

BB DEVELOPMENT, LLC

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

APPEAL DOCUMENTS

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April 19, 2011

Susan Lessard, Chair
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

By Hand Delivery and Facsimile to 207.287.2814

Re: Appeal of the Order of the Commissioner in the matter of BB Development, LLC,
L-25203-28-A-N and L25203-TE-B-N

Dear Chair Lessard,

On behalf of the Androscoggin River Alliance and eighteen individuals who are residents and/or owners of property in the Town of Oxford, I hereby submit the attached appeal of the decision of the Commissioner of the Maine Department of Environmental Protection on March 17, 2011, granting BB Development, LLC, a water quality certification and permits under the Site Law of Development Act, the Natural Resources Protection Act, and Section 402 of the federal Clean Water Act to construct the Oxford Resort Casino in Oxford, Maine.

Pursuant to the Department and Board's Rules, the appeal period in this matter expires on Weds. April 20, 2011 due to the interceding weekend, Patriot's Day holiday and the state-shut down day. 06-096 CMR ch. 2, § 3. Department staff have concurred with this calculation of time.

I have arranged for both facsimile and hand delivery of the appeal and will also provide a courtesy electronic copy to the Board staff via email.

Sincerely,



Stephen F. Hinchman, Esq., counsel for
Petitioners

Cc: Commissioner Darryl Brown
BB Development, LLC

Enclosure

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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
L25203-TE-B-N)

**APPEAL OF THE DECISION OF THE COMMISSIONER
IN THE MATTER OF BB DEVELOPMENT, LLC, OXFORD RESORT CASINO**

NOW COME the Androscoggin River Alliance and eighteen individuals listed herein who are residents and/or owners of property in the Town of Oxford (“Petitioners”) to appeal the decision of the Commissioner of the Maine Department of Environmental Protection on March 17, 2011 (“Order”) granting BB Development, LLC, a water quality certification pursuant to section 401 of the federal Clean Water Act (“CWA”) and permits under the Site Law of Development Act (“Site Law”), the Natural Resources Protection Act (“NRPA”), and Section 402 of the federal CWA to construct the Oxford Resort Casino in Oxford, Maine.

For the reasons below, Petitioners request that the Board of Environmental Protection (“Board”) reverse the Commissioner’s Order and order a halt to all work not related to studies required as part of a permit application. Going forward, Petitioners ask the Board to assume jurisdiction over this application, require the applicant to submit additional evidence that affirmatively demonstrates that will fully and completely meet all applicable standards law both for Phase I and for the entire Casino project at full build-out, and reopen public comment. Finally, Petitioners request that, if necessary, the Board admit any new evidence that may become available regarding the conflict of interest involving Commissioner Darryl Brown.

I. INTRODUCTION AND SUMMARY

The Oxford Resort Casino (“Casino”) is a proposed \$164 million four-season resort with gaming facilities, 200-room hotel, restaurants, pool, spa, RV park, conference center, tennis courts, and outdoor activities areas. The project will be located on 97.3 acres on Route 26 in Oxford, Maine, and is proposed to be constructed in three phases between this year and 2015.

Phase I involves construction of a 65,000 square-foot building to house a casino, restaurant and other facilities, a main entrance, emergency entrance, two parking areas that will accommodate 1,050 parking spaces, access ways, a 22,395 gallon per day (“gpd”) centralized drinking water supply system using an unknown number of on-site groundwater wells, an engineered subsurface wastewater disposal system sized to treat 22,395 gpd of sewage, a stormwater drainage system, and other associated infrastructure.

Phases II and III are proposed for permitting and construction in 2012-2015 and will include construction of hotel buildings, expansion of the gaming facilities, additional parking, and additional casino buildings, additional restaurants, spa, pool, conference center, outdoor activity facilities and associated infrastructure. The water supply and sewage treatment systems will be expanded to handle 65,000 gpd. To provide a sense of scale for the project, at the national average of 350 gallons of daily water per household,¹ Phase I is equivalent to building water supply and sewage treatment for 64 homes on the Casino's 97.3 acre property. Phases II and III would equate to water and sewer for 186 homes.

Because of its size and nature, the Casino project may substantially affect the environment and quality of life in areas surrounding the project. This is the largest development currently under consideration in Maine and will be located in an undeveloped, rural community with no services. The site is located on Pigeon Hill, immediately upslope of the Hogan, Whitney, Green, and Mirror Ponds and Winter Brook on one side, and the Little Androscoggin River on the other. Petitioners are concerned that groundwater and aquifer withdrawals both at Phase I and at full build-out may adversely affect existing wells and hydrologically connected natural resources, including the ponds, streams and wetlands. Similarly, Petitioners are concerned that subsurface disposal of sewage will pollute the groundwater and may find its way into Hogan Pond just a few hundred feet downslope, and from there into other surface waters. Petitioners are also concerned that stormwater runoff will adversely affect surface waters, and that the project will lead to increased noise, traffic, and lighting, scenic impacts, disturbance of wildlife and wildlife habitat, reduction of property values, and the permanent and unnecessary filling of forested freshwater wetlands.

Under the Site Law, NRPA and the CWA, the Department is obligated to address each of these issues, both for Phase I and for the complete project, prior to issuing a permit. In this case however, in its rush to permit the Casino project, the applicant failed to conduct the studies necessary to affirmatively demonstrate that either Phase I or the full project proposal meets legal standards.

With regard to Phase I, the application was so rushed it omitted major and mandatory elements of a normal Site Law review. For example, project costs are presented only for site stabilization work rather than all aspects of Phase I. Similarly, the applicant failed to submit data sufficient to make any determinations regarding adequacy of water supplies for Phase I or potential impacts to the environment and other users from aquifer drawdowns. And, with regard to NRPA, the developer submitted only a Tier 2 instead of a Tier 3 application, and conducted the vernal pool study during the wrong season.

Rather than require the applicant to correct these errors and omissions, the Department actually accelerated the permit process – issuing an Order approving the application in less than half the statutory review period despite ongoing staff concerns regarding the lack of data. The

¹ See

<http://www.drinktap.org/consumerdnn/Home/WaterInformation/Conservation/WaterUseStatistics/tabid/85/Default.aspx>.

Order simply ignores some gaps, such as financial capacity, and tries to cover up other problems, such as the lack of any groundwater studies, by imposing a series of sequential conditions which defer the applicant's burden to affirmatively demonstrate compliance with the Site Law until it is well into project development. Such conditional approval is an express violation of longstanding Department Rules and is contrary to statute. The Order also illegally authorizes an expired CWA stormwater discharge permit, and fails to conduct the proper NRPA analysis.

The Order is so fundamentally incomplete and contrary to Maine law that it must be rescinded and all work unrelated to permit studies immediately halted. Given the Department's complete abdication of its role of enforcing the Site Law, NRPA and the CWA, the Board must assume jurisdiction going forward and require the applicant to fully and completely meet each standard in law through submission of additional evidence.

Moreover, the myriad errors cannot be cured by re-writing the permit just as it applies to Phase I. At full build-out the Oxford Casino would be a major resort, with substantial water and sewage demands. Yet the Department never evaluated whether the applicant can provide sufficient and healthful water supplies at full build-out without adverse effects on existing users or natural resources; similarly there is no consideration of whether this site can safely handle the large volumes of sewage from a four-season resort at full build-out without polluting groundwater and nearby ponds, or whether the applicant has the capacity to build a wastewater treatment plant or pay for extension of pipelines to a treatment plant in one of the neighboring towns. Nor is there consideration of the impact at full build-out of stormwater runoff on the ponds and the Little Androscoggin River, or of total wetland fill, or of lights, noise, loss of scenic character or other impacts of the full development.

Nothing in the Site Law, NRPA, CWA, or the Department's implementing regulations, allows an applicant to segment a single project into smaller pieces and thereby avoid a full and comprehensive look at the overall impact. To the contrary, these are exactly the concerns and issues that the Site Law and NRPA demand be resolved before a project is permitted and before irreparable harm can occur.

Finally, it remains unclear whether the Department even has authority to issue the required CWA discharge permits or a water quality certification. Under both federal and Maine law, no person can serve as Commissioner if they receive a substantial portion of their income, now or during the prior two years, from a permit holder or permit applicant. 33 U.S.C. § 1314(i)(2)(d); 38 M.R.S.A § 341-A(3)(B). In this case, the project applicant is BB Development, LLC and the lead consultant and permitting agent for BB Development is Main-Land Development Consultants, Inc. ("MLDC"). The president and sole shareholder of MLDC is Darryl Brown. Brown also worked on the Casino project as the site evaluator and consultant to BB Development, and prepared various documents regarding the subsurface wastewater treatment system and other aspects of the project application. Brown was confirmed as Commissioner of the Maine Department of Environmental Protection ("Department") on January 25, 2011. The Order under appeal approving the Casino project was issued less than two months later on March 17, 2011, even though the statutory permit review period did not expire until July 1, 2011. The Order was signed by Bryce Sprowl for Commissioner Darryl Brown.

On Feb. 7, 2011, the Androscoggin River Alliance petitioned the federal Environmental Protection Agency to investigate whether Commissioner Brown's financial relationship with MLDC and BB Development violates federal law requiring state CWA permitting programs to be in compliance with federal conflict of interest standards at all times. On March 17, the EPA ordered Commissioner Brown to provide a response in writing regarding the potential conflict. The deadline for the Commissioner's response has been extended to May 1. Any reissuance of a water quality certification or discharge permit under the CWA should be contingent upon a finding by EPA that the conflict of interest involving Commissioner Brown does not deprive the agency of authority to administer federal Clean Water Act permitting in Maine. Based on the Commissioner's response, the Board may also need to consider whether the conflict of interest violates Maine law. Both of these issues may require Board consideration of new evidence.

II. THE PETITIONERS

The Androscoggin River Alliance ("ARA") is a private non-profit corporation dedicated to the protection and restoration of the Androscoggin River watershed. ARA is headquartered in Lewiston, Maine, and has the mission to "work together with individuals, other organizations, and federal, state, and local governments for a healthy river, good jobs, and strong communities, and to give the citizens of the Androscoggin River Valley a collective voice in the future of the river's policy, planning, and management." Since its formation in 2004, ARA has participated in most Clean Water Act permit proceedings, 401 certifications, water quality standards review, native fish recovery programs, habitat restoration efforts and many other regulatory, legislative and other proceedings involving the Androscoggin River watershed, including the Little Androscoggin River tributary watershed.

ARA filed a petition with the federal Environmental Protection Agency ("EPA") on Feb. 7, 2011 regarding the apparent conflict of interest created by Commissioner Brown's financial relationship with MLDC and the Casino project. ARA submitted comments to DEP as an interested party in the instant case, and as part of those comments provided copies of its filings with EPA for inclusion in the record here. ARA is concerned that the conflict may deprive the Department of authority to administer MEPDES permitting or to make related Clean Water Act determinations. ARA is further concerned that the proposed discharges to surface and subsurface waters, filling of wetlands and wetland habitat, and groundwater and aquifer withdrawals may negatively impact the environment, habitat, and waters that ARA seeks to protect. ARA is also concerned that the project will impact the area's environment and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Terri Marin lives in Oxford, Maine approximately one mile from the proposed Casino development. Her property abuts Green and Mirror Ponds. Marin's property is serviced by a private groundwater well. She is a member of ARA and president of the Green and Mirror Ponds Association, and a volunteer lake monitor. She regularly uses and desires to continue to use Hogan, Whitney, Green, and Mirror Ponds, Winter Brook, and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on the water. Marin chooses to live in the area due to its rural and peaceful character and its undeveloped and natural environment; she often walks the scenic stretch of Rabbit Valley Road between her house and Route 26 and enjoys bird watching and viewing wildlife in the area during these walks and at

other times. Marin submitted comments to DEP during the permit proceedings regarding water quality impacts from the development. Marin is concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter her uses of the waters both for recreation and as a drinking water source. Marin is also concerned that the project will impact her use and enjoyment of her property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Joelle Schutt lives in Oxford, Maine approximately one mile from the proposed Casino property and her home abuts Green and Mirror Ponds. Schutt regularly uses and desires to continue to use Hogan, Whitney, Green, and Mirror Ponds, Winter Brook and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on the water. Schutt chooses to live in the area due to its rural and peaceful character and its undeveloped and natural environment. She enjoys walking Rabbit Valley Road between her house and Route 26. Her home is serviced by a private groundwater well. Schutt is concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter her uses of the waters both for recreation and as a drinking water source. Schutt is also concerned that the project will impact her use and enjoyment of her property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Ronald and Rachel Hamilton live in Oxford, Maine approximately one mile from the proposed Casino property. Their property is serviced by a private groundwater well. The Hamilton's regularly use and desire to continue to use Hogan, Whitney, Green, and Mirror Ponds, Winter Brook and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on the water. The Hamilton's choose to live in the area due to its rural and peaceful character and its undeveloped and natural environment. Rachael Hamilton walks the scenic stretch of Rabbit Valley Road between her house and Route 26 daily and enjoys bird watching and viewing wildlife in the area during these walks and at other times; Ronald enjoys painting the area's scenic landscape. The Hamilton's are concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter their uses of the waters both for recreation and as a drinking water source. They are also concerned that the project will impact their use and enjoyment of their property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

James and Candace Alden own a seasonal cottage on Whitney Pond approximately two miles from the proposed Casino property. The Alden's property abuts Whitney Pond and their water supply is drawn directly from the pond. The Alden's regularly use and desire to continue to use Hogan and Whitney Ponds and associated wetlands for recreational, aesthetic, and other purposes, including recreation in and on the water. The Alden's choose to maintain property in this area because of its rural and peaceful character and are concerned that the presence of the Casino will negatively impact that character and their uses of Whitney and Hogan Ponds.

Richard J. Swanson owns a seasonal cottage on Whitney Pond approximately two miles from the proposed Casino property. Swanson is President of the Whitney and Hogan Ponds Association and his property abuts Whitney Pond. He regularly uses and desires to continue to use Hogan and Whitney Ponds and associated wetlands for recreational, aesthetic, and other

purposes, including recreation in and on the water. Swanson choose to maintain property in this area because of its rural and peaceful character. He is concerned that pollution from the Casino will enter Hogan Pond and from there Whitney Pond via the Hogan Channel, and that any lessening of water quality would detract from his uses of the waters, from his property values, and form his quality of life. He is also concerned that the presence of the Casino will negatively impact his use and enjoyment of his property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Richard Auren owns a seasonal camp on Hogan Pond in Oxford, Maine, which is approximately one mile from the proposed Casino development. Auren's property is serviced by a private groundwater well. He regularly uses and desires to continue to use Hogan Pond and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on the water. Auren values the area due to its rural and peaceful character and its undeveloped, clean, and natural environment. Auren is concerned that pollution from the Casino project will harm Hogan Pond, his property and property values, his uses of the Pond, and his drinking water, and that the project will impact his use and enjoyment of his property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts. Auren submitted comments to DEP during the permit proceedings regarding the potential for pollution of Hogan Pond from the Casino Project.

Carol Ann and Larry LaRoche LaBossiere, live in Oxford, Maine approximately one mile from the proposed Casino property. The LaBossiere's property abuts Green Pond; they regularly use and desire to continue to use Hogan-Whitney-Green-Mirror Ponds, Winter Brook and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on all of these waters. The LaBossiere's chose to live in the area due to its rural and peaceful character. Their home is serviced by a private groundwater well. The Hamilton's are concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter their uses of the waters both for recreation and as a drinking water source. They are also concerned that impacts from the project will lower their property values and negatively impact their use and enjoyment of their property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Brendan McMorrow is a resident of Freeport and a property owner and summer resident at Green Pond in Oxford. McMorrow is a member of the Green and Mirror Pond Association. He was drawn to Green Pond because of the water quality, peace and tranquility, and the opportunity to connect with nature. McMorrow feels safe walking and riding his bicycle along Rabbit Valley Road with his children and enjoys sitting on the deck at night looking up at the night sky and listening to the quietness of rural Maine. McMorrow is concerned that the Casino project would disturb that peace and tranquility and will impact his use and enjoyment of Green Pond, his property, and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Carol Perkins owns a home in Oxford, Maine approximately one mile from the proposed Casino development. Her property abuts Green and Mirror Ponds and she draws domestic water from the pond. Perkins uses and desires to continue to use Hogan-Whitney-Green-Mirror Ponds, Winter Brook and associated wetlands for recreational, aesthetic and other purposes, including

recreation in and on all of these waters. Perkins values the area due to its rural and peaceful character and its undeveloped and natural environment; she often walks Rabbit Valley road between her house and Route 26, is a birdwatcher and enjoys viewing wildlife in the area.

Perkins is concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter her uses of the waters both for recreation and as a drinking water source. Perkins is also concerned that the project will impact her use and enjoyment of her property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Robert Benson and Julie Cameron own a seasonal camp in Oxford, Maine approximately one mile from the proposed Casino property. The camp property abuts and draws its drinking water from Green Pond. They regularly use and desire to continue to use Hogan-Whitney-Green-Mirror Ponds, Winter Brook and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on the water. They value the area due to its rural and peaceful character and are concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter their uses of the waters both for recreation and as a drinking water source. They are also concerned that the project will impact their use and enjoyment of their property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

Mary and Austin Taylor own a home on Route 26 in Oxford, Maine near the Little Androscoggin River. This property is adjacent to other family property in which Mary Taylor has an interest, which is bounded by the Little Androscoggin River. They use and desire to continue to use the Little Androscoggin River near their home and between Oxford and Mechanic Falls for recreational, aesthetic and other purposes, including recreation on the water. They choose to live in the area due to its rural and peaceful character. Also, the Taylor's home is connected to town water serviced by the Oxford Water District ("OWD"). They pay a quarterly fee to the OWD for this water. One of the source wells for the OWD is in the vicinity of Hogan Pond. Mary Taylor submitted comments to DEP as an interested person in the permit proceedings before DEP regarding the impact of the project on the public water supply, wells in the area, and groundwater. The Taylors are concerned that the Casino project will result in pollution to these surface waters and to groundwater including aquifer source water, and that it could impact and deter their uses of the waters both for recreation and as a drinking water source. They are also concerned that the project will impact their use and enjoyment of the area and their quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

John and Evelyn Sylvester own a seasonal camp in Oxford, Maine approximately one mile from the proposed Casino property. The camp property abuts and draws its domestic water from Mirror Pond. They regularly use and desire to continue to use Hogan-Whitney-Green-Mirror Ponds, Winter Brook and associated wetlands for recreational, aesthetic and other purposes, including recreation in and on the water. They value the area due to its rural and peaceful character and are concerned that the Casino project will result in pollution to these surface waters and to groundwater, and that it could impact and deter their uses of the waters both for recreation and as a drinking water source. They are also concerned that the project will

impact their use and enjoyment of their property and quality of life due to noise, lights, traffic, loss of scenic character, air pollution and other impacts.

III. THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND CONDITIONS OR APPROVAL CHALLENGED IN THIS APPEAL

Petitioners object to each finding of fact to the extent that the finding fails to provide a description or analysis of the impacts of the project at full build out. In addition Petitioners object to the following specific findings:

1. Project Description: This finding incorrectly states that the Department approved Maine Construction General Permit NOI # 51672.

2. Financial Capacity: This finding omits the full cost of Phase I.

5. Scenic Character: This finding fails to include recommendations from Department staff that only drought tolerant landscaping be used, unless and until the Applicant demonstrates the capacity to provide adequate water supplies for both public use and irrigation.

8. Buffer Strips: This finding incorrectly incorporates a 100-foot buffer from the thread of the stream instead of from the wetland boundary or normal high water mark.

10. Stormwater: This finding fails to provide adequate protection to Hogan Pond and connected waters, which are designated as lakes most at risk from new development.

11. Water Supply: This finding and incorporated conditions violate Site Law for the reasons stated in this appeal.

12. Groundwater: This finding and incorporated conditions violate Site Law and NRPA for the reasons stated in this appeal.

13. Wastewater Disposal: This finding violates Site Law and NRPA for the reasons stated in this appeal.

15. Flooding: This finding fails to consider whether discharge of stormwater runoff from the project will contribute to flooding of off-site waters.

16. Wetland Impacts: This finding violates Site Law and NRPA for the reasons stated in this appeal.

With regard to the Department's conclusions pursuant to 38 M.R.S.A. sections § 480-A *et seq.*, Petitioners object to all of the Conclusions for the reasons stated in this appeal.

With regard to the Department's conclusions pursuant to 38 M.R.S.A. sections § 481 *et seq.*, Petitioners object to all of the Conclusions and Conditions for the reasons stated in this appeal.

With regard to the Department's Approval subject to the enumerated Conditions, Petitioners object to all of the Conditions for the reasons stated in this appeal.

The applicant has failed to affirmatively demonstrate that there will be no unreasonable adverse effect on air quality due to non-point emissions from the estimated 4,000 one-way trips per day of increased traffic generated by the Casino. *See* 06-096 CMR ch. 375, § 1(B)(2), 1(C)(2) (requiring modeling to demonstrate no adverse environmental effect on air quality). Likewise, the Order failed to consider air quality impacts from the overall project.

IV. GROUNDS FOR THE APPEAL

A. VIOLATIONS OF THE SITE LAW OF DEVELOPMENT ACT, 38 M.R.S.A § 481 *ET SEQ.*

1. The Applicant Has Failed to Affirmatively Demonstrate That it Has the Financial Capacity For All Aspects of Phase I or For All Aspects of the Complete Project.

In order to ensure that a developer has the financial capacity to meet state pollution control standards, the Site Law of Development requires that an applicant affirmatively demonstrate that it “has the financial capacity to construct, operate, and maintain *all aspects of the development*, and not just the pollution control aspects.” 06-096 CMR ch. 373, § 1(A) (emphasis added). This is due to a concern that “if the developer's funds run low or run out toward the end of development, the pollution control aspects of the development may be slighted.” *Id.* (note). To meet the financial capacity standard, 38 M.R.S.A § 484(1), the applicant must submit evidence showing “[a]ccurate and complete cost estimates of the development”, “[t]he time schedule for construction and for satisfying pollution abatement measures,” and documentation showing that the developer has assured access to all funding required to complete the project. *Id.* ch. 373, § 1(B). The applicant has utterly failed to meet these requirements both for Phase I and for the project at full build-out.

(a) The application omits significant costs for Phase I.

The applicant's Summary of Opinion of Probable Site Costs: Phase 1 estimates the cost of site stabilization work for Phase I at \$6,746,000 – but omits all other costs. (*App.* § 3.02.) As noted in the Key Private Bank letter regarding availability of financing,

[t]he estimate includes site work from clearing and grubbing to final site stabilization. The estimate includes earthwork for on-site building areas, but does not include the building structures nor the interior work. The estimate does not include off-site aerial power improvements, nor offsite traffic improvements, should they become necessary.

(App. § 3.03). No other cost estimates or any other financial information are provided in the application; nor were Petitioners able to discover additional financial information in their search of the record after the permit was issued. The applicant's failure to provide plans, designs, a construction schedule or budget for the buildings and interior work, including the casino itself, may be due to the fact that it does not yet have a gaming partner with adequate financial resources as required by 8 M.R.S.A § 1016. Lack of a gaming partner explains the applicant's failure to develop a design for the casino. It does not, however, excuse its failure to meet the financial capacity standard under the Site Law; rather it reinforces Petitioners concerns that this application was filed too soon and without the evidence necessary to affirmatively demonstrate that the applicant has the financial resources to complete *all aspects of the project*.

In addition, the financial information for the Phase I site work is also incomplete. The cost of utilities is not broken down by activity or construction schedule. (App. § 3.02.) Given that the applicant does not have a water supply use and operations plan, has not determined how many wells it will drill, the level of treatment necessary, or whether it will need to provide mitigation for other users or affected water-related natural resources, it is impossible to determine whether the applicant's estimated cost of utilities is complete or accurate. For this reason as well, the Department's Order was premature.

In summary, at best the applicant has only submitted financial information about phase one of Phase I, but even that is incomplete. Accordingly, because the applicant has failed to provide "accurate and complete cost estimates of the development," 06-096 CMR, ch. 373, § I(B), including the cost of the water treatment system and mitigation, as well as building structures, interior work, gaming equipment, off-site expenses, and other costs associated with construction of Phase I, it has failed to meet its threshold obligation to provide complete information about total costs of that phase.

The Department, unfortunately, simply ignored the gaps in the application. Despite the fact that the Order defines Phase 1 of the project to include a 65,000 foot building and entryways (Order at 1), the Department failed to acknowledge that the cost estimates submitted by the applicant omitted the cost of construction of the building. (Order at 2.) Thus, Department's finding that the "total cost of the project is estimated to be \$6,746,000" is inaccurate and directly contradicted by the only competent evidence in the record. (*Id.*) Thus, the Department's finding that the applicant met the financial capacity standard is also reversible error. (Order at 13.)

(b) The application omits any information about costs and financial capacity for Phases II and III.

Additionally, the applicant has failed to even attempt to affirmatively demonstrate that it has the financial capacity to meet Site Law standards for all three phases of the project. This is particularly important with regard to long-term water supply and wastewater treatment, which may be very expensive propositions. As the Supreme Judicial Court noted in *In re: Maine Clean Fuels, Inc.*, "it is clear that the ability to finance the cost of meeting pollution standards [is] inexorably a part of the ability of [the applicant] to obtain *total financing*..." 310 A. 2d 736, 755 (1973) (emphasis added). In this case, the applicant has failed to include the complete cost of

pollution control that includes both Phase I and full build-out. Barring evidence in the record to affirmatively demonstrate sufficient financial capacity to meet these costs for the full project, DEP cannot approve Phase I. *See* 06-096 CMR, ch. 372, § 10 (“Approval of phases ... shall be based on compliance of the entire proposed development with the standards of the Site Location Law.”). *See also id.*, ch. 372, § 1; *id.* ch. 373, § 1(A).

Here, the record indicates that the applicant is working with local governments and the Oxford Water District to develop plans to extend both public drinking water and sewage treatment to the project area. Thus, the applicant is clearly aware that provision of utilities, and particularly sewage treatment, will require extension of services, that it will be very expensive and that this may affect the overall viability of its proposed resort. But the application fails to provide any cost estimates, construction schedules, or proof of financial capacity to make the necessary improvements or utility connections. Given the distances involved and the very significant costs for extension of public water and sewer services, these omissions are fatal to the applicant’s case.

2. The Applicant Has Failed to Affirmatively Demonstrate That it Has Adequate and Healthful Water Supplies

Under the Site Law, the DEP must determine that the applicant can provide sufficient and healthful water supplies for a proposed project. 38 M.R.S.A § 484(6); 06-096 CMR ch. 373(5)(B). If the water supplies are to be pumped from groundwater, DEP must consider the direct and cumulative effects of groundwater withdrawals on water-related natural resources *and* existing wells:

[T]he 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. In making findings under this paragraph, the department shall consider both the direct effects of the proposed water withdrawal and its effects in combination with existing water withdrawals.

38 M.R.S.A § 484(3)(F).

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.

(a) The applicant failed to meet its burden to show that there are adequate water supplies for Phase I.

The applicant has failed to “affirmatively demonstrate” that it has made adequate provision for sufficient and healthful water supplies. 06-096 CMR ch. 373(5)(B). The

application does not identify the number, location, or yield of groundwater wells necessary to provide adequate water supplies; rather it states that the applicant will “drill a well and perform tests concurrent with the early review process” (*App.*, § 15(A)(2)) and that “[w]ith successful well data, a more complete supply system can be designed and submitted.” (*App.*, § 16.1 at 1.)

Lacking any well data, the applicant’s demonstration of adequate supplies relies solely upon a simple calculation that the “annual water requirement for the first phase (8,174,175 gallons) is only slightly higher than the estimated annual bedrock recharge (8,138,228 gallons).” (*App.* § 16.02 at 4.) This water budget is based on an estimated groundwater infiltration and recharge rate for a 97.3-acre property that experiences 44 inches of rain annually. (*Id.*) However, because Phase I of the project would create 12.90 acres of new impervious area, and would include a total developed area of 27.63 acres, (*App.* §12(A) at 1), infiltration and recharge will not occur on the entire 97.3 acres. Rather, because there is a total of 27.63 acres of impervious surface in Phase I, recharge rates will in fact be at least 28 percent lower than water withdrawals. Thus, what the applicant has actually demonstrated is that the proposed water withdrawal rates for Phase I substantially exceed available groundwater supplies and therefore are not sustainable. The project’s water supply problems will substantially increase with future development, because Phases II and III will increase demand while further reducing infiltration and recharge of the aquifer due to the expansion of impervious surfaces.

Even assuming that supply and demand were in balance, however, the applicant’s expert concedes that, based on the lack of any data, it still cannot guarantee or even predict the adequacy of water supplies for Phase I:

It is clear that water use by the casino will affect groundwater beyond the property boundaries. The underlying granitic bedrock has an aquifer within a complex system of fractures that are impossible to predict without an on-site pumping/monitoring well test and until that testing is done, we cannot make any predictions on the effects of drawdown *on-site or off-site*.

(Sweet Associates, *Response to Review Memorandum Dated Dec. 30, 2010 Oxford Resort Casino, Oxford*, at 1 (Jan. 5, 2011) (item #8) (emphasis added).)

Therefore, because the application lacks any data about groundwater supplies, because the application errs in concluding that groundwater use in Phase I was sustainable based on estimated recharge rates that failed to consider the total developed area, and because the applicant’s expert conceded that it cannot predict the *on-site* impacts of proposed groundwater withdrawals, applicant has failed to meet its burden to affirmatively demonstrate that there are adequate and healthful water supplies for Phase I of the casino project.² For the same reasons, the applicant has also failed to meet its burden to affirmatively demonstrate that groundwater

² The Order is further in error because the findings with regard to scenic impacts conflict with the Department staff recommendations to use only drought tolerant landscaping until and unless the applicant affirmatively demonstrates that it has adequate water supplies for both public use and irrigation.

withdrawals will not adversely effect on-site or off-site water-related natural resources (such as hydrologically connected wetlands) or off-site existing uses (such as existing water supply wells).

(b) The Order illegally applied conditions of approval as a substitute for the applicant's burden of proof to demonstrate that it meets the Site Law's water supply standard.

DEP acknowledges this fatal flaw in the application. The Department Order expressly concludes that "an initial pump test of on-site wells on the applicant's property is necessary to determine whether adequate yield can be obtained without unreasonable adverse impact to off-site water supplies." (Order at 8.) Under DEP rules, where such information is lacking, the applicant should be required to perform on-site and/or off-site testing as part of the permit process:

If there is reasonable doubt that a sufficient and healthful water supply can be provided by means of on-site wells, the following may be required:

- (i) water from wells located in close proximity to the development site be tested for potability; and/or
- (ii) a test well be dug or drilled on the development site and a report prepared indicating the volume and potability of water obtained from the well.

06-096 CMR ch. 373, § 5(B)(2). In this case, however, in order to meet the applicant's deadline, the normal process was abandoned. John Hopek, with the DEP's Division of Environmental Assessment, reviewed this part of the application. As explained by Hopek's second memorandum reviewing the groundwater feasibility analysis,

The normal process for a project requiring a large volume of on-site water would be for pump tests and other preliminary exploration to have been conducted prior to submission of the application. This would allow the applicant substantially greater certainty in the design of the water system to serve the facility and evaluation of the potential need for off-site water or other measures. However, the applicant chose not to develop this information prior to submission of the application, and the present application actually contains less information than a typical application proposing this volume of extraction. While there may have been valid reasons for this, it does reduce the amount of information available to the Department to determine that water can be provided to the development in the volume determined to be necessary without adverse impact on offsite or onsite resource or offsite wells. Consequently, given the applicant's deadline, it may be necessary to approach this in a series of sequential conditions, rather than through a single condition or no special condition at all, which would actually be the normal and preferred procedure.

(John Hopek, *Review Memorandum* at 2 (Feb. 6, 2011) (item #6).) DEP Project Manager Beth Callahan later informed the applicant: “Because I want to try to get this permit out the door ASAP for you, some or most of the comments may end up as conditions of approval rather than asking you to compile data now.” (Email from Beth Callahan, DEP, to Bob Berry, MLDC, Feb. 9, 2011 3:33 pm.) Ultimately, the Department Order, issued a month later, conditioned its findings of adequate water supplies and no undue adverse effect on groundwater upon submission of a (yet to be designed) aquifer drawdown test and then, based on those results, development of an on-site well use and monitoring plan that includes provisions for mitigation of impacts to offsite wells. (Order at 8-9.)

Approval based on these conditions blatantly violates DEP rules, which strictly limit use of conditional permits as follows:

[T]erms and conditions shall address themselves to specifying particular means of satisfying minor or easily corrected problems, or both, relating to compliance with the Site Location Law and shall not substitute for or reduce the burden of proof of the developer to affirmatively demonstrate to the Board that each of the standards of the Site Location Law has been met.

06-096 CMR ch. 372, § 2. Here, the approved conditions do not address minor or easily corrected problems, *see In re: Belgrade Shores, Inc.*, 371 A.2d 413, 416 (Me. 1977), nor are they precautionary measures imposed as additional insurance for a project that the Department has already determined meets standards. *In re Ryerson Hill Solid Waste*, 379 A. 2d 384, 387-88 (Me. 1977). To the contrary, the Order imposes a series of sequential conditions. The first condition is the design and implementation of an aquifer drawdown study, which is necessary to show that adequate water supplies are available. The second condition is, based on the results of that study, submission of a use and monitoring plan that will provide detailed information on each water supply well (location, depth, yield, logs, etc.) and provisions to both use neighboring wells if necessary and ensure that there will be no adverse effects to off-site wells. (*Order*, at 8-9.) As Hopek and Callahan candidly acknowledge, these conditions – which involve the core data necessary to address the Site Law’s water supply and groundwater standards – are expressly used as temporary substitutes to make up for the applicant’s failure to affirmatively demonstrate it meets standards. This is impermissible under DEP Rules, ch. 372, § 2.

Conditional approval is also illegal in this case because it does not involve a situation, as in *Belgrade Shores*, where DEP had a choice between a series of denials pending correction of minor deficiencies, or conditional approval. 371 A.2d 413, 416. Here, the only reason that appears in the record to justify use of these conditions was *to meet the applicant’s deadline*. There is no indication that there was insufficient time prior to expiration of the statutory permit review deadline on July 1, 2011 (a full three and a half months later) to conduct the necessary tests or that DEP was faced with a choice to conditionally approve or deny the project. In fact, correspondence between DEP and the applicant indicates that such testing was and is ongoing. (*See* Email from Bob Berry, MLDC, to Beth Callahan, DEP, March 4, 2011 10:17 am; Beth Callahan, handwritten meeting notes, March 22, 2011, discussing “aquifer test protocol.”). There is no reason why DEP could not have waited for the necessary data – or extended the review period until the applicant provided the necessary data consistent with its burden. Thus,

the use of conditions in lieu of the statutorily required determinations of the Site Law standards is unwarranted and illegal.

Even if such conditions were permissible, the Department Order also violates the Site Law because the conditions utterly fail to address critical issues such as the applicant's financial capacity and ability to acquire title, right and interest to alternate water supplies if the drawdown tests show that inadequate water supplies are present, or indicate that funding is needed to mitigate impacts to offsite wells. Likewise, the conditions fail to address potential impacts that excessive groundwater withdrawals may cause to on-site or off-site water-related resources, such as hydrologically connected wetlands, streams and ponds. 38 M.R.S.A § 484(3)(F).

In summary, because DEP's conditional approval does not involve minor or easily corrected problems, but rather substitutes for and effectively reduces the applicant's burden of proof to show that there are sufficient and healthful water supplies and that there will not be undue adverse effects to water-related natural resources or existing groundwater users, the Department Order should be vacated and remanded to DEP for a proper and full analysis.

3. The Order Failed to Consider All Phases of the Project.

The Legislature's concern in enacting the Site Law of Development Act was "that many developments because of their size and nature are capable of causing irreparable damage to the people and the environment on the development sites and in their surroundings..." 38 M.R.S.A § 481. It directed DEP to apply the Site Law standards to "insure that such developments will be located in a manner which will have a minimal adverse impact on the natural environment within the development sites and of their surroundings and protect the health, safety and general welfare of the people." *Id.*

In order to ensure that the "size and nature" of a project do not cause irreparable harm to the environment or public health, safety and general welfare, DEP rules require submission of present plans for all phases. 06-096 CMR, ch. 372, § 10. The rules further state that,

[i]n 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.

Id. (emphasis added). *See also id.* ch. 371, § 1 (requiring consideration of the size, location, and nature of the proposed development in relation to "potential primary, secondary, and cumulative impacts of the development on the character, quality, and uses of the land, air, and water on the development site and on the area likely to be affected by the proposed development" and upon public health, safety, and general welfare).

Alternately, the applicant could seek a planning permit pursuant to 38 M.R.S.A § 485-A(1-C) (requiring DEP to adopt rules to permit "long-term construction projects" that allow "approval of development within a specified area and within specified parameters such as

maximum area and groundwater usage, although the specific nature and extent of the development or timing of construction may not be known at the time a permit for the long-term construction project is issued”). Under DEP’s planning permit provisions, these rules only apply to large developments, including resorts, that will be constructed over a significant period of time. 06-096 CMR ch. 380, § 1. Assuming the Oxford Resort Casino qualifies – and it may not since the specific nature, extent and timing were known at the time of application – the planning permit provisions also require affirmative demonstration that the proposed project will comply with each Site Law criterion at full build out, including maximum groundwater use, wastewater treatment at full build-out, solid waste disposal, groundwater protection, stormwater management, etc. *See id.*, § 3.

Here, applicants propose a four-season resort with casino, hotel, pool, spa, restaurants, RV park, conference center and outdoor activities areas. (*App.* § 1(A); *App.* Drawing 06 P 1.1, Phasing Plan Map.) According to the applicant’s brochure distributed at the required public informational meeting, the total project cost is \$164 million and construction will occur in three phases between now and 2015. The Department Order, however, looks narrowly and solely at Phase I. (*See* Order at 1 “Project Description.”) Even though present plans for the full project are known, no attempt is made to evaluate whether, given its “size and nature” the overall development is “located in a manner which will have a minimal adverse impact on the natural environment within the development sites and of their surroundings and protect the health, safety and general welfare of the people.” 38 M.R.S.A § 481. Nor does the Department Order make the required findings with respect to “cumulative impacts,” 06-096 CMR, ch. 372, § 1, or whether the “entire proposed development” will comply with the standards of the Site Law. *Id.* § 10.

This complete abdication of the agency’s responsibility to consider whether the overall project, including secondary and cumulative impacts, meets the requirements of Site Law renders the Department Order invalid. As the explanatory note in the DEP rules states:

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.

06-096 CMR, ch. 372, § 10. Accordingly, the Department Order should be rescinded and the application returned for development of evidence that affirmatively demonstrates that the overall project is located in a manner that will have minimal adverse impact of the natural environment and the public, health, safety and welfare, and that each phase and the primary, secondary and cumulative impacts of the overall project will comply with *each* Site Law standard. Alternately, if it qualifies, the applicant may resubmit an application pursuant at full build out under the planning rules in Chapter 380.

(a) The Applicant failed to show and the Order failed to find that there are adequate water supplies for entire project.

The review of the overall project and potential cumulative impacts of the overall project is particularly critical with regard to water supply and wastewater disposal. This is a very large project – the biggest currently proposed in the state – and the administrative record indicates that locating a project of this size in an undeveloped rural area with no public drinking water services or a wastewater treatment plant may create substantial environmental and economic problems for the area. These are the very concerns that the Site Law requires be resolved *prior* to construction.

Estimated water demand at full build out of the Oxford Casino is 65,000 gpd. (App. § 16.02 at 4.) Therefore, pursuant to DEP Rules, 06-096 CMR, ch. 372, §§ 1 and 10, approval of construction for Phase I requires a determination that the applicant can also meet Site Law standards considering cumulative impacts at full build out with water demand of 65,000 gpd. Specifically, the applicant has an affirmative burden not only to show that sufficient and healthful water supplies at full build-out are available and will not adversely affect water-related natural resources and existing groundwater uses, but also that it has the financial capability to provide the necessary water supplies and to protect other resources. 06-096 CMR, ch. 373, § 1.

In this case, however, the applicant's groundwater expert has conceded that the proposed location may be incapable of supplying the estimated water demand that would occur at full build out:

The estimated water supply requirement for full site development is 65,000 gallons of water per day or 23,725,000 gallons of water per year. Based on the calculations shown above, it is unlikely that this amount of water can be withdrawn from the bedrock aquifer without affecting nearby properties. The only possible solution to this issue would be to drill deeply cased wells, which intersect fractures that are hydrologically connected to the sand and gravel aquifer associated with Whitney/Hogan Ponds and the Little Androskoggin River basins. Theoretically, a deeply cased well should greatly increase the volume of water that can be extracted from the bedrock aquifer, thereby causing an insignificant water level drawdown in the bedrock aquifer over an area much larger area than the site itself.

(App. § 16.02 at 4.). Failure to consider long-term water supplies is even more problematic given that the applicant provided no data whatsoever for any phase of the project. Department staff raised this concern, but it was ignored and not included in the final permit. As Hopek noted in internal comments, "In general, the jump from Phase I to full build out is too big to let it go without a look at the performance of their water systems, particularly in the absence of on-site well performance." (Email from John Hopek, DEA, to Beth Callahan, DEP Project Manager, Jan. 2, 2011, 1:28 am.)

Issues related to water supply at full build out are further complicated by the fact that the closest public water supply lines are miles away. The applicant states that while it has met with

the Oxford Water District, it was unable to formulate a plan to fund and design a service extension, and therefore an “extension is not guaranteed at this time and is not part of this application.” (*App.* § 16 at 1.) Thus, unless and until the applicant provides evidence that it has adequate groundwater supplies onsite, or that it has the financial capability to secure adequate water supplies from an alternate source, such as the Oxford Water District, it has failed to meet its burden of affirmatively demonstrating that it can provide sufficient and healthful water supplies for the entire project without adverse affects on natural resources or existing users.

This is exactly the type of determination that the Site Law requires to be made before a project starts and before permanent and irreversible harm occurs: unless the applicant can show adequate water supplies for the full project, this may be the wrong location and the DEP should deny the permit. 06-096 CMR, ch. 372, § 10. *See also id.* ch. 380, § 3(F) (requiring demonstration of adequate water supplies at full build out).

(b) The Applicant failed to show and the Order failed to find that there is adequate capacity on the site for wastewater disposal for entire project.

DEP also failed to review overall or cumulative impacts of wastewater disposal for the project at full build-out. As with drinking water, the Department Order makes findings only with regard to Phase I, even though the applicant submitted present plans showing estimated wastewater flow for the entire project at 65,000 gpd.

The Phase I proposal includes a 22,395 gpd subsurface wastewater disposal system, including a pre-treatment system to reduce nitrate levels, two 15,000-gallon septic tanks, and a 34,672 square foot disposal and leaching field with over 1,700 advanced sand filter treatment modules. (*App.*, § 17, Sweet Associates, *Hydrogeological Investigations & Wastewater Mounding And Transmission Analysis* (Dec. 10, 2010) at 1.) Because the system will be located on a hillside with a 6.5 percent slope with near-surface groundwater flowing west and downslope towards Hogan Pond, (*id.*), the applicant proposes to fill an approximately 80,000 square foot area beside, below and downslope of the leach field in order to prevent wastewater breakout. (*Id.* at 6.) In order to prevent leached wastewater from moving too quickly through the downslope fill extensions, 100 feet below the disposal field must be filled with specialized materials having a hydraulic conductivity limited to 50 feet/day and 20 feet/day. (*Id.*)

Even with the above design criteria, the applicant and DEP were sufficiently concerned about the adequacy of the design that they included a series of monitoring wells located downslope of the leach field which will be tested regularly to ensure there are no surface breakouts and that groundwater pollution does not migrate beyond the property boundary. (*Mounding Analysis* at App. A.) The downslope edge of the leach field (but not the fill extensions) is 880 feet from the site boundary. (*App.*, § 17, Sweet Associates, *Nitrate-Nitrogen Impact Assessment* (Dec. 10, 2010) at 2.)

The record contains no indication, however, that DEP or the Department of Health and Human Services reviewed whether the site has sufficient capacity to handle the tripling of wastewater flows that would occur at full build-out. Nor is there any analysis of whether

construction of a full 65,000 gpd subsurface wastewater system on the side of Pigeon Hill might cause secondary or cumulative impacts, such as pollution of downslope resources like Hogan Pond or the significant (and heavily used) sand and gravel aquifer bordering Hogan Pond. (*Id.* at App. A.)

This puts the developers in a bind. As noted in the application, “[t]his project will not utilize the municipal wastewater system. The closest system to this site is miles away.” (*App.* § 17(C)). Nor does the applicant intend upon using a lagoon or storage treatment system, or any sort of surface discharge. (*App.* § at 17(D)-(E).) This leaves no other options for wastewater treatment at full build-out except subsurface disposal. Therefore, consistent with Department regulations, approval of Phase I cannot go forward unless and until the applicant can affirmatively show that the site has the ability to treat 65,000 gpd through subsurface disposal. 06-096 CMR, ch. 372, § 10 (“Approval of phases . . . shall be based on compliance of the entire proposed development with the standards of the Site Location Law.”).

Again, this is exactly the type of determination that the Site Law requires to be made before a project starts and before permanent and irreversible harm occurs: unless the applicant can show adequate capacity to treat wastewater for the full project, this may be the wrong location and the DEP should deny the permit. *Id.* See also *id.*, ch. 380, § 3(F) (requiring “demonstration that either the wastewater treatment plant in the area has capacity to handle the maximum volume of wastewater to be generated at full build-out, or that the site soils have the capacity, in the areas proposed for development, to infiltrate the sanitary wastewater to be generated by the parcel at full build-out, without unreasonable adverse impact on surface water quality or groundwater quality”).

4. The Order Failed to Consider Impacts to Air Quality.

The Order failed to consider impacts to air quality from either non-point sources (traffic generated by the facility) or point sources (emissions from the facility during Phase I and at full build-out). According to the applicant’s traffic consultant, the project will result in over 4,000 one-way trips per day.³ A Department of Transportation permit is triggered at 100 trips per day. While DOT and not DEP is responsible for traffic planning, pursuant to the no adverse effect on air quality standard in Site Law, the applicant does have the burden to “affirmatively demonstrate that there will be no unreasonable adverse effect on air quality, including information such as the following, when appropriate . . . (2) Evidence that increased traffic generated by the development will not significantly effect the ambient air quality.” 06-096 CMR, ch. 375, § 1(C). Here, the applicant utterly failed to provide *any* evidence regarding the impact of non-point sources on ambient air quality.

Additionally, the Department looked only at point-source emissions for Phase I, rather than emissions for the entire development. For the reasons noted above, segmentation of the permit review into smaller phases to avoid triggering Site Law standards is impermissible.

³ To the extent that additional evidence is necessary to consider this claim, Petitioners request that the Board take “judicial notice” of the applicant’s DOT Traffic application.

B. VIOLATIONS OF THE NATURAL RESOURCES PROTECTION ACT, 38 M.R.S.A. § 480-A,
ET SEQ.

The Order's findings of fact and conclusions of law regarding wetlands impacts are in error because the Department incorrectly conducted a Tier 2 NRPA permit review even though the Applicant's submission shows that total impacts from the multi-phased Casino project exceed the Tier 3 project threshold. Pursuant to NRPA, "[i]n determining the amount of freshwater wetland to be altered, all components of a project, including all phases of a multiphased project, are treated together as constituting one single and complete project." 38 M.R.S.A § 480-X(2). "If the project as a whole requires 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." *Id.*

The Tier 2 review process applies to any activity that involves a freshwater wetland alteration up to one acre, or 43,560 square feet. *Id.* § 480-X (2)(B). The Tier 3 review process applies to any activity that involves a freshwater wetland alteration of 43, 560 feet, or more. *Id.* § 480-X (2)(C). Applicant's stated total area of altered wetlands for Phase 1 is 42,430 square feet. This area is depicted on Wetlands Plan S1.3, rev. 02-01-11, which only represents wetlands impacted by Phase 1. The development phasing plans, depicting Phase 1, Phase 2 and Phase 3, indicate that the total altered freshwater wetlands for all phases will be greater than 43,560 square feet. Therefore, since the law requires all phases to be treated as one project when determining the total area of wetlands to be altered, a Tier 3 review is required.

The Order does not authorize review under the lesser Tier 2 standards, nor does it provide any discussion, analysis or justification explaining why the project should be reviewed under the lesser Tier 2 standards. In order to determine compliance with the NRPA statutory standards, a Tier 3 review requires submission of detailed plans, including an activity description which requires dimensions of all permanent and temporary structures including, if the proposed activity is part of a larger or multi-phased project, a description of the larger project including all phases, and detailed construction plans showing each step of construction, timing of each step, materials to be used, and any activity phasing. *See* Maine DEP, Application for a Natural Resources Protection Act Permit, at 43. To correct this error, the Order must be vacated and the application remanded and reviewed in light of plans for development of all phases of the Casino project.

In addition, the Order's findings of fact and conclusions of law regarding avoidance of wetland impacts is in error because the Department did not review available and practicable alternatives that would be less damaging to the environment. BB Development has a first right of refusal on five adjacent properties to the proposed Casino location, and officers of BB Development have stated that they also own an option to purchase these properties. Given that these additional contiguous properties are available to the developer, a hybrid on-site/off-site alternative could have been developed using a larger land base in order to avoid and minimize

wetlands impacts. The Order must be remanded and the application reviewed in light of this alternative.⁴

The Department's determination that the proposed activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic habitat, travel corridor, freshwater estuarine or marine fisheries or other aquatic life is error. In the case of vernal pools, the Department had insufficient evidence to make that determination because the vernal pool survey was done outside the required survey period despite the fact that the applicant was directed to perform the study during the appropriate identification period and the statutory review period included more than adequate time to conduct the survey during the spring months when vernal pools can be conclusively identified. *See* Letter from Department of Inland Fisheries and Wildlife (Scott Lindsay) dated January 26, 2011 to Beth Callahan, Maine Department of Environmental Protection: "Since the timing of the surveys is outside the survey period required for vernal pool surveys, it cannot be conclusively determined if vernal pools are present or not." *See also*, Letter from Maine Department of Environmental Protection dated August 9, 2010 to Robert Berry, Main-Land Development Consultants, Inc., sent in response to MLD's request for Significant Wildlife Habitat maps: "Please note that GIS data layers for Vernal Pools that have already been identified are currently available; however, the project area should be screened by a qualified professional during the appropriate identification period to determine if significant vernal pools are present."

In the case of wetlands associated with an unnamed tributary stream to Hogan Pond, 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. In a letter from Department of Inland Fisheries and Wildlife (Brian Lewis, Fishery Specialist) dated September 8, 2010 to Robert Berry, IFW outlined the department's regional riparian buffer policy:

Stream systems are vulnerable to environmental impacts associated with increased development and encroachment. If present, this project should be sensitive to these resource issues by including provisions for riparian buffers and minimizing any other potential stream impacts. Our regional buffer policy requests 100 foot undisturbed buffers along both sides of any stream or stream-associated wetlands. Buffers should be measured from the upland wetland edge of stream-associated wetlands, and if the natural vegetation has been previously altered then restoration may be warranted. This buffer requirement improves erosion/sedimentation problems; reduces thermal impacts; maintains water quality; supplies leaf litter and woody debris for the system; and provides valuable wildlife habitat. Protection of these important

⁴ *See also*, Maine Joint Processing Meeting Comment Form dated January 13, 2011: "Although there was apparently an 'exhaustive' search for sites, almost no information is given to demonstrate that the preferred site is indeed the LEDPA . . . also cannot tell if project would result in indirect/secondary impacts to wetlands not being filled . . ."

riparian functions insures that the overall health of the stream habitat is maintained.

As noted in IFW comments dated January 21, 2011, the applicant ignored this policy requirement.

The applicant has proposed 100' undisturbed buffers on either side of the identified stream thread. MDIFW's regional buffer policy is to provide 100' undisturbed buffers from the stream/or its associated wetlands. This is particularly important when those wetlands have a strong hydrological connection to the stream system. . . . On a similar note, wetland C appears to be a headwater wetland to the stream system that may or may not be strongly connected hydrologically to the stream system. If it is, then more wetland protection may be warranted with the intent of benefitting the stream sources.

Unlike the Board's decision in Friends of Lincoln Lakes v. Board of Environmental Protection, 989 A.2d 1128, 1136 (Me. 2010) that "reasonably relied on" the MDIFW advisory to monitor nesting eagles post-construction, here the Department has disregarded, without comment or explanation, the MDIFW advisory to require 100 foot buffers from the upland edge of stream-associated wetlands in making its determination that the casino construction activity would not unreasonably harm wildlife and plant habitats.

C. VIOLATIONS OF THE CLEAN WATER ACT, 33 U.S.C. §§ 1341, 1342.

The Order incorrectly states that the Department approved BB Development's Notice of Intent # 51672 to comply with the requirements of the Maine Construction General Permit ("MCGP") on Dec. 28, 2010. The MCGP expired on Jan. 20, 2008 and is therefore invalid and ineffective. *See* MCGP, Part I(A). The provisions for an administrative continuance of the MCGP once it has expired permit do not apply to an application for a new discharge. *See* MCGP, Part I(B). Therefore, because the general permit is no longer valid, the Department could not have approved MCGP NOI #51672. Instead, it must issue an individual stormwater discharge permit.⁵

To extent that the MCGP remains valid, by its terms the review period must coincide with the Department's review of the consolidated Site Law and Stormwater Management Law applications. *See* MCGP, Part III(A)(1) ("When application materials are consolidated, the review period for the NOI is extended to coincide with the review period of the other program."). During the consolidated review, the project plans related to the MCGP were altered. Therefore, the MCGP, if valid, was either approved or modified simultaneously with the Order.

⁵ Because the Order expressly states that it does not constitute or substitute for any other required state or federal approval, the Order cannot be deemed to be an individual stormwater discharge permit under the federal CWA.

As noted above, due to the conflict of interest involving Commissioner Brown's financial relationship with MLDC and BB Development, the Department may be in violation of sections 314 and 402 of the Clean Water Act and therefore without authority to approve the MCGP or any other discharge permit for this project pursuant to section 402 of the federal Clean Water Act. For the same reason, the Department may also be without authority to make determinations regarding compliance with water quality standards or to grant a water quality certification for this project pursuant to section 401 of the federal Clean Water Act.

The Department's ability to issue, re-issue, or modify a water quality certification or discharge permits under the CWA are therefore contingent upon a finding that the conflict of interest involving Commissioner Brown does not deprive the agency of authority to administer federal Clean Water Act permitting in Maine. As noted above, the EPA has ordered the Commissioner to provide a written response, with supporting financial information, regarding his financial relationship with MLDC and BB Development by May 1. Petitioners request that briefing of this question be deferred until after that response and review by EPA. Additionally, Petitioners request the opportunity for a hearing to submit evidence related to this question, if need be, after the Commissioner has provided his written response and supporting documentation. Such additional evidence should be admitted because it was unavailable for submittal earlier in the process. Should the evidence show that Commissioner Brown does have a conflict of interest, then Petitioners aver that any permits issued, re-issued, or modified, signed by Commissioner Brown, or his designee, are invalid with respect to water quality standards, water quality certification, or any other requirements under the CWA.

V. Relief Requested

Petitioners request that the Board vacate, reverse and rescind the March 17 Order together with the water quality certification and permits issued pursuant to the Site Location of Development Act, Natural Resources of Protection Act, and federal Clean Water Act; and declare that MCGP NOI #51672 is invalid and ineffective.

Petitioners further request that the Board order all work unrelated to permit studies be immediately halted. In addition, Petitioners request that the Board assume jurisdiction going forward and require the applicant to submit additional evidence necessary to affirmatively demonstrate that it fully and completely meets each standard in law for the entire project.

Finally, Petitioners request that the Board hold a public hearing to admit any new evidence that may become available regarding the Commissioner's conflict of interest. In the alternative, if the Board declines to admit new evidence regarding the Commissioner's conflict of interest, the Petitioners request that the Board vacate as invalid the water quality certification and any permits issued pursuant to the federal CWA.

Respectfully Submitted,

April ____, 2011

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