



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



JANET T. MILLS  
GOVERNOR

MELANIE LOYZIM  
COMMISSIONER

June 7, 2022

Mr. Matthew E. Sturgis  
Town Manager  
30 Ocean House Road  
Cape Elizabeth, Maine 04107  
e-mail: [matthew.sturgis@capeelizabeth.com](mailto:matthew.sturgis@capeelizabeth.com)

**RE: Municipal Separate Storm Sewer System (MS4) General Permit #MER041000  
Final - MER041005**

Dear Mr. Sturgis:

Enclosed please find a copy of your **final** MEPDES permit and Maine WDL which was approved by the Department of Environmental Protection. Please read this permit/license and its attached conditions carefully. Compliance with this permit/license will protect water quality.

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. Your Department compliance inspector copied below is also 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!

Sincerely,

Gregg Wood  
Division of Water Quality Management  
Bureau of Water Quality

Enc.

cc: Alison Moody, DEP/SMRO	Lori Mitchell, DEP/CMRO	Holliday Keen, DEP/CMRO
Irene Saumur, DEP/CMRO	Damien Houlihan, USEPA	Nathan Chien, USEPA
Richard Carvalho, USEPA	Newton Tedder, USEPA	Ivy Frignoca, FOCB

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

**DEPARTMENT ORDER**

**IN THE MATTER OF**

TOWN OF CAPE ELIZABETH	)	MUNICIPAL SEPARATE STORM
CAPE ELIZABETH, CUMBERLAND COUNTY, MAINE)	)	SEWER SYSTEM
MER041005	)	MER041000
	)	<b>GENERAL PERMIT COVERAGE</b>
<b>APPROVAL</b>	)	<b>RENEWAL</b>

The Department of Environmental Protection (Department/DEP) has considered the Notice of Intent submitted by the TOWN OF CAPE ELIZABETH (Town/permittee), with supportive data, agency review comments and other related materials on file for coverage under the Municipal Separate Storm Sewer System (MS4) General Permit, #MER041000, issued by the Department on October 15, 2020 and revised on November 23, 2021, and FINDS THE FOLLOWING FACTS.

The permittee submitted a Notice of Intent (NOI) with an initial Stormwater Management Plan (SWMP) to the Department on March 30, 2021 that were made available for a 30-day public comment period on the Department's website at <https://www.maine.gov/dep/comment/comment.html?id=4463193>. No public comments were received on the NOI or the initial SWMP. The Department has reviewed the initial SWMP document and made the determination that the document is consistent with and fully articulates what is required to meet the MS4 GP standard. Pursuant to Part IV(B) of MS4 GP issued by the Department on October 15, 2020 and revised on November 23, 2021, the permittee must update the initial SWMP within 60 days of the effective date of this DEP permittee specific order or within 60 days of the final resolution to an appeal of this DEP permittee specific order. The final plan must be submitted to the Department and will be posted on the Department's website.

The permittee must fully implement the following Best Management Practices in accordance with their associated schedules of compliance, as established in the Modified Stormwater Management Plan that is in effect at the time any schedule for compliance is due:

- MCM 1 Education/Outreach Program: BMPs 1.1, 1.2, and 1.3:
- MCM 2 Public Involvement and Participation: BMPs 2.1 and 2.2
- MCM 3 Illicit Discharge Detection and Elimination: BMPs 3.1, 3.2, 3.3, 3.4, 3.5, and 3.6:
- MCM 4 Construction Site Stormwater Runoff Control: BMPs 4.1, 4.2, 4.3, and 4.4:
- MCM 5 Post-Construction Stormwater Management in New Development/Redevelopment: 5.1, and 5.2: and
- MCM 6 Pollution Prevention and Good Housekeeping for Municipal Operations: BMPs 6.1, 6.2, 6.3, 6.4, 6.5, and 6.6.

**Impaired Waters**

The permittee's MS4 includes point source discharges to Trout Brook which is classified as an Urban Impaired Stream (UIS) in Maine DEP Rule Chapter 502 and has its own TMDL dated October 2007. A Watershed Management Plan was completed for Trout Brook in 2012, and three phases of restoration projects have been completed in the watershed. To meet the standards of the MS4 GP for impaired waters, the permittee must also fully implement the following Best Management Practices in accordance with their associated schedules of compliance, as established in the Modified Stormwater Management Plan that is in effect at the time any schedule for compliance is due.

BMPs 7.1, 7.2, 7.3 and 7.4.

Modifications to the Initial Stormwater Management Plan required as a result of this Order, if any, must be provided to the Department in accordance with Part IV.B of the MS4 GP, and the Department will notify the permittee if further changes are required in accordance with Part IV.B.2.


The permittee has agreed to comply with all terms and conditions of the MS4 General Permit, #MER041000, dated October 15, 2020 and revised on November 23, 2021. Operated in accordance with the Municipal Separate Storm Sewer System (MS4) General Permit, #MER041000, the discharges identified by the permittee will not have a significant adverse effect on water quality or cause or contribute to the violation of the water quality standards of the receiving water.

THEREFORE, the Department GRANTS the TOWN OF CAPE ELIZABETH, coverage under the Municipal Separate Storm Sewer System (MS4) General Permit, #MER041000, issued by the Department on October 15, 2020 and revised on November 23, 2021, subject to the terms and conditions therein.

This DEP permittee specific order becomes effective on July 1, 2022 and expires at midnight five (5) years after that date. If the GP is to be renewed, this DEP permittee specific order will remain in effect and enforceable until the Department takes final action on the renewal.

DONE AND DATED AT AUGUSTA, MAINE, THIS 7 DAY OF June, 2022.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY:   
for Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

The Notice of Intent was received by the Department on March 30, 2021.

The Notice of Intent was accepted by the Department on April 5, 2021.

**FILED**  
JUNE 7, 2022  
State of Maine  
Board of Environmental Protection

Date filed with Board of Environmental Protection: \_\_\_\_\_

This Order prepared by GREGG WOOD, BUREAU OF WATER QUALITY

## RESPONSE TO COMMENTS

During the period of March 16, 2022 through the date of signature of this final agency action, the Department solicited comments on the draft MEPDES DEP permittee specific order. The Department did receive timely written comments from the permittee, the Friends of Casco Bay (FOCB) and the U.S. Environmental Protection Agency (USEPA). Responses to substantive comments are as follows:

**Comment #1 (Permittee):** The language in the draft order (italicized below) is potentially vague, which may lead to confusion about what steps are required for compliance.

*“The permittee must fully implement all actions, schedules and milestones established in the March 31, 2021 initial SWMP and any revisions to the initial SWMP reflected in the final plan.”*

Specifically, the permittee is concerned that in the SWMPs it may not always be clear what qualifies as mandatory “actions, schedules and milestones” and what does not. This is because the SWMPs were written broadly to, in addition to setting out specific and measurable actions, provide helpful context, educate officials and citizens about the Plan, and establish process, among other things. There is, therefore, significant text in the SWMPs that does not appear to be an action, schedule, or milestone, and thus would not be enforceable. The permittee is concerned that it will not always be clear exactly what is mandatory and what is not. Additionally, the permittee believes that the language about enforcing any additional revisions to the SWMP also may be somewhat unclear, given that SWMPs are living documents that are expected under the new MS4 general permit to evolve over time.

**Response #1:** The Department concurs with the permittee’s position on the purpose and enforceability of the SWMP as a stand-alone document. Part VI(E), *Relationship Between the SWMP and Permit Required Terms and Conditions* of the December 9, 2016 Federal Register states in relevant part “...under EPA small MS4 regulations, the details included the permittee’s SWMP document are not directly enforceable as effluent limitations of the permit. The SWMP document is intended to be a tool that describes the means by which the MS4 establishes its stormwater controls and engages in the adaptive management process during the term of the permit. While the requirement to develop a SWMP document is an enforceable condition of the permit (see §122.34(b) of the final rule) the contents of the stormwater management document itself are not enforceable as effluent limitations of the permit, unless the document or specific details within the SWMP are specifically incorporated by the permitting authority into the permit.”

Part VI(E), also states in relevant part “... the details of any part of the permittee's program that are described in the SWMP, unless specifically incorporated into the permit, are not enforceable under the permit, and because they are not terms of the permit, the MS4 may revise those parts of the SWMP if necessary to meet any permit requirements or to make improvements to stormwater controls during the permit term. As discussed in more detail below, the permitting authority has discretion to determine what elements, if any, of the SWMP are to be made enforceable, but in order to do so it must follow the procedural requirements for the second step under Sec. 122.28(d)(2).

The regulations envision that the MS4 permittee will develop a written SWMP document that provides a road map for how the permittee will comply with the permit. The SWMP document(s) can be changed based on adaptations made during the course of the permit, which enable the permittee to react to circumstances and experiences on the ground and to make adjustments to its program to better comply with the permit. The fact that the SWMP is an external tool and not required to be part of the permit is intended to enable the MS4 permittee to be able to modify and retool its approach during the course of the permit term in order to continually improve how it complies with the permit and to do this without requiring the permitting authority to review and approve each change as a permit modification.”

**Comment #2 (Permittee):** The General Permit does require that the SWMPs be updated and sent out for public comment annually and lays out a process for any other needed revisions. Multiple versions of the SWMPs should not be enforceable. The only version that should be enforceable is the version that is in force at the time a Best Management Practice or Measurable Goal is due. Accordingly, we recommend clarifying this provision to eliminate any potential confusion.

This will, in turn, promote compliance and lead to better water quality. To accomplish that, we note that our SWMPs have Best Management Practices (BMPs) with Measurable Goals and believe the second step order would be more clear if it references that we will fully implement those BMPs. This approach is consistent with Part III.A.8 of the GP which provides: “Following the public comment period on the NOI, the Department will issue a permittee specific DEP Order that establishes additional terms and conditions, including but not limited to, a list of required actions and corresponding schedules of compliance for a limited number BMPs associated with the implementation of this GP.” Thus, we suggest the following italicized text be incorporated into the final Order:

*The permittee must fully implement the following Best Management Practices in accordance with their associated schedules of compliance, as established in the Modified Stormwater Management Plan that is in effect at the time any schedule for compliance is due:*

*MCM 1 Education/Outreach Program: BMPs 1.1, 1.2, and 1.3:*

*MCM 2 Public Involvement and Participation: BMPs 2.1 and 2.2*

*MCM 3 Illicit Discharge Detection and Elimination: BMPs 3.1, 3.2, 3.3, 3.4, 3.5, and 3.6:*

*MCM 4 Construction Site Stormwater Runoff Control: BMPs 4.1, 4.2, 4.3, and 4.4:*

*MCM 5 Post-Construction Stormwater Management in New Development/Redevelopment: 5.1, and 5.2: and*

*MCM 6 Pollution Prevention and Good Housekeeping for Municipal Operations: BMPs 6.1, 6.2, 6.3, 6.4, 6.5, and 6.6.*

*Impaired waters*

*The permittee’s MS4 includes point source discharges to Trout Brook which is classified as an Urban Impaired Stream (UIS) in Maine DEP Rule Chapter 502 and has its own TMDL dated October 2007. A Watershed Management Plan was completed for Trout Brook in 2012, and three phases of restoration projects have been completed in the watershed. To meet the standards of the MS4 GP for impaired waters, the permittee must also fully implement the following Best Management Practices in accordance with their associated schedules of compliance, as established in the Modified Stormwater Management Plan that is in effect at the time any schedule for compliance is due.*

*BMPs 7.1, 7.2, and 7.3.*

*Should the budget for BMPs 7.1, 7.2, or 7.3 listed above not be approved, the Town must notify the Department as soon as it is aware of the lack of funding and begin implementing BMP 7.4 as written. The Department reserves the right to reopen this order to reestablish a scope of work and schedule for the implementation of alternate BMPs.*

*Modifications to the Initial Stormwater Management Plan required as a result of this Order, if any, must be provided to the Department in accordance with Part IV.B of the MS4 GP, and the Department will notify the permittee if further changes are required in accordance with Part IV.B.2.*

**Response #2:** The revisions cited above are acceptable to the Department and are consistent with Remand Rule in that “the permitting authority has discretion to determine what elements, if any, of the SWMP are to be made enforceable, but in order to do so it must follow the procedural requirements for the second step under Sec. 122.28(d)(2).” BMP7.4 has been referenced in the final DEP permittee specific order as it is considered an alternative BMP if the implementation of BMP7.3 is not feasible.

Part IV.B of the GP states in relevant part “Modified Stormwater Management Plan (SWMP). The permittee must implement and enforce a written (hardcopy or electronic) SWMP. The initial SWMP must be updated within 60 days of permit authorization to include how the permittee will meet all requirements of the DEP Order. The modified SWMP must include a summary of the comments received during the MS4s public comment period and any corresponding changes to the SWMP made in response to the comments received. The permittee must perform all actions required by the permittee specific DEP Order in accordance with the timelines in the permittee specific DEP Order. Unless otherwise specified by the Department in writing, the permittee must submit the updated SWMP to the Department indicating how the permittee has modified their SWMP to be consistent with the GP and permittee specific DEP Order. To modify the schedule established in the permittee specific DEP Order, the permittee must file an application on a DEP form with the Department that includes a justification to formally modify the original permittee specific DEP Order.”

The final DEP permittee specific order has been modified accordingly.

**Comment #3 (FOCB):** From the outset, Friends of Casco Bay has advocated for a comprehensive general permit with all clear, specific, and measurable terms needed to comply with the Remand Rule. The rule, however, allows DEP to issue either a comprehensive general permit or a two-step general permit. A two-step general permit consists of a base general permit and a second permitting step that establishes additional permit terms and conditions. The two documents combined meet the MS4 permit standard. We request that future MS4 permits be issued as comprehensive general permits.

**Response 3:** The Department will take the FOCB’s comment into consideration during the renewal of the MS4 GP in calendar year 2027 and consider renewing the permit as a comprehensive permit.

**Comment #4 (FOCB):** Because SWMPs are now second step orders, would DEP please clarify when a SWMP modification will be considered a minor permit modification that does not require public process and when SWMP modifications will be posted for public comment and process? Although the code of federal regulations spells this out, there has been much confusion throughout the permit renewal process, and clear guidance would be helpful.

**Response #4:** Based on the Responses #1 and #2 above, the entire SWMP is not an enforceable document. Specific BMPs under each MCM and or impaired waters section of the SWMP have been cited in this DEP permittee specific order and are enforceable. The 2022 MS4 General Permit is clear that MS4s must provide an opportunity for annual public comment on any changes to their SWMPs in Part IV(B)(2), and must provide notice to the DEP for any changes to schedules in the SMWP including a rationale for why there is a change. The Modified Stormwater Management Plan is self-implementing as this DEP permittee specific order states:

*The permittee must fully implement the following Best Management Practices in accordance with their associated schedules of compliance, as established in the Modified Stormwater Management Plan that is in effect at the time any schedule for compliance is due.*

If a party, during its annual review of an updated SWMP, wishes to object to modifications to the SWMP proposed by the permittee, it can petition the Department to remedy said objections to ensure the terms and conditions proposed in SWMP are consistent with the Clean Water Act and MS4 regulations.

**Comment #5 (FOCB):** Second step orders incorporate initial SWMPs that were written before the Board of Environmental Protection issued an order remanding the base general permit to DEP. In response to the order, DEP issued a permit modification that requires municipalities to adopt an ordinance that mandates the use of LID for new and re-development. The initial SWMPs uniformly contain terms relating to MCM 5 that do not comply with the BEP Order and subsequent permit modification. DEP should revise SWMPs and add all terms and schedules of compliance to second step orders to fully implement MCM 5 as set forth in the permit modification.

**Response #5:** All permittee's seeking coverage under the MS4 GP are subject to both the October 15, 2020 base general permit and the November 23, 2021 permit modification that mandates the use of LID for new and re-development. All permittees were copied on the final permit modification and are aware of the following language:

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.*

- 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.*

Each permittee is aware these terms and terms are to be incorporated into the Modified Stormwater Management Plan to be submitted to the Department within 60 days of permit authorization. Therefore, this order remains unchanged.

**Comment #6 (FOCB, USEPA)** - To meet the measurable requirement, permittees must evaluate the effectiveness of actions to reduce stormwater pollution. Some of the second step orders contain terms that do not satisfy this standard. Our review focused on terms to reduce stormwater pollution to impaired waters. The BMPs that fail to satisfy the Remand Rule are BMPs that contain a budget caveat. BMPs to restore water quality to impaired waters must be implemented without reference to budget.

The modified base general permit requires permittees that discharge to an impaired water(s) to implement three clear, specific and measurable BMPs to restore water quality. Some second step orders condition the implementation of a BMP on the passage of a budget. If the permittee does not pass a budget to fund the BMP, then the permittee does not have to implement it. Recommending but not executing BMPs does not restore water quality. Nor does it meet the mandate that second step orders require municipalities to implement three BMPs for each impaired water. Finally, it is troubling policy to treat permittees inconsistently. DEP should remove the budget caveat from second step orders. If budget becomes an issue, permittees could propose alternate and equally effective BMPs to DEP that could be considered through a permit modification.

The proposed authorization letters for four permittees contain conditions that are only imposed on the permittee if the necessary funding is in place to complete such action through the passing or approval of a budget. Such conditions are inconsistent with the Clean Water Act (CWA) Section 402 and National Pollutant Discharge Elimination System (NPDES) implementing regulations, including MS4 permit requirements to “include permit terms and conditions to reduce the discharge of pollutants 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. Terms and conditions that satisfy the requirements of this section must be expressed in clear, specific, and measurable terms.” *See* 40 C.F.R. § 122.34(a). Permit conditions that are contingent upon budget approval are not clear, specific, and measurable and are otherwise inconsistent with the CWA and the MS4 regulations. EPA recommends re-wording these conditions to remove all references to budget or funding.

**Response #6** – The language cited by the commenters has been removed from the March 16, 2022 draft DEP permittee specific order. As stated by the FOCB, if budget becomes an issue in implementing a BMP, permittees could propose alternate and equally effective BMPs to the Department that could be considered through a permit modification.

**Comment #7 (FOCB)**: To meet the measurable requirement, permittees must evaluate the effectiveness of actions to reduce stormwater pollution. Some of the second step orders contain terms that do not satisfy this standard. Our review focused on terms to reduce stormwater pollution to impaired waters. The BMPs that fail to satisfy the Remand Rule include the Long Creek BMP. Second step orders for MS4s that discharges to Long Creek must be modified to include clear, specific and measurable BMPs.

The Long Creek watershed is located in the MS4 municipalities of South Portland, Westbrook, Portland and Scarborough. Long Creek is impaired by urban development which has altered stream beds and flows, covered much of the landscape with impervious surfaces, and delivered slugs of pollution to Long Creek including excessive chlorides from winter application of road salt. Using residual designation authority under the CWA, the State issued a general permit regulating stormwater discharges in these municipalities from MS4, commercial and industrial sources. In relevant part, the existing Long Creek permit replaced requirements of the 2013 MS4 Permit. The Long Creek general permit expired April 15, 2020 and has been administratively continued.

Part of the delay in reissuing the Long Creek permit may stem from the fact that EPA has advised DEP that the permit must be renewed with clear, specific and measurable terms commensurate with the Remand Rule. As written, the Long Creek permit is a very general permit supported with non-enforceable management plans.

MS4 municipalities:

[M]ay rely upon another entity to satisfy its NPDES permit obligations to implement a minimum control measure if:

- (1) The other entity, in fact, implements the control measure;
- (2) The particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and
- (3) The other entity agrees to implement the control measure on the permittee's behalf.

In this case, the 2015 Long Creek general permit is not as stringent as the requirements of the 2022 MS4 Permit because it contains no clear, specific and measurable actions. Therefore, MS4 communities cannot rely on the 2015 Long Creek general permit to comply with the 2022 MS4 Permit. This may be easy to cure. DEP could review the Long Creek Restoration Project Plans and select three clear, specific and measurable actions to include in the South Portland, Portland, Westbrook and Scarborough second step orders.

**Response #7:** This comment is not applicable to the permittee as it does not discharge to Long Creek.

**Comment #8 (FOCB) -** We had hoped that second step orders would encourage, where appropriate, the development and implementation of fertilizer ordinances to reduce nutrient pollution to urban impaired and threatened waters. For example, Portland seeks to implement a fertilizer ordinance under its pending Integrated Plan to reduce nutrient pollution. We had hoped this decision might be supported through the MS4 process.

**Response #8:** The Department agrees with the commenter that developing and implementing a fertilizer ordinance can be an effective BMP to reduce nutrient loading to surface water bodies. Short of formally adopting an ordinance, many of the permittees have developed BMPs in their SWMPs to address nutrient loading to surface water bodies by way of public education (MCM1 and MCM2), yard-scaping programs and watershed management plans.

**Comment #9 (FOCB):** To meet the measurable requirement, permittees must evaluate the effectiveness of actions to reduce stormwater pollution. Some of the second step orders contain terms that do not satisfy this standard. Our review focused on terms to reduce stormwater pollution to impaired waters. The BMPs that fail to satisfy the Remand Rule include the chlorides reduction BMP. The chlorides reduction BMP must be replaced with clear, specific and measurable actions that reduce chlorides pollution to the MEP.

Many urban impaired streams cannot be restored without reducing chlorides. To address this, some second step orders contain the following provision:

- a. At least one representative from the City must attend an annual regional training or roundtable to learn about new chloride reduction techniques coordinated by the ISWG or another organization.
- b. The permittee, solely or in combination with others, must;
  - Beginning July 1, 2022 and alternating years thereafter until it passes, provide educational outreach to legislators regarding limited liability legislation and at least two other organizations representing firms that conduct application of chloride on private property;
  - In years when limited liability legislation has not passed and is not active for procedural reasons, the City will provide winter maintenance education and outreach to the public using two tools from the City's Stormwater Management Plan.
  - The first year after legislation passes, the City must provide awareness of its passage in the form of a presentation to the Council.
  - Beginning the second and subsequent years after passage, the City must educate property managers, private contractors, and/or the public on winter maintenance practices to maintain public safety and protect the environment using two tools from the City's Stormwater Management Plan.

While well intended, this BMP does not satisfy the tenets of the CWA and Remand Rule. It is not a clear, specific, and measurable term designed to actually reduce stormwater pollution to the maximum extent practicable. It does not include narrative, numeric, or other types of requirements designed to reduce pollutant loads. Once a year training for municipal officials might be important, but without more, does not reduce pollution. Similarly, educating legislators might be laudable but is not a BMP for purposes of a CWA permit. There is no chlorides reduction bill before the legislature, and education efforts alone will not pass and implement such a bill. The concept is simply too attenuated to satisfy the Remand Rule.

DEP should strike the above-referenced chlorides reduction BMP from second step orders and replace it with direct actions municipalities can take to reduce chlorides to urban impaired waters. We have attached Appendix F from the NH MS4 Permit as guidance for the types of BMPs that might be included.

**Response #9:** The permittee's SWMP does contain language with direct actions municipalities can take to reduce chlorides to urban impaired waters such as the following:

*The Town has already taken several actions over the past few years to minimize their chloride contributions during deicing, will continue to implement the following chloride reduction practices which are also specified in the Maine BMP Manual for Snow and Ice Control, 2015:*

- *Annual review of appropriate application rates with crew at beginning of winter season*
- *Use of Ground Speed Control and Annual Equipment Calibration to ensure proper application rates*
- *Recalibration of equipment whenever major repairs are made*
- *Use of pavement temperature gauges to determine application rates*
- *Use of liquid (prewetting) to improve performance and to reduce "bounce and scatter" when applying sodium chloride, and*
- *Use of road weather information cameras/sensors, to assess real time conditions.*

These BMPs are direct actions that are clear, specific and measurable under the impaired waters section of the applicable SWMPs and are enforceable (see Response #4 of this order) as they are cited as BMP7.1 in the DEP permittee specific order.

In addition, the permittee's SWMP does state that educational outreach regarding limited liability legislation will be provided to legislators and at least two other organizations representing firms that conduct application of chloride on private property, regardless of whether or not legislation is passed to support chloride reduction. The information provided will identify how chlorides affect water quality and how limited liability legislation will support a training, data collection, and certification program like the New Hampshire "Green Snow Pro" program or Minnesota's Smart Salting Training Program for private applicators.



# DEP INFORMATION SHEET

## Appealing a Department Licensing Decision

**Dated: August 2021**

**Contact: (207) 314-1458**

### SUMMARY

This document provides information regarding a person's rights and obligations in filing an administrative or judicial appeal of a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner.

Except as provided below, there are two methods available to an aggrieved person seeking to appeal a licensing decision made by the 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.

### **I. ADMINISTRATIVE APPEALS TO THE BOARD**

#### **LEGAL REFERENCES**

A person filing an appeal with the Board should review Organization and Powers, [38 M.R.S. §§ 341-D\(4\)](#) and [346](#); the Maine Administrative Procedure Act, 5 M.R.S. § [11001](#); and the DEP's [Rule 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**

Not more than 30 days following the filing of a license decision by the Commissioner with the Board, an aggrieved person may appeal to the Board for review of the Commissioner's decision. The filing of an appeal with the Board, in care of the Board Clerk, is complete when the Board receives the submission by the close of business on the due date (5:00 p.m. on the 30<sup>th</sup> calendar day from which the Commissioner's decision was filed with the Board, as determined by the received time stamp on the document or electronic mail). Appeals filed after 5:00 p.m. on the 30<sup>th</sup> calendar day from which the Commissioner's decision was filed with the Board will be dismissed as untimely, absent a showing of good cause.

#### **HOW TO SUBMIT AN APPEAL TO THE BOARD**

An appeal to the Board may be submitted via postal mail or electronic mail and must contain all signatures and required appeal contents. An electronic filing must contain the scanned original signature of the appellant(s). The appeal documents must be sent to the following address.

Chair, Board of Environmental Protection  
c/o Board Clerk  
17 State House Station  
Augusta, ME 04333-0017  
[ruth.a.burke@maine.gov](mailto:ruth.a.burke@maine.gov)

The DEP may also request the submittal of the original signed paper appeal documents when the appeal is filed electronically. The risk of material not being received in a timely manner is on the sender, regardless of the method used.

At the time an appeal is filed with the Board, the appellant must send a copy of the appeal to: (1) the Commissioner of the DEP (Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333-0017); (2) the licensee; and if a hearing was held on the application, (3) any intervenors in that hearing proceeding. **Please contact the DEP at 207-287-7688 with questions or for contact information regarding a specific licensing decision.**

### **REQUIRED APPEAL CONTENTS**

A complete appeal 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 bring the 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 of 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 criteria 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 to changes in specific license 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 hearing must be filed as part of the notice of appeal, and it must include an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any witnesses would testify. 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 supplemental evidence must be submitted with the appeal. The Board may allow new or additional evidence to be considered in an appeal only under limited circumstances. The proposed supplemental 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. Requirements for supplemental evidence are set forth 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 accessible by the DEP. Upon request, the DEP will make application materials available to review and photocopy during normal working hours. There may be 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 the appeal.* DEP staff will provide this information upon 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 licensee may proceed with a project pending the outcome of an appeal, but the licensee 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 acknowledge receipt of an appeal, and it will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials admitted by the Board as supplementary evidence, any materials admitted in response to the appeal, relevant excerpts from the DEP's administrative record for the application, and the DEP staff's recommendation, in the form of a proposed Board Order, will be provided to Board members. The appellant, the licensee, and parties of record are notified in advance of the date set for the Board's consideration of an appeal or request for a hearing. The appellant and the licensee will have an opportunity to address the Board at the Board meeting. The Board will decide whether to hold a hearing on appeal when one is requested before deciding the merits of the appeal. The Board's decision on appeal may be to 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 will notify the appellant, the licensee, and parties of record of its decision on appeal.

## **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 Clerk at 207-287-2811 or the Board Executive Analyst at 207-314-1458 [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov), or for judicial appeals contact the court clerk's office in which the appeal will be filed.

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**Note: This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, is provided to help a person to understand their rights and obligations in filing an administrative or judicial appeal. 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.**

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