layout with conservation of sensitive areas	
Protect natural drainage system	✓ Maintain a minimum 25 foot buffer on all natural water resources including intermittent channels ✓ Do not divert stormwater from its natural sub-watershed	Design practices developed at the planning phase that will help mitigate environmental impacts. Ideally, these are cost-effective and environmentally friendly.
Minimize the decrease in time of concentration	✓ Break up or disconnect the flow of runoff over impervious surfaces ✓ Sheet flow over pavement that is less than 100 feet	
Minimize impervious area or the effect of impervious area	✓ Build vertically with multi story buildings and parking garages ✓ More than 25% of pavement area (overflow) in pervious pavement. All pedestrian walkways are pavers or pervious pavement. Runoff from paved surfaces should be directed to stabilized, vegetated areas ✓ Disperse LID techniques throughout development and incorporate into the landscaping ✓ Infiltrate as much roof runoff as standards allow Minimize the use of paved areas (sidewalks, driveways and streets) Minimize the use of hardscaped areas.	

Table 1 – LID Measures and Techniques*		
LID Measure	Example Technique	Design
Minimize soil compaction	- Minimize the construction window and target the development area - Rototilling all areas to be revegetated	Design practices developed at the planning phase that will help mitigate environmental impacts. Ideally, these are cost-effective and environmentally friendly.
Minimize lawns and maximize landscaping that encourages runoff retention	- Low maintenance Maine native plants - No invasive plants - Limit the use of pesticides and biocides - Fertilizer application only during initial planting and repair of damaged areas.	
Provide vegetated open-channel conveyance systems	- Evaluate road gutters and roof gutters to determine effective means to direct runoff to treatment BMPs - Level spreaders to buffers where possible - Underdrained swales	
Rainwater is stored for later reuse for the building or landscape	Rain Collection Cisterns	
Stormwater Quality Treatment and Retention Requirements	Buffers	Design, size, install and maintain per the Maine recommended guidelines found in a document entitled <i>Maine Stormwater Management Design Manual, Technical Design Manual, Volume III, May 2016</i>
	Infiltration (basins, trenches, dry wells, etc.)	
	Underdrained grass filters	
	Underdrained filter bioretention	
	Roofline filtration	
	Roof Greening	
	Pervious Pavement	

*LID measures, example techniques and design practices in this table are intended to be illustrative and shall be taken into consideration where applicable, practicable and allowable pursuant to applicable land use planning and development requirements.

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

PERMIT MODIFICATION

FACT SHEET

1. PROCEDURAL HISTORY

On November 13, 2020, the Friends of Casco Bay (FOCB) filed a timely appeal of the GP with the Maine Board on Environmental Protection (BEP). On June 17, 2021, the BEP took up the appeal by the FOCB at its meeting and issued a Board Order on the appeal on the same date. See Attachment A of this Fact Sheet for a copy of the Board Order - Findings of Fact and Order of Appeal for an in-depth discussion on the appeal and the BEP's decision. The Board Order concluded and ordered as follows:

“In consideration of FOCB’s arguments on appeal, responses from the EPA Region I, ISWG, SMSWG, BASWG and the CLF, information from the Commissioner, and review of applicable regulations, including the Remand Rule, the Board concludes that the Final Permit should be remanded to the Commissioner for further proceedings to modify Part IV.C.5 and Part IV.E of the Final Permit. The Board further concludes that the Response to Comments document accompanying the Final Permit must be modified to specify and give reasoned bases for the effective date of the Final Permit and the forthcoming modifications to Part IV.C.5 and Part IV.E of the Final Permit.

Notwithstanding the Board's decision to remand the Final Permit and Response to Comments document for modification as described above, the Board affirms all other findings of fact and conclusions in the Final Permit and the associated Fact Sheet and Response to Comments document.

Therefore, the Board REMANDS to the Commissioner the Municipal Separate Storm Sewer System General Permit MER041000/W009170-5Y-C-R for further proceedings on only Part IV.C.5 and Part IV.E, and the Response to Comments document in accordance with this Order.”

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATION SUMMARY

Part 4(B) on page 4 of the June 17, 2021 BEP Order on Appeal, the BEP stated that “the Response to Comments document accompanying the Final Permit did not comply with 40 C.F.R. § 124.17(a)(1) because it did not specify and give reasoned bases for the three changes from the Final Draft to the final MS4 General Permit.” In accordance with the BEP Order on Appeal, the Response to Comments document accompanying this permit modification will comply with 40 C.F.R. § 124.17(a)(1). Additionally, the Fact Sheet accompanying this permit modification sets out the Department’s reasoning for these three changes that occurred between the final draft GP dated June 23, 2020 and the final permit dated October 15, 2020 that were challenged in the FOCB appeal.

On September 14, 2021 the Department issued a proposed draft permit modification for a formal 30-day public comment period to satisfy the appeal of the MS4 permit issued on October 15, 2020. The proposed draft permit modification inadvertently included Table 10.2 in Appendix F.

The intent of Appendix F was to provide regulated entities with guidance regarding the minimum requirements of the ordinance, in that it must be “at least as stringent as” LID measures and techniques contained in Appendix F. The inclusion of the guidance document responded to a concern raised by the municipalities on appeal and provided uniform guidance consistent with the order from the BEP and the Remand Rule. Appendix F was not intended to establish minimum numeric design standards as Table 10.2 set forth. Therefore, the Department modified Appendix F to remove Table 10.2 in the September 24, 2021 corrected proposed draft permit modification. All other terms and conditions of the proposed draft permit modification issued on September 14, 2021 for a 30-day public comment period remained the same.

A. Low Impact Development

In the November 13, 2021 appeal, the Appellant argued that the LID requirement must be restored to the Final Permit because the Remand Rule requires MCM5 to contain clear, specific, and measurable terms designed to reduce pollution from new construction to the maximum extent practicable, and LID “is the very means by which new development can be designed and stormwater treated before it enters receiving waters.” ISWG, SMSWG, and BASWG responded that the Remand Rule does not mandate the use of LID and that LID is not the only way to reduce stormwater runoff from new development to the maximum extent practicable. ISWG, SMSWG, and BASWG further stated that Department rule Chapter 500, *Stormwater Management*, already mandates the use of LID for developments that disturb one acre or more of land. They argued a statewide rule mandating LID provides more consistency than a patchwork of municipal ordinances that could be created by including the LID term in MCM5 of the MS4 General Permit. ISWG and SMSWG also submitted supplemental evidence suggesting that the Department will be amending Chapter 500, although the emails do not reveal a timeline for this rulemaking or details of how the rule might be amended.

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATION SUMMARY (cont'd)

In its comments on the June 23, 2020 Draft Permit and the October 15, 2020 Final Permit, EPA Region I stated that this part of MCM5 did not contain clear, specific, and measurable terms as required by the Remand Rule. EPA further commented that the Department could cure this defect by (1) restoring the LID term that appeared in the Final Draft, (2) referencing Chapter 500 in the permit, or (3) requiring each MS4 permittee to submit how it plans to regulate new development and redevelopment and create clear, specific, and measurable requirements in the second step of the two-step permitting process.

The Response to Comments section of the October 15, 2020 Final Permit should have addressed the lack of clear, specific and measurable terms placed into the Final Permit. At the time, the Department accepted ISWG's, SMSWG's and BASWG's position that LID is not required by the Remand Rule and the Final Permit condition stated "The permittee must implement a procedure for notifying site developers to consider Low Impact Development techniques" was sufficient. This explanation should have been included in the Response to Comments section of the Final Permit.

Applicable sections of Part IV.C.5 of the Final Permit issued by the Department on October 15, 2020 states in relevant part:

5. MCM5 - Post-Construction Stormwater Management in New Development and Redevelopment.

Each permittee must implement and enforce a program to address post construction stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the MS4.

- a. The permittee must promote strategies which include a combination of structural and non-structural BMPs appropriate to prevent or minimize water quality impacts.
 - i. The permittee must implement a procedure for notifying site developers to consider Low Impact Development techniques.

In paragraph #4 of section 4(D) on page 6 of the June 17, 2021 BEP Order on Appeal, the BEP stated in relevant part:

"... the Board finds that, although LID best management practices (BMPs) are not specifically required by the Remand Rule or Department regulations (Chapter 500), incorporating clear, specific, and measurable LID BMPs into the permit would satisfy the Remand Rule and is also reasonable and appropriate given that the Department has historically endorsed the use of these BMPs in site development approvals."

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATION SUMMARY (cont'd)

Pursuant to the BEP Order on Appeal, the Department is modifying the language in Part IV.C.5.a.i to be consistent with the Remand Rule, 40 C.F.R. §122.34.b.5 which states in relevant part:

“At a minimum, the permit must require the permittee to;

- A. Develop and implement strategies which include a combination of structural and non-structural best management practices (BMPs) appropriate for the community;
- B. Use an ordinance or other regulatory mechanism to address post-construction runoff from new development and redevelopment projects to the extent allowable under State, federal or local law.”

The U.S. Environmental Protection Agency (USEPA) recently issued the small MS4 permits for the states of Massachusetts and New Hampshire as those states have not been granted the authority to administer the National Pollutant Discharge Elimination System (NPDES) permit programs. Under MCM5 of both permits, the USEPA required LID site planning and design strategies be used to the maximum extent practicable and gave the permittees a two-year schedule of compliance beginning upon the effective date of the permit, to develop or modify an ordinance or other regulatory mechanism.

06-096 Code of Maine Regulations (CMR) Chapter 523.7 states in relevant part, "The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations."

During the June 17, 2021 BEP meeting on the appeal, permittees argued that developing or modifying local ordinances or a regulatory mechanism to require LID BMPs is a lengthy process and will likely not be able to be completed on or before the effective date of the permit, July 1, 2022. Therefore, to be consistent with recently issued small MS4 permits for the states of New Hampshire and Massachusetts, the September 14, 2021 proposed draft permit modification and September 24, 2021 corrected permit modification established a two-year schedule of compliance for permittees to develop or modify local ordinances or a regulatory mechanism to require LID BMPs for post construction stormwater management in new development and redevelopment. Municipal Separate Storm Sewer System General Permit MER041000/W009170-5Y-C-R, issued by the Department on October 15, 2020 was proposed to be modified as follows (with modifications emphasized in italics):

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATIONS (cont'd)

5. MCM5 - Post-Construction Stormwater Management in New Development and Redevelopment.

Each permittee must implement and enforce a program to address post construction stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development that discharge into the MS4.

- a. The permittee must *implement* strategies which include a combination of structural and/or non-structural BMPs appropriate to prevent or minimize water quality impacts.
 - i. *On or before July 1, 2024, permittees must develop or update an enforceable ordinance or other regulatory mechanism to require that LID techniques be used to the maximum extent practicable for stormwater management on new and redevelopment sites. The ordinance or regulatory mechanism must be at least as stringent as the LID techniques found in Appendix F of this permit, unless such techniques are infeasible on site.*

During the period September 14, 2021 – October 25, 2021, the Department made the permit modifications available for a 30-day public comment period. The Department received comments from the Friends of Casco Bay (FOCB), the U.S. Environmental Protection Agency (USEPA), the City of Lewiston (Lewiston), the Interlocal Stormwater Working Group (ISWG), Southern Maine Stormwater Working Group (SMSWG), and Bangor Area Stormwater working Group (BASWG). See Section 4, Response To Comments, of this Fact Sheet for the responses to substantive comments received. As a result of the comments received, the final language for MCM5 is as follows:

5. MCM5 - Post-Construction Stormwater Management in New Development and Redevelopment.

Each permittee must implement and enforce a program to address post construction stormwater runoff to the *maximum extent practicable* from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development that discharge into the MS4.

- a. The permittee must *implement* strategies which include a combination of structural and/or non-structural BMPs appropriate to prevent or minimize water quality impacts as follows:

On or before September 1, 2022, each permittee must develop a Model LID Ordinance for stormwater management on new and redevelopment sites which establishes performance standards for each of the LID Measures contained in Table 1 of Appendix F. The Model LID ordinance should, at a minimum, refer to Appendix F for guidance.

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATIONS (cont'd)

The Model LID Ordinance shall be submitted to the Maine DEP for review by September 1, 2022. DEP will post the model ordinance for public comments and approve it, with or without modifications, on or before November 1, 2022.

On or before July 1, 2024 each permittee shall adopt an ordinance or regulatory mechanism that is at least as stringent as the required elements of the Model LID Ordinance or incorporate all of its required elements into the permittee's code of ordinances or other enforceable regulatory mechanism.

B. Impaired Waters

The provision for Pollution Prevention/Good Housekeeping for Municipal Operations (MCM 6) in the June 23, 2020 Final Draft provided that, if an MS4 discharges to impaired waters for which EPA has approved a TMDL, its SWMP "must propose clear, specific and measurable actions to comply with the TMDL waste load allocation, and any implementation plan." Final Draft, Part IV.E.1, p. 51. The October 15, 2020 Final Permit omits the words "clear, specific and measurable." Final Permit, Part IV.E.1, p. 51. Instead, the Final Permit required a permittee that discharges to an impaired water with an EPA approved TMDL to "address compliance" with the TMDL, the waste load allocation, and any implementation plan in its SWMP.

The Appellant states that this change removes the requirement to propose BMPs for discharges to impaired waters other than to urban impaired streams, for which permittees are required to propose and fully implement at least three structural or non-structural BMPs. FOCB argues that the change in language between the Final Draft and Final Permit fails to advise permittees of how they must address compliance with TMDL waste load allocations, and that it is insufficient to address this issue in the second step of the MS4 permitting process. ISWG and SMSWG responded that the Final Permit satisfies the Remand Rule because it includes clear, specific, and measurable actions to address stormwater runoff to impaired waters. Specifically, ISWG and SMSWG point to the following actions required by the Final Permit: (1) development of three BMPs for urban impaired streams, which account for most of the MS4 discharges to impaired waters, *see* Final Permit, Part IV.3, p. 26; (2) implementation of illicit discharge detection and elimination plans, *see* Final Permit, Part IV.E, p. 52; and (3) Department review and approval of SWMPs that include BMPs, *see* Final Permit, Part IV.A- B, pp. 20-22. They note that nothing in the Final Permit authorizes discharges to impaired waters that are inconsistent with a TMDL waste load allocation. EPA Region I and BASWG did not comment on this change, although BASWG indicated its general support for the arguments made by ISWG and SMSWG.

The Response to Comments section of the October 15, 2020 Final Permit should have addressed the language change from the June 23, 2020 Final Draft permit. At the time, the Department agreed with ISWG and the SWSWG that other provisions within the Final Permit were sufficient to address discharges impaired waterbodies and that including the terms clear, specific, and measurable actions in the paragraph may have been interpreted as additional BMPs above and beyond what was already included in other terms and conditions of the permit. This explanation should have been included in the Response to Comments section of the Final Permit.

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATION SUMMARY (cont'd)

Applicable sections of Part IV.E. of the final permit issued by the Department on October 15, 2020, states in relevant part as follows:

E. Discharges To Impaired Waters

1. If the waterbody to which a point source discharge drains is impaired and has an EPA approved total maximum daily load (TMDL), then the SWMP must address compliance with the TMDL waste load allocation ("WLA") and any implementation plan. This GP does not authorize a direct discharge that is inconsistent with the WLA of an approved TMDL. EPA approved TMDLs prior to the issuance date of this permit, can be found at <https://www.epa.gov/tmdl/region-1-approved-tmdls-state#tmdl-me>. This GP does not authorize a new or increased discharge of storm water to an impaired waterbody that contributes to the impairment at a detectable level.

In paragraph #1 of section 4(E) on page 8 of the June 17, 2021 BEP Order on Appeal, the BEP stated in relevant part:

"Having considered these arguments and responses, the Board finds that actions to be taken by the permittee to address compliance with TMDL waste load allocations must be clear, specific and measurable to comply with the Remand Rule. Incorporating the words 'clear, specific, and measurable' into Part IV. E.1 of the Final Permit as FOCB requests is therefore reasonable and appropriate."

Therefore, Municipal Separate Storm Sewer System General Permit MER041000/W009170-5Y-C-R, issued by the Department on October 15, 2020 is being modified as follows (with modifications emphasized in italics):

E. Discharges To Impaired Waters

1. If the waterbody to which a point source discharge drains is impaired and has an EPA approved Total maximum daily load (TMDL), then the SWMP must *propose clear, specific and measurable actions to comply* with the TMDL waste load allocation ("WLA") and any implementation plan. This GP does not authorize a direct discharge that is inconsistent with the WLA of an approved TMDL. EPA approved TMDLs prior to the issuance date of this permit, can be found at <https://www.epa.gov/tmdl/region-1-approved-tmdls-state#tmdl-me>. This GP does not authorize a new or increased discharge of storm water to an impaired waterbody that contributes to the impairment at a detectable level.

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

2. MODIFICATION SUMMARY (cont'd)

C. Term of the permit

The June 23, 2020, Final Draft set an effective date of September 1, 2021, for the general permit. Final Draft, Part LB.I, p. 5. The Final Permit sets an effective date of July 1, 2022. Final Permit, Part LB.I p. 5. The Appellant argues that the Board must restore the effective date that appeared in the Final Draft in the Final Permit because the extended effective date "fails to meet the tenets of the Remand Rule and reduce stormwater pollution to the [maximum extent practicable]." ISWG and SMSWG responded that the Remand Rule does not specify what the effective date of the new MS4 General Permit must be and that the Department may use its best professional judgment in setting the effective date.

The second step of the MS4 general permitting process requires the Department to review NOIs and SWMPs submitted by thirty regulated entities and issue final permittee-specific orders for those entities. Although the Department has temporarily reallocated resources to assist in the reviews and issuance of orders necessary for coverage under the MS4 General Permit, the Department would nevertheless be unable to complete these reviews and issue these orders by the effective date of September 1, 2021, that appeared in the Final Draft. This would mean that some regulated entities would not have coverage under the MS4 General Permit by that effective date. Therefore, shortly before issuing the Final Permit, the Department reevaluated the permitting timeline and concluded that an effective date of July 1, 2022, was the earliest possible effective date that the Department could set for the MS4 General Permit. Although the change was not identified in the Response to Comments document, Department staff informed FOCB of this change before issuing the final permit. Regardless, the October 15, 2020 should have formally responded to the comment submitted by the Appellant.

The June 17, 2021 BEP Order of Appeal states "Based on the arguments of the participants and the information provided by the Commissioner, the Board finds that the effective date that appears in the Final Permit is reasonable and necessary and not prohibited by the Remand Rule. The Department would be unable to complete the second step of the MS4 permitting process by the effective date of September 1, 2021, that appeared in the Final Draft. In contrast, the effective date of July 1, 2022, provides the Department with the time necessary to properly review the required NOIs and SWMPs and issue permittee-specific orders in the second step of the MS4 permitting process. The effective date in the Final Permit is both reasonable under the circumstances and within the Commissioner's discretion. The Board is satisfied that the Remand Rule does not mandate a particular effective date and that the Commissioner and Department staff have used their best judgment in setting the earliest possible effective date for the Final Permit. Accordingly, the Board affirms that portion of the Commissioner's decision."

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

3. DEPARTMENT CONTACTS

Additional information concerning this permitting action may be obtained from, and written comments sent to:

Gregg Wood
Division of Water Quality Management
Bureau of Water Quality
Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017
e-mail: gregg.wood@maine.gov
Telephone: (207) 287-7693

4. RESPONSE TO COMMENTS

During the period September 14, 2021 – October 25, 2021, the Department made this permit modification to settle the appeal by the Friends of Casco Bay (FOCB) available for a formal 30-day public comment period. The Department received comments from the FOCB, the U.S. Environmental Protection Agency (USEPA), the City of Lewiston (Lewiston), the Interlocal Stormwater Working Group (ISWG), Southern Maine Stormwater Working Group (SMSWG), and Bangor Area Stormwater Working Group (BASWG). Response to substantive comments are as follows:

Comment #1 (City of Lewiston and BASWG): The commenters stated that MCM5 as written in the September 24, 2021 draft permit modification is not consistent with the Maine Administrative Procedures Act (APA; Maine Revised Statute §8001 – 11008) and the National Pollutant Discharge Elimination System (NPDES) MS4 General Permit Remand Rule (Remand Rule). The commenter cited the language “The ordinance must be at least as stringent as the LID techniques found in Attachment F (emphasis added) of the permit unless such techniques are infeasible on site.” The use of the term “at least as stringent as” in the proposed draft modification for the MS4 Permit establishes Attachment F as a regulatory benchmark, performance standard and enforceable requirement that is subject to the requirements of the Maine APA and Remand Rule. Attachment F does not meet the Maine APA requirements because it does not establish specific requirements by which a determination of compliance can be made and therefore lacks the specificity necessary to render it judicially enforceable. The commenter also states Attachment F does not meet the Remand Rule requirements because it provides generalized guidance rather than clear, specific and measurable performance standards. Without clear, specific and measurable performance standards, Attachment F is likely to yield inconsistent interpretations from the permittee, the public and the permitting authority.

Response #1: The first italicized paragraph in the final language in MCM 5 of the permit modification (*On or before September 1, 2022, each permittee must develop a Model LID Ordinance for stormwater management on new and redevelopment sites which establishes performance standards for each of the LID Measures contained in Table 1 of Appendix F. The Model LID ordinance should, at a minimum, refer to Appendix F for guidance.*) requires the permittee to develop an ordinance or regulatory mechanism that establishes specific performance standards taking into consideration the LID measures included in the guidance document in Appendix F.

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General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer

4. RESPONSE TO COMMENTS (cont'd)

In addition, the second italicized paragraph in the final language in MCM 5 of the permit modification (*The Model LID Ordinance shall be submitted to the Maine DEP for review by September 1, 2022. DEP will post the model ordinance for public comments and approve it, with or without modifications, on or before November 1, 2022.*) provides individual permittees the flexibility to tailor the LID ordinance or regulatory mechanism to their specific city or town. These requirements are consistent with the Maine APA and Remand Rule as they are requiring the permittees to propose clear, specific and measurable performance standards for their ordinances/regulatory mechanism.

Comment #2 (City of Lewiston and BASWG): The commenters stated the underlined language below in MCM 5 as written in the September 24, 2021 corrected proposed draft permit modification is inconsistent the Maine APA and Remand Rule.

- ii. On or before July 1, 2024, permittees must develop or update an enforceable ordinance or other regulatory mechanism to require that LID techniques be used to the maximum extent practicable (emphasis added) for stormwater management on new and redevelopment sites. The ordinance or regulatory mechanism must be at least as stringent as the LID techniques found in Appendix F of this permit, unless such techniques are infeasible on site. (emphasis added)

The commenters stated the Maine APA and Remand Rule require that the MS4 Permit contain requirements that are clear, specific, and measurable. In the September 24, 2021 corrected proposed draft permit modification, the Department does not establish clear, specific, and measurable criteria by which permittees shall make determinations of maximum practicability or infeasibility. As such, the draft MS4 Permit does not comply with the Maine APA or Remand Rule.

Response #2: See Response #1. The final language in MCM 5 requires the permittee to develop an ordinance or regulatory mechanism that establishes specific performance standards taking into consideration the LID measures included in the guidance document in Appendix F.

During the preliminary drafting of the original MS4 permit that was issued as a final order on October 15, 2020, the Department included a definition for maximum extent practicable. The USEPA objected to the inclusion of the definition because the definition proposed was a “one size fits all” approach. The USEPA suggested deleting the definition and have each permittee propose what is maximum extent practicable and feasible for their particular town or city and not the permitting authority.

Comment #3 (USEPA): The commenter stated “The proposed modification to the Final Permit dated September 14, 2021 included a provision for Post Construction Stormwater Management in New Development and Redevelopment that required permit holders to develop a regulatory mechanism that adopted Low Impact Development (LID) techniques with specific performance standards that are found in the proposed Attachment F to the Final Permit. This approach is consistent with 40 C.F.R. §122.28 and 40 C.F.R. §122.34 and includes clear, specific, and measurable goals for permit holders. However,

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4. RESPONSE TO COMMENTS (cont'd)

the updated modification dated September 24, 2021 removed the performance standards for the LID practices and the proposed modification is no longer consistent with 40 C.F.R. §122.28 or 40 C.F.R. §122.34. To remedy this situation EPA offers the following two potential options:

1. Issue the Final Permit modification consistent with the proposed modification language dated September 14, 2021 including all performance standards for LID measures to be incorporated into each permittee's regulatory mechanism.
2. Update the Final Permit modification language to include a requirement that each permittee submit proposed performance standards to be included in their regulatory mechanism for each LID measure in Attachment F. This can be done as part of each permittee's permit application, consistent with the two-step permitting process found in 40 C.F.R. §122.28, or during the permit term provided MDEP allows for public comment on each permittee's proposed regulatory mechanism for post-construction stormwater management."

Response #3: The language in the final permit modification is remedied by USEPA's suggestion in number two above of their comments. The final language in this permit modification states;

The Model LID Ordinance shall be submitted to the Maine DEP for review by September 1, 2022. DEP will post the model ordinance for public comments and approve it, with or without modifications, on or before November 1, 2022.

Comment #4 (FOCB, CLF): The commenter stated "Overall, Friends of Casco Bay supports the Permit Modification. We do, however, recommend editing the language related to Part IV.C.5 or Minimum Control Measure (MCM) 5. The language requires that each permittee: *"must develop or update an enforceable ordinance or other regulatory mechanism to require that LID techniques be used to the maximum extent practicable for stormwater management on new and redevelopment sites. The ordinance or regulatory mechanism must be at least as stringent as the LID techniques found in Attachment F of this permit, unless such techniques are infeasible on site."*

This language conforms to the BEP Order but creates two potential issues, one related to who determines the "maximum extent practicable" and the other related to Attachment F. Attachment F should be relabeled as Appendix F to be consistent with the remainder of the Final Permit. It incorporates Chapter 10 of Maine's Stormwater Best Management Practices Manual as guidance. Appendix F includes Table 1 but not Table 2 of Chapter 10. Without Table 2, Appendix F does not include performance standards to set the clear, specific and measurable targets for reducing stormwater pollution from new development and redevelopment.

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4. RESPONSE TO COMMENTS (cont'd)

To address both issues, Friends of Casco Bay requests that DEP revise this section of the Permit Modification as follows:

5. *MCM5 - Post-Construction Stormwater Management in New Development and Redevelopment*

Each permittee must implement and enforce a program to address post construction stormwater runoff to the maximum extent practicable from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development that discharge into the MS4.

- a. *The permittee must implement strategies which include a combination of structural and/or non-structural BMPs appropriate to prevent or minimize water quality impacts, as follows:*

On or before September 1, 2022, each permittee must develop a Model LID Ordinance for stormwater management on new and redevelopment sites which establishes performance standards for each of the LID Measures contained in Table 1 of Appendix F. The Model LID ordinance should, at a minimum, refer to Appendix F for guidance.

The Model LID Ordinance shall be submitted to the Maine DEP for review by September 1, 2022. DEP will post the model ordinance for public comments and approve it, with or without modifications, on or before November 1, 2022.

On or before July 1, 2024 each permittee shall adopt an ordinance or regulatory mechanism that is at least as stringent as the required elements of the Model LID Ordinance or incorporate all of its required elements into the permittee's code of ordinances or other enforceable regulatory mechanism.

In addition, the FOCB stated "We further request that DEP modify Table 1 in Appendix F. See attachment and comments of ISWG/SMSWG."

Response #4: The final permit language proposed by the FOCB and modifications to Appendix F as suggested by ISWG/SMSWG the CLF and the City of Lewiston have been incorporated into the final permit modification.

Comment #5 (BASWG): The commenter stated "The BASWG members plan to participate in the model ordinance development as indicated by Ms. Rabasca. The timeline and proposed process for the model ordinance as summarized by Ms. Rabasca (on behalf of ISWG/SMSWG) will help to streamline the process of adopting ordinances in individual communities. However, some of our members have concerns that coming to an agreement statewide on how that model ordinance should be written may be difficult. Please ensure that the final language allows for individual permittees to craft model ordinance language to be submitted to and approved by Maine DEP."

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4. RESPONSE TO COMMENTS (cont'd)

Response #5 – The final language in the permit modification does allow individual permittees to craft model ordinance language to be submitted and approved by the Department. The final language states in relevant part as follows:

On or before September 1, 2022, each permittee must develop a Model LID Ordinance for stormwater management on new and redevelopment sites which establishes performance standards for each of the LID Measures contained in Table 1 of Appendix F. The Model LID ordinance should, at a minimum, refer to Appendix F for guidance.

The Model LID Ordinance shall be submitted to the Maine DEP for review by September 1, 2022. DEP will post the model ordinance for public comments and approve it, with or without modifications, on or before November 1, 2022.

On or before July 1, 2024 each permittee shall adopt an ordinance or regulatory mechanism that is at least as stringent as the required elements of the Model LID Ordinance or incorporate all of its required elements into the permittee's code of ordinances or other enforceable regulatory mechanism.

ATTACHMENT A

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION



JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

June 22, 2021

SENT VIA ELECTRONIC MAIL AND U.S. POSTAL MAIL

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RE: Municipal Storm Sewer System General Permit, MS4 General Permit
#MER041000/W009170-5Y-C-R
Appeal by Friends of Casco Bay
Board Findings of Fact and Order on Appeal

Dear Participants:

Attached, please find a copy of the Board of Environmental Protection's June 17, 2021, decision on the appeal of Friends of Casco Bay of Department Order #MER041000/W009170-5Y-C-R, the MS4 General Permit.

Maine law generally allows aggrieved persons to appeal final Board licensing decisions to Maine's Superior Court. A party's appeal must be filed with the Superior Court within 30 days

June 22, 2021

BEP Decision Re: Municipal Storm Sewer System General Permit
MS4 General Permit

of receipt of notice of the Board's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. A copy of the DEP Information Sheet "Appealing a Department Licensing Decision" (November 2018) is enclosed.

If you have any questions regarding the Board's decision, you may contact Board Executive Analyst William Hinkel (bill.hinkel@maine.gov or 207-314-1458) or Assistant Attorney General Laura Jensen (207-626-8868).

Sincerely,

A handwritten signature in cursive script, appearing to read "Ruth Ann Burke".

Ruth Ann Burke, Administrative Assistant
Board of Environmental Protection

Attachments: Board Decision on Appeal
DEP Information Sheet *Appealing a Department Licensing Decision*

cc: Service List w/ attachments



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

BOARD ORDER

IN THE MATTER OF

MUNICIPAL SEPARATE STORM	)	BOARD ORDER
SEWER SYSTEM GENERAL PERMIT	)	
STATE OF MAINE	)	FINDINGS OF FACT AND
MER041000	)	ORDER ON APPEAL
W009170-5Y-D-Z	)	

Pursuant to 38 M.R.S. § 341-D(4) and 06-096 C.M.R., ch. 2, *Rule Concerning the Processing of Applications and Other Administrative Matters* (Chapter 2), the Board of Environmental Protection (Board) has considered the appeal of Friends of Casco Bay (FOCB or Appellant) of the Municipal Separate Storm Sewer System General Permit (MS4 General Permit or Final Permit) issued by the Commissioner of the Department of Environmental Protection (Department). Based upon materials filed in support of the appeals, the responses to the appeals, comments received, and other related materials in the Department's file, the Board FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY

On December 6, 2019, the Department initiated the formal process to renew the MS4 General Permit, last issued by the Department on July 1, 2013, for a five-year term. The MS4 General Permit regulates discharges of stormwater from small municipal separate storm sewer systems (MS4s)¹ to surface waters of the State. It sets forth permit coverage and limitations, definitions, authorization and notice requirements, stormwater program management plan (SWMP) requirements, and standard conditions for covered municipalities and other MS4s entities.

Between March 2017 and December 2019, the Department held stakeholder meetings regarding the renewal of the MS4 General Permit. On December 6, 2019, Department staff released a draft MS4 General Permit and associated draft fact sheet (Draft) for a formal 30-day public comment period in accordance with Chapter 2, § 18 and 06-096 C.M.R., ch. 522, *Application Processing Procedures for Waste Discharge Licenses*. The Department received comments from interested persons between December 6, 2019, and January 5, 2020, when the comment period closed. After making changes to the Draft based on the comments received, Department staff released a revised draft MS4 General Permit on June 23, 2020 (Final Draft) for additional public comment. The Department received comments on the Final Draft from interested persons between June 23, 2020, and July 10, 2020, when the additional comment period closed.

¹ Generally, the definition of small MS4 includes those MS4s that serve less than 100,000 persons and are located within the urbanized area boundary as determined by the latest U.S. Census and construction sites that disturb one to five acres. *See* 40 C.F.R. § 122.26(b)(16).

On October 15, 2020, the Commissioner of the Department issued combined Waste Discharge License W009170-5Y-C-R and Maine Pollutant Discharge Elimination System permit MER041000, thereby renewing for a period of five years the July 1, 2013, MS4 General Permit. Pursuant to 40 C.F.R. § 122.28(d)(2), the Department incorporated a two-step permitting process for MS4s in Maine into the renewed MS4 General Permit. Issuance of the MS4 General Permit is the first step in the process; the second step is granting coverage for individual dischargers under the MS4 General Permit. Each entity seeking coverage under the MS4 General Permit must submit to the Department a Notice of Intent to Comply with the MS4 General Permit (NOI) and a SWMP. In granting coverage under the MS4 General Permit, the Department issues an Order that may or may not establish additional required actions and corresponding schedules of compliance based upon the circumstances and the Department's review of each NOI.

On November 13, 2020, FOCB filed with the Board a timely appeal of the MS4 General Permit pursuant to 38 M.R.S. § 341-D(4)(A) and Chapter 2, § 24. The Appellant argues that certain terms that had been included in the Final Draft were changed or omitted from the Final Permit without explanation. Specifically, FOCB argued that the following terms from the Final Draft must be restored in the Final Permit in order for it to comply with the federal Clean Water Act (CWA):

- 1) an effective date of September 1, 2021;
- 2) a requirement that municipalities mandate the use of Low Impact Development (LID) site planning and design strategies to the maximum extent feasible; and
- 3) for municipalities that discharge to an impaired water body, a requirement that SWMPs contain clear, specific, and measurable actions to comply with the total maximum daily load (TMDL), waste load allocation, and any implementation plan.

The United States Environmental Protection Agency (EPA), Region 1; the Interlocal Stormwater Working Group and the Southern Maine Stormwater Working Group, jointly, (ISWG and SMSWG); and the Bangor Area Stormwater Group (BASWG) each filed timely responses to FOCB's appeal. ISWG and SMSWG proposed as supplemental evidence Department emails "regarding Chapter 500 Updates." The Appellant objected to this proposed supplemental evidence, arguing that it was not relevant and was not the type of evidence on which reasonable persons would rely. In a procedural order dated March 2, 2021, the Presiding Officer admitted the proposed supplemental evidence pursuant to Chapter 2, § 24(D)(2).

Additionally, FOCB requested a hearing on the appeal pursuant to Chapter 2, § 24(A).

2. APPLICABLE STANDARDS ON APPEAL

Pursuant to Chapter 2, § 24(G) the Board is not bound by the Commissioner's findings of fact or conclusions of law. The Board shall affirm all or part, affirm with conditions, order a hearing to be held as expeditiously as possible, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings. The Board's decision is based on the administrative record on appeal, including any supplemental evidence admitted into the record and any evidence admitted during the course of a hearing on the appeal. The decision to hold a hearing is discretionary with the Board.

3. STANDING

The Appellant states that it is a nonprofit organization with more than 3,000 members that works to improve and protect the environmental health of Casco Bay and its watershed. FOCB states that its members depend on clean and healthy water in the Bay and that it has identified stormwater pollution as one of the most serious threats to the Bay. FOCB further states that it will be negatively affected if stormwater pollution is not adequately controlled. The Appellant participated in the MS4 permitting process before the Department by filing comments and attending stakeholder meetings. No Respondent challenged FOCB's standing on appeal.

The Board finds that the Appellant may suffer particularized injury as a result of the Department's MS4 permitting decision and that FOCB therefore is an aggrieved person and has standing to bring this appeal pursuant to Chapter 2, §§ 1(B) and 24.

4. DISCUSSION AND FINDINGS OF FACT

A. Background

Municipal and industrial stormwater discharges are subject to regulation pursuant to section 402(p) of the CWA. 33 U.S.C. § 1342(p). In 1999, EPA promulgated a rule requiring National Pollutant Discharge Elimination System (NPDES) permits for discharges from small MS4s (the Phase II Rule). 64 Fed. Reg. 68722, Dec. 8, 1999. The Phase II Rule requires small MS4s to develop and implement SWMPs designed to reduce pollutants discharged from the MS4 "to the maximum extent practicable (MEP), to protect water quality, and to satisfy the appropriate water quality requirements of the Clean Water Act," and requires that the SWMPs include six "minimum control measures" (MCMs). 40 C.F.R. § 122.34. Small MS4s may seek coverage under an applicable general permit or may apply for an individual NPDES permit.

In 2001, the Department received authorization from the EPA to administer the NPDES permit program for most of the State of Maine,² commonly referred to as the Maine Pollutant Discharge Elimination System (MEPDES) permit program. Department rule, 06-096 C.M.R., ch. 529, *General Permits for Certain Wastewater Discharges*, authorizes the Department to

² EPA took no action at that time regarding Maine's implementation of the NPDES program in Indian country in Maine. *See Maine v. Johnson*, 498 F.3d 37, 40 (1st Cir. 2007).

issue general permits for certain wastewater discharges, including discharges from MS4s. The Department issued the first MS4 General Permit for the State of Maine on July 1, 2013.

In 2003, petitions for review of the Phase II Rule were filed in federal court. The reviewing court partially remanded the rule to EPA because it lacked adequate procedures for permitting authority review and public notice and the opportunity to request a hearing on NOIs. *Environmental Defense Center v. U.S. Environmental Protection Agency*, 344 F.3d. 832 (9th Cir. 2003). To remedy these defects, EPA promulgated an amended rule, *National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule*, 81 Fed. Reg. 89320-01 (Dec. 9, 2016) (the Remand Rule). The Remand Rule requires state permitting authorities to select either a “Comprehensive General Permit” or “Two-Step General Permit.” See 40 C.F.R. § 122.28(d). It also clarifies that the terms and conditions of the general permit “must be expressed in terms that are ‘clear, specific, and measurable’” and that “the permit requirements must be enforceable, and must provide a set of performance expectations and schedules that are readily understood by the permittee, the public, and the [state] permitting authority alike.” 81 Fed. Reg. at 89326.

Because the permit was due to expire on July 1, 2018, Maine initiated the renewal permitting process for the MS4 General Permit in March 2017. The Department was aware of the Remand Rule and incorporated its requirements into the permit renewal process.

B. Response to Comments (Part IV of the Fact Sheet)

Pursuant to 40 C.F.R. § 124.17(a)(1), upon issuing a MEPDES permit, the Department must also issue a response to comments that “[specifies] which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change.” In the Response to Comments document that accompanied the Final Permit, the Department failed to specify or explain the rationale for the three changes it made to the Final Draft challenged by the Appellant. In its comments on the MS4 General Permit, EPA Region 1 noted that the Response to Comments document issued by the Department does “not address or justify” two of those three changes—the change in the effective date and the change to Part IV.C.5 of the Final Permit. See Sections 4(C) and (D) below.

The Board finds that the Response to Comments document accompanying the Final Permit did not comply with 40 C.F.R. § 124.17(a)(1) because it did not specify and give reasoned bases for the three changes from the Final Draft to the final MS4 General Permit. Specifically, the Response to Comments document should have noted and explained the changes to (1) the effective date; (2) the LID term component of the required municipal post construction ordinance or other regulatory mechanism; and (3) the requirement to propose clear, specific, and measurable actions to comply with the TMDL waste load allocation and any implementation plan for discharges to impaired waters.

C. Effective Date (Part I.B.1 of the Final Permit)

The Final Draft set an effective date of September 1, 2021, for the general permit. Final Draft, Part I.B.1, p. 5. The Final Permit sets an effective date of July 1, 2022. Final Permit, Part I.B.1, p. 5. The Appellant argues that the Board must restore the effective date that appeared in the Final Draft in the Final Permit because the extended effective date “fails to meet the tenets of the Remand Rule and reduce stormwater pollution to the [maximum extent practicable].” ISWG and SMSWG respond that the Remand Rule does not specify what the effective date of the new MS4 General Permit must be and that the Department may use its best professional judgment in setting the effective date.

The second step of the MS4 general permitting process requires the Department to review NOIs and SWMPs submitted by thirty regulated entities and issue final permittee-specific orders for those entities. Although the Department has temporarily reallocated resources to assist in the reviews and issuance of orders necessary for coverage under the MS4 General Permit, the Department would nevertheless be unable to complete these reviews and issue these orders by the effective date of September 1, 2021, that appeared in the Final Draft. This would mean that some regulated entities would not have coverage under the MS4 General Permit by that effective date. Therefore, shortly before issuing the Final Permit, the Department reevaluated the permitting timeline and concluded that an effective date of July 1, 2022, was the earliest possible effective date that the Department could set for the MS4 General Permit. Although the change was not identified in the Response to Comments document, Department staff informed FOCB of this change before issuing the final permit.

Based on the arguments of the participants and the information provided by the Commissioner, the Board finds that the effective date that appears in the Final Permit is reasonable and necessary and not prohibited by the Remand Rule. The Department would be unable to complete the second step of the MS4 permitting process by the effective date of September 1, 2021, that appeared in the Final Draft. In contrast, the effective date of July 1, 2022, provides the Department with the time necessary to properly review the required NOIs and SWMPs and issue permittee-specific orders in the second step of the MS4 permitting process. The effective date in the Final Permit is both reasonable under the circumstances and within the Commissioner’s discretion. The Board is satisfied that the Remand Rule does not mandate a particular effective date and that the Commissioner and Department staff have used their best judgment in setting the earliest possible effective date for the Final Permit. Accordingly, the Board affirms that portion of the Commissioner’s decision.

D. Low Impact Development (LID) (Part IV.C.5.b of the Final Permit)

In accordance with the Remand Rule, the MS4 General Permit requires regulated entities to implement and enforce a program to address post-construction stormwater runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale. Minimum Control Measure (MCM) 5 (Post-Construction Stormwater Management in New Development and Redevelopment) of the Final Draft required permittees to have and implement a post-construction discharge ordinance or other regulatory mechanism that contains “Low Impact Development site planning and design strategies must be used to the maximum extent feasible.” Final Draft, Part IV.C.5.b.1, p. 34. The Final Permit omits this LID requirement. Final Permit, Part IV.C.5.b, p. 34.

The Appellant argues that the LID requirement must be restored to the Final Permit because the Remand Rule requires MCM 5 to contain clear, specific, and measurable terms designed to reduce pollution from new construction to the maximum extent practicable, and LID “is the very means by which new development can be designed and stormwater treated before it enters receiving waters.” ISWG, SMSWG, and BASWG respond that the Remand Rule does not mandate the use of LID and that LID is not the only way to reduce stormwater runoff from new development to the maximum extent practicable. ISWG, SMSWG, and BASWG further state that Department rule Chapter 500, *Stormwater Management*, already mandates the use of LID for developments that disturb one acre or more of land. They argue a statewide rule mandating LID provides more consistency than a patchwork of municipal ordinances that could be created by including the LID term in MCM 5 of the MS4 General Permit. ISWG and SMSWG also submitted supplemental evidence suggesting that the Department will be amending Chapter 500, although the emails do not reveal a timeline for this rulemaking or details of how the rule might be amended.

In its comments on the Draft and the Final Permit, EPA Region 1 stated that this part of MCM 5 did not contain clear, specific, and measurable terms as required by the Remand Rule. EPA further commented that the Department could cure this defect by (1) restoring the LID term that appeared in the Final Draft, (2) referencing Chapter 500 in the permit, or (3) requiring each MS4 permittee to submit how it plans to regulate new development and redevelopment and create clear, specific, and measurable requirements in the second step of the two-step permitting process.

Having considered these arguments, responses, and comments, the Board finds that, although LID best management practices (BMPs) are not specifically required by the Remand Rule or Department regulations (Chapter 500), incorporating clear, specific, and measurable LID BMPs into the permit would satisfy the Remand Rule and is also reasonable and appropriate given that the Department has historically endorsed the use of these BMPs in site development approvals. Chapter 10 of the Department’s publication *Maine Stormwater Management Design Manual, Stormwater Management Manual Volume I (March 2016)* contains a list of specific

measures and techniques to reduce the impacts of stormwater runoff from new development and redevelopment. Rather than referencing Chapter 500 as suggested by EPA Region 1, the measures and techniques in Chapter 10 should be incorporated into the MS4 General Permit as an appendix. The Department and members of the stakeholders that participated in the draft of the permit were in agreement that simply referencing the Chapter 500 rules would be cumbersome and confusing to permittees as there are numerous provisions in the rule that are not applicable to the GP. All parties agreed that rather than referencing to other Department rules or documents, the GP should be a stand-alone document with all of the requirements incorporated within. Incorporating the LID measures and techniques into the GP will satisfy the Remand Rule by giving permittees clear, specific, and measurable BMPs to be utilized to the maximum extent practicable for stormwater management unless the BMPs are infeasible for a particular site.

E. Discharges to Impaired Waters (Part IV.E.1 of the Final Permit)

The provision for Pollution Prevention/Good Housekeeping for Municipal Operations (MCM 6) in the Final Draft provided that, if an MS4 discharges to impaired waters for which EPA has approved a TMDL, its SWMP “must propose clear, specific and measurable actions to comply with the TMDL waste load allocation, and any implementation plan.” Final Draft, Part IV.E.1, p. 51. The Final Permit omits the words “clear, specific and measurable.” Final Permit, Part IV.E.1, p. 51. Instead, the Final Permit requires a permittee that discharges to an impaired water with an EPA approved TMDL to “address compliance” with the TMDL, the waste load allocation, and any implementation plan in its SWMP.

The Appellant states that this change removes the requirement to propose BMPs for discharges to impaired waters other than to urban impaired streams, for which permittees are required to propose and fully implement at least three structural or non-structural BMPs. FOCB argues that the change in language between the Final Draft and Final Permit fails to advise permittees of how they must address compliance with TMDL waste load allocations, and that it is insufficient to address this issue in the second step of the MS4 permitting process. ISWG and SMSWG respond that the Final Permit satisfies the Remand Rule because it includes clear, specific, and measurable actions to address stormwater runoff to impaired waters. Specifically, ISWG and SMSWG point to the following actions required by the Final Permit: (1) development of three BMPs for urban impaired streams, which account for most of the MS4 discharges to impaired waters, *see* Final Permit, Part IV.3, p. 26; (2) implementation of illicit discharge detection and elimination plans, *see* Final Permit, Part IV.E, p. 52; and (3) Department review and approval of SWMPs that include BMPs, *see* Final Permit, Part IV.A-B, pp. 20-22. They note that nothing in the Final Permit authorizes discharges to impaired waters that are inconsistent with a TMDL waste load allocation. EPA Region 1 and BASWG did not comment on this change, although BASWG indicated its general support for the arguments made by ISWG and SMSWG.

FINDINGS OF FACT

AND

ORDER ON APPEAL

Having considered these arguments and responses, the Board finds that actions to be taken by the permittee to address compliance with TMDL waste load allocations must be clear, specific and measurable to comply with the Remand Rule. Incorporating the words “clear, specific, and measurable” into Part IV. E.1 of the Final Permit as FOCB requests is therefore reasonable and appropriate.

CONCLUSIONS

In consideration of FOCB's arguments on appeal, responses from the EPA Region I, ISWG, SMSWG, BASWG and the CLF, information from the Commissioner, and review of applicable regulations, including the Remand Rule, the Board concludes that the Final Permit should be remanded to the Commissioner for further proceedings to modify Part IV.C.5 and Part IV.E of the Final Permit. The Board further concludes that the Response to Comments document accompanying the Final Permit must be modified to specify and give reasoned bases for the effective date of the Final Permit and the forthcoming modifications to Part IV.C.5 and Part IV.E of the Final Permit.³

Notwithstanding the Board's decision to remand the Final Permit and Response to Comments document for modification as described above, the Board affirms all other findings of fact and conclusions in the Final Permit and the associated Fact Sheet and Response to Comments document.

ORDER ON APPEAL

Therefore, the Board REMANDS to the Commissioner the Municipal Separate Storm Sewer System General Permit MER041000/W009170-5Y-C-R for further proceedings on only Part IV.C.5, Part IV.E, and the Response to Comments document in accordance with this Order.

DONE AND DATED IN AUGUSTA, MAINE THIS 17th DAY OF JUNE, 2021.

BOARD OF ENVIRONMENTAL PROTECTION

BY:  _____
PRESIDING OFFICER

³ Although the Board has discretion to modify the Final Permit itself, the Board concludes that the Commissioner is in a better position to do so on remand in this particular instance where the CWA imposes specific requirements for notice and comment. *See* 38 M.R.S. § 414-A(5); 06-096 C.M.R. ch. 522, § 4; 06-096 C.M.R. ch. 529, § 2(b)(1).

Board of Environmental Protection
Appeal of MS4 General Permit
Maine Pollutant Discharge Elimination System Permit #MER041000
Waste Discharge License #W009170-5Y-C-R
Service List, revised March 1, 2021

Every document or communication filed with the Board in this matter must be served on
all parties on this service list.

BEP

*Filings with the Board must be directed
to Ruth Ann Burke*

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Appellant

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Respondents

Interlocal Stormwater Working Group (ISWG) is comprised of Biddeford, Cape Elizabeth, Cumberland, Cumberland County Soil and Water Conservation District, Falmouth, Freeport, Gorham, Old Orchard Beach, Portland, Saco, Scarborough, South Portland, Southern Maine Community College, University of Southern Maine, Westbrook, Windham, and Yarmouth jointly with

Southern Maine Stormwater Working Group (SMSWG) is comprised of Berwick, Eliot, Kittery, South Berwick, and York

Represented by:
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Board of Environmental Protection
Appeal of MS4 General Permit
Maine Pollutant Discharge Elimination System Permit #MER041000
Waste Discharge License #W009170-5Y-C-R
Service List, revised March 1, 2021

Every document or communication filed with the Board in this matter must be served on
all parties on this service list.

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Portland, ME 04101
brayback@pierceatwood.com

Respondents (cont'd)

Bangor Area Stormwater Group (BASWG) is comprised of City of Bangor, City of Brewer, Town of Hampden, Town of Milford, City of Old Town, Town of Orono, Town of Veazie, Dorothea Dix Psychiatric Center, Eastern Maine Community College, Maine Air National Guard, University of Maine Augusta at Bangor, and University of Maine

Represented by:
Richard May, Chair BASWG
City of Bangor Engineering Department
73 Harlow Street
Bangor, ME 04401
richard.may@bangormaine.gov



DEP INFORMATION SHEET

Appealing a Department Licensing Decision

Dated: November 2018

Contact: (207) 314-1458

SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner: (1) an administrative process before the Board of Environmental Protection (Board); or (2) a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S. §§ 341-D(4) & 346; the *Maine Administrative Procedure Act*, 5 M.R.S. § 11001; and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 C.M.R. ch. 2.

DEADLINE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed more than 30 calendar days after the date on which the Commissioner's decision was filed with the Board will be dismissed unless notice of the Commissioner's license decision was required to be given to the person filing an appeal (appellant) and the notice was not given as required.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017. An appeal may be submitted by fax or e-mail if it contains a scanned original signature. It is recommended that a faxed or e-mailed appeal be followed by the submittal of mailed original paper documents. The complete appeal, including any attachments, must be received at DEP's offices in Augusta on or before 5:00 PM on the due date; materials received after 5:00 pm are not considered received until the following day. The risk of material not being received in a timely manner is on the sender, regardless of the method used. The appellant must also send a copy of the appeal documents to the Commissioner of the DEP; the applicant (if the appellant is not the applicant in the license proceeding at issue); and if a hearing was held on the application, any intervenor in that hearing process. All of the information listed in the next section of this information sheet must be submitted at the time the appeal is filed.

INFORMATION APPEAL PAPERWORK MUST CONTAIN

Appeal materials must contain the following information at the time the appeal is submitted:

1. *Aggrieved Status.* The appeal must explain how the appellant has standing to maintain an appeal. This requires an explanation of how the appellant may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions, or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions regarding compliance with the law, license conditions, or other aspects of the written license decision or of the license review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the license decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific licensing requirements that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for public hearing must be filed as part of the notice of appeal, and must include an offer of proof in accordance with Chapter 2. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the application, the request and the proposed evidence must be submitted with the appeal. The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered in an appeal only under very limited circumstances. The proposed evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Specific requirements for supplemental evidence are found in Chapter 2 § 24.

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, and is made easily accessible by the DEP. Upon request, the DEP will make application materials available during normal working hours, provide space to review the file, and provide an opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed, the license normally remains in effect pending the processing of the appeal. Unless a stay of the decision is requested and granted, a license holder may proceed with a project pending the outcome of an appeal, but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge receipt of an appeal, and will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, any materials submitted in response to the appeal, and relevant excerpts from the DEP's application review file will be sent to Board members with a recommended decision from DEP staff. The appellant, the license holder if different from the appellant, and any interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. The appellant and the license holder will have an opportunity to address the Board at the Board meeting. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, the license holder, and interested persons of its decision.

II. JUDICIAL APPEALS

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court (see 38 M.R.S. § 346(1); 06-096 C.M.R. ch. 2; 5 M.R.S. § 11001; and M.R. Civ. P. 80C). A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 314-1458, or for judicial appeals contact the court clerk's office in which your appeal will be filed.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.
