STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION
AUGUSTA, ME 04333

DRAFT BOARD ORDER

IN THE MATTER OF

NORTHERN NEW ENGLAND PASSENGER	)
RAIL AUTHORITY	)
LAYOVER FACILITY	)
Brunswick, Cumberland County	)
STORMWATER MANAGEMENT PERMIT	) APPEAL DECISION
	) FINDINGS OF FACT AND ORDER
APPEAL filed by	)
Brunswick West Neighborhood Coalition	)
Charles F. Wallace, Jr., J. Maurice L. Bisson, and	)
Robert N. Morrison	)
	)
L-26119-NJ-D-Z (appeal denied)	)

Pursuant to the provisions of 38 M.R.S. §§ 341-D (4) and 420-D, and Chapter 2 §24, Chapter 3 §30 and Chapter 500 of the Department of Environmental Protection's regulations, the Board of Environmental Protection has considered the appeal of the Brunswick West Neighborhood Coalition, Charles F. Wallace, Jr., J. Maurice L. Bisson, and Robert N. Morrison (the appellants) of the Stormwater Management permit issued to the Northern New England Passenger Rail Authority (the licensee). The Board considered the material filed in support of the appeal, the response of the licensee, the response filed by the intervenors in support of the issuance of the permit, other responses filed in support of the appeal, and other related materials on file, and FINDS THE FOLLOWING FACTS:

1. PROCEDURAL HISTORY:

On August 14, 2013, the licensee filed an application with the Department for a Storm Water Management Law permit for the construction of a passenger rail layover facility to be constructed in Brunswick. In Department Order #L-26119-NJ-A-N, dated November 13, 2013, the Department issued a permit for the proposed project.

BMR Brunswick, LLC, Charles F. Wallace, Jr., Daniel Sullivan, and Frederick Schwab (petitioners) appealed the Department's issuance of the permit to the Cumberland County Superior Court. The petitioners maintained that certain neighboring landowners, including the three individual petitioners who owned property southerly of the project site, were not properly notified by the applicant of the permit application, and were therefore unable to

participate in the review process. In *BMR Brunswick, LLC v. DEP*, the Court held that the petitioners included abutters as defined in the Department's applications processing rule (Chapter 2 §1(A)), and were therefore entitled to notice of the stormwater permit application. On that basis, in its decision dated July 2, 2014, the Court vacated the Department's approval (Department Order #L-26119-NJ-A-N).

A second permit application for a stormwater management system for the proposed passenger rail equipment layover facility was received by the Department on August 6, 2014. That application, DEP Project #L-26119-NJ-B-N, was found to be unacceptable for processing due to incomplete information regarding design and construction plan details and was returned on August 27, 2014.

A revised application was received by the Department on September 12, 2014, and was found to be complete for processing. The materials in the record from the first permit application and its review were incorporated into the record of the revised application.

A public hearing on the application was held by the Department on March 25, 2015 at the Brunswick Golf Club in Brunswick. The Department granted intervenor status to the appellants and to TrainRiders Northeast (TrainRiders), and all parties participated in the public hearing process. A portion of the hearing was devoted to receiving testimony from members of the general public. Written comments were received throughout the application processing period, until the close of the hearing on March 25, 2015.

A draft order was distributed on June 3, 2015 for public comment. The Department approved the proposed project in Department Order #L-26119-NJ-C-N, dated June 16, 2015.

On July 10, 2015 the appellants filed with the Commissioner an application for a stay of the permit decision. The Department received responses to the application for a stay from the licensee and from TrainRiders. On August 11, 2015, the Commissioner issued a decision denying the appellants' application for a stay.

On July 16, 2015, the appellants filed a timely appeal to the Board requesting that the Board hold a public hearing and reverse the permit approval by the Department. The Board received a response to the appeal from the licensee dated September 22, 2015, and a response from TrainRiders, dated September 22, 2015. Twenty other responses were received from interested persons.

2. PROJECT DESCRIPTION:

The licensee intends to construct a stormwater management system for a passenger rail equipment layover facility which would be used for overnight storage, light maintenance and refueling of passenger trains. The project includes a train enclosure building, rail spurs to access the building, vehicle travel lanes, parking areas, utilities to support the facility, and a stormwater management system.

The stormwater management system includes grassed swales, a roof drip edge collection system, and a catch basin collection system, all discharging to a wet pond for treatment and then to an unnamed tributary stream that drains to the Androscoggin River. The system is designed to capture and treat stormwater runoff from the layover facility building, new rail tracks, paved and gravel access drives, and paved parking areas. The project will result in a total of 4.3 acres of new impervious area and 6.7 acres of new disturbed area. Foundation drains will discharge groundwater into a drainage ring located down gradient from the building. The drainage ring will re-infiltrate this water back into the ground. The project site is located between Church Road and Stanwood Street in the Town of Brunswick.

3. STANDING:

Charles F. Wallace, Jr., J. Maurice L. Bisson, and Robert N. Morrison own land that either directly abuts or is in close proximity to the project site. The Brunswick West Neighborhood Coalition represents members who own land that either directly abuts or is in close proximity to the project site.

The Board finds that the appellants are aggrieved and may bring this appeal before the Board.

4. FINDINGS AND CONCLUSIONS OBJECTED TO:

The appellants object to Department findings and conclusions relating to the following:

A. The appellants assert that a pre-application public informational meeting was required to be conducted by the applicant pursuant to Chapter 2 §§ 10(B)(6) and (C)(2), and was not held prior to filing the third stormwater permit application;

B. The appellants assert that the Department was required, pursuant to Chapter 2 §10(A), to provide interested persons with a written summary of all pre-application meetings and did not do so;

C. The appellants assert that the September 12, 2014 application was not complete for processing. The appellants contend that the placement of excessive number of special conditions on the permit requiring the submission of additional information is evidence that the application was incomplete. The appellants further contend that submission of that additional information required by the special conditions required in the permit results in the public or intervenors being denied an opportunity to review and comment on this information, which they allege violates Chapter 2 §§ 14(B) and (16);

D. The appellants assert that Special Condition 14 of the permit violates Chapter 3§30(A) of the Department's *Rules Governing the Conduct of Licensing Hearings*. The appellants contend that the permit improperly exempts from notice to the parties certain additional submissions that require Department review and approval;

E. The appellants assert that registration of the drainage ring as a Class V injection well with the Bureau of Water Quality's Underground Injection Control (UIC) program should have been required concurrent with the processing of the September 12, 2014 application and not made a condition of the permit. The appellants contend that taking this action would have resulted in the licensee being subject to the pre-application meeting requirements of Chapter 2 §10(B)(6);

F. The appellants assert that the permit contains errors of fact and omits substantive project history related to the stormwater treatment standards and other standards of the Department's Rules, including the following:
   1. Issues related to Chapter 500 §4(A), Basic Standards:
      - The application does not address solid waste disposal of sewer grit and the permit simply requires compliance with the Maine Solid Waste Management Rules;
      - The Seeding Management Plan is inadequate; and
      - The application lacks a Housekeeping Plan and a Comprehensive Operations Plan.
   2. Issues related to Chapter 500 §4(B), General Standards:
      - The application does not contain a discussion of Low Impact Development;
      - The application does not properly address infiltration; and
      - The applicant ignored existing groundwater injection wells.
   3. Issues related to Chapter 500 §4(D), Flooding Standard:
      - The stormwater model submitted with the application used inaccurate inputs to determine runoff quantities which resulted in errors in the stormwater model's conclusions; and
      - The stormwater treatment units are unreliable because of errors in the stormwater model.
   4. Issues related to the permit in general:
      - The dewatering plan is inadequate;
      - The application does not examine the full extent of contamination on the site and does not address the prevention of stormwater and groundwater from contamination or the exposure of workers to contamination; and
      - Issues related to additional information included in the record.

G. The appellants assert that the Department failed to consider inadequacies with the approved Voluntary Response Action Program (VRAP) Plan and the Environmental Site Assessment (ESA) and the licensee has not received additional permits required by the Department or the Town of Brunswick.

H. The appellants assert that construction on the project was started prior to receipt of a permit from the Department.

5. <u>REMEDIES REQUESTED</u>:

The appellants request that the Board reverse the June 16, 2015 Department decision approving the layover facility stormwater plan and specifically request the following:

- That the Board hold a public hearing on this appeal;

- That the Board allow the submission of supplemental evidence related to the September 12, 2014 application;
- That the Board have the record reviewed by Department staff or an independent third party who was not previously responsible for review of the application; and
- That the Board make a finding that the September 12, 2014 application was incomplete for processing and require the licensee to submit a new, complete stormwater permit application in compliance with the notification and meeting requirements of Chapter 2.

6. RESPONSE TO REQUEST FOR A PUBLIC HEARING AND REQUEST THAT SUPPLEMENTAL EVIDENCE BE ADMITTED:

The Department held a public hearing in Brunswick to receive comment on the application on March 25, 2015. Prior to the hearing the appellants, the licensee, and the TrainRiders submitted pre-filed direct testimony and rebuttal testimony. During the eleven hour hearing the appellants, the licensee, and TrainRiders had the opportunity to testify and to cross-examine all witnesses, and the general public had the opportunity to testify as well. The record for this revised application was open for the submission of comments and information for a period of 6 months, from September 12, 2014 to March 25, 2015. Thus the appellants had ample opportunity to present information and argument to the Department, and availed themselves of that opportunity. The Board was provided with all the pre-filed testimony and the entire hearing transcript for its review in the course of its consideration of this appeal.

The Board finds that the record is adequately developed with regard to the statutory criteria, that a second hearing is not necessary to assist the Board in understanding the evidence, and that the appellants did not demonstrate that there is sufficient conflicting technical evidence to warrant a public hearing on the appeal.

On September 2, 2015, the Board Chair ruled that certain of the proposed supplemental evidence may be admitted, that some of the supplemental evidence already exists in the record, and that some of the proposed supplemental evidence would not be admitted because it was in part not relevant to the Stormwater licensing standards or that it could have been submitted earlier in the licensing process.

7. DISCUSSION AND RESPONSE TO APPEAL:

The Board, with the assistance of staff, has reviewed the record. Third party independent consultants were not utilized by the Board nor did the Board request staff that had not been involved in the processing of the application as requested by the appellants. The Board finds that Department staff knowledgeable about the proposed project can provide a fair and thorough review of the evidence to assist the Board.

Based on its review of the record, and recommendations from the Department's staff, the Board finds the following:

A. PROCEDURAL MATTERS

1) Meeting Requirements.

The appellants contend that two Department permits are required for the proposed project and therefore the Chapter 2 provision requiring a pre-application meeting and a public information meeting applies in this matter.

The licensee proposes to return water removed from the building foundation drain back into the groundwater by means of a drainage ring, a concrete cylinder with perforated sides set below the surface to allow water that discharges into the ring to infiltrate out into the ground surrounding the ring. The drainage ring will allow the foundation drain water to infiltrate into the groundwater down gradient of the building. The drainage ring meets the definition of a Class V injection well as defined in the Department's *Rules to Control the Subsurface Discharge of Pollutants*, Chapter 543.

The appellants contend that licensing of the drainage ring as a Class V injection well and licensing the entire project under the Department's *Stormwater Management Rules*, Chapter 500 (as amended December 27, 2011), should have triggered the pre-application meeting requirements in Chapter 2 §10(B)(6) and the public informational meeting requirements of Chapter 2 §13(A).

Pursuant to Chapter 543§5(B)(2), the discharges from Class V wells are authorized by rule without having to obtain an individual waste discharge license. The Board finds that because an individual waste discharge permit is not required, two Department permits are not required; thus Chapter 2 §10(B)(6) is not applicable and a pre-application meeting is not required. Because Chapter 2 §10(B)(6) is not applicable, there is also no requirement that a public informational meeting be held.

The appellants' next argument concerning meetings is that because the September 12, 2014 application was a resubmittal of the application returned as deficient on August 27, 2014, a pre-submission meeting was required pursuant to Chapter 2 §10(C)(2). However, the Department is authorized under Chapter 2 §10(D) to waive a pre-application meeting or a pre-submission meeting if the Department is satisfied that such a meeting would be of limited value in achieving the purposes of such meetings. The purpose of a pre-application meeting is for the Department and an applicant to determine the statutory and regulatory requirements applicable to a specific project, identify issues, processing times, fees, and the types of information and documentation necessary for the Department to properly assess the project. The purpose of a pre-submission meeting, in part, is to allow the Department and an applicant to review the assembled application to ensure that the necessary information has been included prior to filing the application.

In this case, the Department and the licensee met on July 30, 2014 to discuss the activities to be conducted by the licensee and to examine which of these activities may require action by the Department, including issues related to stormwater management. In a letter,

dated August 27, 2014, the Department identified the deficiencies in the application that led to the second application being returned as incomplete. The licensee's cover letter with the September 12, 2014 application provided responses to the application deficiencies the Department had noted.

Although the record does not include explicit documentation stating that the Department waived the pre-submission meeting, the Board finds that the waiver is implied and because the September 12, 2014 application was the third filing for the project, holding a pre-application and pre-submission meeting was unnecessary to achieve the purposes of Chapter 2 §10(A)(2).

2) Application Complete for Processing.

The appellants contend that submission of additional information following the filing of the September 12, 2014 application is indicative that the application was incomplete for processing. The appellants further contend that the number of special conditions; the requirements of Special Conditions 3, 6, 7, 8, 9, 10, and 13; and the amount of information provided during the processing of the application, signify that the application was incomplete. The appellants also argue that submission of additional information in fulfillment of a condition results in important parts of the application process being unavailable for public review and comment and that that violates the rule requiring notice to parties of post-hearing submissions. The appellants argue that all of the submissions required in Special Conditions 3, 6, 7, 8, 9, 10, and 13 should be subject to public review and comment.

In support of their argument that insufficient information was in the application for it to be deemed complete, the appellants point to the licensee's 450-page submittal, dated October 6, 2014, addressing the issues raised in Commissioner Aho's August 27, 2014 letter in conjunction with the return of the second application. The Commissioner's letter addressed a number of regulatory issues that were of concern to the Department, and it was not limited solely to the stormwater management permitting process. The licensee's submittal included a response to the stormwater issues raised by the Commissioner, but it also included a 236–page Coal Ash/Ash-Impacted Soil Management Plan and 168-page Groundwater Assessment Report, which is Appendix C of the soil management plan. The Coal Ash/Ash-Impacted Soil Management Plan was developed as a remedial action stipulated by the Department in its No Action Assurance Letter, dated September 12, 2011 as part of the VRAP Plan for the site.

The Board notes that Chapter 2 §11(B) states that "a determination that an application is complete for processing is based on staff's determination that the application fee has been paid, that sufficient title, right, or interest has been demonstrated, that the application form has been properly filled out, and that information is provided for each of the items required by the forms." A determination of completeness is not a review of the sufficiency of the information submitted with the application form, and the Department is not precluded from requesting additional information during processing.

The appellants have not argued that the elements required in Chapter 2 §11(B) have not been met, but instead assert that because the information submitted in the application does not meet the standards in Chapter 500, then the application is incomplete.

Based on the evidence in the record, the Board finds that, the September 12, 2014 application met the requirements for a completeness determination listed in Chapter 2 §11(B).

The appellants contend that the number of special conditions (14), the requirements of Special Conditions 3, 6, 7, 8, 9, 10, and 13, and the amount of information provided during the processing of the application signify that the application was incomplete.

The documents and actions required by the Special Conditions which are the focus of the appellants' objections include:

- Special Condition 3 - Provide the construction contractor with erosion control details on the final construction plans;
- Special Condition 6 - Submit a revised housekeeping plan that consolidates all the elements of a housekeeping plan required in Chapter 500 §4(A) into a single document;
- Special Condition 7 - Ensure that spill containment protocols utilized by contractors are equivalent to those of the licensee and report any petroleum spill within two hours of discovery;
- Special Condition 8 - Submit a revised plan to include an impermeable liner around the roof drip edge collection system for Department review and approval;
- Special Condition 9 - Register the drainage ring with the Department's Underground Injection Control (UIC) Program;
- Special Condition 10 - Submit a revised dewatering plan for Department review and approval;
- Special Condition 13 - Submit to the Bureau of Land Resources copies of all information required under the VRAP approval.

The sufficiency of the requirements of these Special Conditions is also an issue raised by the appellants. These substantive aspects are discussed in Section 7(B) of this Order.

The appellants argue that the actions and submissions required in Special Conditions 3, 6, 7, 8, 9, 10, and 13 should have been proposed and included as part of the application.

The application in the record contained information that sufficiently addressed the Stormwater Standards for a determination of completeness for processing to be made. Based on input from the Department staff, the Board finds that certain of the Special Conditions imposed here are routinely attached to Stormwater permits to provide additional assurance of compliance with the permit. These include providing erosion control details to contractors (Special Condition 3), requiring sewer grit disposal in compliance with Solid Waste Management Rules (Special Condition 11), and

construction oversight (Special Condition 12). Certain other of the Special Conditions here are atypical for a Stormwater permit, and require information or actions beyond what would be necessary for a permit application to be complete for processing or may only become available following commencement of the project. These conditions were imposed due to the past activities on this site, and they provide extra assurance that the stormwater management plan will not result in groundwater impacts (Special Conditions 6, 7, 8, and 10), they provide extra assurance of compliance with Chapter 500 and additional Department Rules that the project triggers (Special Conditions 3, 4, 6, 7, 8, 9, 10, and 12), and they address concerns raised of the appellants (Special Conditions 6, 7, 8, 10, and 13).

Chapter 2 §19(D) authorizes the Department to impose any requirement as a license condition to provide for and ensure compliance with applicable State law or rule. Special Condition 6 does not request additional information but rather requires that information submitted in pieces in different sections of the application be consolidated and put in one Housekeeping Plan. Special Condition 9 does not require any new information necessary to meet the Stormwater Standards, but states that registration of the drainage ring as an injection well must be completed before the drainage ring becomes operational. Special Conditions 8 and 10 do require revised plans, however plans often evolve in the licensing process and revisions to plans are not necessarily indicative of an incomplete application having been filed. Lastly, Special Condition 13 requires duplicates of materials being filed in response to the licensee's VRAP plan approval be sent to the Bureau of Land Resources, for the ease of both Department staff and access by members of the public who are interested in this project.

The Board finds that the number of Special Conditions and the requirements imposed by them do not constitute evidence that the application was incomplete for the purposes of processing. The Board further finds that the requirements set forth in Special Conditions 3, 6, 7, 8, 9, 10, and 13 are appropriate to ensure that construction activities comply with applicable State law or rule and do not constitute information that should have been included in the September 12, 2014 application to meet the completeness requirement set forth in Chapter 2 §11(B).

3) Additional Notice.

The appellants argue that the submissions in response to the Special Conditions would constitute significant new or additional information that substantially modifies the application and as such additional public notice should be required pursuant to Chapter 2 §14(B).

The Board finds that the provision in Chapter 2 §14(B) applies to modifications made by an applicant during the processing of an application, and is not directed at submittals required by the Department in a condition of an approval. Moreover, after a review of the Special Conditions, the Board finds that none of the conditions results in the

submission of significant new information or a substantial modification of the proposed project that would require such notice.

4) Post-decision submissions.

The appellants contend that the permit violates the rule regarding notice to parties of certain post-decision submissions in cases in which a hearing was held. The appellants argue that several Special Conditions other than Special Conditions 8 and 10 require the submittal of documents, and that the licensee should have been required to provide notice to the parties of the filing of these documents and that the appellants should be allowed to comment on those submittals.

Chapter 3 §30(A) requires any licensee that receives an approval following a hearing to provide notice to all parties of the filing of any documents with the Department that require Department review and approval.

The Board finds that only Special Conditions 8 and 10 require the submission of information to the Department for review and approval. Therefore, Special Condition 14 correctly requires the licensee to send to the appellants and TrainRiders copies of just the documents submitted to the Department to demonstrate compliance with Special Conditions 8 and 10.

The process for getting Department approval of the materials submitted under Special Conditions 8 and 10 involves the licensee submitting this information with a Condition Compliance permit application. For a Condition Compliance permit application, the rules for processing a permit application apply, and anyone may submit comments on such an application. In this case, the licensee has submitted its Condition Compliance application and supporting documentation and the appellants have submitted comments.

The Board finds that the remaining Special Conditions in the permit do not require Department review and approval, and thus there is no requirement that the licensee provide notice of the filing of submittals in compliance with them to the parties to the underlying licensing proceeding. There is no review and approval by the Department of those submittals and thus no official comment period would be appropriate. However, any party or member of the public may review any submittal related to these Special Conditions and may submit comments on the licensee's submittals with regard to the Special Conditions to the Department at any time.

The Board finds that the permit provided the parties, including the appellants, the opportunity to comment on the information submitted by the licensee pursuant to Special Conditions 8 and 10 and that the permit conditions are in accordance with the notice requirement of Chapter 3 §30(A).

B. TECHNICAL MATTERS

1) Basic Standards.

The proposed project would disturb more than one acre and therefore, pursuant to Chapter 500 §4(A), it must meet the Basic Standards for erosion and sedimentation control, inspection and maintenance, and housekeeping found in Appendices A, *Erosion and Sedimentation Control*, B, *Inspection and Maintenance*, and C, *Housekeeping* of Chapter 500.

The appellants' specific objections pertaining to the Basic Standards are: that the application failed to address how the licensee will comply with the Department's Solid Waste Management Rules when removing sewer grit and accumulated sediment from the stormwater management system, that the Seeding Management Plan is inadequate to protect abutting properties from groundwater and surface water contamination resulting from the placement of fertilizers on the project site, and that there is no Comprehensive Operations Plan.

(i) The appellants assert that the application is deficient because it fails to address how sewer grit and accumulated sediment collected in the stormwater management system will be disposed, and the permit only requires that the licensee comply with the Department's Solid Waste Management Rules for disposing of this material.

Appendix B(2)(b)(iv) of Chapter 500 requires the removal and legal disposal of any accumulated sediments and debris. While the record contains an inspection and maintenance plan that establishes and outlines the frequency of routine maintenance of the stormwater management system, including the removal of sewer grit, accumulated sediment, and litter, the licensee's plan does not address the disposal of this material. The stormwater management system consists of catch basins, a subsurface drainage system, a roof drip edge collection system, grassed swales, and a wet pond. The risk of contamination of sewer grit and accumulated sediment collected in the system is variable depending on where this material settles out of suspension, and the risk of contamination may vary over time. The disposal options for this material are also variable depending on the quantity and quality of the material.

Given the potential variability in the quality of sewer grit, accumulated sediment, and litter that can be collected in the stormwater management system, and given the options for disposing of this material, the Board finds that a broader regulatory approach is adequate and better addresses the potential variability of the quality of the material generated rather than limiting disposal of sewer grit to one specific method. Thus, requiring the licensee to comply with the Department's Solid Waste Management Rules for disposal is the most appropriate means for allowing the licensee to determine the best method of disposal of accumulated sediments and debris, and is adequate pursuant to Appendix B(2)(b)(iv).

(ii) The appellants assert that the Seeding Management Plan will result in contamination of groundwater on the project site from the application of fertilizers, which will then be discharged as a non-point source of pollution into navigable waters of the United States.

Appendix A is intended to ensure a project complies with the Erosion and Sedimentation Act (38 M.R.S. §§420-C), and section 5 of Appendix A requires permanent stabilization of all disturbed areas. For those areas in which vegetation is used for stabilization, then the proper vegetation for the light, soil, and moisture conditions must be selected and when necessary, disturbed subsoils must be amended with topsoil, compost, or fertilizers.

The licensee submitted a Seeding Management Plan to comply with Appendix A §5. This plan was amended to address public concerns of excessive nutrients entering the unnamed stream. The licensee agreed to determine the fertilizer application rate based on the results of soil testing of the topsoil used for stabilizing the project site. The Board finds that this precaution will provide a fertilizer application rate based on existing site conditions to ensure that over application of fertilizer and the risk of nutrient running off the site during rain events is avoided.

The Board finds that the Seeding Management Plan that proposes to use soil testing of the project site for determining the fertilizer application rate is the most appropriate means to ensure final stabilization of vegetated areas of the project site and minimize the potential for runoff of nutrients.

(iii) The appellants assert that the application lacks a Housekeeping Plan which is required pursuant to Chapter 500 §8(C)(3), and that Special Condition 6 of the permit serves to allow the licensee to comply with the requirements of Appendix C after the fact, thereby depriving the public of the opportunity for review and comment on that evidence.

Chapter 500 §8(C)(3) requires the submission of a Housekeeping Plan that addresses spill prevention, groundwater protection, fugitive sediment and dust control, debris and other materials collection, control of water generated from trench or foundation dewatering, and control of non-stormwater discharges. To ensure that a project meets the Basic Standards of the Stormwater Rules, the elements of a Housekeeping Plan must meet the performance standards found in Appendix C of Chapter 500.

The application, in documents labeled Appendix C and Appendix I, includes a dewatering plan that addresses how sediment laden groundwater generated during dewatering of the building and wet pond will be handled and a fugitive sediment and dust control plan. The spill prevention and groundwater protection plans are set forth in Exhibit 9 of the pre-filed testimony from the licensee. The licensee identified vehicle washing and snow melting off the train set as non-stormwater discharges with the potential for contaminating stormwater. The evidence in the record reflects that

vehicle washing and snow melt will take place inside the building and that these waste streams will be collected into an interior collection system and discharged to the municipal sanitary sewer system, not the stormwater management system. Exhibit 19 of the pre-filed testimony from the licensee includes a floor drain discharge permit issued by the Brunswick Sewer District. The Board finds that this evidence, either in the application or the written testimony filed before the public hearing, was available for public comment and as a subject for cross-examination by the appellants at the hearing. While this was not submitted as a single document, the Department staff reviewed each of the licensee's submittals related to the performance standards of Appendix C and determined that each submittal meets its respective performance standard.

Special Condition 6 requires the licensee to develop a Housekeeping Plan that consolidates all of the elements documenting how the licensee will meet the performance standards of Appendix C into a single document. This single document must then be incorporated into the project plan set which would be available for the contractor and any possible subcontractors to immediately access.

The Board finds that the record reflects the licensee submitted sufficient information to meet the performance standards of Appendix C of Chapter 500 and that the requirement established in Special Condition 6 of the permit is intended to provide a single repository of the overall Housekeeping Plan.

(iv) The appellants assert that the application lacks a Comprehensive Operations Plan.

The Stormwater Rules do not require an applicant for a stormwater permit to submit a Comprehensive Operations Plan; therefore, the Board finds the lack of such a plan is not a basis for reversal of the permit.

2) <u>General Standards.</u>

The proposed project must meet the General Standards for Stormwater, which are found in Chapter 500 §4(B). These standards require that a project's stormwater management system include general treatment measures that will mitigate for the increased frequency and duration of channel erosive flows due to runoff from smaller storms, provide for effective treatment of pollutants in stormwater, provide adequate treatment of stormwater prior to the discharge to an infiltration area, and mitigate potential temperature impacts. This must be achieved by using Best Management Practices to control runoff from no less than 95 percent of the new impervious area and no less than 80 percent of the new developed area. The General Standards recommend an examination of the use of low impact development techniques in project development.

The licensee intends to construct vegetated swales with catch basins, a subsurface drainage system with catch basins, and a roof drip edge collection system, all of which discharge to a wet pond to provide treatment for developed areas on the site.

The appellants' objections pertaining to the General Standards are that the application failed to address low impact development options and that it failed to properly address infiltration. The appellants also contend that the licensee ignored existing groundwater injection wells.

(i) The appellants assert that the application failed to demonstrate that the licensee had considered low impact development.

Chapter 500 §4(B)(2) contains a Note stating that the Department strongly encourages the incorporation of low impact development measures where practicable. Low impact development involves the avoidance of stormwater impacts by minimizing developed and impervious areas, considers the location of protected natural resources, and maintaining natural drainage patterns. One aspect of low impact development is the incorporation of stormwater runoff storage measures throughout a site rather than directing flows to a single collection, treatment, and discharge point.

The record shows that the shape of the project site is long and narrow, following along the existing rail lines. The Pre-Development Watershed Map, sheet C-8.1 of the licensee's plan set, shows that currently the majority of the stormwater flow travels in a west to east direction and leaves the project site from the eastern property boundary where it enters a stream that flows to the north.

Given the linear nature of the site, the scope of the project, and the location of the stream, the Board finds that implementation of low impact development measures, such as multiple discharge points is not practicable. The Board further finds that the Note in the regulation encourages, but does not require, the use of low impact development measures, and in any case, Notes in regulations are not legally binding. The Stormwater rules do not require that low impact development measures be utilized or that the use of these measures must be considered in any application for a stormwater management permit.

(ii) The appellants assert that the application failed to properly address infiltration.

The treatment measures required to use infiltration as a means to control stormwater runoff are contained in Chapter 500 §4(B)(2)(c). This section also states that in order to be considered a *de minimus* discharge and exempt from obtaining an individual waste discharge permit, a stormwater infiltration system must meet the standards of Appendix D of Chapter 500.

For the proposed project, only the foundation drains discharge to the drainage ring, which is designed to infiltrate groundwater from around the foundation back into the ground. The record includes a set of three plans, the first entitled, "Stormwater Schematic," dated June 2013, with the latest revision date of March 16, 2015. The

color plans show storm drain lines, foundation drain lines, domestic sewer lines, and internal floor drain lines that lead to an oil/water separator before discharging to the domestic sewer. Stormwater runoff from the site and the building is collected into separate pipe systems and discharged into the wet pond.

The Board finds that the stormwater management system does not include infiltration as a means to control stormwater runoff, therefore the requirements of Chapter 500 §4(B)(2)(c) for an infiltration treatment system are not applicable to this project.

(iii) The appellants assert that the licensee ignored existing groundwater injection wells and that there are multiple, unlicensed Class V underground injection wells on the site consequential to the design and construction of the project.

The appellants' reference to a Class V injection well refers to the Department's rules, Chapter 543. A well, also known as an injection well, is defined in Chapter 543 §1(S), as a bored, drilled or driven shaft whose depth is greater than the largest surface dimension, whether the shaft is typically dry or contains liquid; or a dug hole whose depth is greater than the largest surface dimension; or a subsurface wastewater disposal system, and specifically excludes retention basins, lagoons or any ditch or dug hole that is wider than it is deep. Well injection is defined in Chapter 543 §1(T) as the subsurface discharge of fluids into or through a well.

The May 2013 Geotechnical Report submitted with the application stated that 24 borings were drilled and four monitoring wells were installed as part of the site assessment on the project site. There is no evidence in the record that these wells are being used for well injection, and the appellants did not specify the location of any existing groundwater injection wells.

The Board finds that the evidence in the record does not show any groundwater injection wells on the project site.

3) <u>Flooding Standard.</u>

The proposed project must meet the General Standards for Stormwater, which are found in Chapter 500 §4(B). These standards require that stormwater management systems detain, retain, or result in the infiltration of stormwater from 24-hour storms of the 2-year, 10-year, and 25-year frequencies such that the peak flows of stormwater from the site do not exceed the peak flows of stormwater prior to the construction of the project.

The appellants' claim pertaining to the Flooding Standard is that the stormwater model submitted with the application used inaccurate inputs to determine runoff quantities that result in errors in the stormwater model results. The appellants argue that the stormwater treatment units are therefore inappropriately designed. The appellants also contend that the application should have included a hydro-geological impact study to address the

potential that alterations in groundwater flow would result in groundwater surcharging off-site and cause an increase in flooding on abutting properties.

(i) The appellants assert the stormwater model is based on an incorrect number for the amount of acres that will be impervious, that the stormwater model does not take into account all available topographic information for the site, and that incorrect soil data and cover types were used.

Stormwater management systems must detain, retain, or result in the infiltration of stormwater from specific storm events such that the peak flows of stormwater from the site do not exceed the peak flows of stormwater prior to the construction of the project. The methods that can be used for determining how this is achieved are found in Chapter 500 §8(E)(2). One of the acceptable methods is the use of HydroCAD, a stormwater modeling software that utilizes the methodologies outlined in Technical Releases #55 and #20, U.S.D.A., Soil Conservation Service.

With regard to the appellants' claim of the wrong figure being used for acreage of impervious area, the record reflects that during the review of the draft permit document, the appellants noted that on the application form (in box 16) the applicant listed the amount of impervious area created by the project as 4.3 acres. The appellants argued that the number used for the post-development impervious area in the stormwater model was 7.063 acres, and that after subtracting the 3.461 acres of existing (pre-development) impervious area, the stormwater model apparently only ran the calculations for 3.602 acres of impervious area, not the 4.3 acres described in box 16 of the permit application form. They argued that approximately 0.7 acres of impervious area (4.3 acres – 3.602 acres) would be created by the project that was not accounted for in the stormwater model. If true, this would mean additional stormwater, not accounted for in the design of the wet pond, would runoff the site and into the wet pond, causing overflow conditions.

The record reflects that the Department reviewed the appellant's assertion prior to issuing the permit and determined that the 4.3 acres of impervious area reported on the application form included the approximately 3.6 acres of new impervious area plus redevelopment over approximately 0.7 acres of existing impervious area. Box 16 of the application form requires that the total new impervious area created by a project be listed. The application form does not provide space for noting redevelopment of existing impervious area. The appellants' assertion was addressed in the findings of the permit.

The Board finds that the licensee's stormwater model used the appropriate values for the amount of impervious area for pre- and post-development.

The appellants argue that there were other inaccurate stormwater model inputs, soil moisture content values, ground cover and soil types, which affected the curve number used to generate runoff amounts. The appellants also contend that the

stormwater model lacks sufficient topographic data to determine sub-watershed boundaries which would also adversely affect the stormwater model results.

The evidence shows that the licensee reviewed soil borings, site assessment information, and the geotechnical report in conjunction with soils maps to determine which ground cover and soil types should be entered into the stormwater model. At the public hearing, the design engineer for the licensee testified that soil types used in the stormwater model provided the most conservative means of calculating maximum stormwater runoff volumes, which were then used to design the size of the wet pond.

The design engineer testified that he used his professional judgement, based on his knowledge of the site, to determine which ground cover types in the stormwater model best fit conditions on the ground, and from this, curve numbers were determined for use in the stormwater model. The record also supports the conclusion that the stormwater model defaults to a "normal moisture content" setting and that the normal moisture content level is most appropriate for the project site. The input selections offered in the stormwater model do not always match site conditions from one project to the next. The selections used in this case were based on the design engineer's professional judgement, as shown in the testimony during the public hearing.

In a Technical Review Memorandum, dated May 20, 2015, the Department's stormwater engineering staff noted that during the public hearing the issue that the plans lacked enough on- and off-site topographic data to model the site, but stated that sufficient topographic data could be found on the plans to model the pre- and post-development conditions. No objections to the input selections used in the model were noted in the review memo.

The Board finds the licensee's design engineer's testimony to be credible and finds that the groundcover and soil types used adequately represent the site in terms of stormwater issues.

Based on the site plans, the testimony of the design engineer and the Department's engineer's analysis, the Board finds that the input assumptions used in the stormwater model for the project were appropriate for this site.

(ii) The appellants assert that the stormwater treatment structures proposed, such as the wet pond and pipe sizing, are unreliable because of the allegedly inaccurate stormwater model inputs (impervious area, ground cover and soil types, and moisture content) used in the stormwater model.

The treatment requirements and design criteria for a wet pond are set forth in Chapter 500 §4(B)(2)(a), and section 4(E)(3) outlines the design requirements for piped or open channel systems.

The record demonstrates that the licensee used conservative input values in its stormwater model to estimate runoff amounts greater than may actually occur. The stormwater runoff volumes were then used to determine the size of the wet pond required to provide holding capacity sufficient to attenuate peak flows from the site to less than the pre-development flows. In the Technical Review Memorandum, the Department's stormwater engineering staff concluded that the wet pond and the stormwater collection system that conveys stormwater runoff to the wet pond were designed in accordance with the Department's stormwater Best Management Practices manual.

Based on the licensee's conservative assumptions, and the Board's findings above with regard to the appropriateness of the inputs into the model, as well as the Department's engineer's analysis, the Board finds that stormwater treatment unit, the wet pond, meets the design requirements outlined in Chapter 500 §4(B)(2)(a) and that the design of the stormwater collection system meets the requirements outlined in Chapter 500 §4(E)(3).

(iii) The appellants contend that the application did not include a hydro-geological impact study to address the potential for altering groundwater flow resulting in higher groundwater levels off-site and an increase in flooding on abutting properties.

The focus of the Stormwater rules is the management of runoff from impervious and developed areas created by a project. The rules allow that land use activities may cause changes in stormwater flows, but require a project to meet appropriate standards to prevent and control the release of pollutants to waterbodies, wetlands, and groundwater, and reduce impacts associated with increases and changes in stormwater flow. Stormwater is defined in Chapter 500 §3(W), as the part of precipitation, including runoff from rain, or melting ice or snow, that flows across the surface as sheet flow, shallow concentrated flow, or in drainageways.

The Board finds that 38 M.R.S. §§ 420-D and Chapter 500 do not address a project's potential effect on groundwater flow. An applicant for a Stormwater permit is not required to provide an analysis of groundwater flows on a proposed site. Thus the appellants' argument that the application should have included a hydro-geological impact study to address the potential for altering groundwater flow resulting in groundwater surcharging off-site is not properly the subject of an appeal of this Stormwater permit.

4) <u>Other issues raised by the appellants.</u>

(i) The appellants assert that the dewatering plan provided by the licensee is inadequate because it lacks measurements and calculations required to predict site conditions during the dewatering process. The appellants argue that testing and modeling to determine groundwater flow, pump rates, the effects of dewatering, and an estimate of the volume of water that would be generated are necessary before dewatering

begins. The appellants also contend that the dewatering plan was not prepared by a licensed professional engineer or certified geologist.

Dewatering is the process of removing water from a work area and is a common practice for construction projects in Maine. Depending on the size of the work area and the depth below groundwater level required, it may be necessary to model for dewatering. This modeling requires soils data and groundwater data to accurately determine the size of the system required to safely dewater a site. For sites where the depth of construction is shallow, the area requiring dewatering is small, or the duration of dewatering operations is expected to be short, then dewatering can be performed without modeling.

For this project, dewatering will be required for the construction of the building foundation and the wet pond and to a depth estimated at three feet below the groundwater level. Review comments by Department staff noted that the dewatering plan did not provide substantial detail describing the design or operation of the dewatering system or the length of time the system will be in operation. However, based on its experience with similar systems at other projects, the Department agreed with the licensee that dewatering operations would not be expected to extensive or that they would continue for an extended period.

The licensee proposes to conduct dewatering in accordance with the Department's "Maine Erosion and Sediment Control BMPs" manual. The original dewatering plans, submitted with the application, addressed the performance standard for trench or foundation dewatering found in Appendix C of Chapter 500 by routing the groundwater, which may contain sediment, through a stabilized sediment trap.

In his pre-filed testimony, Matthew Tonello, PE, representing the licensee's contractor, stated that dewatering at the site will be performed using well points with the intent of lowering the groundwater level to one to two feet below the bottom elevation of the building foundation and the wet pond. The well point method of dewatering involves the close placement of a number of small diameter wells around the work area. Attached to vacuum pumps, the well points create a cone of depression that lowers the groundwater level to allow for dry work conditions. Water generated from the dewatering process will be collected into a sump and allowed to re-infiltrate into the ground. Mr. Tonello also stated that the dewatering plan included contingencies for addressing dewatering flow volumes that may exceed the capacity of the sump area.

The Board finds that the scope of the construction work that requires dewatering on the site, the method for dewatering the work area, and means for handling water generated during the dewatering operations, do not support the appellants' argument that testing and modeling is required prior to the start of dewatering operations.

The licensee's investigation of groundwater quality on the site showed that, with the exception of one exceedance for sodium levels in one monitoring well, analytical results found all constituents below the applicable Federal Primary Drinking Water Standard Maximum Contaminant Levels or State of Maine Maximum Exposure Guidelines. In its review comments, Department staff stated that water quality data provided with the application do not indicate significant adverse impact on groundwater quality in the immediate area of the proposed project. While the evidence in the record does not show contamination as alleged by the appellants, as a precaution the Department requested a revised dewatering plan for addressing potential contaminants if they are detected in the groundwater pumped during the dewatering process.

Because the licensee intends to re-infiltrate water generated during dewatering operations, the permit includes specific testing procedures and protocols that must be implemented during dewatering operations to ensure protection of the groundwater from the reintroduction of any pollutants that may be present in the discharge from the dewatering operations. Special Condition 10 of the permit requires the submission of a revised dewatering plan that incorporates the procedures and protocols required in the permit for detecting hydrocarbons that may be in the groundwater removed during dewatering and for controlling hydrocarbons if they are detected. Special Condition 10 requires Department review and approval of the revised dewatering plan prior to the start of construction.

Based on the groundwater quality data submitted by the licensee, the Board finds that the presence of contaminants during dewatering operations is not expected. The Board further finds that in the event contaminants are encountered, then the revised dewatering plan that incorporates the procedures and protocols required in the permit will provide adequate controls to avoid an unreasonable impact on groundwater due to pollutants that may be encountered during the dewatering process.

With regard to the appellants' argument that the dewatering plans were not prepared by a licensed professional, the record reflects the following. The two dewatering plans submitted with the application do not indicate who prepared each plan. Neither plan is signed or stamped by a licensed professional, however Chapter 500 does not require that a dewatering plan be prepared by a licensed professional. The appellants' claim is apparently based on the stormwater permit application instructions, which state that all work performed by a professional engineer or other licensed professional must be dated, stamped and signed by the professional.

Based on the testimony at the public hearing, the Board finds that it is reasonable to infer that Mr. Tonello, a licensed professional engineer, prepared or at least reviewed the dewatering plan that was submitted with the application. The issue of a signature may be adequately cured by the submission of a signed and certified revised dewatering plan as outlined in Special Condition 10 of the permit.

(ii) The appellants argue that the licensee did not examine the full extent of the possibility of contamination on the site and that the application does not address the prevention of stormwater and groundwater contamination or the exposure of workers to contamination. The appellants contend that the testing and the form of testing included in the Environmental Site Assessment (ESA) submitted by the licensee present a biased view of the extent of contamination on the site. The appellants assert that the Site Safety and Health Plan submitted by the licensee indicates that workers, as well as neighboring residential properties, will be at risk from exposure to contaminated dust.

As a result of the past usage of the site during the era of coal-fired locomotives, contaminants associated with coal ash were identified in the soils at the site during a Limited Phase II Environmental Site Assessment conducted by the applicant in 2011. Because of the history of the site, the applicant developed a voluntary remedial action plan and submitted an application to the Department's Voluntary Response Action Program (VRAP).

The proposed remedial actions and other recommendations for management of contaminated soils were conditionally approved by the Bureau of Remediation and Waste Management's (BRWM) in a letter dated September 12, 2011. The Coal Ash/Ash Impacted Soil Management and Health and Safety Plans were designed to integrate the construction of the layover project with the requirements of the voluntary remedial action plan described above and was reviewed and found to be acceptable by BRWM staff. The proposed project is subject to the findings, conclusions and conditions of the September 12, 2011 letter of approval from BRWM and the October 2014 soil management plan. The permit requires that copies of any soil test results or other materials submitted to the BRWM pursuant to the VRAP must also be submitted to the Bureau of Land Resources (formerly the Bureau of Land and Water Quality).

Although no other hazardous materials or evidence of petroleum contamination were identified by the licensee on the surface or in subsurface explorations at the site, the nature of the project site and adjacent properties is such that these materials may be encountered during construction of this project. The licensee developed contingency measures to be followed should contractors encounter conditions or materials suggesting the presence of hazardous materials and/or petroleum during excavation. Contingency measures to be taken are described in the Coal Ash/Impacted Soil Management and Health and Safety Plans, submitted by the licensee in pre-filed rebuttal testimony. Upon discovering any such potential contaminants, all work in that area must immediately stop (except as may be necessary for worker safety) and the BRWM must be contacted.

With regard to the appellants' arguments pertaining to potential dust on site, the Board finds that the implementation of the proposed dust control measures are expected to adequately address the risk of exposure from contaminated solid

particulates. The Board finds acceptable the provisions for fugitive sediment and dust control.

(iii) The appellants contend that the ESA does not fully comply with the American Society for Testing and Materials (ASTM) standards and that the ESA does not identify historical off-site pollution sources, which would obligate the licensee to conduct additional testing to determine the extent of contamination on the project site. The appellants argue that the VRAP plan requires the licensee to address human health and environmental contamination issues in accordance with applicable standards.

The ESA and VRAP Plan in this case provided useful information with regard to characterizing site conditions, but they are not documents that must be included with a stormwater permit application. The VRAP approval was not appealed and cannot be appealed in this proceeding. The Board finds that whether the ESA fully complies with established standards and whether the approved VRAP Plan is protective enough are not matters properly before the Board in this appeal.

(iv) The appellants contend that the licensee does not have permits from the Brunswick Sewer District to discharge sanitary sewage or industrial wastewater from inside the building or to discharge overflow from the dewatering operation into the District's sewer system.

The Board finds that the licensee's procurement of municipal permits does not affect the Board's ability to issue a decision on a stormwater application.

(v) The appellants argue that the licensee has not addressed the issue of air emissions which may result in contamination of stormwater and groundwater and that the licensee does not have a State of Maine General Permit for control of contaminated stormwater runoff from unspecified points of origin.

In Commissioner Aho's August 27, 2014 letter, the Department notified the licensee that air emissions from the project are not expected to exceed thresholds that require an air emissions license.

In the October 6, 2014 letter to Commissioner Aho, the licensee reported meeting with Department staff from the Bureau of Water Quality and responsible for the implementation of Multi-Sector Industrial Stormwater General Permit on August 26, 2014 to discuss the industrial activities that will take place at the facility. Based on that discussion, Department staff concurred that no industrial activities would be performed outside and therefore the licensee may submit a No Exposure Certification for Exclusion from MEPDES Storm Water Permitting form to the Department.

The Board finds that the licensee has initiated action to ensure compliance with the Multi-Sector Industrial Stormwater General Permit and that an air emission license is not required based on the proposed activity.

5) Start of Construction Without a Permit.

The appellants assert that removal of vegetation constituted the start of construction of the project prior to issuance of the permit.

The Board finds that the question of whether an applicant has started construction of a project that requires a permit before the issuance of a permit is an enforcement issue and is not ground for appeal of that permit.

Based on the above findings, the Board concludes that:

1. The appellants filed a timely appeal.

2. The Board denies the request for a public hearing for this appeal.

3. The licensees' proposal to construct a passenger rail layover facility in Brunswick meets the criteria for a permit pursuant to 38 M.R.S §420-D and Chapter 500 of the Department's rules.

THEREFORE, the Board AFFIRMS the Department Order approving the application of NORTHERN NEW ENGLAND PASSENGER RAIL AUTHORITY to construct a LAYOVER FACILITY in BRUNSWICK, Maine and DENIES the appeal of THE BRUNSWICK WEST NEIGHBORHOOD COALITION, CHARLES F. WALLACE, JR., J. MAURICE L. BISSON, AND ROBERT N. MORRISON. All other findings of fact, conclusions and conditions in Department Order #L-26119-NJ-C-N remain as originally approved and are incorporated herein.

DONE AND DATED AT AUGUSTA, MAINE, THIS_____ DAY OF _____, 2015.

BOARD OF ENVIRONMENTAL PROTECTION

By: _____

James W. Parker, Chair