

**CITY OF PORTLAND
MEMORANDUM**

TO: Chair Mavadones and Members of the Finance Committee
FROM: Danielle P. West-Chuhta, Corporation Counsel
DATE: September 17, 2014
RE: Stormwater Research re: Direct Dischargers

The following is a summary of the research I have conducted to date with regard to direct dischargers and the City's proposed stormwater ordinance. I have also included a brief supplemental discussion regarding the need for a 100% credit option to be included in the City's stormwater credit manual.

I. Are property owners that directly discharge pursuant to permits from the State or otherwise required to pay the City's proposed stormwater disposal system fee?

Maine's home rule statute allows the City to adopt ordinances to exercise "any power or function... which is not denied either expressly or by clear implication".¹ Further, "[t]here is a rebuttable presumption that any ordinance enacted . . . is a valid exercise of a municipality's home rule authority."² "The [primary] inquiry on a preemption question is whether the local action would frustrate the purpose of any state law." E. Perry Iron & Metal Co., Inc. v. City of Portland, 941 A.2d 457, 462 (Me. 2008), quoting Sawyer Envtl. Recovery Facilities, Inc. v. Town of Hampden, 2000 ME 179, ¶ 27, 760 A.2d 257, 263–64 (quotation marks omitted). Local action will be preempted by implication where it "prevents the efficient accomplishment of a defined state purpose . . ." Id.

¹ 30-A M.R.S. § 3001.

² Id.

The State permits individuals to directly discharge into Maine water bodies through its Environmental Protection Agency (“EPA”)-granted authority to authorize National Pollutant Discharge Elimination System (“NPDES”), or as from the State, Maine Pollutant Discharge Elimination System (“MEPDES”) permits.³ Dischargers that are not required to have such individual permits may alternatively be required to be authorized under a general permit for specific activities.⁴

The stated purpose of these regulatory schemes is to directly protect the quality of the receiving water according to state standards, and they most often involve detailed analysis and hefty regulation of the discharge activity.⁵

Similarly, the purpose of the City’s proposed ordinance is to “protect the public health, safety and welfare . . . of the City’s residents, the City “manages and administers stormwater programs, services, systems and facilities aimed at preventing polluted stormwater from entering streams, rivers, wetlands and coastal waters and restoring water quality . . .”, as well as secure “sufficient and stable funding” for the city’s stormwater management activities.⁶

The proposed ordinance (as its purpose statement indicates) provides a means for the City to manage its stormwater, which includes quality and quantity. Stormwater quality and quantity are both directly affected by the volume and cleanliness of municipal

³ See National Pollutant Discharge Elimination System Memorandum of Agreement Between the State of Maine and the United States Environmental Protection Agency, at <http://www.epa.gov/compliance/resources/policies/state/moa/me-moa-npdes.pdf>.

⁴ See <http://www.maine.gov/dep/land/stormwater/storm.html>, and <http://www.maine.gov/dep/water/wd/stormwater/index.html>.

⁵ See, generally, 38 M.R.S. § 414-A.

⁶ Proposed Portland City Code, Chapter 24, Article V, Section 24-80.

streams and other natural watercourses. Likewise, stormwater enters and is carried by natural watercourses and affects the quantity and quality of all waters downstream.

Overall, these purposes do not conflict with or frustrate the aforementioned purpose of State law, and are should not be found to be preempted by the State's regulation of (or lack thereof) direct dischargers.

Furthermore, the City's broad definition of "storm water disposal system" (which includes structures and "natural streams and rivers and other water bodies used wholly or partly to convey or control storm water or floodwater")⁷ mirrors the State's statute that clearly enables municipalities to "establish a schedule of service charges . . . upon improved real estate connected with a municipal sewer or sewer system or storm water disposal system for the use of the system", and which clarifies that "'storm water disposal system' means storm water and flood control devices, structures, conveyances, facilities or systems, including natural streams and rivers and other water bodies used wholly or partly to convey or control storm water or floodwater".⁸

Finally, it has been alleged that the Law Court has interpreted the aforementioned section of state law to invalidate user fees charged to a citizen during a period when that citizen's property was not physically connected to the City's sewer system. See Tucci v. City Of Biddeford, 864 A.2d 185, 189 (Me. 2005). Although this is accurate, the Law Court's decision in Tucci is distinguishable from situation presented by the direct dischargers in Portland. This is because, under the express language of the ordinance in that case, the citizen only contributed (and therefore could be charged a sewer user fee) if

⁷ Proposed Portland City Code, Chapter 24, Article V, Section 24-81.

⁸ 30-A M.R.S. § 3406.

he was physically connected by a structure to the City’s sewer system.⁹ As described in detail above, however, Portland’s proposed ordinance plainly applies to all properties that are in any way connected to the City’s stormwater system, which includes structures, natural water bodies, etc. “used wholly or partly to convey or control storm water or floodwater.”¹⁰

II. 100% Stormwater Fee Credit

Questions have also arisen regarding why the 100% credit option has been included in the City’s proposed credit manual. In order to answer this question it is important to first describe the difference between a user fee and an impermissible tax under Maine law.

The “[d]istinction between a fee, which may be imposed by judicial and executive branches, and tax, which may only be imposed by legislature, is one of purpose and of degree of particularity. Butler v. Supreme Judicial Court (1992) Me., 611 A.2d 987 (applying Me. Const. art. III, § 2). “[W]hether the assessment is a fee: (1) whether the primary purpose is to raise revenue [or is for a regulatory purpose]; (2) whether the assessment is “paid in exchange for exclusive benefits not received by the general public”; (3) whether the assessment is voluntary; and (4) whether the assessment is “a fair approximation of the cost to the government and the benefit to the individual of the services provided.” City of Lewiston v. Gladu, 40 A.3d 964, 967 (Me. 2012).

⁹ The Law Court specifically noted that the municipal ordinance’s only purpose was “to collect charges from all users who contribute wastewater to the city’s treatment works.” Id.

¹⁰ Proposed Portland City Code, Chapter 24, Article V, Section 24-81.

The availability of the 100% credit is directly applicable to the voluntariness prong discussed by the Law Court above. In fact, when reviewing that prong, the Court cited approvingly to a case which held that:

On the question of whether payment of the fee was voluntary, the court noted that there was an “opt out” provision in the ordinance by which a landowner could install their own storm water retention system in order to qualify for a credit against the charge. The court acknowledged that it is highly unlikely that any landowner would go to those lengths in order to opt out of the service charge. Still, the court found that the existence of the credit provision made the charge voluntary.

Church of Peace v. City of Rock Island, 828 N.E.2d 1282, 1284-85 (Ill. App. 3d Dist.

2005). As a result of this analysis, it is recommended that a 100% credit option be included in the City’s stormwater credit manual.¹¹

¹¹ For your reference, I have also attached my prior memorandum to the Finance Committee on this subject.

**CITY OF PORTLAND
MEMORANDUM**

TO: Chair John Anton and Members of the Finance Committee

CC: Michael F. Brennan, Mayor; Mark Rees, City Manager; and Ellen Sanborn, Finance Director

FROM: Danielle P. West-Chuhta, Corporation Counsel

DATE: November 4, 2013

RE: **Storm Water Ordinance**

This memo is written in response to several questions posed by Councilor Anton and other members of the Finance Committee with regard to the proposed Storm Water Ordinance. The following is a summary of my responses to each of the aforementioned questions:

Can the Sewer Fund Bear the Costs of the Storm Water Phase-in Period?

The language of the City’s ordinance broadly defines sewer as “a pipe or conduit for conveying liquid or other liquid-carried waste.” Chapter 24, section 24-2. The ordinance goes on to provide that wastewater shall mean “a combination of the liquid and water-carried wastes from residences, commercial buildings . . .together with such other ground, surface and stormwater as may be present.” *Id.* Finally, the ordinance provides that the charges made for sewer may be used for, among other things, to defray the expenses of operating and maintaining the wastewater system” and “to pay the interest and repay the principal on outstanding or future indebtedness of the city for construction of sewers . . .” *Id.* at section 24-73.

As a result of these definitions, it is appropriate for the sewer monies to fund the start-up/phase-in of the storm water program. With that said, the City’s Finance Director has also made it clear that “[i]n order to avoid contributing general fund money to the stormwater effort, and since the stormwater costs are now borne by the Sewer Fund, [she] would transfer cash from the Sewer Fund to the Stormwater Fund to cover costs until it began realizing its own revenue stream.” *See* the Memo attached hereto as Exhibit A. Thereby further alleviating any potential concerns.

Are Credits Important/Does There Need to be a 100% Credit Option?

In City of Lewiston v. Gladu the validity of a storm water fee was reviewed by the Maine Law Court through the application and consideration of the following four factors:

(1) whether the primary purpose is to raise revenue; (2) whether the assessment is paid in exchange for exclusive benefits not received by the general public; (3) whether the assessment is voluntary; and (4) whether the assessment is a fair approximation of the cost to the government and the benefit to the individual of the services provided.

City of Lewiston v. Gladu, 2012 ME 42, ¶ 9 (quotations and citations omitted).

Through out the review of all of four of these factors, as well as outlined in the cases that the Court cited in its analysis, the voluntariness of a fee was of primary importance in determining that the proposed user fee is a fee and not a tax. “In other words, whether . . . [there is] the ability to avoid the assessment if he[/she] wishes to do so.” Id. at ¶ 21. It is important for the proposed ordinance to “provide for credits to offset or eliminate the fee.” Id. at ¶ 22.

It is also clear from the cases cited by the Law Court that the credit must be based on the impervious surface area and applies to all properties. Overall, if the person minimizes the impact to the system (as a result of the items they receive a credit for) then that person should receive a credit.

Is it Necessary to Differentiate Between MS4 and Combined Sewer Areas?

There is no need to differentiate in the ordinance between properties that are served by the City’s MS4 system and those that are served by a combined sewer system. This is because the separation of the City’s sewer system is not the primary or exclusive reason why the proposed storm water fee is being instituted and is not the only item that the fee monies will be spent on. On the contrary, the proposed ordinance makes it clear that the fee will be used “[t]o defray the current expenses of storm water services . . . [t]o pay the interest and repay the principal on any outstanding or future indebtedness of the city for construction of the storm drainage system and a portion of the combined sewer systems . . . [and] [t]o reimburse the city for the cost of computation, billing and enforcement of such charges.” Chapter 24, at section 24-82.

Would Property Tax Exempt Organizations (like the State and Federal Government, etc.) be Required to Pay the new fee?

Tax exempt properties are still required to pay user fees. See Municipal Corporations, McQuillin, Section 44.62.20. Consequently, as described above in the other legal memorandum provided to the Finance Committee on this subject, since the City’s proposed storm water fee is a valid user fee that meets all the requirements of the *Gladu* holding (i.e. it is a fee and not a tax), and is a payment given in return for a government provided benefit, any tax exempt property (including federal and state properties) would be required to pay the fee under Maine law.

What is the Difference Between the Real Estate Valuation Appeal Process and the Proposed Appeal Process in the Stormwater Ordinance?

Under Maine law, a record owner of a parcel of land can appeal their real estate valuation (i.e. seek an abatement) under 36 M.R.S.A. section 841 for the following reasons: (1) because of an alleged overvaluation; (2) to correct an illegality, error or irregularity in the assessment; and/or (3) because of poverty or infirmity. If the owner is seeking abatement for an overvaluation, such an appeal must be filed within 185 days of the commitment of the tax. If the individual/entity, however, is seeking to correct an illegality, error or irregularity in the assessment, their appeal must be filed within 1 year, but not later than 3 years from the assessment. And, finally, if they are seeking abatement because of poverty or infirmity, such a request must be made within 3 years of the date of the tax commitment.

On the other hand, the appeals process for the storm water fee is different and is specifically provided for in section 24-87 of the proposed ordinance. Under this process, a record owner can appeal their bill (only because the storm water generated on site is less than the City calculated; and the only factors that will be considered is the impervious area and credits available to the owner) to the Director of Public Services within 30 calendar days of the date of the bill. Thereafter, they can appeal that decision to the City Manager within 30 calendar days; and finally they can appeal that decision to the Superior Court pursuant to Rule 80B within 30 calendar days of the date of the City Manager's decision.

Please note that credits under the proposed ordinance can be applied for at any time. See Chapter 24, section 24-85. They must be approved by the Department of Public Services, and they will be applied to the first bill issued 30 calendar days after approval of the credit by the Department of Public Services. Id.

What are the Differences Between the Lewiston and the Proposed Portland Storm Water Ordinances?

Attached hereto as Exhibit B is a first draft of the proposed storm water ordinance which highlights the differences between the Lewiston Ordinance and the City's proposed Ordinance. Essentially, the attached draft shows that the City first attempted to adopt the Lewiston ordinance with some minor adjustments to reflect specific areas that are unique to the City. The City's proposed ordinance has been edited further, but still primarily tracks the language used by the City of Lewiston.

How Does the Proposed Ordinance Conform With the Various Case Law Holdings?

Based on the applicable case law, it is essential for the City's proposed storm water fee to be for something that each land owner individually and exclusively benefits from. See Gladu, at ¶¶ 17-20. The fee also needs to be a fair approximation of the cost of the service to the City, and be part of a regulatory program that is intended to raise

monies to cover the cost of administering the program. Id. at ¶¶ 13-16. It is further important for there to be the option of not using the City's storm water service (i.e. have a 100% credit in place), and the fees need to be deposited into a separate fund/account, not in the general fund. Id. at ¶¶ 21-23.

Overall, the City's proposed ordinance lines up nicely with the aforementioned requirements and holdings on this subject. More specifically, it has a broad purpose section which specifies the specific public policy reasons for adopting the fee, it contains specific language about how the fees may be spent and where they are to be kept (i.e. in a separate fund), it provides a right to appeal, and it has the option of seeking credits (including a 100% credit).



MEMORANDUM

To: Finance Committee

From: Ian Houseal, Assistant to the City Manager

Date: September 26, 2014

RE: Question Regarding Definition of the System and 100% Credit for Direct Dischargers

1. Has the city defined its "stormwater disposal system"?

Yes, see the following authority and establishment of the Stormwater Fund and definitions of stormwater services.

Sec. 24-82 Authority and Establishment of the Stormwater Fund

"... To defray the current expenses of stormwater services and a portion of the current expenses of the combined sewer system attributable to providing stormwater service;"

Sec. 24-2 Definitions

Stormwater services shall mean the program and maintenance activities as well as the pipe, conduits, or other conveyances or facilities provided by the city including but not limited to necessary programs, improvements, or maintenance required to meet national pollutant discharge elimination system (NPDES) permits the city may hold or other regulatory or court imposed obligations on the city, or general maintenance of pipes, conduits or other facilities improvements and other unforeseen improvements necessary to provide stormwater service to the city.

Stormwater drainage system shall mean any publicly owned or operated conveyance for stormwater, natural and human-made including, but not limited to, storm sewers, city and state roads including the Maine Turnpike and other physical works with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, culverts, human-made channels, swales, ditches, swamps, rivers, streams, creeks, brooks, reservoirs, ponds, drainage ways, inlets, pipes, head walls, lakes, properties, and improvements which transfer, control, convey or otherwise influence the movement of stormwater runoff and its discharge to and impact upon receiving waters.

2. Will the credit manual be amended to provide for 100% credit if someone can demonstrate that their property is not connected to the stormwater disposal system?

The credit manual *as written* allows for a 100% credit for properties discharging directly into tidal waters as defined in Section 3.1 of the Credit Manual.

Credit Manual Section 3.1

“If a property meets the General Standard, and receives or obtains a waiver of the Flooding Standard, as defined in of the Department of Environmental Protection Chapter 500 – Stormwater Management AND discharges directly into a tidal water without flowing through an off-site, publicly-owned manmade conveyance or natural stream system, it will qualify for the normal full compliance Flooding Standard credit...”

The credit percentage breakdown for properties seeking a waiver of the Flood Reduction Credit is as such:

- Basic Water Quality Credit: 50%
- Basic Flood Reduction Control Credit: 10%

OR

- Extra Water Quality Credit: 75%
- Extra Flood Reduction Credit: 25%