

**Chapter 500: Stormwater Management
and
Chapter 502: Direct Watersheds of Lakes Most at Risk from New Development
and Urban Impaired Streams**

2006 Proposed Revisions: Basis Statement & Response to Comments

BASIS STATEMENT

The Maine Department of Environmental Protection is proposing revisions to Chapters 500 and 502 affecting how stormwater is regulated in the State of Maine. The current rules were approved by the Board on November 4, 2004. These were major substantive rules that were subsequently approved by the Maine Legislature and became effective on November 16, 2005.

Implementation of the rules led to several concerns, including the need for more flexibility for large (Site Law sized) redevelopment projects where strict adherence to the existing requirements for best management practices (BMPs) can be very expensive. Because of this, a developer might consider going to an undeveloped site rather than redeveloping an existing impervious area due to the expense of stormwater treatment. A proposed revision to Chapter 500 would allow the department to approve redevelopment projects that do not meet all of the new standards, provided there is not an increase in stormwater impacts leaving the site. Other changes are also proposed, which are relatively minor in scope. The following summarizes the most significant of these changes:

1. **Developed Area** (Page 1): Narrows the definition of developed area to no longer include areas that are changed from forest to meadow. This would allow a project (such as an airport) to clear trees and still qualify under PBR as long as they keep the area in natural vegetation mowed no more than once per year.
2. **Linear Project** (Page 3): Changes definition of a “linear project” to “linear portion of a project” so that the term matches its usage in the rule, and allows subdivision roads to fall under the definition so that reduced, but still appropriate, treatment standards will apply to them.
3. **BMP Standards** (Page 5): Drops the term “BMP standards” due to confusion over multiple meanings (regulatory and non-regulatory) of the term. Those standards will be referred to as “general standards” in the rule.
4. **General Standards - required treatment area** (Page 5): Adds flexibility to general standards so that treatment of impervious area can be reduced from 95% of the impervious area to 90%, provided that overall treatment on the site will remain equivalent.
5. **Wetpond requirements** (Page 6, Appendix E: Pages 49 - 51): Revises the technical requirements for use of a wet pond under the general standards section.
6. **Redevelopment** (Page 7): Changes the language on redevelopment of existing impervious area so that it applies to impervious area in place as of November 16, 2005 (the effective date of the rule revisions). This closes a loophole whereby a developer could pave just under an acre prior to coming in for a permit and have it treated as “existing” in order to avoid treatment of it.
7. **Redevelopment - Site Projects** (Page 8): Changes the language on redevelopment for Site Location projects under the general standards section so that the project must “meet the general standards to the extent practicable as determined by the department.” The date of November 16, 2005 is used as cut-off date for “redevelopment” sites. This provides flexibility to the applicant

and the Department, so that a very expensive treatment technology with high maintenance needs, such as an under parking lot manufactured system is not unrealistically required for a redevelopment site.

8. **Redevelopment in urban impaired stream watersheds** (Page 9): Drops the requirement for redevelopment projects to meet the urban impaired stream standard if there will be no increase in impacts due to stormwater runoff.
9. **Flooding standard** (Page 10) In the standard that governs flooding, the revision allows the department to grant a variance for discharges to rivers other than “major river segments” if the department determines there will be no adverse impact.
10. **Permit by rule** (Pages 17 – 20) Changes Permit by Rule language to add clarity and greater consistency with current PBR practices under the Natural Resources Protection Act (NRPA).
11. **Permit shield** (Pages 29 – 30): Revises Permit shield (section 14) language to make it clearer and to emphasize that a project cannot get an exemption from a standard required under the Site Law by breaking the project into pieces and first complying with a lesser standard under the Stormwater Law. The current language regarding redevelopment projects is an example of where in the rule this could arise.
12. **Appendix E** (Pages 47 – 52): Change language in Appendix E to include under-drained soil filter beds, with specifications consistent with language in our new Stormwater BMP Manual.
13. **Minor word changes**: Throughout the rule there are minor word changes made to improve readability.
14. **Ch. 502, Appendix A: Lakes Most at Risk** From Development: The following lakes have been added to this list: Abrams Lake in Eastbrooke; Androscoggin Lake in Wayne; Long Pond in Belgrade; Messalonskee Lake in Belgrade; Great Moose Lake in Hartland. Cobbossee Lake is removed from the “severely blooming” category.
15. **Ch. 502, Appendix B: Urban Impaired Streams**: Bobbin Mill Brook in Auburn is removed from the list.

The proposed changes were developed in consultation with a stakeholder group, which met twice during the summer of 2006.

RESPONSE TO COMMENTS

Comments were received from the following people:

- Al Palmer; PE, Palmer Consulting Engineers
- Jeff Edelstein; Facilitator, Interlocal Stormwater Working Group (ISWG)
- Nick Bennett; Staff scientist with the Natural Resources Council of Maine

Comment:

Al Palmer: We are very familiar with both the Site Location of Development Act and the Stormwater Law, as we have permitted over a million square feet of commercial space within the state within the last two years under these two programs. We support the proposed changes to the rules, as we believe that the proposed modifications with respect to redevelopment of Site Law projects is crucial, as it will allow flexibility for department staff to determine which measures may be practicable for water quality improvement given site constraints. Not all of the measures that are required under the general standards can be done on a redevelopment type project.

Department Response: We agree.

Comment:

Jeff Edelstein: In a 2004 report, the department stated that “maintenance of stormwater best management practices (BMPs) has been poor to date The department and municipalities lack sufficient resources to conduct compliance inspections and follow-up with permittees to ensure that maintenance is carried out. Without the needed maintenance, BMPs often become ineffective, and in some instances, may do more harm than good.” The changes to Chapter 500 in 2005 now require detailed maintenance plans, addressing yearly and even seasonal maintenance procedures and a specific inspection schedule to be followed by the permit holder. In addition, every 5 years, the permit holder must submit a certification to the department that the maintenance plan is being implemented as approved. The ISWG supported the changes to Chapter 500 last year.

When the Environmental Protection Agency (EPA) developed rules for regulated municipal separate storm sewer systems (MS4s) in the 1990’s, few states had this type of comprehensive approach to maintenance. EPA placed a requirement on the MS4s to ensure long-term maintenance of these systems since most state governments had failed to address this. The maintenance requirement comes under the post-construction requirements of the MS4 program, which has two major components: 1. design, review and approval of stormwater management systems; and 2. Long-term operation and maintenance of these systems. For component 1, the department allows MS4s to reference its administration of Chapter 500, avoiding duplication of effort. For component 2, the department has indicated that MS4s can rely on Chapter 500 to a great extent. Since the changes to Chapter 500 were enacted, the ISWG has committed to partner with DEP on maintenance by proposing the following measures:

1. Possession of any necessary state stormwater permits will be a condition of municipal site plan and/or subdivision approval.

2. Municipal building permit applications will include a notice alerting applicants to the need for state stormwater permits for projects disturbing greater than 1 acre.
3. Municipalities will investigate sites in response to complaints and will refer sites to DEP for additional action, as appropriate.

The ISWG believes it is too early to tell whether the combination of Chapter 500 maintenance requirements and the above measures will be sufficient to ensure adequate long-term maintenance. The MS4s have concerns about adopting ordinances, fees, inspection programs and enforcement programs related to maintenance because:

- A lack of information about the effectiveness of the current measures should be addressed using pilot programs, research and monitoring.
- There shouldn't be a duplication of effort between DEP and the MS4 communities.
- There is a cumulative effect of more treatment systems being added to the maintenance list every year. Addressing this cumulative impact may best be handled through education, outreach and technical assistance to treatment system owners.

Based on the above concerns, MS4s believe it is too early to start passing municipal ordinances, and instead propose the following:

1. Implement the combination of Chapter 500 measures and proposed MS4 measures;
2. Work together over the next two years to obtain funding assistance for pilot programs to monitor the effectiveness of the program and to provide education and outreach to improve maintenance;
3. Implement the pilot programs in years 1 – 3 of the next 5 year general permit for MS4s.
4. Assess results in year 4 of the next general permit to determine what additional measures need to be taken.

If the department does not agree with the ISWG on this, then the department should specifically identify what aspects of the program fall short of ensuring maintenance and what findings support these shortcomings. If the department cannot wait to assess how the program will work or to work with the ISWG to develop and raise funds to pilot innovative education and technical assistance programs, the department should take on the responsibility for whatever additional measures it feels must be permanently institutionalized, by changing Chapter 500 in whatever manner necessary to meet the degree of maintenance that the department believes will be lacking.

Department response: The Department appreciates the thoughtful comments of the ISWG with regard to this important issue. While, this comment does not address the proposed changes in Chapter 500, the Department is fully committed to exploring this issue more completely during the upcoming revisions to the municipal stormwater (MS4) permit this coming year. The comment does state that the department should consider further changes to Chapter 500 if it determines that maintenance of stormwater BMPs will not be adequately addressed by the existing rule, along with proposed activities offered by regulated MS4 communities. However, the concern expressed by the comment is directed at the requirements of the MS4 general permit,

which was issued by the department as part of the Maine Pollutant Discharge Elimination System (MEPDES) stormwater program, and the comment would be more appropriately directed to that program.

Department staff concurs that additional time is needed to determine the effectiveness of prior changes in Chapter 500 with respect to stormwater BMP maintenance requirements. No further changes to Chapter 500 are proposed with respect to maintenance requirements at this time. Requirements for MS4 communities to meet the MS4 general permit management measure for post-construction will not be determined through this rule-making process. Those requirements will need to be determined through the department's administration of the MEPDES stormwater program.

Comment:

Nick Bennett: Section 4.B.(3)(f) – The proposed change would allow a Site Law project involving redevelopment of existing impervious area to meet the general standards to the extent practicable, as determined by the department. I am concerned that this will lessen the role Chapter 500 can play in improving water quality. While other programs exist that can address existing sources, it is unclear if they will be effective.

Redevelopment is good for the environment, but I'm concerned that there are going to be sites where people are going to say the extent practicable is nothing, and we're not going to do anything. The Council believes that Chapter 500 is an important tool towards improving water quality in impaired urban watersheds, particularly since stormwater TMDLs are still new and untested. Although TMDLs may eventually result in programs to bring urban impaired streams into compliance, it is highly unlikely they will do so soon.

Therefore, in order to both encourage redevelopment and encourage redevelopers to improve water quality in impaired streams, the Natural Resources Council proposes the following change to the Department's Section 4.B.(3)(f) in Chapter 500:

For a project requiring a Site Location of Development Law permit, redevelopment of existing impervious area that was in existence as of November 16, 2005 (the effective date of Chapter 500 revisions), redevelopment of that impervious area is required to meet the general standards to the extent practicable as determined by the department. If the Department determines that it is not practicable to make significant progress towards meeting the general standards for the redeveloped impervious area, the applicant may elect to meet the requirements of Section 6.A.(1). However, the required compensation fees and mitigation credits are reduced by half for redevelopment of existing impervious area. The requirements of Appendix D must still be met, if applicable.

The Council believes that reducing mitigation requirements is appropriate in order to encourage redevelopment, but we do not believe it is appropriate for redevelopment projects to make no effort towards water quality improvement. We are concerned that the Department's proposed changes may have this result unless some level of mitigation is required.

Department response: The department concurs that some level of effort should be made to meet the general standards for Site Location projects involving redevelopment. The department does not support the Natural Resources Council's proposed language in its entirety, because we believe the payment of a fee would provide less water quality benefit, than the amount of treatment that would be practicable on the vast majority of sites. The inclusion of that provision would cause applicants to quickly go to the fee instead of trying to make significant progress on site, because the fee would be seen as an easier solution. While the department would still have to agree to the fee, we believe it increases the likelihood of conflict when applicants request the fee instead of on-site treatment.

The department does support language clarifying that it may require off-site mitigation where significant progress is not feasible on-site. We believe that this provision will seldom be necessary in that most sites will have options available to improve the quality of stormwater. Being able to require off-site mitigation, however, will provide a fall-back measure in the event that on-site treatment is deemed too expensive. We do not believe that off-site mitigation will be a readily sought out alternative because it will necessitate special provisions to ensure long-term maintenance of BMPs.

The department is supportive of the following revision to Section 4.B.(3)(f):

For a project requiring a Site Location of Development Law permit, redevelopment of existing impervious area that was in existence as of November 16, 2005 (the effective date of Chapter 500 revisions), redevelopment of that impervious area is required to meet the general standards to the extent practicable as determined by the department. If the Department determines that it is not practicable to make significant progress towards meeting the general standards for the redeveloped impervious area, the department may require off-site mitigation within the same watershed as an alternative for stormwater treatment. The requirements of Appendix D must still be met, if applicable.

Comment:

Nick Bennett: Section 4.E.(2)(a) – This is the flooding standard. It currently waives the requirement for projects that discharge to the ocean, a great pond, or a major river segment. The proposed change would also allow the department to grant a waiver from the standard for other rivers and wetlands. This causes us concern. How big is the river going to be? What rivers are they talking about that are going to get the variance? What are the specific characteristics of a river that will allow you to have a variance? I'm neither for or against this language, I'm trying to express a concern. It gives a lot more discretion to the applicant to make a case and the department to make a decision. With that comes the responsibility to really make sure that you're getting it right because we don't want to be building facilities and sites that are going to cause floods.

Department response: The proposed language allowing the department to waive the flood standard requirements was in the original 1997 version of Chapter 500 and inadvertently was left out of the 2005 revision. The department concurs that it has the responsibility to ensure that waiver is only granted in situations where a project would not contribute to a flooding problem. Department staff have been able to meet that responsibility in the past and should be able to do so in the future.