

BB DEVELOPMENT, LLC

Site Location of Development Act // Natural Resources Protection Act
Phase I-Oxford Resort Casino – Oxford

RESPONSE TO APPEAL

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN RE: BB DEVELOPMENT, LLC)	SITE LAW OF DEVELOPMENT ACT
OXFORD, OXFORD COUNTY)	NATURAL RESOURCES PROTECTION ACT
OXFORD RESORT CASINO – PHASE I)	FRESHWATER WETLAND ALTERATION
L-25203-28-A-N)	WATER QUALITY CERTIFICATION
L-25203-TE-B-N)	

**Black Bear Development LLC's Response to
Petitioners' Appeal of Permits L-25203-28-A-N and L-25203-TE-B-N**

BB Development, LLC (“BB Development”) hereby responds to Androscoggin River Alliance’s (“ARA”) and eighteen individuals’ (collectively “Petitioners”) April 20, 2011 appeal (the “Appeal”) of licenses L-25203-28-A-N and L-25203-TE-B-N (“Licenses” or “Permits”) issued by Maine Department of Environmental Protection (the “Department”) to BB Development on March 17, 2011 (“Order”). The Order grants BB Development a water quality certification pursuant to Section 401 of the federal Clean Water Act (“CWA”), a permit under the Site Location of Development Act (“SLODA”), and a permit under the Natural Resources Protection Act (“NRPA”)(which includes approval of alterations to freshwater wetlands).

As explained in detail below, the issues raised in Petitioners’ Appeal lack merit and the Appeal should be denied in its entirety. All of the issues raised by the Petitioners were considered by BB Development and/or the Department and addressed to the Department’s satisfaction. In particular, the Department and BB Development discussed project phasing early in the permitting process and the Department approved of permitting Phase I as a stand-alone project consistent with its regulatory authority.

Furthermore, Petitioners lack standing and all of the relief requested in Petitioners’ Appeal, aside from their request to revoke the Order and to hold a hearing, is outside the scope of

remedies available to Petitioners in this context (a license appeal to the Board). For the reasons set forth in detail below, the Order should not be revoked. Additionally, although the Board has the discretion to hold a hearing on any appeal of a license issued by the Department, Petitioners have only requested a hearing “to admit new evidence that may become available regarding the Commissioner’s conflict of interest” – which issue is outside of the Board’s jurisdiction and otherwise not a sufficient basis to grant a hearing. Petitioners do not offer any new or credible conflicting technical evidence in the Appeal. Instead, Petitioners simply offer legal arguments based upon the information in the record. Therefore, the Board can, and should, address the issues raised in the Appeal without a hearing.

I. Background

In November of 2010, Maine voters approved the development of a casino resort in Oxford County. BB Development’s objective is to create Maine’s first four season commercial entertainment resort facility in Oxford, Maine. This facility has been conceptually comprised of three phases. The Permits were issued for Phase I (the “Project”) which will be a fully functional stand-alone 65,000 square foot four season casino and hotel with 1050 parking spaces, two site entrances, and associated utilities and appurtenances. The Project will be built in the northwest corner of the intersection of Main Street (Route 26) and Rabbit Valley Road in southern Oxford and will bring good paying jobs and economic activity to the State generally and to Oxford County in particular.

BB Development and the Department have spent an enormous amount of time and effort in the process leading up to the granting of the permits for this Project. BB Development’s technical project team includes: JCJ Architecture, Kenneth Stratton, CSS, LSE (wetland scientist), Land Design Solutions, Maine Traffic Resources, Main-Land Development

Consultants, Summit Geoengineering Services, and Sweet Associates. *See* BB Development SLODA App. § 4. A significant number of government regulators have reviewed and approved of this project, including Department staff, led by project manager Beth Callahan, personnel from the Maine Department of Inland Fisheries and Wildlife, Maine Department of Transportation, as well as the Army Corps of Engineers.

Throughout the permitting process BB Development has made considerable effort to keep the government officials, including the Department and the public informed about the Project. BB Development has also closely coordinated with relevant permitting authorities, including the Department, and responded quickly and fully to any comments or requests. BB Development's permitting timeline, including meetings with the Department and public included among others, the following:

- On September 9, 2010, BB Development held a "pre-application" meeting with the Department to explain the project and to discuss the information that would be necessary to obtain the required environmental permits.
- On December 7, 2010, a Public Information Meeting ("PIM") was held to discuss the project with members of the public, to obtain their comments and to respond those comments. Over 200 people attended the meeting.
- On December 9, 2010, BB Development held a "pre-submission" meeting with the Department to make sure that all issues would be addressed in the application.
- On December 17 and 22, 2010, BB Development submitted permit applications for licenses under NRPA and SLODA respectively.
- March 4, 2011, the Draft Order was sent to interested parties, including counsel for the Petitioners.
- The Petitioners and others were provided the opportunity to submit comments to the Department on the Draft Order.
- On March 11, 2011, comments were received from numerous entities or individuals, including many of the Petitioners and Petitioners' counsel.

- March 17, 2011, following an internal review process and after consideration of comments from members of the public and from other governmental agencies, the Department issued an Order approving the Permits.

II. Relief Requested

Petitioners request various types of relief in the Appeal most of which are beyond the Board's authority to provide in a license appeal. Specifically, Petitioners request that the Board order the following relief: (1) vacate, reverse and rescind the Order; (2) stay all work, excluding work on studies; (3) assume jurisdiction in order to (a) "require the applicant to submit additional evidence that affirmatively demonstrates that will [sic] fully and completely meet all applicable standards law [sic] both for Phase I and for the entire Casino project at full build-out" and (b) reopen the public comment period; and (4) "hold a public hearing to admit new evidence that may become available regarding the Commissioner's conflict of interest" or alternatively, if the Board declines to admit new evidence regarding the Commissioner's conflict of interest, vacate as invalid the water quality certification and any permits issued pursuant to the federal CWA."¹

A. Reversal or a Hearing are the Only Categories of Relief Requested by Petitioners That Are Potentially Available

Petitioners have requested numerous categories of relief; however, only their request for a hearing or reversal actually is permitted by Department rules. Chapter 2(24) of the Department rules provides that on appeal, "the Board shall, as expeditiously as possible, affirm all or part, affirm with conditions, order a public hearing to be held as expeditiously as possible, or reverse all or part of the decision of the Commissioner." 06-096 CMR ch. 2(24). No other forms of relief are provided by the rules. Therefore, the only relief requested in the Appeal that the Board can grant is to hold a hearing or reverse all or part of the decision of the Commissioner.

¹ Petitioners' requested relief is articulated on pages 1 and 23 of the Appeal.

A complete reversal of a Commissioner's Order regarding an existing permit is equivalent to revocation (which the Petitioners have also requested). The Board has previously ruled in the context of a Petition to revoke, modify, or suspend a license that revocation is "an extraordinary remedy that requires Petitioners to bring forth new and compelling evidence that necessitates action by the Board." *See* Attachment A, April 21, 2011, *Board Order Dismissing Petition to Revoke Air License of Berwick Iron & Metal Recycling, Inc.*

As explained below, the Department carefully reviewed the license applications (including any comments from the public and follow-up information provided by BB Development) and properly issued the Order as written. Petitioners have not provided any evidence, let alone new or compelling evidence that would necessitate vacating, reversing, or rescinding the Order.

Furthermore, a hearing on this Appeal is unnecessary and inappropriate. Petitioners only request a hearing for the purposes of admitting "any new evidence that may become available regarding the Commissioner's conflict of interest." *See* Appeal at 23. The Board's "decision to hold a hearing is discretionary with the Board." *See* 06-096 CMR ch. 2, § 24(B).

The Board does not hold hearings "to admit new evidence that may become available." *See* April 22, 2011, Letter from the Board to the parties to this Appeal. Instead, the Board's practice is to grant a hearing only where there is credible conflicting evidence and a public hearing would assist the Board in understanding the evidence. *Id.*

Petitioners had the opportunity to submit supplemental evidence, including credible conflicting evidence, when they filed their briefs. *See* 06-096 CMR ch. 2, § 24(B) (stating that "if the appellant [i.e. Petitioners] is requesting that supplemental evidence be included in the record and considered by the Board, such a request, with the proposed supplemental evidence,

must be submitted with the appeal.”). Petitioners did not submit any supplemental evidence with their Appeal and have waived their ability to supplement the record prior to a Board meeting on the appeal. *See* BEP Chair letter dated March 2, 2011, Appeal of Solid Waste License for Juniper Ridge Landfill (denying request to supplement even where information was unavailable at the time of filing the appeal)(Attachment B). Therefore, Petitioners should not be granted a hearing solely “to admit new evidence that may become available.”

Furthermore, the issue upon which the Petitioners seek to have new evidence introduced is outside the scope of the Board’s authority and irrelevant to this Appeal. The question of whether the Commissioner is able to serve as the head of Maine’s federally authorized Clean Water Act program or as Commissioner is a question for the U.S. EPA and the Maine Attorney General’s Office to address, not the Board of Environmental Protection in the context of a license appeal.

Moreover, the alleged conflict issue for which Petitioners requested a hearing is now moot. On April 27, 2011, former Commissioner Brown resigned as Commissioner of the Department and was appointed as the Director of the State Planning Office prior to the conclusion of any investigation into his ability to serve as Commissioner or the Department. Since any investigation into his status and ability to serve as Commissioner of the Department is now moot, Petitioners request for a hearing on this issue and for new evidence to be admitted at such a hearing should be denied.

Last, Petitioners have not submitted with their Appeal any supplemental or credible conflicting information on any issues they raise. Instead, Petitioners simply make legal arguments based upon the record. Therefore, even if Petitioners’ request for a hearing was read more broadly to include a request for a hearing generally, this request, should be denied as the

Board can easily decide the Appeal based upon Petitioners' Appeal and BB Development's Response.

B. The Other Relief Requested by Petitioners is Unavailable

In addition to requesting a hearing to admit certain new evidence that may become available and reversing the Department's Order, Petitioners request that the Board: (1) stay construction; (2) assume jurisdiction in order to (a) require BB Development to submit additional evidence, and (b) reopen the public comment period. None of these categories of relief are permitted by the Department's rules governing license appeals.

1. A Stay is Not Relief Provided by Department Rules Governing License Appeals

Petitioners request a stay of "all work not related to studies" but, not surprisingly, offer no authority to support this request. *See* Appeal at 1. Pursuant to 38 M.R.S. § 344(8), a license granted by the Department is effective when the Commissioner signs the license. There are no Department rules that allow the Board to stay construction. In fact, the Board recently ruled that such relief is beyond the Board's authority. In denying a recent request to stay a Department solid waste license revision, the Board Chair ruled as follows:

Given that the statutory and regulatory scheme governing appeals to the Board does not provide any procedure or criteria for the Board to reconsider or grant a stay of a Commissioner's license decision, the Board lacks the authority to stay such a decision.

See BEP Chair letter ruling, dated March 2, 2011 in *Appeal of Solid Waste License for Juniper Ridge Landfill*. Therefore, the Board must reject Petitioners' request for a stay.

2. The Board Cannot Assume Original Jurisdiction Over a License for the First Time in a License Appeal

Petitioners waived their opportunity to request that the Board assume jurisdiction over this project. Pursuant to Chapter 2(17)(A) of the Department's rules, "[a]ny person may request

that the Board assume jurisdiction over an application by submitting the request to the Department in writing no later than 20 days after the application is accepted as complete for processing.” 06-096 CMR Ch. 2(17(A)). Petitioners did not make such a request within 20 days after the application was accepted for processing. The record establishes that this Appeal is the first time that the Appellants have sought Board jurisdiction.

Further, there is nothing in Department rules that would allow the Board to take original jurisdiction of the applications at this point in the process. The Department rules governing processing and review of applications and appeal of application decisions are very clear. The Board has stated that in the absence of a specifically identified process or remedy under these rules, it does not have authority to grant such extra-rule relief. *See* BEP Chair letter ruling, dated March 2, 2011 in Appeal of Solid Waste License for Juniper Ridge Landfill.

3. The Board Cannot Require the Applicant to Submit Additional Evidence

Moreover, the Board cannot, as a part of this Appeal, “require the applicant to submit additional evidence that affirmatively demonstrates that will [sic] fully and completely meet all applicable standards law [sic] both for Phase I and for the entire Casino project at full build-out.” Since Petitioners have missed their opportunity to request the Board assume jurisdiction over the applications for this project. Petitioner’s request to have BB Development submit additional evidence and reopen the public comment period also should be denied for similar reasons.

III. Petitioners Lack Standing

Only “an aggrieved person may appeal to the Board for review of the Commissioner’s decision.” 06-096 CMR ch.2 § 24(B)(1). An aggrieved person is defined as “any person whom the Board determines may suffer a particularized injury as a result of a licensing or other decision. *Id.* at § 1(B). “A particularized injury occurs when a judgment or order adversely and

directly affects a party's property, pecuniary, or personal rights. *Nergaard v. Town of Westport Island*, 2009 ME 56 ¶ 18, 973 A.2d 735, 740; *see also Storer v. DEP* 656 A.2d 1191, 1192 (Me. 1995) ("The agency's action must operate prejudicially and directly upon a party's property, pecuniary or personal rights."). A person suffers a particularized injury only when that person suffers injury or harm that is "in fact distinct from the harm experienced by the public at large." *Nergaard* at ¶ 18, 973 A.2d at 740. "If the Chair decides an appellant is not an aggrieved person, the Chair may dismiss the appeal." *See* 06-096 CMR ch.2 § 24(B)(1).

The Petitioners in this Appeal are comprised of ARA, a private non-profit corporation that states it is interested in the Androscoggin River watershed's protection and restoration, and 18 individuals ("Individual Petitioners"). *See* Petition at pgs. 4-7. The Individual Petitioners are as follows:

- Terri Marin – lives approximately one mile from the proposed development, abuts Green and Mirror Ponds, and is a member of ARA. *See* Petition at pg. 4.
- Joelle Schutt – lives approximately one mile from the proposed development and abuts Green and Mirror Ponds. *See* Petition at pg. 5.
- Ronald and Rachel Hamilton – live approximately one mile from the proposed development. *Id.*
- James and Candace Alden – own a seasonal cottage approximately two miles from the proposed development and abuts Whitney Pond. *Id.*
- Richard Swanson – owns a seasonal cottage on Whitney Pond approximately two miles from the proposed development. *Id.*
- Richard Auren – owns a seasonal camp on Hogan Pond, approximately one mile from the proposed development. *Id.* at pg. 6.
- Carol Ann and Larry LaRoche LaBossiere – live approximately one mile from the proposed development and abut Green Pond. *Id.*
- Brendan McMorrow – resident of Freeport and summer resident at Green Pond. *Id.*
- Carol Perkins – lives approximately one mile from the proposed development, abutting Green and Mirror Ponds. *Id.*
- Robert Benson and Julie Cameron – own a seasonal camp approximately one mile from the proposed development and abuts Green Pond. *Id.* at pg. 7.
- Mary and Austin Taylor – owns a home on Route 26 in Oxford, Maine, near the Little Androscoggin River; distance to the proposed development is not mentioned in the Appeal. *Id.*

- John and Evelyn Sylvester – owns a seasonal camp approximately one mile from the proposed development that abuts Mirror Pond.

None of the Individual Petitioners to this appeal have specifically alleged any property, pecuniary or personal rights that will be adversely and directly affected by the SLODA and NRPA permits. Instead, Petitioners generically assert that the proposed development will: (1) negatively impact their individual status as residents or property owners in Oxford, Maine; (2) cause pollution that will impair their use (recreational and drinking water-related) of surface water and groundwater; and (3) impact use and enjoyment of private property and quality of life due to noise, lights, traffic, loss of scenic character and air pollution. These claims, made without sufficient particularity, fail to provide any of the Petitioners with standing in this matter.

With respect to ARA, as a non-profit entity based in Lewiston, Maine, it too has no property, pecuniary or personal rights that will be adversely and directly impacted by the permits. ARA has participated in regulatory proceedings relating to the Androscoggin River watershed in the past. *See* Petition at pg. 4. However, previous involvement in separate and unrelated matters does not confer ARA standing in this licensing decision. ARA can only obtain standing if one of its own members has standing. *Friends of Lincoln Lakes v. Town of Lincoln*, 2010 ME 78, ¶ 15, 2 A.3d 284, 289 (where a non-profit could have earned standing had it shown one of its members was in “close proximity to the affected land” and who could show particularized injury). The fact that one of its members, Terri Marin, is also an Individual Petitioner, however, does not confer ARA any standing, as Ms. Marin has no particularized injury.

A. Residency

Individual Petitioners’ status as residents of, or property owners within, Oxford, Maine does not establish standing. An individual’s status as a resident in a particular municipality is

not sufficient to generate standing because “the injury suffered must be distinct from any experienced by the public at large.” *Nelson v. Bayroot, LLC*, 2008 ME 91, ¶ 10, 953 A.2d 378, 382. In *Nergaard*, for example, the court found that the residents of the Town of Westport Island lacked standing to appeal the Town’s permit authorizing updates and improvements to a public boat ramp. 2009 ME 56, ¶¶ 117-22, 973 A.2d at 740-742. In *Chabot v. Sanford Zoning Board of Appeals*, the “plaintiff pleaded only that he was a resident and property owner . . . [and] did not plead or prove any injury from the zoning board’s decision.” 408 A.2d 85, 85 (Me. 1979). Each of the Individual Petitioners’ references to their status as Oxford citizens (or property owners therein) fails to set them apart from any other resident of Oxford (or the State) and as such does not provide them with standing. Only particularized injuries can establish such standing.

B. Use of Surface Water and Groundwater

Individual Petitioners state that they are concerned that the proposed development will result in pollution to Green, Mirror, Hogan, and Whitney ponds, Winter Brook and associated wetlands, which in turn could “impact and deter” their use of those resources for both recreational and drinking water purposes.² See Petition at pgs. 4-7.

Petitioners asserting standing based upon their use of natural resources must show their actual use (past, present and future) of the affected property in question. *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 197 (Me. 1978). Petitioners in this case do not (and cannot) allege, that they use the proposed site where Phase I will be built. Individual Petitioners are not actual users of the property upon which the development is proposed, which was the case in

² Notably, despite ARA alleging concern regarding discharges to surface and subsurface waters, filling of wetlands and wetland habitat, and groundwater and aquifer withdrawals that could negatively impact the environment, its own member, Ms. Marin, makes no such allegations and demonstrates no particularized injury related to those concerns. See Petition at pgs. 4-5. Therefore, standing cannot be conferred to ARA with respect to those particular issues.

Fitzgerald. They do not abut the property. They do not recreate on the property. Neither are the various natural resources that they enjoy located on the property.

Instead, Individual Petitioners claim that their use of certain natural resources for recreational or drinking water purposes – various ponds, a brook and wetlands – will be adversely affected by the development. *See* Petition at pgs. 4-7. Neither Individual Petitioners nor ARA offer any evidence as to the hydrology of the proposed development site, nor the hydrology of the one to two miles of land between it and the water bodies they claim could be affected by development activities.

An allegation of injury “must [be] more than an abstract injury.” *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382. Individual Petitioners have not alleged with any specificity any injury other than pure speculation about what might occur to natural resources that they use, although such resources are not located on or proximate to the development site. As such, they lack a direct and particularized injury sufficient to establish standing.

C. **Impacts due to Noise, Lights, Traffic, Loss of Scenic Character and Air Pollution**

In its description of ARA and Individual Petitioners, in an attempt to establish standing, Petitioners assert that the proposed development will negatively impact the enjoyment of Petitioners’ property and their quality of life, by way of impacts from noise, lights, traffic, loss of scenic character and air pollution. *See* Petition at pgs. 4-7. With the exception of air pollution, these concerns are not raised as substantive legal or factual issues in the Appeal of the Department’s Order. Therefore, Petitioners cannot have standing to address concerns that are not even the subject of their Appeal. Presumably, if Petitioners found fault with the Department’s Order related to those issues, they would have raised substantive objections on these points in their Appeal. Instead, it appears that Petitioners could not find fault with the

Department's findings on these issues and merely used such statements as "make weight" in their attempt to secure standing in this matter. Therefore, there is no information to substantiate Petitioners concerns on these issues.

Furthermore, these allegations of adverse impacts, especially the general concern regarding air pollution, are abstract and fail to allege a particularized injury. *Nelson*, 2008 ME 91, ¶ 10, 953 A.2d at 382. Neither ARA – nor any of the Individual Petitioners – directly abut the property. The proposed development is to be located at least one mile, if not two miles, away from the Individual Petitioners, with mostly forested lands in between. *See* Attachment C (satellite and street maps). Noise, light and scenic impacts have not been alleged in sufficient detail to determine how such impacts, if any, will personally injure ARA or Individual Petitioners on their respective properties.

ARA's and Individual Petitioners' allegations regarding traffic and air pollution lack specificity to allege particularized direct injury. There is no mention of whether automobile traffic to and from the proposed casino development will pass by their respective properties; rather, at most the allegation is made that this traffic will impact ambient air quality generally. *See* Appeal at pg. 19. Therefore, Petitioners have failed to allege any particularized injury that confers upon them standing to challenge the Department's licensing decisions.

IV. ARA's Claims Related To Project Phasing Lack Merit

Petitioners' main contention, and the basis for most of their arguments in the Appeal, is that the Department should have considered and made findings on the potential environmental impacts from all potential phases of the project, not just Phase I.³ Petitioners misunderstand or

³ Petitioners reference to Chapter 380 of the Department rules is misplaced as Chapter 380 relates to procedures for obtaining a "planning permit" to obtain "approval for future build-out in a delineated area within specified parameters." *See* 06-096 CMR ch. 380(1). A planning permit is available as a discretionary permitting option for an applicant to pursue, but is not required – nor could it be forced upon an applicant. *Id.* ("A planning permit may

simply ignore the practical realities of permitting a large development project with numerous future possibilities that are contingent upon a number of external factors that will play out in the future, many of which are beyond the control of the Applicant. Most significantly, Petitioners disregard operable statutory and regulatory language that provides the Department with discretion to permit a single initial phase of a project — especially stand-alone projects like Phase I.

Petitioners cite to the purpose of the SLODA, which is to “insure that such developments will be located in a manner which will have minimal adverse impact on the natural environment.” However, they fail to mention that the Maine Legislature determined “that discretion must be vested in state authority to regulate the location of developments which may substantially affect the environment and quality of life in Maine.” *See* 38 M.R.S. § 481. Furthermore, the Legislature explicitly acknowledged that “[t]he purpose of this subchapter is to provide a **flexible and practical** means by which the State, acting through the department, in consultation with appropriate state agencies, may exercise the police power of the State. . .” *Id.* (emphasis added).

Chapter 372(10) explicitly provides the Department with the authority and discretion to permit a single phase of development in such circumstances, as are present here, where conceptual future phases of a development project are too uncertain to permit or evaluate potential impacts. Chapter 372(10), including its accompanying note (which is not part of the regulatory regime, but is merely explanatory) states:

be sought as an optional alternative to individual approvals for specifically described and located projects”). Clearly, BB Development has decided not to opt for a planning permit. Furthermore, a planning permit is appropriate when an applicant has presented plans and evidence to obtain approval for a project, but the project will be built over a long period of time. That is not the case here. BB Development applied to permit Phase I as a stand alone project and did not (nor does it currently) have sufficient information to obtain permits for any potential future phases.

The Board requires that an application for approval include present plans for all phases of a development to be undertaken on a parcel. In the absence of evidence sufficient to approve all phases of the proposed development, the Board may approve one or more phases of the development based on the evidence then available. Approval of phases, however, shall be based on compliance of the entire proposed development with the standards of the Site Location Law.

NOTE: A proper analysis of the potential primary, secondary and cumulative impacts of a proposed development can be made only when all phases of a proposed development are considered. Also, the plans for site modification and pollution mitigation need to be based on the entire extent of a proposed development in order to insure their effectiveness in accomplishing the desired objectives.

See 06-096 CMR ch. 372 § 10 (emphasis added). Two scenarios are contemplated by the Department rules: (1) where the Board has evidence sufficient to approve all of the phases together ("present plans" are available); and (2) where the Board does not have evidence sufficient to approve all phases together. Under the second scenario, the Department "may approve one or more phases of the development based on the evidence then available." *Id.*

Petitioners point to the last sentence in Chapter 372(10) and the accompanying note to argue that the Department cannot permit one phase of a project without considering the potential impact from all of the potential phases. But Petitioners' proposed interpretation of the last sentence of Chapter 372(10) and the note conflicts with, and would eliminate, the Department's ability to permit one phase of a project based on present plans and data where there is insufficient information necessary to permit all phases of a project.

Since Chapter 372(10) explicitly provides the Department the authority to permit one phase of a multi-phase project where there is insufficient evidence to permit all phases together, Petitioners proposed interpretation cannot stand. "In interpreting statutes and regulations, courts must try to give them a harmonious, comprehensive meaning, giving effect, when possible, to all provisions." *McCuin v. Secretary of Health & Human Services*, 817 F.2d 161, 168 (1st Cir. 1987). "Courts should be careful when construing statutes or regulations to harmonize any

apparently conflicting provisions and give effect to both sections if possible." *Reisinger v. Grayhawk Corp.*, 860 S.W.2d 788, 790 (Ky. Ct. App. 1993). All the words in a statute or regulation should be given meaning. *Morse v. Laverdiere's Super Drug Store*, 645 A.2d 613, 615 (Me. 1994) ("[S]tatutes are not construed to contain surplusage or superfluous language.")

To comply with this bedrock rule of statutory (and regulatory) construction, the last sentence of Section 10 of Chapter 372 and the note should be read consistently with the first two sentences of that section. There are at least two ways to interpret the last sentence so that it is consistent and in harmony with the rest of the paragraph.

The first is that the last sentence and the note only apply to situations in which multiple phases are being permitted (where there is sufficient information on the project scope to permit and evaluate the impacts from multiple phases in one permit proceeding). The fact that the last sentence says "phases" versus "a single phase" or "one phase" supports this reading.

The second potential reading is that the impacts from additional phases proposed in the future must be examined cumulatively with previously approved phases and existing development. This reading would be consistent with the Board's previous rulings regarding cumulative impacts. *See Hannum v. Board of Environmental Protection*, 2006 ME 51, ¶ 14, 898 A.2d 392 (holding that the Board could only examine the impact of the one existing dock and that dock's reasonably anticipated uses on local wildlife not future speculative docks).

Further compelling one of these readings is the fact that the second sentence ("In the absence of evidence sufficient to approve all phases of the proposed development, the Board may approve one or more phases of the development based on the evidence then available.") would be rendered meaningless if the last sentence of that section were read to effectively prohibit approval of a stand-alone phase where there is inadequate information to permit and

consider all phases at once — as the second sentence appears to allow. *See Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me. 1979) ("Nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible.").

The note in Chapter 372(10) clearly was meant to only apply to projects where evidence sufficient to approve all phases of the proposed development is available. Any other reading would lead to the absurd result that an applicant and the Department would have to try to evaluate impacts from multiple phases without adequate information regarding what those phases are or will become once the initial phase is permitted and built. The Department and the Board instead, as they have done on other projects in the past, approved a stand-alone phase of a multi-phase conceptual project. The Department was correct in doing so for this project.

Moreover, the Department has discretion to interpret the meaning of regulations it administers, including interpreting Chapter 372(10) in a manner that allows the permitting of a stand-alone phase, such as Phase I. Maine courts "give deference to the [DEP's] interpretation" of "the statute it is charged with enforcing and the regulations it has promulgated" *Kroeger v. Dep't of Environmental Protection*, 2005 ME 50, ¶16, 870 A.2d 566, 570; *see also Conservation Law Foundation v. Dep't of Environmental Protection*, 2003 ME 62, ¶30, 823 A.2d 551, 561 ("Because this is a reasonable construction of a statute by the agency [DEP] that administers it we defer to its construction."). The Department and the Board have previously approved stand-alone phases of a multi-phase conceptual project. For example, Department Order In The Matter of Mt. Abrams Ski Area permitted construction of ski trails, a ski lift and snowmaking extensions. *See* Mt. Abrams License #L-15190-87-A-N. Subsequent Department Orders regarding Mt. Abrams approved the expansion of a snowmaking pond, a new ski trail, a

tubing hill, lighting for night skiing, a new ski lodge and a snow-tube park. See Mt. Abrams License #L-15190-87-E-M.

In this case, BB Development coordinated with DEP staff at every phase of the permitting process, including defining the Project that was permitted. At the pre-application meeting, BB Development LLC explained to the Department that Phase I of the project was the only phase of the project that was concrete enough to permit. The specific design details of the other contemplated phases of the development were then (and are now) still in flux and prone to change depending upon factors such as the economic climate and which investors buy into the project.⁴ In short, “present plans” were not available for any future phases. Phase I is a stand-alone four-season resort casino project that can operate independently even if Phases II (separate hotel) and III (casino resort expansion) are never built. Given these facts, the Department correctly determined that Phase I was “the Project” and should be permitted as such.

BB Development is not aware of any Maine cases addressing Chapter 372(10). Cases under the federal National Environmental Protection Act, 42 U.S.C. § 4321 et seq. (“NEPA”), in the context of project segmentation, however, are instructive. Under NEPA, “segmentation [phasing] is improper when the segmented project has no independent justification, no life of its own, or is simply illogical when viewed in isolation.” *One Thousand Friends of Iowa v. Mineta*, 364 F.3d 890, 894 (8th Cir. 2004) (holding project was not improperly segmented where permitted portion had “independent utility”); see also *Save Barton Creek Association v. Federal Highway Administration*, 950 F.2d 1129, 1139 (5th Cir. 1992) (“Segmentation analysis functions

⁴ BB Development specifically informed the Department and the public that phases II and III were subject to substantial change depending upon market forces. For example, Brian Davis, the lead architect on the project explained phases II and III at the Public Information Meeting as follows: “I think Rob alluded to this, it’s really what we call market driven expansion. If the market says, we don’t need anymore hotel rooms but a feasibility analysis showed that a show would be better or a bowling alley would really work here, those are the kind of things that happen as the market develops. Right now, with the feasibility analysis we have in place, this is our best guess right now. . .” See SLODA App. § 25(3), Dec. 7, 2010, Public Information Meeting Transcript.

to weed out projects which are pretextually segmented, *and* for which there is no independent reason to exist.") (emphasis in original) (internal quotation marks omitted). In NEPA cases, multiple stages of a development must be analyzed together when "the dependency is such that it would be irrational, or at least unwise, to undertake the first phase if subsequent phases were not also undertaken." *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985).

By contrast, in this case, Phase I is a fully functional stand-alone casino resort project with independent utility. Even if the other two phases of the project are never permitted, the casino resort can continue to operate independently. The construction of Phase I is not dependent upon Phases II or III. Therefore, the concern associated with permitting dependant phases of a project are not at issue here. If no additional phases are ever built, Phase I would be a complete, sustainable project.

Furthermore, from an environmental perspective, there is little risk posed by this approach. A developer that permits a single phase of a larger planned project bears the risk that any future phases might not be permitted. When future phases are proposed for permitting, the Department can take into account the cumulative impacts of any new phase with the previously permitted phases and determine whether the permits should be approved. See 06-096 CMR 372(1) and accompanying note. As just explained, where the previously-permitted phase is a stand-alone project with independent utility, there is no danger that future regulators will find themselves backed into a corner by the approval of the initial phase.

V. **Many of Petitioners Other Substantive Arguments Fail Given That They are Based Upon Speculative Consideration of Amorphous Potential Future Project Phases.**

Since the Department correctly exercised its discretion to permit the only phase of the project that is defined and capable of being permitted, all of Petitioners' arguments based upon this phasing claim should be rejected by the Board. These arguments include Petitioners'

SLODA arguments regarding adequate water supplies, adequate capacity on the site for wastewater disposal, air impacts from point sources, and Petitioners' NRPA argument that a Tier III evaluation should have been conducted.

A. Adequate Water Supplies for the Entire Project

As discussed, the project at issue for the purposes of this permit is Phase I. The Department has correctly examined the Phase I water supply issues (as discussed more fully in Section VI(A) below). At this point it is unclear what water source will be used for potential later phases. It is possible, for example, that the project will use Town water in any future project phase by connecting to the Oxford Water District. However, any future phases and any details of such phases are too speculative at this point to permit. These issues, including cumulative impacts, will be addressed when permits for future phases, if any, are submitted to the Department. BB Development is aware that in order to obtain permits for future phases it must address water issues as well as all other issues associated with any possible future project build out.

B. Adequate Capacity on the Site for Wastewater disposal for the Entire Project

Petitioners' argument that the Department must consider wastewater disposal for the entire project is also without merit. The Department has correctly examined the wastewater issues for Phase I and determined that the Applicant has met the standards for approval under the SLODA. As previously explained, the details of any additional phases are not specific enough at this point to permit, yet alone apply for. These issues, including cumulative impacts, will be addressed when permits for the other phases are submitted to the Department. BB Development is aware that in order to obtain permits for future phases it must address wastewater issues as well as all other issues associated with any possible future project build-out.

C. Air Quality Impacts

Petitioners argue that the Order should have considered the air emissions from non-point sources and point sources for the full build-out. As discussed above, the permit application and review is for Phase I, not any other phases at this time. If and when applications for additional phases are submitted, air impacts, including cumulative impacts would have to be considered. Since no other phases are currently being permitted besides Phase I, the potential air emissions from point sources for the full build out are not relevant.

Furthermore, Petitioners incorrectly argue that BB Development and the Department erred by not considering non-point sources in its SLODA application. This is incorrect for two reasons. First, Chapter 375(1)(C) only requires the submission of evidence that increased traffic generated by the development will not significantly affect ambient air quality “when appropriate.” 06-096 CMR ch. 373(1)(C). Second, Chapter 375(1)(C) simply states that “modeling of the effect of non-point sources of air pollution on ambient air quality *may be requested.*” *Id.* (emphasis added) Hence, the Department significant discretion in its evaluation process in this area.

In this case, the number of vehicles anticipated for the Project does not warrant modeling of air pollution. BB Development and the Department held a number of meetings (pre-application and pre-submission meetings as well as numerous other meetings with the Department) and the Department did not request modeling or other evidence on this issue because it was not appropriate. Instead, the application properly focuses on the larger potential sources of air emissions such as dust emissions during actual construction (which will be addressed through erosion control measures) and the building heating system (which will

produce emissions that are below the thresholds required for a permit). See SLODA App. at Section 21.⁵

D. Natural Resources Protection Act – Tier 2 versus Tier 3

Petitioners argue that the Order should have addressed Tier 3 NRPA issues which might be triggered in the event future phases are constructed. As discussed above, the permit application and review is for Phase I, and no other phases at this time. If and when, applications for additional phases are submitted, the Department will consider whether Tier 3 review is appropriate.

The Natural Resources Protection Act, 38 M.R.S.A. 480-A et. seq., allows the Department to review Phase I as the project.

If the project as a whole requires Tier 2 or Tier 3 review, then any activity that is part of the overall project and involves a regulated freshwater wetland alteration also requires the same higher level of review, *unless otherwise authorized by the department*.

See 38 M.R.S.A. 480-X (emphasis added). In this case, as discussed previously, the Department met with the applicant several times to discuss the project and determined that Phase I could be permitted separately. See Order at 1, Para. 1 (Defining the Project as Phase I).

The Tier 2 review applies to any activity that involves a freshwater wetland alteration up to one acre, or 43,560 square feet. It is anticipated that Phase I will result in altered wetlands only up to 42,430 square feet. See NRPA App. ¶ 15, Tab 9 at 3, Tab 11, Tab 12. Therefore, the Department correctly conducted a Tier 2 and not a Tier 3 review.

⁵ In any event, mobile sources are independently regulated under Section 202 of the Clean Air Act. See 42 U.S.C. § 7521. Therefore, there are environmental regulations that already address these nonpoint sources.

VI. License Challenges That are Unrelated to the Project Phases.

A. SLODA -- Sufficient and Healthful Water Supplies

Petitioners argue that the “Department’s Order is in error because the applicant has failed to affirmatively demonstrate that it meets the Site Law’s water supply and no adverse harm standards and because the Department’s Order illegally applied conditions of approval as a substitute for the applicant’s burden of proof to demonstrate that each of these standards has been met.” *See Appeal at 11.*

Petitioners point out that, pursuant to 06-096 CMR ch. 373(5)(B), an applicant must demonstrate that it has made adequate provision for sufficient and healthful water supplies, and argues that the information submitted was insufficient. Petitioners, however, ignore the broad applicable standards and flexible nature of the Department’s directive under 38 M.R.S.A. § 484(3)(F) and Section 5 of Chapter 373 (06-096 CMR ch. 373(5)).

38 M.R.S.A. § 484(3)(F) simply states that the Department shall “consider the effects of the proposed withdrawal on waters of the State, as defined by section 361-A, subsection 7; water-related natural resources; and existing uses, including but not limited to, public or private wells, within the anticipated zone of contribution to the withdrawal.” The statute does not require any specific showing by the applicant or specific findings that must be made by the Department.

Chapter 373(5)(B) of the Department rules contains a list of information that may be submitted, but does not define the entire scope of evidence that is permissible to meet this burden. Included in the list of information that may be submitted is a “[a] letter from a geologist or well driller knowledgeable about the area where the development is located that a sufficient and healthful water supply is likely to be available.” *See 06-096 CMR ch. 373(5)(B)(1).* Even

this information is optional. *See* 06-096 CMR ch. 373(5)(B)(2)(a) (“If there is reasonable doubt that a sufficient and healthful water supply can be provided by means of on-site wells, the following [two types of potential testing] *may* be required”)(emphasis added).

Further, Chapter 373, Section 5(C) allows conditions of approval to include any reasonable requirement that will ensure adequate water supplies. 06-096 CMR ch. 373(5)(C) (“[t]he Board may, as a term or condition of approval, establish *any reasonable requirement* to ensure the adequate provision of a sufficient and healthful water supply”)(emphasis added).

In this case, BB Development submitted to the Department an assessment, by a team of geologists and well drillers (Sweet Associates and Goodwin Well & Water, respectively) knowledgeable about the site, of groundwater supplies addressing the availability of sufficient and healthful water. *See* SLODA App. at 16. BB Development and its consultants also met with Department staff numerous times, including staff from the Bureau of Land and Water Quality, to discuss this issue; the Department’s Division of Environmental Assessment conducted a review of the application and relevant information. In particular, John Hopek, Ph.D., Division of Environmental Assessment did a careful review of the site information and concluded that a series of conditional approvals was appropriate. *See* John Hopek, Feb. 6, 2011, Review Memorandum ¶ 6 (recommending that “this permit for the first phase would have two separate conditions, one requiring review and approval of a report describing the results of an aquifer test designed in consultation with the Department, and a second, requiring review and approval of a plan for long-term monitoring of aquifer performance, including target levels based on the pump test results and other relevant criteria”).

There is no doubt that sufficient and healthful water can be supplied from on-site wells. *See* SLODA App. § 16. Instead, any questions relate to the proper location of wells on-site to

prevent unreasonable off-site impacts. These determinations will likely require an iterative process of well testing and adjustment. The Department understood this fact and therefore, approved the licenses with the condition that BB Development submit, prior to the start of operation, “the results of an aquifer test and the applicant must submit well monitoring information, including a proposal to use neighboring wells, if necessary, to the Department for review and approval. . .” See Department Order at 8-9 Para. 11.

Petitioners question the sufficiency of information and the analysis on this issue, but do not offer any independent credible conflicting information. Instead, Petitioners simply disapprove of the Department’s use of conditional approval concerning water supply for the Project, arguing that it is contrary to the applicant’s burden and illegal. Petitioners ignore the fact that under Department regulations additional testing regarding water supply “may” be required but is not mandatory. Petitioners also ignore the fact that conditional approvals are explicitly permitted by the rules.

Although Petitioners acknowledge that conditions are not *per se* illegal, they assert that, pursuant to Department Rules Section 372(2), conditions of approval are only available to address “minor or easily corrected problems,” and in this case, as a factual matter, they claim that the conditions address a problem that is not minor or easily corrected.⁶ See Appeal at 14.

First, Petitioners are incorrect as a matter of law that conditions of approval are only available to address minor or easily corrected problems. Section 2 of Chapter 372, the section

⁶ Petitioners reliance on *In re Belgrade Shores, Inc.*, 371 A.2d 413 (Me. 1977) and *In re Ryerson Hill Solid Waste*, 379 A. 2d 384 (Me. 1977) is misplaced. In fact, both of these cases provide support for the Department’s approach to this permit approval. In both cases, the Court upheld the permit approvals on the grounds that the Department has the flexibility to craft conditions of approval where appropriate. For example, in *Belgrade Lakes* the Court upheld the permit and the Board’s use of conditional permits stating, “the express concern that regulation be ‘flexible and practical’ [38 M.R.S. § 481] negates the categorical approach appellants urge.” See *Belgrade Shores*, 371 A.2d 413, 414-416 (“that the Board found non-compliance with two of the four criteria listed in § 484 does not, as appellants claim, require disapproval. Such a result would be neither practical nor flexible where the non-compliance is minor, easily corrected, or both”); see also *Ryerson Hill Solid Waste*, 379 A. 2d 384 at 387 (upholding the Board’s use of conditions of approval).

upon which Petitioners' argument relies upon, is a broad statement regarding conditions in general that purports to implement former 38 M.R.S. § 483 (entitled, "Notification required; board action; administrative appeals, this section of the statute was repealed in 1989). Petitioners choose to ignore (or simply neglect to mention) Section 5(C) of Chapter 373, which contains specific requirements applicable to Department findings regarding sufficient and healthful water supplies and allows the Department to establish reasonable terms of condition of approval.

Section 5(C) Chapter 373 specifically states:

The Board may, as a term or condition of approval, establish *any reasonable requirement* to ensure the adequate provision of a sufficient and healthful water supply. . . [listing examples].

See 06-096 CMR ch. 373(5)(C)(emphasis added). Hence, Section 5 of Chapter 373 specifically allows the Department to adopt any reasonable conditions in the permit, without a finding that such measures are meant to address minor or easily correctable problems, to address the criteria regarding sufficient and healthful water supply.

Second, as a factual matter, the conditions in Paragraph 11 of the Department's Order do address a minor or easily correctable problem and the Department would not have allowed such conditions unless it thought this issue would be relatively easy to address.⁷ Furthermore, it is important to point out that BB Development must satisfy these conditions of approval to the Department's satisfaction -- otherwise the project will not have approval to operate. Therefore, there is no risk that the project will operate in a matter that creates an unreasonable adverse impact on neighboring landowners or waters of the state.

⁷ Further highlighting the fact that this issue is "minor" is the fact that Town water is available as an alternative to groundwater. See SLODA App. Section 16. Although it is anticipated that groundwater will be used as the water supply for Phase I, BB Development has met with Oxford Water District about working jointly to extend public water to the site. *Id.* Petitioners are incorrect that the Applicant must have shown financial capacity and the ability to obtain title right or interest in order for Town water to be an alternative that shows that this issue is "minor." See Appeal at 15. In this case the Department properly considered the site conditions as well as potential impacts from groundwater withdrawal and approved the Project with conditions, knowing that any issues are minor and can be easily addressed.

Petitioners attempt to make something of the fact that John Hopek stated in an internal DEP memorandum that he thought the normal process would be for the water supply testing to be complete prior to the filing of applications. Although it is unclear whether there is a “normal” process given the wide disparity and unique nature of each project, the Department does in fact routinely include all manner of conditions of approval in SLODA permits.

One example of this is the Department’s approval of Cissel Enterprises’ proposal to construct a 4.53 mile access road, 145 residential units and 51 houses on a 443 acre parcel located in the Town of Rumford. That license decision, issued April 13, 2007, included 19 non-standard conditions ranging from requiring erosion control, establishing buffers along water courses, placing limitations on soil disturbance, and requiring a third party inspector. *See Cissel Enterprise Licenses #L-23174-L3-A-N/#L-23174-TE-B-N* at pgs. 14-15. Similarly, the Site Location, NRPA, Water Quality Certification and Tier One Wetland Alteration proposed by Duane’s Retreat, LLC, to develop a 121 unit condominium development at Mt. Abram ski area, was approved by the Department in June 2010 with 14 non-standard conditions. *See Duane’s Retreat, LLC Licenses #L-15190-28-S-A and # L-15190-TC-T-N.*

For all of the above reasons, the use of conditions of approval is within the Department’s discretion to employ and certainly is not illegal.

B. Financial Capacity

Petitioners argue that the applicant incorrectly submitted and the Department should have evaluated costs and financial assurance beyond the Site work. 38 M.R.S. § 484 of the SLODA entitled “Financial capacity and technical ability” requires the Department to make an inquiry to determine whether:

The developer has the financial capacity and technical ability to develop the

project in a manner consistent with state environmental standards and with the provisions of this article. The commissioner may issue a permit under this article that conditions any site alterations upon a developer providing the commissioner with evidence that the developer has been granted a line of credit or a loan by a financial institution authorized to do business in the State as defined in Title 9-B, section 131, subsection 17-A or with evidence of any other form of financial assurance the board determines by rule to be adequate.

The purpose of requiring an applicant to prove financial capacity is to make sure that projects can afford pollution controls as well as the costs for the development itself. In this case, BB Development demonstrated that it had the financial capacity to cover all of the relevant costs (including for pollution controls) for Phase I. Accepting this cost information is within the Department's discretion and is in line with the scope of the Board's jurisdiction and the purpose of the requirement.

The Department has accepted this type of financial assurance in many projects in the state. Representative projects include Department Order in the Matter of Duane's Retreat, LLC. In that instance, the Department found the applicant had demonstrated adequate financial capacity to comply with departmental standards for Phase I of that particular project, estimated at \$1,034,000.00 and self-funded by the developer. *See* #L-15190-28-S-A at pg. 2. Phases 2-5 were estimated to cost a total of \$3,000,000. The license provides that prior to starting construction of Phases 2-5, the applicant was to submit final cost estimates and evidence that it had either a line of credit or a loan by a financial institution in a sufficient amount. *Id.*

In addition, Department Order in the Matter of Rangely North, LLC found the developer had proper financial capacity for its project estimated at \$2,900,000. *See* Rangely North, LLC License L-24156-MX-A-N at pg. 2. There, the applicant had submitted a letter from Farm Credit of Maine that indicated it intended to "provide financing for a portion of the project." *Id.*

(emphasis added). The Department required that the applicant submit evidence that it had been granted a line of credit or a loan prior to starting construction. *Id.*

In this case, it is especially appropriate for the Department to require financial information regarding the site work alone, which will include all of the pollution controls (stormwater and wastewater control systems).⁸ This is not the type of project where pollution controls need to be placed on top of a building or as a separate structure after the project is completed – as would be the case with a scrubber or bag house in a power plant or pulp and paper mill. Instead, the pollution controls in this context are integral to the site work and would be implemented at the outset of the project. Therefore, there is little risk that the project would run out of money before pollution controls can be purchased and installed. The Department correctly found, consistent with previous practice, that BB Development has the financial capacity to cover all site work and pollution controls.

C. Natural Resources Protection Act - Avoidance of Wetlands Impacts

Petitioners argue that the Department failed to properly review available and practicable alternatives that would be less damaging to the environment. Petitioners assert that a hybrid onsite/offsite alternative could have been developed but does not specify what such a hybrid should be or what the Department should have required.

BB Development submitted an alternatives analysis on December 17, 2010 that was revised on February 22, 2011. The application and the supplemental information included a review of the available alternatives and made all efforts to design Phase I to minimize impacts to wetlands, including redesigning the stormwater management structures and removing an

⁸ In a project like this one, much of the total project cost depends upon what is placed on the inside of the building structure, which is highly variable, and has no impact on the environment. For example, in the context of a casino, the costs of tables and slot machines make up a significant portion of the project costs but are unassociated with any potential environmental impacts from the project.

employee parking lot on the west side of the property. After conducting a thorough review, BB Development concluded that there were no feasible site alternatives. *See* NRPA App. at Tab 9.

BB Development also evaluated the mitigation options to achieve the goal of no net loss of wetland functions and values and submitted a plan to compensate for any loss of wetland function or value. After considering the options BB Development elected to make a contribution in the In-Lieu-Fee program of \$147,656 for the loss of 42,300 square feet of wetlands at the project site.

The Department properly reviewed practicable alternatives and determined that “the applicant has avoided and minimized impacts to the greatest extent practicable, and that the proposed project represents the least environmentally damaging alternative that meets the overall purpose of the project.” *See* Order at ¶ 16(C).

D. Natural Resources Protection Act – Vernal Pools

Petitioners argue that the Department had insufficient evidence to make a determination that the Phase I will not harm vernal pools because the vernal pool survey was done outside the “required” calendar survey period. *See* Appeal at 21. Although the vernal pool investigations took place in the Summer and Fall, not the Spring, there were no indications of the presence of vernal pools. *See* NRPA App. Tab 5, Wetlands Delineation Report (reporting that no vernal pools were found, even after periods of heavy rains). Furthermore, Phase I is located on a sloped property that, based upon its topography, is not conducive to the formation of vernal pools. *See* Tab 3 and 12. In fact, BB Development evaluated other sites and subsequently rejected them because of the existence of vernal pools.

The Department was aware of the fact that the vernal pool study was conducted in the Summer and Fall. *See* NRPA App. Tab 5. The site topography coupled with the investigations

themselves confirmed that there are no vernal pools on the property. *Id.* (Stratton and Gallant reporting that “reliance was made on identifying the topographic characteristics for a vernal pool, mainly depressions on the landscape which showed some indication of having standing water. No such areas were found”).

E. Natural Resources Protection Act – Stream Setbacks

Petitioners argue that “the Department required an inadequate buffer zone because it measured the 100’ foot set back from the thread of the stream instead of the edge of the normal high water mark and/or wetland boundary.” *See* Appeal at 21. BB Development worked closely with the Department to make sure that it measured the stream setback from the proper points and the Department properly considered the appropriate setbacks in approving the licenses. First, the 100 foot setback that Petitioners refer to is a Maine Inland Fisheries and Wildlife (“IF&W”) “policy.” It is not a hard and fast rule. In fact, the September 8, 2010 letter that Petitioners reference in their Appeal correctly states that the 100 foot setback is an IF&W policy. *See* IF&W Letter to Mr. Berry dated September 8, 2010 (“Our regional buffer *policy* requests 100 foot undisturbed buffers along both sides of any stream or stream associated wetlands)(emphasis added). Department rules only require a 75 foot setback. 06-096 CMR ch. 310(3)(a).

Nevertheless, contrary to Petitioners’ assertions, BB Development did use a 100 foot setback. *See* Project App. at Section 10 (“the project proposes [deeded] 100 foot setback buffers from the one stream onsite”). The fact that BB Development measured for this 100 foot setback from the thread (or middle) of the stream versus from the edge of the stream as suggested by IF&W is inconsequential for two reasons. First, the size of the stream at issue is so small, ranging in width from a few inches to 24 inches, that there is no practical difference between measuring from the thread (or middle) of the stream versus the edge of the stream. Second, the

buffer setbacks are drawn based upon straight, not curved lines, for ease of surveying and mapping. These lines are drawn outside of the boundaries that would normally apply if curved lines were used. Therefore, in actuality, the setbacks set forth in the application exceed the 100 foot IF&W recommended setbacks from the edge of the stream even though BB Development technically measured from the thread of the stream.

In conclusion, there is no enacted statute of Rule that requires applicants to satisfy a 100 foot setback from the edge of a stream. Nevertheless, BB Development's conservative 100 foot buffer achieves the same result. The Department did not ignore the IF&W, but in this instance IF&W's preferred methodology is inconsequential due to the size of the stream and the surveying and mapping techniques which require a conservative boundary from the actual 100 foot setback contours.

F. Clean Water Act – MCGP and Former Commissioner Brown

Petitioners argue that because the Maine Construction General Permit ("MCGP") expired on January 20, 2008, any applicants for a MCGP after that date, including the BB Development's Notice of Intent #51672 ("NOI") are invalid. *See* ARA Appeal at 22.

Petitioners ignore the fact that the MCGP explicitly states that this program has been administratively continued. Part I Section C of the MCGP entitled "Continuation of Expired General Permit" states:

If this permit is not reissued, revoked, or replaced prior to the expiration date, it will be administratively continued in accordance with the Administrative Procedures Act and remain in force and effect.

See State of Maine Department General Permit Construction Activity, July 21, 2006, at 1, Part I(C); 06-096 CMR ch. 529, § 3(C)("[i]f the general permit is to be renewed, it shall remain in force until the Department takes final action on the renewal"); *see also, e.g.*, 2011 MSGP Section

8(B) (“An expired General Permit continues in force and effect until a new General Permit is reissued”). The fact that the MCGP goes on to explain that permittees who were previously granted coverage prior to the expiration date will automatically remain covered until certain events take place does not mean that the MCGP *only* remains in effect for previous permit holders.

In fact, Petitioners ignore the fact that the Department has accepted [REDACTED] NOIs pursuant to the MCGP after January 20, 2008 and continues to accept such NOIs under the MCGP today. *See* Attachment D. The Department’s current website for the MCGP, while noting that the MCGP originally issued on March 10, 2003 expired on January 20, 2008, specifically cites to the language in Part I(C) of the MCGP regarding continuation of the program and italicizes the language stating that the MCGP “will be administratively continued in accordance with the Administrative Procedures Act and remain in full force and effect.” This is a clear indicator the Department has extended the program. *See* <http://www.maine.gov/dep/blwq/docstand/stormwater/construction.htm>.

BB Development is not aware of any statement by the Department that it intends to withdraw this program or holds the view that the administrative continuance only applies to NOIs that were submitted prior to January 20, 2008. It is clearly within the Department’s discretion to administratively continue a program until it can be renewed.

If the Board were to agree with Petitioners and decide that the administrative continuance of the MCGP only applies to NOIs submitted prior to January 20, 2008, the Board would be invalidating the [REDACTED] permits that were issued after January 20, 2008. Instead, the Board should reject Petitioners’ argument and uphold the Department’s ability to administratively continue the MCGP as well as BB Development’s MCGP.

Petitioners argue in the alternative that BB Development's MCGP should be deemed invalid because it was effectively issued along with the Department's Order regarding BB Development's SLODA permit after Darryl Brown was sworn in as the Commissioner of the Department on February 1, 2011. ARA argues that Mr. Brown's role as the Commissioner of the Department violated federal Clean Water requirements for an authorized state program. Petitioners therefore request a hearing and an opportunity to submit evidence regarding Commissioner Brown's conflict of interest.

Petitioners' sweeping argument that all water-related permits issued while Darryl Brown was Commissioner are invalid is legally and factually incorrect. First of all, Mr. Brown's appointment as Commissioner has not been found to be in conflict with the provisions of the Clean Water Act. Former Commissioner Brown was in the process of producing documents pursuant to an EPA and State request when he resigned on April 26, 2011. Although there were statements that his appointment "may" have been in violation of the Clean Water Act and without additional documentation it "appeared" as though he was not able to serve as Commissioner, there was no conclusion reached by any regulatory authority regarding his status — nor is there likely to be — since he resigned as Commissioner on April 26, 2010. Therefore, as a factual matter this issue is moot.

Furthermore, even if former Commissioner Brown's appointment was in violation of the Clean Water Act provision, he could have delegated responsibility for overseeing the program to others in the Department as has been done in other states such as Alabama [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] see e.g. *State of Alabama v. Byington*, CV 2004-

3178 at 4, May 18, 2006 (“[t]he evidence submitted by Byington establishes that the established remedy for any conflict of interest is recusal, not disqualification from office”)(Attachment F);

[REDACTED]

[REDACTED]

[REDACTED]

With respect to this project, Mr. Brown recused himself from any Department related actions regarding this project. Deputy Commissioner Patricia Aho then delegated responsibility for the permitting of this Project to three Directors within each of the three Bureaus of the Department. *See* Recusal and Delegation Memos (Attachment H). Therefore, even if it was found that appointing Mr. Brown had violated Clean Water Act requirements, as Commissioner he never oversaw any of the permitting aspects of this project, including the MCGP. It is also worth noting that, in any event, BB Development was able to comply with the MCGP simply by submitting an NOI, which does not require detailed Department review. Therefore, even if Mr. Brown had not delegated permitting responsibility for all aspects of this project, his role as Commissioner would have had no impact on BB Development’s ability to obtain a MCGP. The Board should reject ARA’s argument that former Commissioner Brown’s status to serve as Commissioner has any role in this Appeal.

CONCLUSION

For all the reasons stated above, Petitioners’ Appeal lacks merit and should be denied. All of the issues raised by the Petitioners were considered by BB Development and/or the Department and addressed to the Department’s satisfaction. Therefore, the Board should decline to hold a public

hearing, reject Petitioners' Appeal and uphold the Department's Order in its entirety.

DATED: May 6, 2011.

Respectfully submitted,



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