



DRAFT BOARD ORDER

IN THE MATTER OF

MUNICIPAL SEPARATE STORM)	DRAFT 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.B.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.B.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.B.5.b.1, p. 34. The Final Permit omits this LID requirement. Final Permit, Part IV.B.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.

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.B.5.b 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.B.5.b 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.B.5.b, Part IV.E, and the Response to Comments document in accordance with this Order.

DONE AND DATED IN AUGUSTA, MAINE THIS _____ DAY OF _____, 2021.

BOARD OF ENVIRONMENTAL PROTECTION

BY: _____
Robert S. Duchesne, 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).