

DuPage County Countywide Stormwater and Flood Plain Ordinance - Update

Comment Responses on
Revised Public Comment Draft
Stormwater Committee January 17, 2012
(expanded discussion)



The Stormwater Committee, in reviewing this presentation, requested that an expanded discussion of each of the issues highlighted in this presentation be provided, to help them evaluate any underlying policy decisions. This discussion should also provide comment on how the response will generate Ordinance language that is “different” than either the existing Ordinance currently in effect, or the 2nd draft of the Update Amendment, and an opinion on whether this will be “more restrictive”, “less restrictive”, “neutral”, or just “different”. These comparisons will be in blue font.

In order to key the discussion to the slides presented to the committee, this discussion has been added directly to this presentation. All text in red is new discussion, added after the Committee meeting, the content of the text from the original slides is kept intact.

The entire 2nd draft is under the State’s Attorney’s Office review. Their review is an iterative process to the final draft, the proposed changes should be reviewed by the SAO so they can make recommendations back to the Stormwater Committee.

-The Consulting Team, January 17, 2012

Comment Response Document

- Comments from 20 Different Entities/People, 22 sets of Comments
- More Than 390 Separate Comments
- Document to be Posted on the Website
- Some Blanks to Be Filled In at Adoption:

- Fees

Each Community, as it adopts the Ordinance, should be considering what fees it will charge for permit review. Each Community is free to adopt their own schedule, however in partial Waiver Communities where the County reviews a part of the submittal, the County will set its own fees for that service. While fee-in-lieu of detention amounts may be adopted by each community, the Ordinance provides requirements to keep a Community from adopting artificially low fees for the purpose of “attracting development”.

**REQUIREMENTS ARE NEUTRAL TO THE EXISTING ORDINANCE
NO CHANGE FROM THE 2nd DRAFT**

- Penalties

Article 2: Administration

- Municipal Engineers Group (MEG) is “Officially” Recognized (15-16.A)
 - “...provide input to the County...”
 - “...Recommend General Certification Topics...”
 - “...Provide Educational and Training Opportunities...”
 - “...Review Draft General Certifications...”
 - “...Discuss permitting issues as they arise...”
 - Formality of the group has been reduced to answer concerns on Open Meetings Act.

Article 2: Administration

- The Municipal Technical Advisory Panel (15-16.B) is Dropped from the Ordinance.
 - Too many conflicting comments to reconcile.
- Technical Issues (15-16.C) Has been dropped from the Ordinance.
 - Not necessary to define a “technical issue” outside of the context of the MTAP.

Article 2: Administration

All three comments in the presentation referencing Article 2 are discussed below together as they are all related.

The original concept for the Municipal Engineers Group (MEG) came from a need to replace the watershed basin committees that the current Ordinance calls for, but were never implemented, with a group that is reflective of what has been working while fulfilling two needs:

- Provide a forum for an applicant to be able to air out a technical “difference of opinion” on the myriad of technical material that the Ordinance involves.
- Provide Municipal input to the Director on interpretation of the Ordinance.

The Municipal Engineers Meeting Group has been meeting informally since the ordinance was first adopted, and this group will now be recognized as the Municipal Engineers Group (MEG), with duties that it was either already performing or assigned to it. The MEG will remain an informal group with only its recognition identified in the proposed draft.

A second group had been proposed, a Municipal Engineers Technical Advisory Panel (MTAP), who it was hoped would be made up of individuals with the experience and training to react quickly to technical issues and provide input to the Director. Unfortunately, no real consensus could be reached regarding this group’s appointment and role, with main concerns voiced over whether or not the duties could be handled by the much larger MEG, and whether this function would undermine the local decision making of the Community.

While recognizing the concerns raised, the Consulting Team and the County Staff are not convinced that the MEG will be able to act quickly, given the variation of understanding and interest in the specific technical issues that might be raised. Dropping the MTAP concept appears to be the best way of proceeding, given the divergence of views between the County and the Communities on how it will be used and how effective it will be.

THE RECOGNITION OF THE MEG IS NEW COMPARED TO THE EXISTING ORDINANCE AND DIFFERENT FROM THE 2ND DRAFT BUT NEUTRAL.

DROPPING THE MTAP IS DIFFERENT FROM THE 2ND DRAFT AND WILL BE NEUTRAL COMPARED TO THE EXISTING ORDINANCE.

Article 3: General Provisions

- When does this Ordinance Apply?
 - It does Not apply to land uses existing as of February 15,1992 until or unless they are “developed”.
 - Comment: FEMA interprets this as a conflict with the NFIP, because there are some provisions of the NFIP, that would apply to all structures, and our Certifications last 3-years, not 180 days.
 - This ordinance has never been all that is required for maintaining Community participation in NFIP.

Article 3: General Provisions

In order for the Countywide Stormwater Ordinance to serve as the only municipal Ordinance required for a Community to maintain its standing in the National Flood Insurance Program (NFIP), **several changes would have to be implemented that would be more restrictive:**

- The Ordinance would have to apply to structures predating the initial adoption of the ordinance in February of 1992.
- All building permits would also have to be reviewed for Certification under this Ordinance.
- A Certification can only be considered valid for 180 days before the work has to start.

All of these provisions would extend the need to obtain a Stormwater Certification to even the most simple building permit situation, where currently a Stormwater Certification is not required, such as work in the interior of a building. Further, the applicant might have to pay to have the Certification extended if it is delayed beyond 180 days. In both cases the Consulting Team sees this as an “additional burden” on the applicant, and a duplication of functions currently served in each community typically at the building permit level.

A stated goal of this rewrite is to reduce the “burden” on an Applicant. The Consulting Team is responding to FEMA that in keeping with County Policy, this Ordinance will not be considered the only Ordinance necessary to maintain standing in the NFIP. It should be noted that FEMA still disagrees with this, and has suggested that they will drop the County from the NFIP if we do not make the changes they have suggested. It is our understanding, and we are also consulting the States Attorney, that while the Countywide Ordinance cannot be Contrary to the rules of the NFIP, it does not have to be the only Ordinance that a Community must adopt. The Consulting Team will not recommend a course that will jeopardize standing in the NFIP.

THE PROPOSED CHANGE WILL BE NEUTRAL TO THE EXISTING ORDINANCE AND THE 2ND DRAFT.

Article 4: Stormwater Management Certifications

- Status of General Certifications
 - Currently being worked on by Municipal Engineers Group (MEG)

The application of General Certifications will be different than the existing ordinance but will offer greater permitting flexibility while offering the same level of protection as the existing Ordinance and the 2nd draft.

Article 4: Stormwater Management Certifications

- Performance Security and Easements (Also Article VI)
 - Multiple Comments on Recording maintenance, wetlands and Floodplains against the title. **Response: Recording against the Title is a compromise instead of requiring easements.**

The existing Ordinance requires that a permanent easement be dedicated over all stormwater facilities. Further, the existing Ordinance requires that the maintenance plan for stormwater facilities be on the face of a plat of subdivision. The Ordinance defines Stormwater Facilities to include many measures not originally contemplated in 1992 when this language was developed, like floodplains, wetlands, and small scale BMP's. Comments on this section were deferred to the State's Attorney's Office, as this section was originally written by Attorneys as a legal matter.

The County and others have expressed a real concern, based on experience, that the requirements for maintenance, and the absence or presence of wetlands, floodplains and buffers is not being communicated to owners who were not the original developers.

The State's Attorney, as a compromise, has suggested that instead of easements, informational notes be recorded against the title. In the Consulting team's and the State's Attorney's opinion, **this option is less burdensome and restrictive than the current Ordinance and the 2nd draft.** These notes will show up in a title search and thus be communicated to a new buyer at the time of sale. Recording these notes is much simpler and less costly than dedicating easements. As the State's Attorney has pointed out in his responses, recording a note is less subject to being construed as a taking as well.

Article 8: Post Construction Best Management Practices

- Comment: 2500 sq. ft. is not appropriate for longer Roadway Projects. Response: For Roadway projects, exemption of 2500 sq. ft. expanded to “ 2500 sq. ft. per quarter mile”.

The suggested modification to the second draft with respect to roadway thresholds for BMP's was suggested by a number of commenters. It results in Ordinance language that is different and less restrictive than the current Ordinance and the 2nd draft. The Consultant team concurs with the rationale behind the comment and is recommending implementing it.

Article 8: Post Construction Best Management Practices

- **Comment:** For any size project, as long as the project is less than 50% impervious, allow Fee-in-lieu without justification. **Response:** This reflects a shift away from localized and distributed PCPMP's, and the comment was not implemented.

The suggested modification is an expansion of the use of fee-in-lieu instead of construction of volume control BMPs. **The suggested modification may be considered less restrictive than the current Ordinance** if one considers more permissive use of fee-in-lieu less restrictive. The Consultant Team's response is to not implement this suggestion, **keeping the language the same as the 2nd draft and neutral compared to the existing Ordinance.**

The suggested modification in the comment was repeated by a number of commenters.

The Consulting team has established in this process that runoff volume reduction for frequent events is a requirement this Update needs to implement. Fee-in-lieu is not the preferred approach to achieving volume reduction, as the consultant team believes the best opportunity to get this infrastructure built is with a development, and getting the infrastructure local to the development will provide a number of secondary benefits such as reducing neighbor-to-neighbor drainage complaints that Communities have confirmed are a problem and difficult to solve.

The suggested modification placed no limit on the size of development involved and puts all decision making in the hands of the applicant, not the Administrator. We believe that few applicants will choose to build the infrastructure, putting pressure on Communities to come up with projects which can achieve comparable results.

Article 9: Site Runoff Conveyance and Storage

When is site runoff storage (detention) required? Draft Ordinance

- Required for total area of disturbance when:
 - The cumulative total of the first 25,000 sq ft of new impervious area on a lot platted prior to February 15,1992 is exempt from site runoff storage requirements. (15-72)
 - Change in Response to Comment: County comment, and with concurrence of the Municipal Engineers Group, that the 25,000 sq. ft. should not be “exempted”, but “deferred” until cumulative development goes over 25,000 sq. ft. Once threshold is crossed, must provide detention for deferred impervious area.

This change reflects current policy with the existing Ordinance. The Consulting Team brought the issue to the Municipal Engineers Meeting Group, who confirmed that the 25,000 sq. ft. is a deferral and not an exemption, The Municipal Group endorsed the idea of keeping it as a deferral, so the Consulting Team will implement the direction of the County staff and Municipal Group.

The suggested change is neutral with respect to the existing ordinance and more restrictive with respect to the 2nd draft.

- If the percentage of impervious area of the development site increase or does not decrease by 5 % compared to the highest percentage in the previous three years.
- If the with-project impervious area of the site is greater than 10%

Article 11: Wetlands

Draft Ordinance

- Allow permanent impacts of up to 0.1 acres of wetlands without mitigation? **Response: Not Implemented, as it represents a reduction in protection to natural resources.**

In comments from DMMC on the 2nd draft amendment, and repeated by others, it was suggested that the County allow impact of any wetland, by any applicant of up to 0.1 acres without providing mitigation. In the DMMC comments on the 1st draft amendment, the same suggestion was more limited to public entities and units of government being allowed to impact up to 0.1 acres of wetland without mitigation. The rationale offered on the 2nd draft amendment is that this is necessary to help keep DuPage County economically competitive. **This suggestion is less restrictive than the 2nd draft, and the 2nd draft amendment is already less restrictive than the current ordinance.**

The Consulting Team and County Staff are not recommending that this suggestion be implemented, **which is neutral to the current Ordinance and the 2nd draft.** In the scope of the Ordinance Update given to the Consulting Team in the beginning of the process, a separation was drawn between lowering protection of natural resources like wetlands, and stripping away superfluous requirements and procedures in the Ordinance that cost applicants time and money in obtaining a permit which put DuPage County at an economic disadvantage. Providing mitigation does not fall under that category but goes to the heart of County policy with regard to loss of wetlands. Allowing impacts of even 0.1 acres, without mitigation, will result in loss of wetlands. Considered cumulatively, the loss may be on a large scale. No other factors are considered, such as the size of the existing wetland, the number of 0.1 acre impacts permitted to the same wetland, and the relative efficiency of any particular wetland in providing those functions that make Wetlands worth protecting. If the County's policy remains to protect the water quality and stormwater storage benefits that wetlands provide, then the decision on whether or not mitigation should be required cannot be based strictly on economics.

Many changes to wetland permitting have been implemented, in part in response to DMMC comments, which are designed to get at the heart of the "uncompetitive problem" which is more related to the time and money spent in the process of getting a permit than in "overprotecting wetlands" ..

The responses to the survey of applicants and feedback from several Municipalities indicated that the existing Ordinance provides a "good level of protection of natural resources". To date, the Consulting Team is not aware that the County has changed its overall policy on loss of wetlands, and the consulting team has not seen a lot of support for allowing additional loss of wetlands.

Article 11: Wetlands

Draft Ordinance

- Allow impacts of up to 0.1 acres of wetlands without avoidance and minimization, and without alternatives analysis? **Response: yes, but still keeping the limitations that are spelled out in the draft to avoid negative impact of piecemeal development.**

The Consulting team implemented changes to the 1st draft amendment reflected in the 2nd draft amendment to address the burden of “alternative analysis” raised by the DMMC and others. The suggestions implemented did not go as far as the DMMC suggested, and the comments offered on the 2nd draft amendment are similar but more limited to wetlands that the Corps of Engineers does not take jurisdiction of. **This suggestion is less restrictive than the 2nd draft amendment, and the 2nd draft amendment is already less restrictive than the current ordinance.**

The Consulting team, in considering whether to recommend implementing the more expansive suggestion, also considered comments received from the County staff supporting the important role that alternatives analysis plays in developing a permitable plan. We asked “is this just a burdensome policy?” In practice, it causes applicants to avoid wetland impacts. While there are cases of it being taken too far, and a subjective and burdensome process used, that appears more the exception than the rule. On the whole, an alternatives analysis raises wetlands avoidance to the level of zoning and other land use policy in the design process, and has resulted in multiple examples of projects which could be successfully redesigned to avoid wetlands or reduce impacts.

The 2nd draft has already tried to bring some predictability and consistency into the process, such as providing a definition of an alternatives analysis that was lacking in the existing ordinance. It also already implements several exemptions that will in certain circumstances save time and money for an applicant. The Consulting Team believes that if the suggestion is implemented, efforts to avoid and minimize impacts by designers will be reduced, which does not appear to reflect the value the County has historically placed on wetlands.

Article 11: Wetlands

Draft Ordinance

- Use a sliding scale of mitigation instead of alternatives analysis, assuming the economics of impact will protect the most valuable resources? **Response: Not implemented because:**
 - Only practical metric to base sliding scale on is a measure of the “conservative nature” of the plant community, or some form of “community type” valuation, neither of which captures full value of the existing wetland.
 - Approach is out of sync with the Federal Clean Water Act.

A similar comment was offered by the DMMC on the 1st draft amendment and raises the same suggestion again on the 2nd draft amendment, which was repeated by others. **The suggestion is difficult to judge as more or less restrictive, but the Consulting Team believes that in any practical application of the concept, there is a great potential for misuse resulting in significant loss of wetland function, and the Consulting Team has not recommended the implementation of the sliding scale of mitigation.**

This suggestion elevates economics to the only factor influencing an applicant on whether or how much of a wetland to impact. That is contrary to the Federal Clean Water Act and does not recognize the localized benefit of the existing wetland that mitigation does not replace.

The DMMC has pointed out that a vegetative metric is used in other places in the Ordinance and Guidance on the subject, and we do not discount that it plays an important role in decision making. However, it still only reflects one aspect of a wetland: the conservative nature of the existing plant community. Where currently used in the Ordinance, it does not become the only consideration.

There are other vegetative metrics that can also be considered, but in creating a “sliding scale”, the dividing lines in the scale become economically exaggerated. As an example: assume the scale was that for a wetland that had an nFQI of less than 5 mitigation would be at the rate of 1:1. For an nFQI of 5 but less than 10 perhaps the mitigation ratio would be 2:1. We believe that there would be very significant pressure placed on practicing professionals and reviewers verifying wetland delineations to “not find a plant” or to argue the dominance of a plant community, in order to keep the nFQI from crossing the mitigation increase threshold.

This system would say nothing about other wetland functions such as stormwater storage and infiltration, or water quality benefit, realized directly in that watershed. Wetlands are preserved in DuPage County because of they are a significant portion of the natural watershed storage in DuPage County. By filling wetlands, the storage volume is lost and downstream reaches flood to maintain the natural watershed balance, adversely impacting downstream residents and businesses.

Finally, we do not believe that the wetland is “protected” by the economics of the mitigation, it just skews the development potential in favor of a developer with deeper pockets and certain highly lucrative land uses, making the concept prejudicial. Adding additional metrics just multiplies these “friction zones”.

Article 12: Buffers

- Eliminate the provision that allows an applicant to demonstrate that the 100-yr floodplain is not an appropriate Buffer? **Response: Floodplain limit is the default, but suggestion implemented because no part of floodplain delineation is based on buffers, so must have some way of allowing applicant to “right-size” the buffer.**

The Consulting Team views this suggestion as more restrictive than the current Ordinance and the 2nd draft and is not recommending that it be implemented, which is neutral to both the current Ordinance and 2nd draft.. The 100-yr floodplain is delineated with only considerations of flood flow, stream hydraulics and topography. The 2nd draft amendment lists some functions that buffers have, and none of those functions influences the location of the line on the map we call a 100-year floodplain. Consequently, the Consultant believes that both applicants and regulators need a way of redefining a buffer other than the 100-year floodplain in those cases where it will not make sense. The applicant can default to the 100-year floodplain if he is unwilling to go to the additional effort and expense of evaluating what the buffer might be otherwise. For wetlands, buffer widths are defined by fixed numbers that are developed to be consistent with Corps of Engineers permitting.

Website

<http://ec.dupageco.org/StormWaterUpdate/>

Questions?