**STATE OF MAINE**
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**IN THE MATTER OF**

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| MUNICIPAL SEPARATE STORM SEWER SYSTEM | ) | Public Hearing Requested |
| GENERAL PERMIT | ) | |
| STATE OF MAINE | ) | APPEAL OF FINAL PERMIT TO |
| MER041000 | ) | BOARD OF ENVIRONMENTAL |
| W009170-5Y-C-R | ) | PROTECTION |

Friends of Casco Bay requests that the Board of Environmental Protection (BEP) restore three terms to the Municipal Separate Storm Sewer System (MS4) permit (Final Permit) to: (1) set an effective date of September 1, 2021 rather than July 1, 2022; (2) require that the municipal post construction ordinance or other regulatory mechanism under Minimum Control Measure (MCM) 5 mandate the use of Low Impact Development (LID) site planning and design strategies to the maximum extent feasible; and (3) require that if the waterbody to which a point source discharge drains is impaired and has an EPA approved total maximum daily load (TMDL), then the stormwater management plan (SWMP) must propose clear, specific, and measurable actions to comply with the TMDL waste load allocation (WLA) and any implementation plan.

These terms were included in the Final Draft MS4 Permit dated June 23, 2020 (Final Draft) and must be restored to the Final Permit to reduce municipal stormwater pollution to the maximum extent practicable (MEP) in accord with the Phase II Remand Rule and the Clean Water Act (CWA).

## Aggrieved Status

Friends of Casco Bay is a nonprofit organization with more than 3,000 members. For 30

years, Friends of Casco Bay has worked to improve and protect the environmental health of Casco Bay and its watershed. We have identified stormwater pollution as one of the most serious threats to the health of the Bay.

The Final Permit covers municipalities that discharge stormwater through their storm sewer systems into Casco Bay and its watershed, including Cape Elizabeth, Cumberland, Falmouth, Freeport, Gorham, Portland, South Portland, Westbrook, Windham, and Yarmouth. Friends of Casco Bay has members in each of these municipalities. Our members include, but are not limited to, lobstermen, fishermen, aquaculturists, Bay-dependent business owners, naturalists, swimmers, kayakers, fishermen, and coastal property owners who depend upon clean, healthy waters for their pursuits.

Without adequate control measures, discharges from municipal storm sewer systems in the above-referenced communities carry loads of pollutants that degrade Casco Bay and its watershed and negatively affect the pursuits of our members. As such, Friends of Casco Bay has standing as an aggrieved party. *See* 06-096 CMR Ch. 2 § 24(B)(1). Prior to this appeal, Friends of Casco Bay participated fully in the MS4 permit process by: filing at least 7 sets of comments on preliminary drafts; attending numerous stakeholder meetings convened by DEP; and submitting formal comments on the Proposed Draft MS4 Permit (Proposed Draft) dated December 6, 2019 and Final Draft issued for public comment.

## Background

Factual Background: Stormwater pollution poses a serious and increasing threat to the Casco Bay watershed. Maine's statewide annual precipitation has increased by 6 inches since 1895, will continue to increase, and will continue to include more heavy precipitation events. *See* Scientific Assessment of Climate Change and its Effects in Maine, a Report by the

Scientific and Technical Subcommittee of the Maine Climate Council (MCC STS Report) (Aug. 2020) at 9. Increased and more intense precipitation leads to more stormwater runoff, which transports tons of soil and pollutants into our waters and necessitates that Maine strengthen its existing stormwater regulations. *Id.* at 10; *see also* Community Resilience Working Group strategies[1] and Coastal and Marine Working Group strategies[2] (recommending revision of state stormwater laws to address this increasing threat).

Stormwater conveyed through municipal storm sewer systems carries many pollutants, including nutrients, pesticides, oils, and other toxins, to receiving waters. *See e.g.* Final Permit Fact Sheet at 24. "Higher nutrient loads shift biota in rivers, streams, and lakes to less-desirable species including nutrient-loving invasive species, cyanobacteria and possibly toxin-producing harmful algal bloom species." These shifts degrade water quality in violation of state water classification standards. *See* MCC STS Report at 10.[3] The MS4 communities in the Casco Bay watershed already have streams that do not meet water quality classification standards because of stormwater pollution; these waters are deemed impaired and must be restored. *See* Impervious Cover-TMDL[4]; *see also* Final Permit at 51-52 and App. B.

Stormwater discharges also directly impair the health of Casco Bay. For example, excess nutrients flowing through stormwater outfalls fertilize nuisance algal blooms (thick green mats of algae that cover flats). Friends of Casco Bay has documented such blooms in every MS4 community that discharges stormwater into the Bay. We have observed some of

[1] https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/CommunityResiliencePlanning_FinalStrategyRecommendations_June2020.pdf (*see especially* Appendix A with detailed recommendations).
[2] https://www.maine.gov/future/sites/maine.gov.future/files/inline-files/CoastalMarineWG_FinalStrategyRecommendations_June2020.pdf. (*see especially* Appendix A nature-based solutions and blue carbon strategies)
[3] *see also* https://www.cascobayestuary.org/about-casco-bay/stormwater/.
[4] https://www.maine.gov/dep/water/monitoring/tmdl/2012/IC%20TMDL_Sept_2012.pdf.

these blooms smothering clams and other benthic organisms and preventing juvenile clams from settling. We have measured lower sediment pH and noted black sediment conditions indicative of low oxygen levels under blooms. We know that as blooms die off, they release carbon dioxide which can exacerbate coastal acidification. *See* MCC STS Report at 12. Friends of Casco Bay also has documented the presence of pesticides from stormwater at many locations around the Bay.

Legal Background: Permits issued under the Clean Water Act are for fixed terms not to exceed five years. 33 U.S. Code § 1342 (b)(1)(B). DEP last issued the MS4 permit on July 1, 2013 and should have renewed the permit on July 1, 2018. The reissuance was delayed as DEP strove to substantially rewrite the permit to comply with a critical change in law.

In 2016, EPA published the "Remand Rule" which fundamentally changed how MS4 permits must be written. *See* National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System General Permit Remand Rule (Remand Rule), 81 F.R. No. 237, 89,320 (Dec. 9, 2016) (permitting authority, not MS4 permittee, has ultimate authority to determine what small MS4s must do to meet the MS4 permit standard). The rule responds to a remand from the 9th Circuit United States Court of Appeals, directing EPA to change the Phase II rule for small MS4s. *Environmental Defense Center, et. al. v. EPA*, 344 F.3d 832 (9th Cir. 2003). In relevant part, the Phase II rule now requires greater regulatory oversight and that the MS4 permit contain "clear, specific and measurable" terms and conditions[5] for MCM

[5] 40 C.F.R. § 122.43 Establishing permit conditions (applicable to State programs, see § 123.25).
(a) In addition to conditions required in all permits (§§ 122.41 and 122.42), the Director shall establish conditions, as required on a case-by-case basis, to provide for and ensure compliance with all applicable requirements of CWA and regulations. These shall include conditions under §§ 122.46 (duration of permits), 122.47(a) (schedules of compliance), 122.48 (monitoring), electronic reporting requirements of 40 C.F.R. part 3 (Cross-Media Electronic Reporting Regulation) and 40 C.F.R. part 127 (NPDES Electronic Reporting), and, for EPA permits only, §§ 122.47(b) (alternatives schedule of compliance) and 122.49 (considerations under Federal law.

requirements, water quality-based requirements, and evaluation, recordkeeping and reporting requirements. Remand Rule, 81 F.R. No. 237, 89,323, 89,326, and specific terms to reduce pollutant loads to impaired waters subject to a TMDL. *See e.g.* MA and NH MS4 Permits, Appendices F and G. The terms must reduce the discharge of pollutants to the MEP, as the Administrator or the State determines appropriate for the control of such pollutants. 33 U.S.C. § 402(p)(3)(B)(iii).

The 2013 MS4 permit was written before the Remand Rule was published and does not comply with the rule, as it fails to provide adequate regulatory oversight and set clear, specific and measurable terms. As DEP developed the new permit, it wrote numerous preliminary drafts and then issued two formal drafts for public comment, a "Proposed Draft" on December 6, 2019 and the Final Draft on June 23, 2020.

DEP's first public draft did not fully comply with the Remand Rule. *See e.g.* 03062020 EPA Comment Letter, 01062020 FOCB Comment Letter, and 01062020 CLF Comment Letter. With respect to construction and post construction, EPA wrote that MCM 5 "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." 03062020 EPA Comment Letter at 6. Friends of Casco Bay commented that: "We continue to believe th[at] MCMs [4 and 5] fall short of the requirements of the Remand Rule and do not adequately protect water quality. . . . Consistent with our prior comments, in this permit cycle, we recommend: That MCMs 4 and 5 specifically require low impact development (LID) site planning and design strategies to be used to the maximum extent feasible in order to reduce the discharge of stormwater from new development and redevelopment." 01062020 FOCB Comment Letter at 3; *see also* 01062020 CLF Comment Letter (incorporating comments submitted by Friends of Casco Bay).

With respect to impaired waters, EPA stated that: "In order to provide clear, specific and measurable permit requirements, the impaired waters section should include a requirement that all applicants submit a TMDL plan for all waterbodies that have an EPA approved TMDL outlining a plan that identifies actions to be taken to ensure that the discharge meets the applicable TMDL WLAs. Without clear, specific and measurable permit requirements for each authorized discharge . . . permittees will not know if their discharges are authorized by the general permit or not." 03062020 EPA Comment Letter at 6. Friends of Casco Bay commented that "Part IV(D)(1), which addresses impaired water-bodies other than those covered by the IC-TMDL, [should include] clear, specific, and measurable terms regulated communities must undertake to ensure that discharges from the MS4 system are consistent with the WLA of any TMDL referenced in the permit. As written, there is no directive regarding how the Department will determine whether or not discharges from MS4s are consistent with WLAs." 01062020 FOCB Comment Letter at 2[6]; *see also* 01062020 CLF Comment Letter (incorporating comments submitted by Friends of Casco Bay).

In response to these comments, DEP published the Final Draft. *See* 06232020 DEP Email Final Draft. The Final Draft added the LID requirement to MCM 5 and the requirement to propose clear, specific and measurable actions in the SWMP to comply with TMDL WLAs. *See* Final Draft at 34 (Part IV(C)(5)(b)(i)) and 51 (Part IV(E)(1)). These requirements satisfy the tenets of the Remand Rule and are supported by the Proposed and Final Fact Sheets.

> **One objective of [MCM 5] is to have the hydrology associated with new development closely mirror the pre-development hydrology and to improve the hydrology of redevelopment sites through required onsite retention/infiltration or treatment of stormwater**. **Another objective of this measure is to reduce the concentration and pollutant loadings found in stormwater prior to discharge of stormwater from new and re-development projects within the regulated area**.

[6] The Final Draft and Final Permit shifted to cover impaired waters under section (E).

Proposed Draft Fact Sheet at 23, Final Permit Fact Sheet at 23 (emphasis added). The Fact Sheet further explains that:

> Post construction stormwater runoff may cause two types of impacts. One is an increase in the type and the quantity of pollutants. The alteration of the land by development can increase the discharge of pollutants such as oil and grease (hydrocarbons), heavy metals, solids and nutrients. Another impact occurs with an increase in the quantity of stormwater that is delivered to water bodies during storm events. Increases in impervious area decrease the amount of precipitation that naturally infiltrates into the ground, which provides for natural filtration of many pollutants found in stormwater. The lack of natural infiltration increases the volume of stormwater runoff into water bodies which causes increased flows and increase in sediment loadings in the stream that can cause stream bank scouring, impacts to aquatic habitat, and flooding. The increased pollutant loading associated with increased impervious area will further degrade the receiving waterbodies if new and redevelopment is allowed to continue unmitigated. Planning and design for the minimization of pollutants in post construction stormwater discharges is the most cost-effective approach to stormwater quality management.

Proposed Draft Fact Sheet at 24, Final Permit Fact Sheet at 24.

With respect to impaired waters, the Fact Sheets note that, "[i]f the waterbody to which a point source discharge drains is impaired and has an EPA approved TMDL, then the point source discharge must be consistent with the TMDL WLA and any implementation plan. This GP [General Permit] does not authorize a discharge that is inconsistent with the WLA an approved TMDL." Proposed Draft Fact Sheet at 27, Final Permit Fact Sheet at 27.

DEP allowed seventeen days for formal public comment on the Final Draft, stating: "Attached is a final (?) [sic] draft MS4 General MEPDES permit based on comments received during the original formal 30-day public comment period that took place between December 6, 2019 and January 6, 2020. Beginning today, Tuesday, June 23, 2020, the draft permit is being made [sic] for a formal 17-day public comment period." *See* 06232020 DEP Email Final Draft.[7]

[7] DEP also considered EPA's comments submitted in March.

Friends of Casco Bay and others filed comments. *See e.g*. 07082020 FOCB Comment Letter (strongly supporting changes in Final Draft).

DEP then issued the Final Permit on October 15, 2020. The Final Permit extends the effective date from September 1, 2021 to July 1, 2022, omits the LID term for MCM 5, and omits the requirement to propose actions in the SWMP to meet TMDL WLAs. *Compare* Final Draft at 4-5, 34, and 51 to Final Permit at 4-5, 34, and 51. The Final Fact Sheet does not discuss comments filed after the Final Draft and therefore fails to explain why DEP made these changes. *See* Final Permit Fact Sheet at 29.

The 2013 MS4 Permit is administratively continued until the Final Permit takes effect in July 2022. *See* https://www.maine.gov/dep/water/wd/ms4/index.html.

Basis of Appeal

The Final Permit does not comply with the Remand Rule. To be lawful, the Final Permit must include the following terms from the Final Draft: (1) set an effective date of September 1, 2021; (2) 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; and (3) require that if the waterbody to which a point source discharge drains is impaired and has an EPA approved TMDL, then the SWMP must propose clear, specific, and measurable actions to comply with the TMDL WLA and any implementation plan. *See* Final Draft at 4-5, 33-34, and 51.

When DEP deleted these terms from the Final Permit, it failed to explain why it did so. *See* Final Permit Fact Sheet at 29. This is especially troubling since DEP specifically added those terms to the Final Draft in response to public comments (including regulatory oversight by EPA) to comply with the Remand Rule. When a final permit is issued, the permitting

authority must issue a response to comments, and "[s]pecify which provisions, if any, of the draft permit have been changed in the final permit, and the reasons for the change." 40 C.F.R. § 124.17(a)(1); *see also* 40 C.F.R. § 123.25(a)(31) (which extends this requirement to NPDES programs administered by a state). DEP did not include and discuss comments filed after the Final Draft. Therefore, there is no record of why DEP deleted the very text it had added to the Final Draft to make it comply with the law.

For the reasons set forth below, there is and can be no valid "reasons for the change." 40 C.F.R. § 124.17(a)(1). The Final Fact Sheet should be revised as needed to support adding the missing terms back into the Final Permit.

The Final Permit should take effect September 1, 2021: The Final Permit goes into effect July 1, 2022, four years late and nine months after the date proposed in the Final Draft. *Compare* Final Draft at 4, 5 to Final Permit at 4, 5. The 2013 MS4 permit should not be administratively continued until 2022. It fails to meet the tenets of the Remand Rule and reduce stormwater pollution to the MEP. *See EDC v. EPA*, 344 F.3d 832, 853-856 (2003); *see also* Remand Rule, 81 F.R. No. 237, 89,333-89,334.

The Final Draft complied with the Remand Rule and set an effective date of September 1. 2021. Final Draft at 4, 5. That date struck a balance between the administrative need to write further permit terms in second-step orders[8] and the need to act swiftly to reduce stormwater pollution. *See e.g.* Final Draft Fact Sheet and MCC STS Report. That date already represented a three-year delay in implementation, at a time when stormwater pollution poses a significant risk to water quality and must be addressed with increased regulation. MCC STS Report at 10; *see also* Community Resilience Working Group strategies and Coastal and Marine Working Group

[8] DEP chose to adopt a two-step permit rather than write a comprehensive general permit. This means that DEP will write a separate second-step Department Order for each municipality with specific additional terms.

strategies. There should be no further delay.

The Final Permit should be revised to set an effective date of September 1, 2021, commensurate with the Final Draft. The Final Permit should also adjust the date to file a Notice of Intent (NOI). The Final Draft required municipalities to file an NOI no later than December 1, 2020. *See* Final Draft at 4, 5.

The LID Term Must Be Restored: Under the Remand Rule, MCM 5 must contain clear, specific and measurable terms designed to reduce pollution from new construction to the MEP. Consistent with the Remand Rule, the Final Draft mandated that the municipal post construction ordinance or other regulatory mechanism require: Low Impact Development site planning and design strategies must be used to the maximum extent feasible. *See* Final Draft at 34 (Part IV(C)(5)(b)(i)). The Final Permit omits this clear, specific, and measurable term, which renders the permit unlawful and unable to reduce stormwater pollution from new construction to the MEP. *See* Final Permit at 34 (Part IV(C)(5)(b)); Final Fact Sheet at 24, 29; 03062020 EPA Comment Letter at 6; 01062020 FOCB Comment Letter at 3; and 01062020 CLF Comment Letter.

The Fact Sheet states that one objective of MCM 5 "is to have the hydrology associated with new development closely mirror the pre-development hydrology and to improve the hydrology of redevelopment sites through required onsite retention/infiltration or treatment of stormwater." Proposed Draft Fact Sheet at 23; Final Fact Sheet at 23. This cannot happen without the use of LID, since that is the very means by which new development can be designed and stormwater treated before it enters receiving waters. *See e.g.* 2016 MA MS4 General Permit at 44; 2017 NH MS4 General Permit at 46; Compendium of MS4 Permitting Approaches, EPA, at 33, 35. Without LID, runoff from new development will degrade water

quality in contravention of the Clean Water Act. *See* Maine Impervious Cover TMDL Assessment; 40 C.F.R. § 131.12 (antidegradation policy which requires that existing instream water uses and the level of water quality necessary to protect those uses must be maintained and protected); 38 M.R.S.A. § 464(F) (Maine's antidegradation policy).

The Final Permit must restore the LID term, so that MCM 5 mandates that the municipal post construction ordinance or other regulatory mechanism require that: Low Impact Development site planning and design strategies must be used to the maximum extent feasible. *See* Final Draft at 34 (Part IV(C)(5)(b)(i)). Without this term, the Final Permit excludes a directive by the State regarding how a permittee shall reduce pollution from construction to the MEP and violates the Remand Rule. *See* 33 U.S.C. § 402(p)(3)(B)(iii); 40 C.F.R. § 122.28; and 40 C.F.R. § 122.34.

The BMP Term for Impaired Waters Must Be Restored: The Final Draft provides that: "If the waterbody to which a point source discharge drains is impaired and has an EPA approved TMDL, **then the SWMP must propose clear, specific and measurable actions** to comply with the TMDL waste load allocation ('WLA') and any implementation plan." Final Draft at 51 (Part IV(E)(1) (emphasis added). This language addresses the concerns raised in comments and provides a clear directive commensurate with the Remand Rule. *See* Remand Rule, 81 F.R. No. 237, 89,320; 33 U.S.C. § 402(p)(3)(B)(iii); 03062020 EPA Comment Letter at 6; 01062020 FOCB Comment Letter at 2; 01062020 CLF Comment Letter. The language also makes the requirements for impaired waters more uniform. Specifically, the Final Draft and Final Permit both require that, if the impaired water is listed as an Urban Impaired Stream (UIS), "the permittee must propose and fully implement at least three structural or non-structural BMPs to be

considered for inclusion in the permittee specific DEP Order." Final Draft at 52 (Part IV(E)(3)); Final Permit at 52 (Part IV(E)(3)).

Under the Final Draft, permittees have clear and consistent directives regarding what they must propose to meet all TMDL WLAs for impaired waters, and there is clear guidance regarding what to expect in second-step DEP Orders. The Final Permit creates inconsistency and fails to create enforceable expectations.

The Final Permit removes the requirement to propose BMPs for impaired waters, other than for UISs. *Compare* Draft Permit at 51-52 (Part IV(E)(1) and (3)) with Final Permit at 51-52 (Part IV(E)(1) and (3)). Instead it states: "If the waterbody to which a point source discharge drains is impaired and has an EPA approved total maximum daily load (TMDL), **then the SWMP must address compliance** with the TMDL waste load allocation ('WLA') and any implementation plan." Final Permit at 51 (Part IV(E)(1)) (emphasis added). This language fails to advise permittees of how they must address compliance with TMDL WLAs. *See* 33 U.S.C. § 402(p)(3)(B)(iii). It is insufficient to leave this up to the second-step DEP Order; the general permit should advise permittees of what will be expected of them. In this manner, the requirements for impaired waters listed as urban impaired streams and other impaired waters will be uniformly addressed in accord with the Remand Rule.

Because the language of the Final Draft provides flexibility to propose structural and nonstructural BMPs, municipal permittees can meet the BMP requirements for multiple impaired waters by proposing measures that reduce pollutant loads to more than one impaired receiving water. For example, municipalities might adopt fertilizer and pesticide ordinances, additional street sweeping, or measures to use less chlorides to reduce pollutant loads to all waters impaired

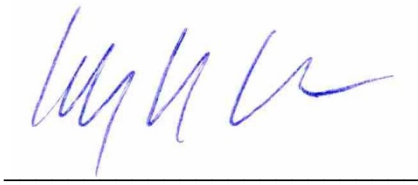
by those pollutants. Such measures would begin to meaningfully restore and protect the health of receiving waters without the need for expensive infrastructure.

Given Maine's urgent need to reduce stormwater pollution, as well as the Remand Rule, BEP should restore the language from the Final Draft to the Final Permit. *See* Remand Rule, 81 F.R. No. 237, 89,320; 33 USC § 402(p)(3)(B)(iii); 03062020 EPA Comment Letter at 6; 01062020 FOCB Comment Letter at 2; 01062020 CLF Comment Letter. The Final Permit should include the requirement that "the SWMP propose clear, specific and measurable actions to comply with the TMDL waste load allocation ('WLA') and any implementation plan." *See* Final Draft at 51 (Part IV(E)(1)).

## Conclusion

For the foregoing reasons, Friends of Casco Bay respectfully requests that the Board of Environmental Protection grant the relief requested and restore three terms to the Final Permit to: (1) set an effective date of September 1, 2021; (2) require that the municipal post construction ordinance or other regulatory mechanism under Minimum Control Measure (MCM) 5 mandate the use of Low Impact Development (LID) site planning and design strategies to the maximum extent feasible; and (3) require that if the waterbody to which a point source discharge drains is impaired and has an EPA approved TMDL, then the stormwater management plan (SWMP) must propose clear, specific, and measurable actions to comply with the TMDL waste load allocation (WLA) and any implementation plan.

Dated at: Cumberland, Maine
This 13th day of November, 2020



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