

Vermont DEC Stormwater Program

Pre-Stormwater Rule Public Outreach: Stormwater Offsets, Impact Fees, and Expired Permits (7/25/2017)

Introduction

DEC is required to adopt an updated Stormwater Management Rule by January 1, 2018. This rule will cover all Stormwater permitting programs, including operational and NPDES-based programs. Adoption of the rule, and associated general permits, are required by Act 64 (the Vermont Clean Water Act), and are an important component of the Lake Champlain TMDL Accountability Framework whereby EPA monitors Vermont's TMDL implementation efforts.

All portions of the forthcoming rule will be open to public comment. In advance of filing the proposed rule, and to provide an extended opportunity for consideration of the proposal and for public input, DEC is providing this summary of the proposed "three-acre impervious surface" requirements, offset and impact fee system, and requirements related to expired permits in stormwater-impaired waters.

Regulatory Background

The proposed rule will align with federal and state law requirements. Statute directs fundamental permitting requirements, including offset applicability. Under statute, offsets and impact fees are only applicable in stormwater-impaired waters, Lake Champlain, and waters that contribute to the impairment of the Lake. Standards vary based on when there is no TMDL in place, which is currently the case for stormwater-impaired streams at three ski areas, and once a TMDL is adopted as is the case in the remaining stormwater-impaired waters and Lake Champlain.

In the pre-TMDL condition, generally speaking, projects must maximize treatment and result in no increase in pollutant load. In the post-TMDL condition certain categories of existing dischargers must retrofit, and new dischargers must fully meet the 2017 Vermont Stormwater Management Manual. Whereas DEC has discretion to establish fee levels, engineering feasibility analysis criteria, and technical standards, these statutory requirements drive the proposals described below.

Three-Acre Impervious Surface Permitting

DEC is statutorily required to issue a general permit (GP) by January 1, 2018, for projects with impervious surfaces of three or more acres ("three-acre sites") requiring that these parcels retrofit to include stormwater controls for any stormwater discharges that were not previously permitted, or that were permitted under standards in place prior to the 2002 Stormwater Manual. The proposed Stormwater Rule will describe the retrofit standards to be incorporated in this new general permit. The Department intends to make the three-acre requirements part of a combined general permit addressing all stormwater operational permitting, replacing current GP 3-9010 For Previously Permitted Stormwater Discharges, GP 3-9015 For New Stormwater Discharges, and GP 3-9030 For Residually Designated Discharges.

For jurisdictional purposes, a “three-acre site” will mean a single lot with three or more acres of impervious surface, or any common plan of development when the stormwater permit previously issued for the project covers three or more acres of impervious surface.

Three-acre sites will be required to meet specific standards of the Stormwater Manual depending on the condition of the receiving water. In the Lake Champlain watershed, sites will be required to maximize compliance with the water quality treatment standard and groundwater recharge criteria. In stormwater-impaired waters sites will be required to meet these standards as well as channel protection volume. Sites will need to undertake an engineering feasibility analysis (EFA) as part of the application process (EFA criteria table attached). Projects that do not meet the standard on at least 75% of the site will be required to pay a stormwater-impact fee or implement a stormwater offset.

Three-acre sites that are neither in a stormwater-impaired water, or the Lake Champlain watershed, will also be required to maximize compliance with the water quality treatment standard and groundwater recharge criteria, per an EFA. Because under statute offsets and impact fees only apply in stormwater-impaired waters and the Lake Champlain watershed, three-acre sites outside of those areas will not be required to complete offsets or pay impact fees.

Renewal of Permits in Stormwater-Impaired Waters and the Lake Champlain Watershed

Existing permits with three or more acres of impervious surface will be subject to “three-acre site” requirements. For sites that have less than three acres of impervious surface, and that were designed to standards in place before the 2002 Vermont Stormwater Manual, the requirements for permit renewal will vary pre- and post-TMDL implementation. (Pre-TMDL refers to the period prior to adoption of a TMDL, and post-TMDL covers the period after TMDL adoption, where the TMDL is for a stormwater- impaired water, or Lake Champlain.)

Pre-TMDL adoption, a permit renewal project will be required to maximize compliance with the water quality treatment standard, groundwater recharge, and channel protection volume criteria, per an EFA, and demonstrate no increase in pollutant load. Projects not meeting these requirements on at least 75% of the site will need to pay a stormwater-impact fee or implement an offset.

Post TMDL adoption, a project will be required to comply with the terms of the most recently issued permit, unless an approved TMDL-implementation plan (e.g. Flow Restoration or Phosphorus Control Plan) demonstrates that an upgrade of the site is necessary, in which case the site will need to upgrade to maximize compliance with the water quality treatment standard, groundwater recharge, and channel protection volume criteria, per an EFA, however the channel protection volume criterion will only be applicable in stormwater-impaired waters. Projects not meeting these requirements on at least 75% of the site will need to pay a stormwater-impact fee or implement an offset. Where an MS4 did not initially include a project in a TMDL-implementation plan it may amend the plan, in which case DEC will require the subject site to upgrade.

Additionally, DEC may determine that a permitted site must undertake an upgrade as part of the renewal process upon a determination that the upgrade is necessary to implement a TMDL.

Designated Sites

To address a discharge contributing to a violation of water quality standards, or to implement a TMDL, DEC may designate a site as requiring stormwater permit coverage. The treatment standards for designated sites will generally be similar to the three-acre site requirements.

Expansion of Offsets and Impact Fees

Act 64 directs DEC to allow the use of stormwater offsets, impact fees, and phosphorus credit trading related to permitting in stormwater-impaired waters, and the Lake Champlain watershed. Offsets are approved projects within stormwater-impaired waters, Lake Champlain, or a water that contributes to the impairment of Lake Champlain, that mitigate the impacts of a stormwater discharge. (10 V.S.A. § 1264(b)). Offsets and associated impact fees are a form of trading, however trading between sectors (for instance trading between stormwater and agriculture or between stormwater and wastewater) is beyond the scope of this current rule effort. Several policy, legal, and implementation-tracking issues in these broader trading programs require a more in-depth evaluation process. DEC is committed to leading a further investigation to potentially develop a more expansive trading program following completion of this current rule effort.

Vermont has used offsets to meet “net zero” requirements in stormwater-impaired waters when no TMDL exists. Under the new rule, offsets will remain applicable in stormwater-impaired waters, and will also be expanded to the Lake Champlain watershed. Additionally, offsets will be applicable both prior to, and following adoption of, a TMDL or water quality remediation plan.

The proposed impact fee system, combined with the engineering feasibility component, provides a strong incentive for projects to maximize treatment, and ensures all projects contribute to TMDL-implementation even where limited on-site treatment is feasible. By also allowing regulated projects that exceed standards to receive impact fees, the proposed system also creates a financial incentive for otherwise non-required projects to implement effective stormwater management and hence facilitate TMDL implementation.

Offset Applicability

In the pre-TMDL condition, offsets are applicable to new development, redevelopment, permit renewal, three-acre sites, and designated sites. The post-TMDL condition is similar, however only retrofit sites (i.e. 3-acre sites, designated sites, some expired permits) are eligible to participate in the impact fee and offset system; new development and redevelopment projects must meet an absolute standard, not modified by an engineering feasibility analysis, and hence will not participate in the impact fee and offset system.

Eligible Offset Projects

Currently, in the pre-TMDL condition, offset projects may include the management of stormwater

runoff, or may also include addressing sources such as agriculture runoff or in-stream erosion. In the post-TMDL condition, allowing for offsets that address sources other than developed land stormwater would present significant policy and tracking issues. From a tracking and allocation perspective, if an offset addresses a non-point source, credit for that action would not go to the developed lands portion of the waste-load allocation. It could also result in financial resources that are necessary to address developed land runoff to be directed to non-stormwater sources, and thus potentially impede TMDL implementation. Consequently, DEC intends to limit offsets to the management of stormwater from developed lands. This will also apply pre-TMDL such that offset project accounts, and associated stormwater impact fees, may continue to operate in the event the TMDL status of a receiving water changes. That is, impact fees paid prior to TMDL implementation may be used in the post-TMDL condition.

Offsets will continue to be tracked, and managed, on a watershed basis.

Offsets and Stormwater Impact Fee Implementation

Where a project is not able to meet standards, following completion of an engineering feasibility analysis, the project will be required to pay a stormwater impact fee or implement a stormwater offset to reduce or eliminate the impact fee.

Pre-TMDL, a project may pay an impact fee to obtain permit coverage only where there is offset capacity in the receiving water. Once a TMDL is in place, a project needing to pay an impact fee as part of obtaining permit coverage may pay this fee, and obtain coverage, prior to an offset project taking place. Rather, the fees may be directed to projects that exceed standards and that obtain permit coverage, at a later date.

A project requiring payment of an impact fee may undertake an offset project to reduce or eliminate the fee. Provided the offset project obtains permit coverage, any impact fees the offset project would otherwise generate may be used in lieu of direct payment of impact fees by the required project. This permitting approach will replace both “stand-alone offset permits” and the concept of incorporating off-site offsets into an operational permit for a project requiring an offset.

Projects that exceed requirements will be eligible to receive impact fees. This includes projects such as three-acre sites that manage more than the target percentage for their site (75%), and non-required offset projects that implement stormwater management in conformance with the Stormwater Manual and that obtain permit coverage. MS4 projects done as part of an FRP or PCP that exceed the 75% target are also eligible, as are MS4 projects that manage less than the target, however funding shall be subject to the funding criteria described in the next paragraph. Under the proposed rule, offset developers may be compensated based on the amount of impervious surface treated, and the level of treatment provided. Currently, such projects may only be compensated up to the cost of implementation. These projects are eligible to receive stormwater impact fees -if available- at the same rate at which impact fees are paid.

Offset funds will be disbursed to eligible projects on an annual basis. The priority of funding will be based on the order in which projects submit a certification of project completion, subject to the

following provisions.

- Projects that exceed the 75% target shall be given priority for funding.
- MS4 projects that do not meet the 75% target shall be awarded funding next, after the projects exceeding the 75% target have been awarded funding.
- If a permittee has more than one eligible project for which it is seeking funding in a given year, the permittee may choose the order in which its projects will be eligible for funding.

Offset capacity, and offset funds, will be reserved for use in the watershed of the project, and in the case of MS4-regulated municipalities, within the municipality that created the capacity or paid the impact fees. In this case “watershed” shall mean the watershed of the stormwater-impaired water, or if not stormwater impaired, then the watershed of the Lake Champlain TMDL segment.

Additionally, a project eligible to receive impact fees may direct, through the permit process, that any offset capacity created by the project be made available to a specific discharger that needs offset capacity-this would be applicable in the pre-TMDL condition. In this case, the project eligible to receive funds will only be paid impact fees after impact fees are received from the specific project designated to use the offset capacity.

Changes to Offset Impact Fee Rate; Engineering Feasibility Analysis; Compensation for Offset Projects

The proposed rule also changes the offset impact fee rate, modifies engineering feasibility analysis criteria, and changes how developers of offset projects are compensated. The impact fee will be raised from the currently \$30,000 per acre of impervious surface to \$50,000. This is based on applying the Engineering News Record Construction Cost Index as an estimate of construction cost growth between when the \$30,000 per acre impact (2002) was established and current day.

Date	Construction Cost Index
January 2002	6462
April 2017	10678

$$\text{Cost Multiplier} = \frac{10678}{6462}$$

$$\text{Cost Multiplier} = 1.6524$$

Assuming the base cost of \$30,000, a new impact fee would be \$49,573, or \$50,000, rounded. Further, the \$50,000 is broken down by the groundwater recharge, water quality treatment standard, and channel protection volume criteria. The following tables include the breakdown of the impact fee, as well as a summary of proposed standards and the engineering feasibility analysis criteria.

Summary of Standards: Stormwater Impact Fees and Offsets (a project not able to fully meet standards on site may pay a stormwater impact fee as mitigation or complete an offset; permitted projects exceeding requirements may apply to receive impact fees)

Offset Requirements	Current Standards, Pre-TMDL Offset	Proposed Standards, Pre-TMDL Offset	Proposed Standards, Post-TMDL Offset
Affected Projects	New and existing	New and existing	Existing only
Impact Fee (per acre imp. surface)	\$30,000	\$50,000	\$50,000
Eligible offset projects	Stormwater, agriculture, rivers; previously unregulated	Stormwater only; may be previously regulated	Stormwater only; may be previously regulated
Timing of Offset	Offset prior to new	Offset prior to new	Offset may be later
Engineering Feasibility Analysis (EFA)	Yes	Yes	Yes
Reimbursement for offset implementation (including when permittee is developing an offset to reduce or eliminate impact fees, eligible funds are credited towards applicable impact fees)	Up to cost of project	Based on area treated and level of treatment, up to \$50,000/acre	Based on area treated and level of treatment, up to \$50,000/acre

Summary of Proposed Treatment and Impact Fee Standards

Project Types	Applicable Pre or Post-TMDL	Impact Fee Target (% of Site Impervious Requiring Compliance with Standard)	VSMM Criteria	Fee/Acre	Eligible Fee Reduction
New, Expansion	Pre	100%	All, combined	\$50,000	80% reduction for meeting VSMM for target impervious; 100% for infiltration of 1-year storm
Redevelopment, Permit Renewal	Pre	75%	Rev	\$10,000	Up to 100% reduction for meeting VSMM criteria for Impact Fee Target
			WQTS	\$15,000	Up to 100%- see above
			CPv	\$25,000	Up to 100%- see above
3-Acre; Designated Sites; Permit Renewal for Retrofit Sites (post-only)	Pre, Post	75%	Rev	\$10,000	Up to 100% reduction for meeting VSMM criteria for Impact Fee Target
			WQTS	\$15,000	Up to 100%- see above
			CPv	\$25,000	Up to 100%- see above
Offset Project Receiving Impact Fees	Pre, Post	Same as above categories; no minimum for voluntary projects	Rev	\$10,000	N/A
			WQTS	\$15,000	N/A
			CPv	\$25,000	N/A

Summary of Proposed Engineering Feasibility Analysis Criteria

Prioritization of Standards

In a stormwater-impaired water, and including when a project is in both the watershed of a stormwater-impaired water and the Lake Champlain watershed, a project shall first maximize recharge, followed by channel protection volume, then water quality treatment standard.

In the Lake Champlain watershed, a project shall first maximize recharge, followed by water quality treatment standard.

For a project included in an MS4's FRP approved by the Agency prior to the effective date of this Rule, the Secretary shall consider a project to have maximized recharge, channel protection, and water quality treatment if the FRP identified the required level of treatment and the project complies with the FRP.

Feasibility Criteria

The feasibility criteria here are in addition to feasibility criteria in the 2017 Vermont Stormwater Management Manual regarding the use of Tier 1 through Tier 3 practices. These are similar to feasibility criteria in General Permit 3-9030 but has been modified to require use of sub-surface storage and treatment devices.

A project shall not be required to undertake the following activities in order to maximize stormwater management:

- purchase or acquisition of additional land for off-site treatment of stormwater
- site re-grading or site re-contouring to the point of permanent interference with either the existing land use, or material conditions of any existing land use permits
- pumping or otherwise mechanical re-routing of stormwater runoff
- mechanical or chemical treatment of stormwater
- infiltration where basement flooding or subsurface pollutant plume transport will occur
- construction that would not be in compliance with the Agency's "Flood Hazard Area and River Corridor Protection Procedure" or within any wetland or its 50-foot buffer zone
- destruction of contiguous forested areas exceeding 5,000 square feet