

2.04 Offset Provisions

Background

The Department recognizes that some project sites will have limitations in their ability to comply with the Resource Protection event (RPv) requirements of the *Delaware Sediment and Stormwater Regulations* using traditional stormwater best management practices (BMPs). An offset is an option for compliance with the RPv requirements when those requirements cannot be fully met on the project site. Typically, an offset will be proposed for sites having limitations; however, there may be special circumstances where the Department may consider approval of an offset as a means for compliance for reasons other than site limitations.

Stormwater management offsets can include fees-in-lieu, trading, retrofitting previously unmanaged sites, mitigation, construction of off-site management measures, banking, or other similar techniques when approved by the Department. The technical protocols to determine whether a particular offset is acceptable and a management framework to oversee the process must be provided. While any of the various offset options may be considered for any project site, in order to ensure that at least one offset option has the criteria for implementation defined, the Department has developed a procedure for a fee-in-lieu offset.

Procedures

Plan Review

All projects that require a detailed Sediment and Stormwater Plan approval will follow the three-step submittal process. The first step in the submittal process is the project application meeting. Upon independent completion of the Stormwater Assessment Study (SAS), the owner's representative will schedule a project application meeting with the approval agency. At the project application meeting, the owner and/or owner's representative and the approval agency will discuss methods for complying with the Sediment and Stormwater Regulations on the site, including site design techniques and BMPs to be implemented in order to meet the RPv requirements. The result of the SAS and project application meeting is a Stormwater Assessment Report (SAR), at which time the owner and/or owner's representative will indicate how they may overcome any assessment items rated "Significant" for the site. It is at this awareness step in the process that an owner may begin considering an offset for compliance.

The second step in the plan review and approval process is submittal of the Preliminary Sediment and Stormwater Management Plan. The Preliminary Sediment and Stormwater Plan requirements are fully described in Section 3.3 of the *Regulations* and Technical Document Article 3.02.2. The submittal of the preliminary plan will demonstrate either full compliance with the RPv using onsite BMPs, or the need to consider an offset. The current version of the Delaware Urban Runoff Management Model (DURMM) compliance tool will be utilized to determine whether the suite of BMPs on a particular site fully meet the RPv criteria. Following review of the Preliminary Sediment and Stormwater Management Plan by the approval agency, if the RPv criteria are not fully met on the site, the Department will require an offset for complete compliance with the RPv requirements.

Maximum Extent Practicable Determination

Sections 5.2.3 and 5.6.3 of the Delaware Sediment and Stormwater Regulations require compliance with the RPv requirements to the “maximum extent practicable”, or MEP. A project will be determined to have met the MEP threshold on a particular site when the cost to construct the stormwater management BMPs necessary to meet the required runoff reduction exceeds the “per cubic foot of volume” cost to construct a bioretention stormwater BMP. The current estimated cost to construct a bioretention facility is \$10 per cubic foot of volume treated based on an analysis prepared by the Center for Watershed Protection (see Technical Document Article 2.04.1) under contract to the Department.

In order to verify that MEP has been met on a particular site, the owner’s representative will submit a cost estimate to DNREC for review. The cost estimate will represent the cost of construction of the stormwater management BMPs designed for the site to fully comply with RPv requirements. When the cost estimate shows that construction of BMPs on site will exceed the MEP threshold, an offset may be considered. DNREC will provide correspondence concurring that the project site has met the MEP Determination criteria and is eligible to provide an offset rather than constructing on-site stormwater management BMPs.

The MEP Determination should be the benchmark that if exceeded, allows options for compliance to be considered which may include:

1. Continuing with construction of on-site BMPs to meet R_{Pv} requirements which might exceed the MEP costs;
2. Requesting approval of an offset option contained in the Technical Document for compliance with the R_{Pv}. Offset options include trading, banking, mitigation, retrofitting previously unmanaged sites, and construction of offsite management measures; or
3. Contributing a fee-in-lieu to a fund to be used to plan, design, and construct stormwater management projects.

Offset Type Selection

Once it has been determined that a site is eligible to provide an offset rather than to construct on-site stormwater management BMPs, the owner must provide an offset to make up for the shortfall in meeting the R_{Pv} requirements using on-site BMPs. The owner may propose an offset that will be used to fulfill R_{Pv} requirements, with Department approval, which could include:

- Fees-in-lieu
- Trading
- Banking
- Mitigation
- Retrofitting previously unmanaged sites
- Construction of off-site management measures

As stated previously, any of these offset options may be considered for any project site. To ensure that at least one offset option has the criteria for implementation defined, the Department has developed a procedure for a fee-in-lieu offset. The Department will review other offset proposals as developed and submitted for approval. Final approval of an offset proposal depends upon the Department's findings as to whether the proposed offset proposal meets the goals of the *Delaware Sediment and Stormwater Regulations*.

Fee-in-Lieu Offset Procedure

When the fee-in-lieu offset option is proposed, the owner will pay a fee-in-lieu in the amount of \$18 per cubic foot of volume of runoff that is not able to be reduced or managed onsite. The fee-in-lieu amount of \$18 per cubic foot of stormwater volume represents the estimated costs to construct plus the 20-year present value for maintaining an off-site stormwater management BMP to manage runoff that cannot be managed onsite. The proposed fee-in-lieu amount was derived from the same analysis performed by the CWP to determine MEP (see Technical Document Article 2.04.1). The fee-in-lieu amount will be re-visited and updated as necessary to adjust to varying planning and construction costs, as well as to account for new technologies that may be more representative than bioretention.

While the overall goal for the Rpv is to reduce runoff volume, the Department recognizes there is also benefit derived from traditional stormwater management BMPs that only provide water quality treatment by reducing pollutant concentration. For projects that opt for the fee-in-lieu offset, the fee amount can be reduced by providing such water quality treatment practices. The fee will be reduced by an amount equivalent to the total reduction in total nitrogen (TN) load as computed by DURMM.

The fee-in-lieu amount, less any adjustments for TN reduction, for the phase of the project beginning construction must be submitted to the Department prior to commencement of construction of each phase. Upon submittal of the fee-in-lieu amount for a particular project phase, the project owner's obligation for compliance with the Rpv requirements for that phase will be met. The owner remains responsible for compliance with Conveyance Event (Cv) and Flooding Event (Fv) requirements, which are not eligible for compliance through an offset.

Disbursements of fees-in-lieu collected by the Department will be managed through the ~~Delaware Clean Water~~ Water Infrastructure Advisory Council (CWAGWIAC) (29 Del. C. Ch. 80 Subchapter 1, Section 8011). The CWAGWIAC provides guidance, policy advice, and assistance in the statewide effort to develop funding options for capital and maintenance programs related to drainage, stormwater management, and flood control.

The CWAGWIAC will assist in policy development and implementation of funding stormwater projects using the offset fees-in-lieu collected. Stormwater BMP project locations will be prioritized according to the location ~~for from~~ which the fees-in-lieu have been collected, and consider with consideration given to the recommendations from Watershed Management Plans when applicable. The CWAGWIAC will make the final recommendation for when and where collected fees-in-lieu will be used.

Administration of contracts to plan, design and construct projects using fees-in-lieu collected will be handled by the Department through-in collaboration with the CWAGWIAC. The Department will verify that fees-in-lieu collected are used to implement stormwater projects that meet the volume management goals of the *Delaware Sediment and Stormwater Regulations*.

Sediment and Stormwater Plans for funded projects will be reviewed and approved by the Delegated Agency that has jurisdiction over the site for which the project is approved. Construction review and Operation and Maintenance review of BMPs constructed using fee-in-lieu funds will be conducted by the Delegated Agency that approves the Sediment and Stormwater Plan.

The Department will monitor the function of BMPs constructed under the fee-in-lieu program in total to verify that an equivalent stormwater runoff reduction benefit is realized in the watersheds for which the fees-in-lieu have been collected. Adjustments to the criteria for determining where collected fees-in-lieu will be used will be recommended by the Department to the CWAGWIAC as necessary to ensure that equivalent stormwater runoff reduction benefit is realized.