

EXHIBIT #3



VIA Email and Certified U.S. Mail

January 21, 2021

James W. Parker, Presiding Officer
Board of Environmental Protection
c/o Ruth Ann Burke
Office of the Commissioner
17 State House Station
Augusta, ME 04333-0017

**Re: Friends of Casco Bay Appeal of Final General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems (MS4), Maine Pollutant Discharge Elimination System Permit #MER041000, Maine Waste Discharge License #W009170-5Y-C-R
Response of Bangor Area Stormwater Group**

Mr. Parker:

On November 13, 2020, Friends of Casco Bay (FOCB) filed with the Maine Board of Environmental Protection (BEP) an appeal of the Maine Department of Environmental Protection (MDEP) General Permit for the Discharge of Stormwater from Small Municipal Separate Storm Sewer Systems (MS4), dated October 15, 2020 (Final Permit) (the "Appeal")¹. This letter provides the response of the members of the Bangor Area Stormwater Group (BASWG)² to the Appeal, specifically regarding the FOCB request that the BEP restore to the Final Permit a requirement that Minimum Control Measure 5, *Post-Construction Stormwater Management in New Development and Redevelopment* (MCM 5), mandate the use of Low Impact Development (LID) site planning and design strategies to the maximum extent feasible for sites that disturb greater than one acre.³

¹ State of Maine Department of Environmental Protection, In the Matter of Municipal Separate Storm Sewer System General Permit, State of Maine MER 041000, W009170-5Y-C-R, Appeal of Final Permit to Board of Environmental Protection," November 13, 2020.

² The Bangor Area Stormwater Group (BASWG) is a collaboration of its MS4 regulated community members (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 – Bangor and University of Maine) to use public education and sound science to improve regional water quality through collaborative stormwater management in the Greater Bangor Urbanized Areas.

³ BASWG does not agree with FOCB that the Remand Rule dictates the effective date of the Final Permit or that the Final Permit terms regarding TMDLs are inconsistent with the Remand Rule. This response, however, is focused on the LID issues raised in the Appeal.

Friends of Casco Bay Appeal Concerns

Our concerns regarding the revisions to MCM 5 that would mandate use of LID site planning and design strategies include the following:

- LID site planning and design strategies are not required to meet National Pollutant Discharge Elimination System (NPDES) requirements;
- FOCB proposed revisions are not clear, measurable, or specific;
- FOCB proposed revisions are not consistent with MDEP Stormwater Management regulation; and
- FOCB proposed language will result in unintended consequences including decentralized development, changes to land use cover in unregulated, neighboring communities, and additional burden on MS4 regulated communities.

NPDES Requirements

The FOCB appeal asserts that the MDEP must adopt a regulatory stance that exceeds the requirements of Federal NPDES regulation and infringes on State authority to determine locally appropriate requirements:

*"To be lawful, the Final Permit must... require that the municipal post construction ordinance or other regulatory mechanism under MCM 5 mandate the use of LID site planning and design strategies to the maximum extent feasible...."*⁴

The NPDES MS4 General Permit Remand Rule (Remand Rule)⁵ requires that MS4 permits contain "clear, specific, and measurable" terms and conditions for MCM requirements, water quality-based requirements, and evaluation, recordkeeping, and reporting requirements.⁶ Remand Rule guidance expressly recommends that NPDES permitting authorities adopt MCM 5 terms and conditions, including, specifically, best management practices (BMPs), that are "appropriate for the local community."⁷ The term "appropriate for the local community" means that MCM 5 BMPs must be appropriate for each and every MS4 across the State of Maine.

The Remand Rule does not prescribe specific terms and conditions for meeting MCM 5 requirements; it requires only that the permitting authority promulgate MCM terms and conditions that are clear, specific, and measurable. Thus, the compliance posture conveyed in the appeal not only exceeds that required by Federal regulation, but also infringes on the express intent of the Remand Rule to encourage each NPDES permitting authority to ensure that MCM 5 requirements are appropriate across all MS4 communities in the state.

⁴ Appeal at 8.

⁵ 81 Fed. Reg. 89320 (Dec. 9, 2016)

⁶ *Id.* at 89334.

⁷ *Id.* at 89351.

Clear, Specific, and Measurable Requirement

In its November 18, 2020 correspondence to MDEP, citing its March 6, 2020 comments on the Draft MS4 General Permit, the U.S. Environmental Protection Agency (EPA) asserts that the language for MCM 5 in the Final Permit does not "contain clear, specific, and measurable requirements as required by 40 C.F.R. § 122.28 and 40 C.F.R. § 122.34 and must be revised in the Final Permit."⁸ The FOCB appeal seeks to provide such clear, specific, and measurable requirements by requiring that MCM 5 of the Final Permit be revised to "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."⁹ This proposed revision, however, also lacks specificity because no guidance is offered by FOCB as to what would constitute such LID site planning and design strategies or how they should be used to the maximum extent feasible.

Remand Rule guidance details that, to be "clear, specific, and measurable," permit requirements must... provide a set of performance expectations and schedules that are readily understood by the permittee, the public, and the permitting authority alike."¹⁰ Although the Final Permit defines the term "Low Impact Development," the text of the MCM 5 requirement proposed by FOCB does not establish a standard by which LID methods should be considered, designed, and/or constructed. This lack of specificity impedes efficient identification, design, and implementation of LID measures used to meet FOCB proposed MCM 5 requirements and is likely to lead to inconsistent statewide implementation of MCM 5.

State of Maine Stormwater Management Regulation

The FOCB appeal requests that the State modify the Final Permit to require the use of LID methods for projects that disturb one acre or more. This is inconsistent with the requirements of Maine Chapter 500 Stormwater Management. Chapter 500 already regulates stormwater management at developments disturbing one acre or more on a statewide basis. While Chapter 500, Section 4(C)(4) encourages the use of LID methods by providing a "Low Impact Development Credit" for developers that utilize LID methods to meet General Standards;¹¹ it clearly states that the "use of [LID] strategies is optional and voluntary for all projects."

The FOCB's request that LID methods be mandatory (whether via a municipal ordinance or other regulatory mechanism) for any project that disturbs one acre or more in an MS4 municipality far exceeds the State of Maine "optional and voluntary" approach to

⁸ Letter from Thelma Murphy, EPA to Rhonda Poirier, MDEP regarding "2020 Municipal Separate Storm Sewer Systems (MS4) Final Permit October 15, 2020, Permit Number MER041000," November 18, 2020 at 1.

⁹ Appeal at 1.

¹⁰ 81 Fed. Reg. at 89326.

¹¹ Under Chapter 500, only projects that create one or more acres of impervious area, create five acres or more of developed area within the watershed of a lake most at risk, or create 20,000 square feet of impervious area within the watershed of a lake most at risk are required to meet General Standards.

statewide LID, and far exceeds the State of Maine development threshold for incentivizing LID development (one acre of developed area vs. one acre of disturbed area). Moreover, the MDEP promulgated the Chapter 500 rules in order to ensure statewide protection of stormwater quality pursuant to Federal and State regulation. As noted by EPA in its November 18, 2020, unless MDEP determines Chapter 500 is inadequate to minimize water quality impacts, the permit could simply reference Chapter 500. As Chapter 500 rules are sufficient to ensure statewide stormwater quality, they are accordingly sufficient to ensure stormwater quality in MS4 communities.

Unintended Consequences

The FOCB appeal requests that BEP adopt a regulatory stance that will stimulate decentralized development, i.e., sprawl; effect changes in land cover and land use; and create additional economic burden on MS4 communities.

Remand Rule guidance for NPDES permitting authorities promotes the implementation of policies that "encourage infill development in higher density urban areas, and areas with existing infrastructure." Mandating the use of LID methods only within MS4s incentivizes development in proximate, rural, non-MS4 communities – the precise opposite of encouraging development in urban areas where there is existing infrastructure. Decentralized development results in changes in land cover and land use that may degrade rather than improve stormwater quality.

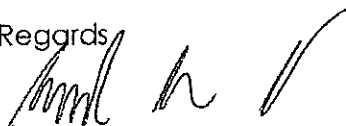
The MDEP is a recognized public expert in stormwater management requirements. Shifting review of LID implementation to MS4 communities is inefficient and is likely to become economically burdensome for MS4 communities. Projects that disturb one or more acre of area are generally of such impact that they require Planning Board approval. Municipal Planning Boards consist of community volunteers that may or may not have the technical background or expertise necessary to review the appropriateness of LID measures proposed by a developer, or to evaluate the extent to which implementation of LID measures is feasible for a proposed development. This gap in knowledge is unlikely to be reconcilable over the long-term because Planning Boards consist of elected or appointed officials serving discrete terms. Thus, this gap can be closed only by contracting with subject matter experts. Such a requirement could place significant additional financial burden on MS4 communities.

Conclusion

The specific revision to MCM 5 proposed by FOCB is neither required under Federal regulations nor is it a locally appropriate condition for all MS4 communities and it is not clear, specific, and measurable. Further, existing State regulation is sufficient to ensure stormwater quality in MS4s and the specific revision to MCM 5 proposed by FOCB will yield unintended, negative consequences. The BASWG respectfully asks that the BEP deny FOCB's requested relief generally and, specifically, with regard to the requested incorporation of terms mandating LID in MCM 5 and affirm the MDEP's issuance of the Final Permit.

On behalf of the BASWG members, thank you for your consideration of this response.

Regards

A handwritten signature in black ink, appearing to be 'R May', followed by a large checkmark.

Richard May
Chair, Bangor Area Stormwater Group

CC (via email only): BASWG Respondents