

Maine Municipal Association's comments to Maine Department of Environmental Protection's Draft Maine Impervious Cover Total Maximum Daily Load Report for Aquatic Life-Impaired Waters (December 2011)

Maine Municipal Association (MMA) would like to thank the DEP for the opportunity to provide comments on the December 2011 draft of the Impervious Cover (IC) Total Maximum Daily Load (TMDL) Report. MMA understands that streams and other water bodies in Maine are very valuable natural resources to the state's citizens, and in certain instances protective measures need to be implemented to restore or protect these State assets. Our comments on these proposed rules are provided from the perspective of regulated entities, rather than the perspective of stream biologists, geomorphologists, or macro-invertebrate specialists.

Regulation or non-regulation: The affected communities deserve to know. This is not an easy document to understand in terms of its real-life implications with respect to those who will ultimately be held responsible for compliance. The fist of mandate is delivered in a velvet glove. In that sense, as a regulatory document, this draft TMDL has a seductive element. For the municipal governments that will likely be held largely or primarily responsible to the federal government or its designee, every effort is made throughout the document to describe the implications of having an impaired stream identified in your community as the beginning of a relatively soft, information-gathering, seemingly inexpensive, step-by-step and "iterative" consciousness-raising experience. Whenever money is implicated, grant programs are identified. Just as seductively, neither the specific methods of determining noncompliance nor the consequences of noncompliance are so much as mentioned.

Cutting through the presentation, the document appears to require 17 municipalities to either take the lead or assume an integral part in the development of 29 watershed management plans that inventory, identify, prioritize and finally implement a broad array of management practices and infrastructure installations at a total cost of millions of dollars. As noted in Case Study #3, the development of the Long Creek management plan was injected with \$2.1 million of federal stimulus funds and enjoys ongoing funding through the imposition of certain annualized fees on watershed property owners effectively imposed as a result of EPA's designation of the watershed as a NPDES-regulated site. The prime funding of the Penjajawoc Stream management plan in Bangor was the more modest \$867,000, half coming from federal stimulus funds and half provided by the City itself. It might be noted that federal stimulus funds are no longer forthcoming, the economy is still in very tough shape, new property tax dollars are unavailable, and even the most sacred local government funding programs at both the state and federal level are at serious risk.

By the softness of this regulatory approach, a conundrum is presented to those trying to represent the interests of the regulated community. Should we gratefully accept these designations of impaired streams because they are couched in a "just show progress" regulatory approach, or should we seek more codified detail with respect to our on-the-ground obligations? There does not appear to be much that can be done with respect to the designations. They flow from the Clean Water Act. Seeking an enhanced regulatory diction, however, is clearly an option.

Generally, a community's highest interests when subjected to regulation are: (1) certainty and predictability with respect to the obligations to be incurred; and (2) rational and cost effective regulatory requirements.

Clean-cut predictability, in the case of this document, is sacrificed to a process; that is, the process of engaging stakeholders, inventorying the assets, prioritizing the response, finalizing the watershed management plan and then implementing its specifics. This process will presumably take the community in the appropriate direction given the particular environmental challenges facing the water body, but the financial and regulatory implications are uncertain. On the financial side, there are certainly some sources where resources external to the municipality may be available, but there is no apparent nexus between the availability of those external resources and prioritized terms of the watershed management plan. For example, if the planning process identifies a prioritized infrastructure installation costing \$500,000, that would appear to become the regulatory imperative regardless of funding availability.

There should be a clearly-stated nexus. To the extent the implementation of this TMDL demands financial expenditures at the municipal level, those obligations should be expressly tolled until financial resources external to the municipality are made available at a significant matching rate. The property taxpayers in the municipality will doubtlessly pay their share and then some, but others at the private-sector, state and federal level must also provide substantial matching contributions, not as a vague promise or a grant program gone dry, but as money on the table.

Related questions for DEP's consideration:

1. Is the IC TMDL Report a regulatory document? If it is not, then changes to the existing language in the Report need to be made so that it does not sound like a directive.
2. What steps does DEP take to ensure the accuracy of its watershed designations and other site specific data?
3. By what criteria does DEP allocate its own limited resources, including the distribution of grants or the Department's hands-on technical assistance, when assisting with the development of the watershed management plan?
4. Does DEP approve the watershed management plan? If so, what is the review process?

The math of impervious cover. This document takes up a great deal of its space laying out as its foundation a correlation between the percent of impervious cover in a small stream watershed and the quality of that stream's water. In summary, a percentage of impervious cover that exceeds 10% more or less is presumptively the root cause of an inability to attain certain water quality standards. It follows that a reduction in that percentage of impervious cover should presumptively result in the waterbody being able to recover its capacity to attain its prescribed rating.

As strong as this Report is on the math of impervious cover, rigorously detailing the percent of impervious cover per identified watershed and matching that baseline against the presumptive “IC” tolerance level, it is very weak on the math of impervious cover reduction where systems have been or will be implemented to effectively reduce or remove the impervious cover from the watershed. This document refers to such systems as “structural BMPS”. What exactly is a structural BMP worth? If a retail establishment’s parking lot is designed to accept all the stormwater generated at the site, collected in a sedimentation tank or pond, and only slowly discharge the settled, collected water into the natural soils, does this Report subtract that acreage from the impervious area tally? Do other stormwater management strategies allow for partial or total “IC” deduction? Does the acreage of “low impact development”, whether implemented previous to or after this Report’s posting, get discounted from the impervious cover analysis?

Having so strongly underscored the correlation between impervious cover and water quality, there is next to nothing in this Report that provides some surety on the part of the regulated municipality that the aggressive reductions in impervious cover that at least some of these impaired stream communities will need to achieve is even remotely achievable. It is only fair that the mathematics of reducing or removing impervious cover (without necessarily tearing it up with a jackhammer) be clearly provided.

Related questions for DEP’s consideration:

5. Would an explanation as to how BMPs will effectively reduce the %IC in the watershed be available for “impacted” communities? Please provide the methodology that will be used by DEP when making that calculation.
6. Does the current condition %IC account for existing BMPs offsets? Is there a listing of different types of BMPs and their effective % IC reduction value (based on area covered) that could be made available to interested parties as part of this Report?

One-way presumption. The presumptions that form the foundation of this document are something of a one-way street. It is presumed that high levels of impervious cover in a stream watershed is the cause of the stream’s poor water quality characteristics and it is further presumed that if the impervious cover tally was reduced to a level somewhere between 5% - 16% (with most being at 9%), depending on the stream, the stream’s capacity to reach attainment would be obtained. On that point, it is stated on page two of this document that: *“Impervious cover targets represent the level of imperviousness (in the contributing watershed) at which the waterbody is capable of supporting a benthic macroinvertebrate community that meets aquatic life use goals and criteria in Maine’s water quality standards.”*

Against that backdrop, the Report makes clear that *“(if the initial IC target is met but the aquatic life still does not attain criteria of the stream’s assigned class, then the process of identifying and evaluating watershed stressors will be revisited”* (page 14).

To the regulated communities, this kind of one-way-valve regulatory approach (which ascribes the cause of the problem as X but is unwilling to admit that the eradication of X is the solution) paints an entirely uncertain regulatory future. Even if the municipality undertakes every recommended action and implements in good faith all the structural and non-structural BMPs

that could be reasonably required, it might still be on the hook for further regulatory actions. It should be noted that achieving the aggressive %IC targets is not an easy task and puts the municipality in conflict with other legitimate economic development and anti-sprawl goals. Therefore, the effort could ultimately be recognized as ineffective and is not what the regulated community wants to hear. That type of regulatory uncertainty and the potential unintended consequences is unfair.

Related questions for DEP's consideration:

7. Why is 9%IC the standard target for all classes of waterbodies (AA,A, B & C)? Should some consideration be given to the characteristics of the differing classes of waterbodies?
8. If progress towards improving water quality is recognized by DEP, why not have a higher %IC target than 9% in the IC TMDL for some of the "impaired" stream that is reflective of their current condition %IC. This approach may alleviate the concern from some of the communities that the %IC target is an unobtainable or unrealistic goal? As current condition %IC improves over the years, these %IC targets could be lowered until the ultimate goal of 9%IC is reached and/or the waterbody meets the necessary quality standards.
9. What happens when money is unavailable for the "impacted" community to fund the development and implementation of the watershed management plan? Would there be recognition among the enforcement community that there is a lack of available resources to fund the management plan and not claim that no "progress" was made by the community?

Restorative time periods. MMA is not qualified with any expertise on the biology or chemistry of stream restoration, but it is obvious from a lay perspective that this document does not readily acknowledge that the restoration of a stream's capacity to achieve attainment will likely precede that stream's actual attainment by a significant period of time.

In our view, if a community has taken substantial steps to achieving its impervious cover target, it should be provided some ledge along the sheer wall of ceaseless regulatory attainment upon which the municipality can rest without wondering what the next wave of requirement might be. If this is not the approach taken by DEP, then this exercise of improving water quality through the "effective" reduction of impervious cover in the watershed will be perceived by the affected communities as never ending.