

OEST Associates, Inc.

- engineers
- architects
- surveyors
- construction managers

343 Gorham Road • South Portland, ME 04106-2317 • TEL (207) 761-1770 • FAX (207) 774-1246
E-mail: mail@oest.com • Web Site: www.oest.com

MEMORANDUM

To: Town Council
Town of Cape Elizabeth, Maine

From: Stephen D. Harding, P. E., OEST Associates, Inc.
Town Engineer

Date: November 18, 2009

Project No.: 360.85.01

SUBJECT: Municipal Separate Storm Sewer Systems (MS4) General Permit
Post-Construction Storm Water Management Ordinance

This memorandum and the attached documents are being submitted to the Town Council (Council) for their consideration and action to adopt an ordinance to bring the Town of Cape Elizabeth (Town) into compliance with the Maine Department of Environmental Protection's (ME DEP) MS4 General Permit and the Federal Clean Water Act.

Please see attached September 24, 2009 letter from David Ladd of the ME DEP that provides his review comments of the Town's permit year one annual report. ME DEP found that the Town has met and in some cases exceeded the permit requirements except for the adoption of a Post-Construction Storm Water Management Ordinance. On Page 2 of Mr. Ladd's letter he notes that Cape Elizabeth has fallen short of meeting the minimum requirements for minimum control measure (MCM) 5 Post-Construction Storm Water Management and to please notify him via e-mail as soon as the Town passes the ordinance. On page 3 of Mr. Ladd's letter he states that "The Town of Cape Elizabeth has substantially complied with five of the six MCMs for the first permit year of the MS4 General Permit. The Town must continue to develop and implement a post construction ordinance to meet full compliance."

In accordance with the Town's request, OEST Associates, Inc. (OEST), in collaboration with Town staff, has prepared a Post-Construction Storm Water Management Ordinance (Ordinance), which needs to be adopted by the Town in order to comply with the ME DEP MS4 General Permit. Attached is a draft copy of that Ordinance in Microsoft Word format for the Council's consideration. For the benefit of the Council, the following provides additional information to support the need for the adoption of the proposed Ordinance.

Effective on January 12, 2001, the State of Maine (State) was authorized to operate the National Pollutant Discharge Elimination System (NPDES) program. As of that date, the State became the primary NPDES authority and point of contact for most wastewater discharge sources in Maine. Essentially, the delegated NPDES program represents a partnership between the State and the Environmental Protection Agency (EPA), with the State taking the lead in most areas of the NPDES program. While the State takes the lead in administering the Clean Water Act in Maine, EPA remains responsible for assuring that the intent of the Act is met in all states, and retains independent authority to enforce its requirements. In 2003 the ME DEP issued their regulations for Storm Water Construction General Permit and MS4 (MS4 = separate storm sewer system municipalities) General Permit (General Permit). Accordingly, the Town prepared a Storm Water Management Plan (Plan) and the Council at their Regular Meeting # 4-03-04 on Monday, September 8, 2003, authorized the Town Manager to file that Plan with ME DEP. Compliance with the ME DEP General Permit has been an on-going endeavor since 2003.

On July 1, 2008 the ME DEP issued its General Permit for the period from July 1, 2008 through June 30, 2013, which supersedes the General Permit issued on June 3, 2003. This General Permit implements the State and Federal Phase II Storm Water Mandates under the Federal Clean Water Act, which require regulated small municipal separate storm sewer system municipalities (small MS4s) to develop, implement and enforce six MCMs. The General Permit authorizes the direct discharge of storm water from or associated with small MS4s to an MS4 or waters of the State other than groundwater. In accordance with the 2008 General Permit, the Town submitted a Storm Water Program Management Plan (Plan) to ME DEP in December 2008, which was approved by ME DEP on March 3, 2009. The Plan includes six requisite MCMs, which are designed to reduce the discharge of pollutants within the urbanized area (urbanized area means areas of the State of Maine defined by U.S. Bureau of the Census latest decennial [2000] census) to and from its regulated small MS4, protect water quality, and satisfy the appropriate water quality requirements of the Clean Water Act. The Plan also includes a section describing a strategy for controlling, to the maximum extent practicable, the discharge of storm water runoff to Trout Brook which is classified as an Urban Impaired Stream. The six MCMs include the following:

- MCM 1 Public Education and Outreach.
- MCM 2 Public Involvement and Participation.
- MCM 3 Illicit Discharge Detection and Elimination.
- MCM 4 Construction Site Storm Water Runoff Control.
- MCM 5 Post-Construction Storm Water Management.
- MCM 6 Pollution Prevention/Good Housekeeping for Municipal Operations.

The Town has been working on the above MCMs in accordance with the requirements of the General Permit and the Town's Storm Water Program Management Plan. Examples of the Town's progress include the following:

- A) MCMs 1 and 2 have been implemented to a degree through the Town's participation with the Interlocal Storm Water Group (ISWG), which is made up of eleven Cumberland County Municipalities and headed by the Cumberland County Soil and Water Conservation District (District). Some of their work includes:
1. Think Blue Maine.org web site.
 2. Rubber Ducky advertisements.
 3. The District's News Letters.
 4. Yard-scaping/healthy lawn care tips distributed at information booths at Portland Flower Show and Cumberland Fair.
 5. Outreach to local schools.
- B) In accordance with MCM 3 Illicit Discharge Detection and Elimination, the Town has accomplished the following:
1. Adopted and enacted a Non-Storm Water Control Ordinance (Article II of Chapter 18 of the Town's Conservation Ordinance) on July 13, 2005.
 2. Performance of dry weather outfall inspections to detect illicit discharges.
 3. Review of the Town's respective storm sewer infrastructure maps.
- C) Please see attached September 24, 2009 letter from David Ladd of the ME DEP that provides his review comments of the Town's permit year one annual report. ME DEP found that the Town has met and in some cases exceeded the permit requirements for five of the six MCMs and has not met the requirements for MCM 5 Post-Construction Storm Water Management.

MCM 5 requires that the Town develop, implement, and enforce an Ordinance or similar measure that ensures long-term operation and maintenance of post-construction Best Management Practices (BMPs). BMPs are defined as schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution of waters of the State of Maine. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage. MCM 5, as excerpted from the Plan, is attached as Exhibit "A" for your convenience. Please note that Measurable Goal 5.1.3 states "By the end of Permit Year 1 (by June 1, 2009), the permittee will enact a post-construction discharge ordinance or similar measure that ensures long term operation and maintenance of post-construction BMPs." It is our understanding that the Town has requested and received an extension of time from ME DEP for Measurable Goal 5.1.3.

To aid the MS4 Municipalities in the preparation of a Post-Construction Storm Water Management Ordinance, the Maine Municipal Association hired Attorneys Perkins Thompson to work with Maine's regulated 28 small MS4s to prepare a sample ordinance that could be enacted as a stand-alone ordinance or incorporated into existing land use ordinances in order to comply with the ME DEP mandates. Last fall, James Katsiaficas of Perkins Thompson circulated a Sample Post-Construction Storm Water Management Ordinance (Sample). Subsequently, several municipalities have developed and adopted their own Post-Construction Storm Water Management Ordinances many of whom have used the Perkins Thompson Sample as a template. South Portland, Falmouth, and Yarmouth provided copies of their ordinances to the Town for reference prior to Cape Elizabeth's preparation of their own ordinance sections.

The Town retained the services of OEST to work in cooperation with Town staff to prepare a Post-Construction Storm Water Management Ordinance to satisfy MCM 5 of Cape Elizabeth's Storm Water Program Management Plan. The Town and OEST agreed that this would be best accomplished by using the Town of Yarmouth's ordinance and the ordinance Sample provided by Perkins Thompson as the basis of Cape Elizabeth's ordinance. The attached Post-Construction Storm Water Management Ordinance was prepared, formatted, and coordinated to fit within Cape Elizabeth's Chapter 18 Conservation Ordinance as Article IV. It is expected that Cape Elizabeth's Town Attorney will provide the legal review of the Post-Construction Storm Water Management Ordinance.

We trust that this submission and this memorandum discussion meet your current needs. Should you have any questions or comments regarding this project, please do not hesitate to contact our office.

EXHIBIT A

“MCM 5 Post-Construction Storm water Management

Goals (within the Urbanized Area)

- Develop a program to address storm water runoff from new development and redevelopment projects that disturb greater than or equal to one acre, including projects less than one acre that are part of a larger common plan of development or sale, that discharge into the permittee’s MS4;
- Implement an ordinance or similar measure to ensure adequate long-term operation and maintenance of post construction BMPs;
- Ensure post construction BMPs are functioning as intended; and
- Document and report annually to the MDEP all applicable post-construction related information.

For specific permit requirements and suggestions, refer to MDEP’s General Permit for the Discharge of Storm water from Small Municipal or State or Federally Owned Municipal Separate Storm Sewer Systems Part IV(H)(5).

BMP 5.1 – Implement Ordinance or Similar Measure

Measurable Goal 5.1.1 - Evaluate the reliance on Chapter 500 or local post construction requirements. In Permit Year 1 (June 1, 2008 to June 1, 2009) the ISWG members will determine if they will rely on the State permit process (Chapter 500) for the installation of post construction BMPs.

Measurable Goal 5.1.2 – In Permit Year 1 (June 1, 2008 to June 1, 2009) the permittee will adapt the model ordinance or other DEP approved measure to meet its desired format.

Measurable Goal 5.1.3 – By the end of Permit Year 1 (by June 1, 2009), the permittee will enact a post construction discharge ordinance or similar measure that ensures long term operation and maintenance of post construction BMPs.

Measurable Goal 5.1.4 – In Permit Years 2 (June 1, 2009 to June 1, 2010) - 5 (June 1, 2012 to June 1, 2013) the permittee will implement the post construction ordinance.

Reporting – Status of implementation of ordinance or similar measure will be provided in the annual report.

Responsible Party: Public Works Director.

BMP 5.2 – Develop and implement an inspection program for post-construction BMPs for which the owner or operator has not hired a qualified third party inspector, and which are located in the direct watershed of a lake most at risk from new development or in watersheds of an urban impaired stream.

Measurable Goal 5.2.1 – The permittee will develop an inspection program, including procedures, protocols, forms, recordkeeping, and training within one year of ordinance adoption.

Measurable Goal 5.2.2 – In PYs 3-5 the permittee will implement the inspection program and document all inspection results. The permittee will also conduct yearly evaluations of program and modify as necessary.

Reporting - Documentation of all inspections will be entered into a database management system or other recordkeeping system for tracking and annual reporting to DEP. Statewide inspection forms are being developed and implemented in 2008 to facilitate consistency of data collected and to maximize the efficiency of the database management system. Information to be collected includes:

- The cumulative number of sites that have post construction BMPs discharging into the permittee’s MS4;
- A summary of the number of sites that have post construction BMPs discharging into the permittee’s MS4 that were reported to the municipality;
- The number of sites with documented functioning post construction BMPs; and
- The number of sites that required routine maintenance or remedial action to ensure that the post construction BMP is functioning as intended.

Responsible Party: Public Works Director.”