BOARD ORDER
IN THE MATTER OF

BB DEVELOPMENT, LLC	) SITE LOCATION OF DEVELOPMENT ACT
Oxford, Oxford County	) NATURAL RESOURCES PROTECTION ACT
OXFORD RESORT CASINO – PHASE I	) FRESHWATER WETLAND ALTERATION
L-25203-28-A-Z	) APPEAL
L-25203-TE-B-Z	) FINDINGS OF FACT AND ORDER
Denial of Appeal	

Pursuant to the provisions of 38 M.R.S.A. Sections 344 (2-A) and 341-D (4), and Chapter 2, Section 24 (B) of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of the Androscoggin River Alliance (ARA), Terri Marin, Joelle Schutt, Ronald and Rachel Hamilton, James and Candace Alden, Richard J, Swanson, Richard Auren, Carol Ann and Larry LaRoche LaBossiere, Brendan McMorrow, Carol Perkins, Robert Benson and Julie Cameron, Mary and Austin Taylor, and John and Evelyn Sylvester, collectively "appellants", the material filed in support of the appeal, the response of the applicant and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On December 22, 2010, BB DEVELOPMENT, LLC (applicant) filed a Site Location of Development Act (Site Law) application and a Natural Resources Protection Act (NRPA) application for a permit to construct Phase I of a multi-phase four-season commercial and entertainment resort facility, known as the Oxford Resort Casino, in the Town of Oxford. The proposed project consists of a 65,000 square foot building, one main entrance, one entrance for emergency use, two parking areas and associated on-site utilities. The application was accepted for processing on December 28, 2010.

During its review of the application, the Department received letters from interested property owners within the community describing specific concerns about the proposed project. The Department approved Phase I of the Oxford Resort Casino (as a single, complete project) in Department Order #L-25203-28-A-N/L-25203-TE-B-N, dated March 17, 2011. Future phases of the Oxford Resort Casino, if any, will require additional permitting and will be examined cumulatively by the Department in conjunction with previous developments on the project site. All current and relevant environmental standards will be applied during the review of any future phases.

On April 19, 2011, the appellants filed an appeal of the Department's decision to the Board and a request for a public hearing on the appeals.

2. STANDING:

The appeal was filed in the name of one association, the Androscoggin River Alliance (ARA), and several individuals who own property in the Town of Oxford but who are not direct abutters to the project. This organization and individuals assert that they are aggrieved persons. Pursuant to Chapter 2, Rules Concerning the Processing of Applications and Other Administrative Matters, an aggrieved person means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision.

ARA is a private, nonprofit organization with a vested interest in the Androscoggin River watershed and the Little Androscoggin River watershed. ARA described specific concerns regarding potential adverse discharges to surface and subsurface waters, filling of wetlands and wetland habitat, groundwater and aquifer withdrawals, and impacts to the area's environment and quality of life. The ARA also alleges a regulatory conflict of interest. The Board finds that ARA is an aggrieved person as defined in Chapter 2, Section 1(B) and may bring this appeal before the Board.

Terri Marin, Joelle Schutt, Ronald and Rachel Hamilton, Carol Ann and Larry LaRoche LaBossiere, Carol Perkins and Mary and Austin Taylor are owners of property in the Town of Oxford. They described specific concerns regarding the Phase I development of the Oxford Resort Casino which include: potential pollution to surface waters and groundwater, impacts to personal quality of life, impacts on their own wells, and loss of scenic character. The Board finds that these individuals are aggrieved persons as defined in Chapter 2, Section 1(B) and may bring this appeal before the Board.

James and Candace Alden, Richard J. Swanson, Richard Auren, Brendan McMorrow, Robert Benson and Julie Cameron, and John and Evelyn Sylvester are seasonal occupants of property that is located in the Town of Oxford. These individuals described specific concerns regarding Phase I of the Oxford Resort Casino which include: interference with recreational use of Whitney Pond and Hogan Pond, loss of property value, adverse impact to drinking water and loss of scenic character. Although these individuals are not full-time residents of the town in which the project is proposed, the Board finds that the individuals submitted sufficient documentation to qualify as aggrieved persons as defined in Chapter 2, Section 1(B), and, therefore, may bring this appeal before the Board.

For the purposes of this decision, the association and individuals listed above will collectively be referred to as "appellants" or by their individual names. The findings set forth above are made only to the appellants' administrative standing before this Board. Since the identified appellants properly demonstrated that they are aggrieved persons, they have standing, and the Board may proceed to the merits of the appeal.

3. FINDINGS & CONCLUSIONS OBJECTED TO AND BASIS FOR APPEAL:

The appellants object to the Department findings and conclusions relating to financial capacity, noise and scenic character, buffers, storm water management, water supply, groundwater, wastewater and wetland considerations.

The appellants assert that the Department erred in finding that:

A. The applicant demonstrated adequate financial capacity to comply with Department standards;
B. The applicant made adequate provisions for fitting the development harmoniously into the existing natural environment and the development will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities;
C. The applicant has made adequate provisions to ensure that the proposed project will meet the basic, general and flooding standards contained in Chapter 500;
D. The proposed project will not pose an unreasonable risk that a discharge to a significant groundwater aquifer will occur;
E. The applicant has made adequate provision of utilities, including water supplies, sewerage facilities, solid waste disposal and roadways required for the development, and the development will not have an unreasonable adverse effect on the existing or proposed utilities and roadways in the municipality or area served by those services; and
F. 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.

Moreover, the appellants claim that the Department improperly failed to consider all potential phases of the proposed project. The appellants also contend that the Department's Order failed to consider impacts to air quality. The appellants further assert that the Department incorrectly issued an approval of the Maine Construction General Permit for the proposed project. Lastly, the appellants allege that a conflict of interest existed during the Department's review of the applications. For this reason, the appellants challenge the qualification of the former Commissioner of the Department, Darryl Brown, to issue a water quality certification for Phase I of the Oxford Resort Casino.

4. REMEDY REQUESTED:

The appellants request that the Board hold a public hearing and reverse the March 17, 2011, Department decision approving a permit for the construction of Phase I of the Oxford Resort Casino in the Town of Oxford. The appellants also request that the Board stay all work on the project, reopen the record, and assume jurisdiction over the applications.

5. REQUEST FOR A PUBLIC HEARING, STAY, AND JURISDICTION:

During the review of the applications, the appellants had the opportunity to present information and argument to the Department and did so by submitting information during that process. Other interested persons also submitted concerns related to water quality, storm water management and surface water flow as well as the water level of the Little Androscoggin River. After the Department issued a draft licensing decision on March 4, 2011, the appellants submitted additional letters regarding potential adverse impact to a public water supply, private wells, groundwater quality, potential increase in erosion and storm water, and a potential conflict of interest. The Department subsequently accepted that information into the record.

The Board finds that the record is adequately developed concerning the statutory criteria, and that the appellants have not demonstrated that there is sufficient conflicting technical evidence on a licensing criterion to warrant a public hearing or a reopening of the record. The appellants also filed a request that the Board assume jurisdiction over this matter. A request for the Board to assume jurisdiction over a project must be requested no later than 20 days after an application is accepted as complete for processing. Chapter 2 (17)(A). The appellants' request was not filed within that time period and is untimely. While the Board may, on its own initiative, assume jurisdiction, the Department has processed this application and the Board will address the appellants' issues in the context of this appeal.

6. DISCUSSION AND RESPONSE TO APPEAL:

A. FINANCIAL CAPACITY:

Appellants challenge the finding that the applicant demonstrated adequate financial capacity to construct all phases of the Oxford Casino, including Phase I. The appellants state that the applicant did not submit cost estimates or other financial information for the proposed building and all interior work. The appellants also state that the applicant did not submit an estimated construction schedule for Phase I or full build-out of the Oxford Resort Casino.

The Site Law requires that an applicant demonstrate financial capacity to develop the project consistent with State environmental standards and the provisions of the Site Law. Chapter 373(1) states that "the Board shall consider all relevant evidence to the effect that the developer has the financial capacity to construct, operate and maintain all aspects of the development, and not just the pollution control aspects. Chapter 373(1) also requires that "applications for approval of proposed developments shall include evidence that affirmatively demonstrates that the developer has the financial capacity to undertake the proposed development, including information such as the following…"

1. Estimated costs. Accurate and complete cost estimates of the development, including the projected cost of measures taken to minimize or prevent adverse effects on the environment during construction and operation.

2. Financing. A letter of commitment from a financial institution, governmental agency, or other funding agency indicating a commitment to provide a specified amount of funds, and the uses for which the funds may be utilized; the most recent corporate annual report indicating availability of liquid assets to finance the development, together with explanatory material interpreting the report, when requested; or copies of bank statements or other evidence indicating availability of funds if the applicant will personally finance the development. In cases where funding is required but there can be no commitment of money until approvals are received, an applicant may submit a letter of "intent to fund" from an appropriate financial institution indicating the amount of funds and their specified uses; cash equity commitment to the development sufficient to demonstrate the applicant's ability to go forward; and a financial plan for the remaining financing.

In its application, the applicant submitted a letter from Key Private Bank, dated December 17, 2010, stating that the applicant has sufficient liquid assets that are immediately available to construct the site development for Phase 1 of the Oxford Resort Casino. The letter states that the applicant provided a cost estimate for site work from clearing and grubbing to final site stabilization and that the applicant has net liquid assets that are immediately available for the site construction costs in excess of $6,746,000. The applicant's estimate of costs includes earthwork for on-site building areas, but does not include the proposed building or interior work. In its review of the application, the Department considered the applicant's financial capacity for Phase I of the Oxford Resort Casino as this is the only project for which the applicant seeks approval.

The applicant states that it demonstrated financial capacity to cover all relevant costs including aspects of pollution control for Phase I of the Oxford Resort Casino and argues that the Department has discretion in determining the information to accept as an adequate demonstration of financial capacity. The Site Law recognizes this discretion regarding a finding of financial capacity. "The commissioner may issue a permit under this article that conditions any site alterations upon a developer providing the commissioner with evidence" of that financial capacity. 38 M.R.S. § 484 (1). Thus, the statute contemplates instances in which proof of financial capacity can be a condition to a permit.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. In determining whether an applicant meets the financial capacity standard, the Board requires proof of adequate funding for the completion of all aspects of a development, not just the air and water pollution control aspects. Based upon the applicant's summary of estimated site costs, the Board recognizes that the applicant adequately demonstrated that it has the financial capacity to meet all aspects of pollution control for Phase I of the Oxford Resort Casino. Based upon the applicant's summary of estimated site costs, the Board finds that

the applicant failed to submit proof of adequate funding for the completion of Phase I development. For this reason, the Board further finds that the Department Order should be modified to be consistent with the Site Law and the underlying Finding.

The Board finds that the evidence in the record demonstrates that the applicant has the financial capacity to comply with the pollution control aspects of the proposed project. However, to comply with the requirement to demonstrate financing of all components of Phase 1 of the project, the Board finds that the applicant must submit to the Department, for its review and approval, additional documentation of financial capacity that includes estimated and itemized total costs for the development of Phase I of the Oxford Resort Casino and evidence that the applicant has been granted a line of credit or a loan by a financial institution authorized to do business in this State or evidence of any other form of financial assurance permitted by Department Rules, Chapter 373(1). This information must be submitted to and approved by the Department prior to any additional work being done on the project site other than work related to testing for water supply. The Board's discussion and finding regarding approval of Phase 1 of the Oxford Resort Casino can be found in Finding 7(A) of this Order.

B. NOISE AND SCENIC CHARACTER:

The appellants challenge the finding that the proposed project will not adversely affect the area's environment and quality of life due to noise, lights, traffic, loss of scenic character and air pollution.

Both the Site Law and the NRPA establish standards a developer seeking permits must meet regarding noise and scenic character. The Site Law states:

> The developer [must make] adequate provision for fitting the development harmoniously into the existing natural environment and... the development [must] not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or neighboring municipalities.

38 M.R.S. § 484 (3). Similarly, the NRPA requires that "[t]he activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses." 38 M.R.S. § 480-D (1).

According to Chapter 375 (10) & (14), the Department must determine whether a proposed project has made adequate provision to control excessive environmental noise and whether a proposed development will have an unreasonable adverse effect on the scenic character of the surrounding area. The Department considers whether all components of the proposed project are in keeping with the surrounding area and whether all the proposed development has been designed and landscaped to minimize its visual impact to the fullest extent practicable.

As part of its application, the applicant submitted a list of potential sources of noise from the development that could produce a minor noise impact. These sources include traffic, music at the entrance to the main facility, mechanical units and an emergency generator. The applicant stated that the noise generated by the proposed project is anticipated to be minor. All mechanical units will be enclosed and sited more than 100 feet from the property boundary.

Moreover, the applicant submitted a visual quality study that summarizes the visibility of the proposed project from various locations within 8 miles of the project site. The selected locations include frequently traveled roads, cell phone towers, a railroad bed and a school. No scenic resources were identified within the viewshed of the proposed project. The applicant stated that the proposed project will be minimally visible from the majority of the selected locations. As depicted in its landscaping plan, the applicant proposed to incorporate several types of vegetation in order to minimize visual impacts from the proposed project. The applicant stated that lighting will be scaled to the development, and fixtures will be sharp cutoff (shielded from side cast light) and downcast (cast at a downward angle).

Based on its review of the project's location and design, the applicant's visual quality study and the applicant's plan for landscaping and lighting, the Department determined that the proposed project would not generate excessive operational noise and that the proposed project would not have an unreasonable adverse effect on the scenic character of the surrounding area and would therefore be in compliance with the Site Law and with Chapter 375 (10)(D)(1) & (2) and Chapter 375 (14) of the Department's regulations.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. After weighing the fact that visual surroundings and excessive noise may influence people's behaviors, against the applicant's analysis of projected minimal visual impacts on the surrounding area and the minor sound levels that will be generated from the development, the Board finds that the applicant has made adequate provisions to ensure that noise standards pursuant to the Site Law Rules, Chapter 375 (10) were met, that the applicant made adequate provisions for fitting Phase I of the Oxford Resort Casino harmoniously into the existing natural environment, and that the development will not adversely affect existing uses, scenic character or other natural resources in the surrounding area. The Board's discussion and finding regarding air pollution can be found in Finding 7(B) of this Order.

C. BUFFERS:

The appellants challenge the finding that the Department permitted an adequate stream buffer. The appellants assert that the applicant measured a 100-foot setback from the thread (middle) of an existing stream instead of the edge of the normal high water line of that stream.

Pursuant to Chapter 375 (9) of the Department's rules implementing the Site Law, the Department considers whether waterbodies within or adjacent to the proposed development will be adequately protected from sedimentation and surface runoff by buffer strips, whether buffer strips will provide adequate space for movement of wildlife between important habits, and whether buffer strips will shield adjacent uses from unsightly developments and lighting in its determination of whether an applicant has made adequate provision for buffer strips. In order to protect these resources, 38 M.R.S.A. §§ 480-C(1) and Chapter 310 (3)(A) of the Department's Wetlands and Waterbodies Protection Rules regulate activities within 75 feet of a great pond, river, stream, or brook measured horizontally from the normal high water line, but do not require a 75-foot buffer.

In its application, the applicant submitted a plan depicting the location of the stream and the proposed 100-foot riparian buffer adjacent to the stream. The applicant also submitted a draft of a forested, no disturbance Declaration of Covenants and Restrictions that protects the 100-foot stream buffer in perpetuity. As seen on the applicant's site plan, the subject stream buffer is located, at its closest point, approximately 60 feet from the proposed septic field units, 530 feet from the proposed loading and service yard, and 660 feet from the proposed building. In addition, the applicant described the functions and values of the stream in a report entitled, "Wetlands Functions and Values Assessment", prepared by a certified soil scientist and dated December 13, 2010. In the applicant's report, the subject stream is known as "Wetland D" and is described as having principal functions of groundwater recharge/discharge, sediment/toxicant retention, and sediment/shoreline stabilization. The report further states that functions of the stream are limited due to its small size, the stream does not support fish, and there are no special or unique features associated with the stream.

The applicant states that the difference in measuring from the thread of the stream versus the normal high water line is inconsequential due to the stream's narrow width, ranging from a few inches to 24 inches, and the applicant's use of straight, surveyed lines. The applicant further states that the 100-foot setback from the stream as described has been exceeded due to the use of straight rather than curved lines.

The Department visited the proposed project site on November 19, 2010, and February 1, 2011. On the west side of the applicant's property, Department staff observed an existing, intermittent stream. Department staff further observed its width and its location in relation to the project site. No fish were observed in the stream.

The Department considered the applicant's measurements of the proposed stream buffer, the size and value of the stream, and the applicant's provision for protection of the stream in its review of Phase I of the Oxford Resort Casino. The Department determined that the applicant's proposal for a 100-foot stream buffer was adequate provided that the Declaration of Covenants and Restrictions that protects the 100-foot stream buffer in perpetuity is recorded with the appropriate deed within 90 days of issuance of the Department's Order.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. The Board has discretionary authority to require buffering from a protected natural resource depending on the severity of a development's impact on the functions and values of the subject resource. The applicant has chosen to create a 100 foot stream buffer. The Board finds that the applicant has made adequate provision for the protection of the resource..

D. STORMWATER MANAGEMENT:

The appellants challenge the finding that the applicant provided adequate protection to Hogan Pond and connected waters. Although the appellants did not specifically name the waters connected to Hogan Pond, they argue that those water bodies are designated as lakes most at risk from new development.

Under the Site Law, the applicant is required to demonstrate that its proposed development meets the standards for stormwater found in 38 M.R.S. § 420-D. See, 38 M.R.S. § 484 (4). Section 420-D sets out detailed application and design requirements, including those that address erosion and sedimentation, location, construction and installation, inspection, maintenance, drainage, buffers and wet ponds. 38 M.R.S. § 420-D. As described below, the applicant has met those standards with respect to the proposed project for which the Department has issued a permit.

Phase I of the Oxford Resort Casino proposes approximately 12.9 acres of new impervious area and 27.6 acres of new developed area. The proposed project lies within the watershed of the Little Androscoggin River and Hogan Pond. Hogan Pond is designated as a lake most at risk from new development according to Appendix A of the Department's Direct Watersheds of Lakes Most at Risk from New Development and Urban Impaired Streams, Chapter 502. The applicant submitted a stormwater management plan based on the basic, general and flooding standards contained in the Department's Chapter 500 Stormwater Management Rules. Under the general standards, the applicant applied the phosphorous methodology to address impacts to Hogan Pond. For this project, the Permitted Phosphorus Export is 4.01 pounds of phosphorus per year. The applicant proposed to remove phosphorus from the project's storm water runoff by utilizing four wet ponds. Wet ponds are stormwater detention impoundments that have a permanent pool of water and have the capacity to temporarily store stormwater runoff while it is released at a controlled rate. Wet ponds are designed to provide flood control as well as water quality treatment. The predicted phosphorus export for the project site based on the applicant's model is 2.64 pounds of phosphorus per year. Based upon results of the applicant's model, the proposed stormwater treatment is expected to reduce the export of phosphorus in the stormwater runoff below the maximum permitted phosphorus export for the site.

The stormwater management system proposed by the applicant was reviewed by the Department's Division of Watershed Management (DWM). DWM recommended

approval of Phase I of the Oxford Resort Casino and stated that the proposed stormwater management system was designed in accordance with the Chapter 500 basic, general and flooding standards.

Based on the stormwater system's design and DWM's review, the Department determined that the applicant had made adequate provisions to ensure that the proposed project would meet the provisions of Chapter 500 provided that the applicant retained the services of a third party inspector, conducted a pre-construction meeting, and retained a professional engineer to inspect the construction and stabilization of the four wet ponds. As outlined in the Department's Order, inspections will consist of weekly visits to the site to inspect the installation of each pond's embankment construction, stormwater inlet, underdrained gravel outlet, gravel outlet filter material makeup and placement, outlet control structure, clay liner and emergency spillway construction from initial ground disturbance to final stabilization of the ponds.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. The Board finds DWM's analysis of the applicant's storm water management plan demonstrates that the project will meet the Department's storm water standards. The Board further finds that the applicant has made adequate provisions to ensure that the basic, general and flooding standards pursuant to Chapter 500 have been met and that the conditions the Department placed on the permit, together with the normal legal requirement that a permit holder comply with the permit issued, will provide an adequate safeguard that Hogan Pond and the Little Androscoggin River will be protected.

E. WATER SUPPLY:

To comply with the Site Law, a developer must demonstrate that it has made adequate provision of utilities, including water supplies, required for the development, and that the development will not have an unreasonable adverse effect on the existing or proposed utilities in the municipality or area served by those services. See, 38 M.R.S. §464 (6). The appellants challenge the finding that the applicant has met this standard for Phase I development and full build-out of the Oxford Resort Casino. The appellants argue that the applicant has not demonstrated that the project will have adequate and healthful water supplies. The appellants further state that the applicant failed to provide adequate water supplies for irrigation. The appellants argue that the Department illegally applied conditions of approval as a substitute for the applicant's burden of proof to demonstrate that the water supply standard has been met.

In its application, the applicant anticipated that Phase I of the Oxford Resort Casino will use approximately 22,395 gallons of water per day when operational. Water for the Phase I development will be supplied by five on-site wells. The applicant submitted an assessment of groundwater supplies that addressed the availability of sufficient and healthful water supplies. The applicant states that sufficient and healthful water can be

supplied by on-site wells. The applicant also stated that irrigation is not anticipated for the proposed project.

During its review of the application, the Department's Division of Environmental Assessment (DEA) reviewed the applicant's analyses for Phase I of the development as this is the only project for which the applicant seeks approval. Based on information submitted by the applicant, DEA recommended conditional approval of Phase I, because an initial pump test of one or more of the proposed groundwater wells on the applicant's property would be necessary to confirm whether adequate yield can be obtained without unreasonable adverse impact to off-site water supplies or protected natural resources. For this reason and based upon DEA's review, the Department determined that the applicant had made adequate provision for securing and maintaining a sufficient and healthful water supply provided that the applicant submits for review and approval the results of an aquifer test to determine whether an adequate supply of groundwater can be obtained from onsite wells without unreasonable adverse impact on offsite water supplies and any protected resources. Subsequent to fulfillment of the condition requiring this aquifer test, but prior to operation of on-site water supply wells, the applicant is also required to submit a proposal for long-term monitoring of aquifer performance, including target levels at on-site and off-site wells, based on the pump test results and other relevant criteria to the Department, for its review and approval, as described in the Department's Order.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. Based upon the analyses of DEA, the Board finds that the applicant has made adequate provisions for securing and maintaining a sufficient and healthful water supply for Phase I of the Oxford Resort Casino pursuant to Chapter 373 (5). The Board further finds that appropriate and reasonable conditions of approvals were placed on the Department's Order as a means of ensuring the adequate provision of a sufficient and healthful water supply in accordance with Chapter 2 (19)(B)(1). The Board's discussion and finding regarding its approval of Phase 1 of the Oxford Resort Casino only can be found in Finding 7(A) of this Order.

F. GROUNDWATER:

The Site Law provides that applicants must show that proposed developments will not pose an unreasonable risk that a discharge to a significant groundwater aquifer will occur. 38 M.R.S. § 484 (5). The individual appellants challenge the finding that Phase I of the Oxford Resort Casino meets that standard. They also claim that possible future projects, for which the applicant has not filed applications, will have additional adverse impacts.

In its application, the applicant submitted a significant sand and gravel aquifer map for the Mechanic Falls quadrangle prepared by the Maine Geologic Survey and a Phase I Environmental Site Assessment. According to the application, the applicant's property is not located over a mapped sand and gravel aquifer. The applicant further stated that water for the development will be supplied by individual on-site wells. The water will be

drawn from these wells at a rate of 22,395 gallons per day and will then be discharged to on-site subsurface wastewater disposal fields. This flow rate was extrapolated from water use records from a similar facility.

DEA's review was limited to Phase I as this is the only project for which the applicant seeks approval. DEA confirmed that the proposed project is not located over a mapped significant sand and gravel aquifer and that Phase I of the Oxford Resort Casino will not impact groundwater, provided that the applicant adheres to the well monitoring requirements as discussed above in Finding 6(E) and as described in the Department's Order.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. Based on the analysis of groundwater supplies at the proposed project site by DEA and given the required well monitoring requirements placed on the Department's Order, the Board finds that Phase I of the Oxford Resort Casino will not have an adverse effect on groundwater quality or quantity. The Board's discussion and finding regarding its approval of Phase 1 of the Oxford Resort Casino only can be found in Finding 7(A) of this Order.

G. WASTEWATER:

The appellants challenge the finding that the applicant demonstrated that the Phase I of the Oxford Resort Casino will have adequate capacity for wastewater disposal. They also claim that possible future projects, for which the applicant has not filed applications, will have additional adverse impacts.

The applicant proposes to install a subsurface wastewater disposal system with an Advanced Wastewater Treatment System and two groups of Eljen GSF units (leachfields) in accordance with the Maine State Plumbing Code, Subsurface Wastewater Disposal Rules. The applicant submitted a Class A High Intensity soils survey map, a soils report and an analysis of potential impacts to off-site groundwater quality resulting from on-site wastewater disposal.

During the Department's review, the proposed wastewater disposal system was also reviewed by the Department of Heath and Human Services' Division of Environmental Health (DHHS-EH) pursuant to Chapter 11 of the Subsurface Wastewater Disposal Rules, CMR 241. The DHHS-EH determined that the proposed disposal design would not result in intrusion of groundwater into the disposal area, according to the applicant's soil study. For this reason, on February 16, 2011, the DHHS-EH granted approval of the applicant's subsurface wastewater disposal system. Based upon the DHHS-EH's review and determination, the Department determined that the proposed wastewater disposal system for Phase I of the Oxford Resort Casino would be built on suitable soil types.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. In light of DHHS-

EH's review and approval of the applicant's subsurface wastewater disposal system, the Board finds that Phase I of the Oxford Resort Casino will not have an unreasonable adverse effect on surface water quality in accordance with Chapter 375 (6) of the Site Law Rules. The Board's discussion and finding regarding its approval of Phase 1 of the Oxford Resort Casino only can be found in Finding 7(A) of this Order.

H. WETLAND AND WILDLIFE CONSIDERATIONS:

The appellants challenge the finding that Phase I of the Oxford Resort Casino 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 as required by the NRPA (38 M.R.S. §480-D (3)). The appellants contend that the Department applied the wrong level of permit review under the Natural Resources Protection Act (NRPA), the Department did not review other alternative options to the proposed project and the Department had insufficient evidence to make a determination regarding vernal pools. They also claim that possible future projects, for which the applicant has not filed applications, will have additional adverse impacts.

1. Tier 2 versus Tier 3 Review. The appellants argue that the Department incorrectly conducted a Tier 2 permit review under the NRPA and claims that the application should have been reviewed in accordance with Tier 3 requirements.

38 M.R.S.A. § 480-X(2)(B) requires a Tier 2 review for any activity that involves a freshwater wetland alteration of 15,000 square feet up to one acre (43,560 square feet). A Tier 3 review process is required for any activity that involves a freshwater wetland alteration of one acre or more. If a project as a whole requires Tier 2 or Tier 3 review, then any activity that is part of that overall project and involves a regulated freshwater wetland alteration, also requires the same higher level of review, unless otherwise authorized by the Department.

In its application, the applicant submitted a wetland delineation of all protected natural resources on the applicant's property, a site plan denoting the locations of proposed wetland impacts for Phase I and a functional assessment of wetland areas proposed to be filled. In order to construct Phase I of the Oxford Resort Casino, the applicant proposed to fill 42,430 square feet of forested freshwater wetlands. Therefore, the Department reviewed proposed wetland impacts for Phase I of the Oxford Resort Casino as described in the applicant's NRPA application as a Tier 2 level of review in accordance with 38 M.R.S.A. § 480-X(2)(B).

Based on the information in the record and arguments provided by the appellants and the applicant, the Board finds that the Department applied the correct level of review when it addressed the wetland impacts caused by Phase I of the Oxford Resort Casino.

2. Avoidance. The appellants assert that the Department failed to properly review available and practicable alternatives that would be less damaging to the environment. The appellants state that the applicant has a right of refusal on five properties adjacent to the project site. For this reason, the appellants contend that a hybrid on-site/off-site alternative could have been developed using a larger land base to avoid and minimize wetland impacts.

Chapter 310 (5)(A) of the Department's rules require an applicant to provide an analysis of alternatives to demonstrate that a practicable alternative does not exist. The applicant states that the location for the proposed development is limited by current state law which requires that the Oxford Resort Casino be sited in Oxford County, at least 100 miles from another casino, within 30 miles of a Level I or Level II trauma center, within 15 miles of the main office of a county sheriff, within 25 miles of the main office of a State Police field troop, within 30 miles of an interchange of the interstate highway system, within 10 miles of a fire station and within a half mile of a state highway. The applicant submitted a list of alternative off-site locations and alternative on-site designs to the proposed Phase I development of the Oxford Resort Casino. These alternatives included a property at the corner of Route 121 and Route 26 and a property on the west side of Route 26, both in the Town of Oxford. The applicant stated that these sites are not feasible due to a significant amount of freshwater wetlands, freshwater wetlands of special significance, a potential significant vernal pool, municipal zoning limitations, shallow groundwater, and unsuitable soils. The applicant also considered the option of siting the project in the center of its property. Following a delineation of on-site protected natural resources, the applicant determined that siting the project at this central location would result in a greater amount of wetland impact.

While the applicant did not provide a list of every property in which they have title, a list of all properties in which an applicant has title, right or interest is not a required submission of the NRPA application.

After considering the information in the permitting record, the arguments of the appellants and the applicant's response to the appeal, and after weighing the amount of freshwater wetland impact that will result from the construction of Phase I against the project alternatives and the potential for a significantly greater amount of impact that may occur to the resources present at the alternative sites, the Board finds that the applicant has avoided and minimized the wetland impacts of Phase I of the Oxford Resort Casino to the greatest extent practicable.

3. Significant Vernal Pool Habitat. The appellants assert that the Department had insufficient evidence to make a determination that the proposed project would not unreasonably harm any significant wildlife habitat because the applicant's vernal pool survey was conducted outside the identification period for an egg mass abundance count.

According to the Department's Significant Wildlife Habitat Rules, Chapter 335 (9), a vernal pool is a natural, temporary to semi-permanent body of water occurring in a shallow depression that typically fills during the spring or fall and may dry during the summer. The Department regulates only those vernal pools that are deemed as significant. Whether a vernal pool is significant is determined by the number and type of pool-breeding amphibian egg masses in a pool, the presence of fairy shrimp, use by rare, threatened or endangered species, or other criteria specified in Chapter 335 (9)(A)(7)&(B). A typical and acceptable measure of determining the significance of a vernal pool is to count egg masses just past the peak breeding period of pool-breeding amphibians as outlined in Chapter 335 (9)(B)(1). In any season outside of the identification period, indicators of a potentially significant vernal pool habitat may include flat topography with depressions or pit-and-mound topography, wetland flora, fingernail clams, caddisfly cases, and evidence of temporary flooding. See Chapter 335(9)(B)(5).

In its application, the applicant submitted a wetland delineation report stating that a wetland identification and delineation study was conducted over a period of days between August 5, 2010, and November 7, 2010. The report furthers stated that "[g]iven that most of the field work was conducted mainly in late summer when ground water levels were down, 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."

Based upon the applicant's report, the Department determined that no vernal pools were present at or near the site of the Phase I development for the Oxford Resort Casino. Therefore, the Department did not review the application as if a significant vernal pool existed at or near the proposed development for Phase I.

The Board has considered the information in the record, including argument provided by the appellants and the applicant. Based upon this information, the Board finds that Phase I of the Oxford Resort Casino 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 at the project site. The Board's discussion and finding regarding its approval of Phase 1 of the Oxford Resort Casino only can be found in Finding 7(A) of this Order.

7. OTHER CONSIDERTIONS:

A. PHASING OF PROJECT:

The appellants assert that the Department failed to consider all potential phases of the proposed project including all secondary and cumulative impacts. The appellants refer to the Site Law, Chapter 372(10) as support for their argument.

Pursuant to Chapter 372 (10), "[t]he 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. 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." (Emphasis added.)

The applicant states that Chapter 372 (10) provides the Department with the authority and discretion to permit a single phase of development, such as Phase I of the Oxford Resort Casino, where future phases are uncertain. The applicant argues that Chapter 372 (10) allows the Department to approve a stand-alone project even when additional development might occur in the future. The applicant recognizes, as it must, that if it proposes any additional development in the future, the Department is required by Chapter 372 (10) to assess and address the secondary and cumulative impacts of the entire development at that time.

The Board has considered the information in the record and the arguments of the appellants and the applicant. The Boards finds that the Department correctly reviewed the application for Phase I of the Oxford Resort Casino as a stand-alone project and that the Department conducted an appropriate review in accordance with the Site Law and the NRPA. The Board also finds that if the applicant proposes any additional development at this site in the future, the Department is required by Chapter 372 (10) to consider the secondary and cumulative impacts of the entire project.

B. AIR QUALITY:

The appellants contend that the Department Order failed to consider non-point source air emissions when reviewing potential impacts to air quality. The appellants state that the Department should have considered the amount of traffic that may be generated at the project site.

An applicant must demonstrate that a proposed development will have no unreasonable adverse effect on air quality including information such as the following, when appropriate: (1) Evidence that an Air Emission License has been or will be obtained. (2) Evidence that increased traffic generated by the development will not significantly affect the ambient air quality. Modeling of the effect of non-point source of air pollution on ambient air quality may be requested. Chapter 375 (1)(A)&(C)(1-2).

In Section 21 of its application, the applicant stated that potential sources of air emissions are the generation of dust during construction and the proposed building's heating system. The applicant stated that the air emission output from the proposed building's heating system and an emergency generator, if used, will be less that 10,000,000 Btu, which is the threshold for which an air emission license is required by the Department. Additionally, Section 5 of the application states that traffic is expected to move on and about the site. During its review of the application, the Department considered all potential sources of air emissions, including the daily amount of traffic that would be at the project site. The Department did not request the applicant to model non-point source air emissions at the project site because the Department does not typically require a non-point source air emissions model unless there will be a significant amount of waiting and idling of mobile sources (cars, trains, etc.). The Department's Bureau of Air Quality (BAQ) was not consulted with regard to Phase I of the Oxford Resort Casino because the applicant stated in its application that anticipated air emissions from the proposed project will be below the threshold for which an air emissions license is warranted.

The Board has considered the information contained in the permitting record, the arguments of the appellants and the applicant's response to the appeal. The Board recognizes that area sources of air emissions such as pollutants from various mobile sources can have an unreasonable adverse effect on air quality. Given that the majority of non-point source air emissions from mobile sources are emitted when those sources are stationary for a significant amount of time, and in light of the fact that traffic at the project site is anticipated to continuously move throughout the project site at varying times of the day, the Board finds that development of Phase I of the Oxford Resort Casino will not result in an unreasonable or adverse impact to air quality at the project site and the surrounding area.

C. MAINE CONSTRUCTION GENERAL PERMIT:

The appellants assert that the Department incorrectly issued an approval of the Maine Construction General Permit (MCGP). Appellants contend that the MCGP expired on January 20, 2008 and is therefore invalid and ineffective. The appellants further argue that the provisions for an administrative continuance of the MCGP are not applicable to new permit holders.

These arguments are not properly before the Board and will not be considered. The appeal before the Board is solely from the Site Law and NRPA permit issued on March 17, 2011 (Department Order #L-25203-28-A-N/L-25203-TE-B-N).

On the same day that it filed its Site Law Application, the applicant submitted to the Department a notice of intent (NOI #51672) to comply with the requirements of the MCGP. NOI #51672 was approved by the Department on December 28, 2010. No person appealed the approval of NOI #51672 which is final and no longer subject to appeal.

Any attempt to inject arguments in this appeal of the Department's December 28, 2010 approval of an NOI under the MCGP must be rejected as untimely.

D. CONFLICT OF INTEREST:

The appellants allege that a conflict of interest existed during the Department's review of the applications in this matter. For this reason, the appellants challenge former Commissioner Darryl Brown's standing with respect to the issuance of water quality certification for Phase I of the Oxford Resort Casino. The appellants state that 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. The appellants refer to 33 U.S.C. § 1314(i)(2)(d); 38 M.R.S.A. § 341-A (3)(B) as support for their argument.

Neither Commissioner Brown nor any of his appointees oversaw any aspect of the Department's review of the proposed project. Final review and issuance of the proposed project was delegated to three of the Department's Division Directors from three separate Bureaus. The Board does not have authority to assume jurisdiction to address the issue of conflict of interest or consider the matter as a basis for determining whether permitting requirements have been satisfied under the applicable laws for any particular project.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.

2. The Board denies the request to reopen the record and for a public hearing for this appeal.

3. The applicant must submit additional documentation of financial capacity to the Department for its review and approval prior to resuming construction as set forth in the modification to the Department's Order in Section 6 (A) of the Order and Modification 1 below.

4. The applicant's proposal to construct a four-season commercial and entertainment resort facility, known as Phase I of the Oxford Resort Casino, in the Town of Oxford meets the criteria for a permit pursuant to the Site Location of Development Act, 38 M.R.S.A. § 484, and the Natural Resources Protection Act, 38 M.R.S.A §480-D.

THEREFORE, the Board AFFIRMS the Department's approval of the permit applications filed by BB DEVELOPMENT, LLC to construct Phase I of a multi-phase four-season commercial and entertainment resort facility, known as the Oxford Resort Casino, in the Town of Oxford, Maine, but MODIFIES Department Order #L-25203-28-A-N/L-25203-TE-B-N as follows:

1. The applicant must submit to the Department, for review and approval, additional documentation of financial capacity that includes an estimated and itemized total costs of the development of Phase I of the Oxford Resort Casino and evidence that the applicant has been granted a line of credit or a loan by a financial institution authorized to do business in this State or evidence of any other form of financial assurance permitted by Department Rules, Chapter 373(1). This information must be submitted to and approved by the Department prior to any additional work being done on the project site other than work related to testing for water supply.

The Board DENIES the appeal of the Androscoggin River Alliance, Terri Marin, Joelle Schutt, Ronald and Rachel Hamilton, James and Candace Alden, Richard J, Swanson, Richard Auren, Carol Ann and Larry LaRoche LaBossiere, Brendan McMorrow, Carol Perkins, Robert Benson and Julie Cameron, Mary and Austin Taylor, and John and Evelyn Sylvester.

DONE AND DATED AT AUGUSTA, MAINE, THIS_____ DAY OF _____, 2011.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____
Susan M. Lessard, Chair