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## **Maine's Statewide Impervious Cover TMDL: What it might mean for municipalities (2011 Presentation)**

John O'Hara  
*University of Maine School of Law*

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# Maine's Statewide Impervious Cover TMDL

**What it might mean for municipalities**

John O'Hara, University of Maine School of Law



# The Clean Water Act's Impaired Waters Process.

- Under the Clean Water Act, <sup>1</sup> (CWA), each state is required to create water quality standards (WQS) for all waters. <sup>2</sup>
- Once the WQS are set, the states are required to identify and list waters that do not meet their respective WQS. (the “§303(d) list.”). <sup>3</sup>
- For impaired waters on the §303(d) list, states must establish a total maximum daily load (TMDL) for pollutants impairing the waters. <sup>4</sup>



# Total Maximum Daily Loads



- Traditionally, a TMDL specifies the maximum daily amount of a pollutant that can be discharged or loaded into the impaired water from all combined sources, without creating a violation of the WQS.<sup>5</sup>

# An Unusual Beast – the IC TMDL

- However, in recent years EPA has begun a new watershed-based pollution control process by issuing a TMDL based not on a specific pollutant, but on impervious cover (IC). <sup>6</sup>
- IC TMDLs use a percentage of connected IC in a watershed as a surrogate for determining maximum allowable pollutant loadings. <sup>7</sup>



# Maine's IC TMDL

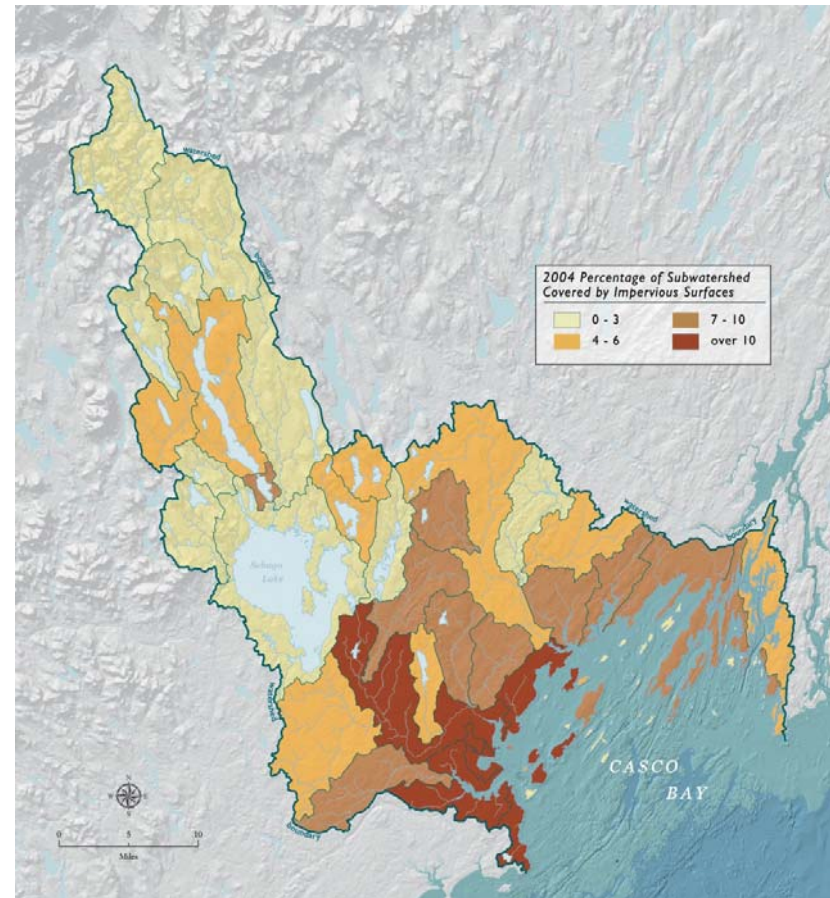
- In March 2011, DEP presented a statewide draft IC TMDL for aquatic life-impaired waters. <sup>8</sup>
- 27 impaired stream segments were included in the TMDL. <sup>9</sup>





# Maine's IC TMDL (continued)

- The draft TMDL establishes the target %IC for the watersheds of a set of impaired surface waters and outlines the reductions needed to meet WQS. <sup>10</sup>
- Reductions are aimed at decreasing the effects of IC through low-impact developments (LIDs) and best management practices (BMPs) to disconnect or convert impervious surfaces. <sup>11</sup>
- In the absence of actual IC reduction, storm water management techniques that offset the negative effect of IC can be implemented in the impaired watersheds. <sup>12</sup>



# TMDL Implementation Process.

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- ❑ Investigate and inventory current conditions in the watershed;
- ❑ Identify and prioritize specific “hot spots” or areas of greatest stormwater impact;
- ❑ Develop detailed site specific mitigation plans and obtain funding to implement;
- ❑ Monitor until impairments are removed and WQS are achieved; and
- ❑ Assess the mitigation progress and repeat with corrective actions if needed. <sup>13</sup>



# Are There NEW MS4 Communities Obligations?

- In a pure legal sense, if your MS4 is affected by a TMDL, a numeric wasteload allocation (WLA) will be assigned and your NPDES permit, when it is reissued or revised, will include effluent limits consistent with the requirements of the WLA. <sup>14</sup>
- How this will play out concerning how quick and with how much force DEP will enforce these requirements is uncertain.

# According to DEP...

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- Provided the MS4 continues to implement measures as previously agreed to and to DEP's satisfaction, DEP will deem stormwater discharges from the MS4 to be consistent with the IC TMDL once it is approved. <sup>15</sup>
- Future progress will be subject to approval through the next iteration of the MS4 permit, which is up for renewal in 2013. <sup>16</sup>
- Ultimately, compliance will be determined based on whether a discharge is found to be causing or contributing to a water quality impairment, whether or not there is an approved TMDL. <sup>17</sup>

# Citizen Suit Concerns?

- The CWA grants citizens the right to sue any person for violating an effluent standard or limitation.<sup>18</sup>
- The CWA defines “person” to include individuals as well as various other entities including corporations and municipalities<sup>19</sup>, and “effluent standard or limitation” is also broadly defined to include essentially all federal and state standards and limitations established under the CWA <sup>20</sup>
- However, with a TMDL and MS4 obligations in place, if a municipality is moving forward with addressing water quality issues, the TMDL somewhat shields them from citizen suits.<sup>21</sup>
- Because there is less enforcement of nonpoint sources, non-MS4 communities would be more vulnerable to suits if they did nothing to address impairments.<sup>22</sup>

# So What's That Mean?

- For municipalities, requirements may include storm water management program revisions that do the following:
  - ▣ Develop or enhance local land development regulations to require or encourage LID practices;
  - ▣ Create an inventory, prioritize and document municipal property and infrastructure suitable for retrofit, and that have been retrofitted with LID BMPs;
  - ▣ Document the increase or decrease in impervious area within its jurisdiction;
  - ▣ Improve pollution prevention and maintenance practices; and
  - ▣ Include water quality monitoring and assessment of progress and effectiveness. <sup>22</sup>



# Is an IC TMDL Legal?

- ❑ The legality of a TMDL based on IC and not on a specific pollutant is debatable.
- ❑ A literal reading of the CWA's TMDL provision seems to require a specific pollutant to be targeted and subsequently limited. <sup>16</sup>
- ❑ However, an IC TMDL is consistent with the TMDL regulations that specify that TMDLs can be expressed in terms of mass per time, toxicity, or other appropriate measures. <sup>17</sup>



# Remaining Issues



- The final IC TMDL has not yet been issued.
  - ▣ Although it will be significantly similar to the draft, DEP is required to respond to comments.
- Progress of the IC TMDL will be measured by assessing aquatic life.
  - ▣ Some uncertainty about whether targeted %IC will actually translate into improvements in aquatic life measures.
- EPA will be releasing its storm water rulemaking draft in September 2011 which could impose additional MS4 requirements and obligations.

# In the Meantime...



- Municipalities should:
  - ▣ Inform the community and stakeholders of what this TMDL may require.
  - ▣ Know which portions of your MS4 territory discharges to impaired waters affected by the TMDL
  - ▣ Begin to identify and prioritize retrofit opportunities.
  - ▣ Identify and focus on “hot spots” of directly connected impervious area that will give you the biggest bang for the buck



# EPA's Stormwater Rulemaking.



- ❖ EPA intends to propose a rule in September 2011, with final action by November 2012.
- ❖ The rulemaking is considering the following actions:
  - Develop performance standards from newly developed and redeveloped sites;
  - Explore options for expanding the protections of the MS4 program;
  - Evaluate establishing a single set of minimum measures requirements for regulated MS4s; and
  - Explore options for establishing requirements for transportation facilities.<sup>26</sup>



For subsequent questions or requests:  
[john.ohara@maine.edu](mailto:john.ohara@maine.edu)