



JANET T. MILLS  
GOVERNOR

387  
STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

**MEMORANDUM**

TO: Board of Environmental Protection

FROM: Gregg Wood, Director, Division of Water Quality Management

RE: Maine Separate Storm Sewer System (MS4) – Appeal of General Permit (GP) Maine Pollutant Discharge Elimination System (MEPDES) Permit #MER041000/Maine Waste Discharge License (WDL) #W009170-5Y-C-R

Appellant – Friends of Casco Bay (FOCB)

DATE: June 17, 2021 – Board Meeting

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**Introduction.** On October 15, 2020, the Department of Environmental Protection (Department) issued a final combination MEPDES/WDL for the discharge of stormwater from thirty regulated small MS4s located throughout the state of Maine. An MS4 is defined as a conveyance or system of conveyances designed or used for collecting or conveying stormwater (other than a publicly owned treatment works as defined at 40 CFR 122.2, or a combined sewer), including, but not limited to, roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, human-made channels or storm drains owned or operated by any municipality, sewer or sewage district, Maine Department of Transportation, Maine Turnpike Authority, State agency or Federal agency or other public entity that discharges to waters of the State other than groundwater.

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).

**Statutory and Regulatory References**

- Pollution Control Law, 38 M.R.S. §§ 411 - 424-B, 451;
- Water Classification Program, 38 M.R.S. §§ 464 - 470;
- Department regulations adopted pursuant to the above laws, including Chapters 520-525, 529 and 579; and
- Code of Federal Regulations 40 C.F.R. Part 122

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**List of Exhibits**

- #1 Friends of Casco Bay (FOCB) appeal letter dated November 13, 2020.
- #2 U.S. Environmental Protection (EPA) Region I comment letter dated November 18, 2020.
- #3 Bangor Area Stormwater Group (BASWG) comment letter dated January 21, 2021.
- #4 Interlocal Stormwater Working Group (ISWG) and Southern Maine Stormwater Working Group (SMSWG) joint comment letter dated January 22, 2021.
- #5 Conservation Law Foundation (CLF) comment letter dated January 22, 2021.
- #6 Excerpts from the December 6, 2019 Proposed Draft Permit, the June 23, 2020 Final Draft Permit and the October 15, 2020 Final Permit.
- #7 Draft Board Order in response to the appeal by FOCB.

**Appeal by the FOCB** - On November 13, 2020, the Friends of Casco Bay (FOCB) filed a timely appeal of the MS4 GP with the Board. See Exhibit #1.

FOCB is requesting the Board restore three terms to the MS4 GP to:

- (1) Set an effective date of September 1, 2021 rather than July 1, 2022;
- (2) Require that the municipal post construction ordinance or other regulatory mechanism under Minimum Control Measure (MCM) 5 mandate the use of Low Impact Development (LID) site planning and design strategies to the maximum extent feasible; and
- (3) Require that if the waterbody to which a point source discharge drains is impaired and has an EPA approved total maximum daily load (TMDL), then the stormwater management plan (SWMP) must propose clear, specific, and measurable actions to comply with the TMDL waste load allocation and any implementation plan.

FOCB states that these terms which were included in the final draft MS4 GP dated June 23, 2020 (Final Draft) but not the final MS4 GP must be restored to the final permit to reduce municipal stormwater pollution to the maximum extent practicable in accordance with the Phase II Remand Rule dated December 9, 2016, and the Clean Water Act.

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**Responses to the appeal by Respondents** - On November 18, 2020, EPA Region I submitted a letter to the Department (see Exhibit #2) stating the final MS4 GP issued on October 15, 2020 contains modifications from the original draft GP (December 6, 2019) and the revised draft GP (June 23, 2020) resulting in the final GP being inconsistent with the Clean Water Act and implementing regulations. More specifically MCM5 and the section on TMDLs.

On January 21, 2021, the Bangor Area Stormwater Group (BASWG) submitted a letter to the Department (see Exhibit #3) objecting to FOCB's request to require that the municipal post construction ordinance or other regulatory mechanism under MCM 5 mandate the use of Low Impact Development (LID) site planning and design strategies to the maximum extent feasible. BASWG states its concerns with FOCB's requested revisions are that:

- (1) LID site planning and design strategies are not required to meet National Pollutant Discharge Elimination System (NPDES) requirements;
- (2) The proposed revisions are not clear, measurable or specific;
- (3) The proposed revisions are not consistent with Department stormwater management regulations; and
- (4) The proposed revisions will result in unintended consequences including decentralized development, changes to land use cover in unregulated neighboring communities and additional burden on MS4 regulated communities.

On January 22, 2021, Respondents Interlocal Stormwater Working Group (ISWG) and the Southern Maine Stormwater Working Group (SMSWG) submitted a joint letter to the Department (see Exhibit #4) objecting to all three of FOCB's requested revisions. ISWG/SMSWG objections are summarized as follows:

- (1) The federal Remand Rule does not specify when an update to the MS4 GP must take effect, therefore, there is no legal claim for failing to meet federal law, but rather a policy argument.
- (2) The federal Remand Rule does not refer to LID and, therefore, there is no basis for the Department to require each municipality to adopt LID standards in the MS4 GP.
- (3) FOCB's claim that the federal Remand Rule requires clear, specific and measurable actions to comply with TMDLs is a mischaracterization. ISWG/SMSWG believe the MS4 GP already requires clear, specific and measurable actions including:
  - (a) Developing three specific best management practices (BMPs) for urban impaired streams.
  - (b) Implementing illicit discharge detection and elimination (IDDE) plans.
  - (c) Reviewing and approving stormwater management plans (SWMPs) by the Department.

On January 22, 2021, the Conservation Law Foundation (CLF) submitted a letter to the Department (see Exhibit #5) in support of the appeal by FOCB and the comments by the EPA Region I. CLF urged the Board to remand the MS4 GP to the Department to make changes required by the Clean Water Act and its implementing regulations.

**Department recommendation** - In consideration of FOCB's arguments on appeal, responses from EPA Region I, ISWG, SMSWG, BASWG and CLF, and review of applicable regulations, including the federal Remand Rule, the Department recommends the MS4 GP should be remanded to the Commissioner for further proceedings to modify Part IV.B.5.b and Part IV.E of the Final Permit. See Exhibit #7 for a draft Board Order remanding the GP back to the Commissioner.

**Estimated time for discussion** – 30 minutes.