MEMORANDUM

TO: The Board of Environmental Protection

FROM: Robert L. Green, Jr., Project Manager, Bureau of Land Resources
Marybeth Richardson, Regional Licensing and Compliance Manager

RE: Appeal filed by the Brunswick West Neighborhood Coalition, Charles F. Wallace, Jr., J. Maurice L. Bisson, and Robert N. Morrison (appellants) of Stormwater Management Law Approval #L-216119-NJ-C-N, for Northern New England Passenger Rail Authority (licensee) to construct a stormwater management system for a passenger rail equipment layover facility to be used for overnight storage, light maintenance and refueling of passenger trains located between Church Road and Stanwood Street in the Town of Brunswick, Cumberland County.

DATE: November 19, 2015

Statutory and Regulatory References: The applicable statutory and regulatory framework for this application includes the Storm Water Management Law 38 M.R.S. §480-D and the Department's *Stormwater Management Rules*, Chapter 500. The Rules interpret and elaborate on the Storm Water Management Law criteria. Procedures for appeals before the Board are outlined in the Department's *Rules Concerning the Processing of Applications and Other Administrative Matters*, Chapter 2 §24(B).

Location: The project site is located between Church Road and Stanwood Street in the Town of Brunswick.

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. 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 include abutters as defined in the Department's applications processing rule (Chapter 2 §1A), and were therefore entitled to notice of the stormwater permit application. In a decision dated July 2, 2014, the Court vacated the Department's approval (Department Order #L-26119-NJ-A-N).

A second 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 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 on October 3, 2014. 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, 2014 for public comment, and the Department approved the proposed project in Department Order #L-26119-NJ-C-N, dated June 16, 2015.

On July 16, 2015, the appellants filed a timely appeal to the Board requesting that the Board hold a public hearing and reverse the decision of 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. Several responses were also received from interested persons.

Project Description:
The licensee intends to construct a stormwater management system for a passenger rail equipment layover facility to 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.

FINDINGS AND CONCLUSIONS OBJECTED TO:
The appellants object to the Department's findings and conclusions:

A. The appellants assert that a pre-application public informational meeting was required to be conducted by the licensee 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, stating that the inclusion of an excessive number of special conditions in 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*, stating that the permit 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 special 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 licensee 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.

Environmental Issues and Discussion:

1) Basic Standards.

The appellants' specific objections related to the Basic Standards are outlined below.

(i) The application is deficient because it fails to address how sewer grit will be disposed, and the permit only requires that Department's Solid Waste Management Rules for disposing of this material be met.

Appendix B(2)(b)(iv) of Chapter 500 requires the removal and legal disposal of any accumulated sediments and debris. While an inspection and maintenance plan that establishes the frequency of routine maintenance of the stormwater management system, including the removal of sewer grit, was submitted, the plan does not address the disposal of this material. The risk of contamination of sewer grit collected in the system is variable depending on where this material settles out of suspension, and that 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. For the above reason, the Department determined that the method for disposal of solid waste in the permit is sufficient. The Department recommends that the Board find that the same conclusion.

(ii) *The Seeding Management Plan will result in contamination of groundwater and surface water on the project site from the application of fertilizers.*

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, 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 Seeding Management Plan included in the application complies with Appendix A(5). This plan was amended to address 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. 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.

Based on the evidence in the record, the Department recommends that the Board find that this means for determining the fertilizer rate is protective of wetlands and waterbodies while ensuring final stabilization of vegetated areas is maintained.

(iii) *The application lacks a Housekeeping Plan pursuant to Chapter 500 §8(C)(3). Special Condition 6 of the permit allows the licensee to comply with the requirements of Appendix C after the fact, thus removing opportunities for public review and comment.*

Chapter 500 §8(C)(3) requires the submission of a 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, 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 includes a dewatering plan that addresses how sediment laden groundwater generated during dewatering will be handled and a fugitive sediment and dust control plan. The spill prevention and groundwater protection plans are found 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 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. This evidence 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.

Based on the evidence in the record, the Department recommends that the Board find that the licensee has developed a Housekeeping Plan that documents that the project will meet the performance standards of Appendix C.

(iv) The application lacks a Comprehensive Operations Plan.

Chapter 500 does not require an applicant for a stormwater permit to submit a Comprehensive Operations Plan; therefore the lack of such a plan is not a basis for reversal of the permit. Based on the evidence in the record, the Department recommends that the Board find that the lack of a Comprehensive Operations Plan is not relevant in this appeal.

Based on the evidence in the record, the Department recommends that the Board find that the project meets the standards of Chapter 500 §4(A).

2) General Standards.

The appellants' specific objections related to the General Standards are outlined below.

(i) *The application failed to consider low impact development.*

Chapter 500 §4(B)(2) includes 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.

Given the linear nature of the site, the scope of the project, and the location of the stream, implementation of low impact development measures, such as multiple discharge points is not practicable. Although a Note in the regulation encourages the use of low impact development measures, Notes are not legally binding. The regulation does 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. The Department recommends that the Board find that the absence of any consideration of low impact development techniques is not a basis for reversal of the 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.

The plans in the record 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. Only the foundation drains discharge to the drainage ring, which is designed to re-infiltrate groundwater from around the foundation back into the ground. Based on the evidence provided, the Department determined 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. The Department recommends that the Board find the same conclusion.

(iii) *The licensee ignored existing groundwater injection wells.*

The record reflects that four monitoring wells were installed as part of the geotechnical review performed on the project site. There is no evidence in the record that these wells are being used for well injection, as set forth in Chapter 543 §1(T). There are no records in the record of any injection wells on the project site. The appellants did not specify the location of any existing groundwater injection wells, and evidence in the record does not show any groundwater injection wells on the project site. The Department recommends that the Board find the same conclusion.

Based on the evidence in the record, the Department recommends that the Board find that the project meets the standards of Chapter 500 §4(B).

3) Flooding Standard.
The appellants' claims pertaining to the Flooding Standard are outlined below.

(i) *The stormwater model is based on an incorrect number for the amount of acres that will be impervious, the stormwater model does not take into account all available topographic information for the site, and that it used incorrect soil data and cover types. The stormwater model inputs for soil moisture content values, as well as, ground cover and soil types, which affect the curve number used to generate runoff amounts, and that the stormwater model lacks sufficient topographic data to determine sub-watershed boundaries which will also adversely affect the stormwater model results.*

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. One of the Department's accepted methods includes 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.

The record reflects that during the review of the draft permit, the appellants noted that on the application form, the licensee listed the amount of impervious area created by the project as 4.3 acres. During the review of the application, the appellants argued that the post-development impervious area used by the applicant in the stormwater model was 7.063 acres, and that after removing 3.461 acres of existing (pre-development) impervious area, then the stormwater model only accounted for 3.602 acres of impervious area. 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. 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 included and addressed in the findings of the permit.

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 also testified that he used his professional judgement 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 "normal moisture content" and that the normal moisture content level is most appropriate for the project site. 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 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.

Based on the evidence in the record, the Department determined that the licensee's stormwater model used the appropriate values for the amount of impervious area for pre- and post-development and the input assumptions used in the stormwater model for the project were appropriate for this site. The Department recommends that the Board find the same conclusion.

(ii) *The stormwater treatment structures, such as the wet pond and pipe sizing, are unreliable because of the allegedly inaccurate stormwater model inputs used in the stormwater model.*

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, Department 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 evidence in the record, the Department determined that stormwater treatment unit, the wet pond, meets the design requirements outlined in Chapter 500 §4(B)(2)(a) and design of the stormwater collection system meets the requirements

outlined in Chapter 500 §4(E)(3). The Department recommends that the Board find the same conclusion.

(iii) *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 drainage ways.

Based on the evidence in the record, the Department determined 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 irrelevant in this appeal. The Department recommends that the Board find the same conclusion.

Based on the evidence in the record, the Department recommends that the Board find that the project meets the standards of Chapter 500 §4(F).

4) Other issues raised by the appellants.

(i) *The dewatering plan is inadequate because it lacks measurements and calculations required to predict site conditions during the dewatering process. 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 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 the project under appeal, 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 intends 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 de-watering 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's testimony also stated that the dewatering plan included contingencies for addressing dewatering flow volumes that may exceed the capacity of the sump area.

With regard to the appellants' argument that the dewatering plan is inadequate as it relates to protection of groundwater quality, 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 procedures and protocols that must be implemented during dewatering operations to ensure protection of the groundwater from the reintroduction of 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.

The Department determined that a 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. The Department recommends that the Board find the same conclusion.

With regard to the appellants' argument that the dewatering plans were not prepared by a licensed professional, the record reflects that two dewatering plans submitted with the application do not indicate who prepared each plan. Neither plan is signed or stamped by a licensed professional. 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 Department determined 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. Further, the issue of a signature will be addressed by the submission of a signed and certified revised dewatering plan, as required in Special Condition 10 of the permit. The Department recommends that the Board find the same conclusion.

(ii) *The application does not examine the full extent of contamination on the site and does not address the prevention of stormwater and groundwater contamination or the exposure of workers to contamination. The limited testing and the form of testing included in the Environmental Site Assessment (ESA) present a biased view of the extent of contamination on the site. The Site Safety and Health Plan submitted in the record 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 (ESA) conducted by the licensee in 2011. Because of the history of the site, the licensee 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 (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 Department examined, and found acceptable, the housekeeping provisions for fugitive sediment and dust control and that implementation of these dust control measures would adequately address the risk of exposure from contaminated solid particulates.

BRWM regulates the investigation and cleanup of contaminated sites through the VRAP process. Matters related to cleanup of contaminated sites are not properly the subject of an appeal of this Stormwater permit. The Department recommends that the Board find the same conclusion.

(iii) *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 VRAP plan requires the licensee to address human health and environmental contamination issues in accordance with applicable standards.*

The ESA and VRAP plan, although useful in characterizing site conditions, are not documents that must be included with a stormwater permit application nor do they provide evidence that a project will meet the standards of Chapter 500. The Department determined that whether the ESA fully complies with established standards and whether the approved VRAP plan is protective enough are not the subject of an appeal of this Stormwater permit. The Department recommends that the Board find the same conclusion.

(iv) *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 licensee's procurement of municipal permits does not affect the Department's ability to issue a decision on a stormwater application. The Department recommends that the Board find the same conclusion.

(v) *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, the Department notified the licensee that air emissions from the project are not expected to exceed thresholds that require an air emissions license. Further, in an October 6, 2014 letter to Commissioner Aho, the licensee reported meeting with Department staff from the Bureau of Water Quality, which is responsible for the implementation of Multi-Sector Industrial Stormwater General Permit on August 26, 2014. Discussed were the industrial activities that will take place at the facility. Based on this 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 licensee has initiated action to ensure compliance with the Multi-Sector Industrial Stormwater General Permit and air emission standards in the Department's Rules. The licensee's procurement of other permit coverage required by the Department does not affect the Department's ability to issue a decision on a stormwater application. The Department recommends that the Board find the same conclusion.

5) Start of Construction Without a Permit.
Removal of vegetation constitutes the start of construction of the project prior to issuance of the permit.

The question of whether a licensee or 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 grounds for appeal of that permit.

<u>Non-environmental (Procedural) Issues and Discussion</u>:

1) Meeting Requirements.
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.

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 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), discharges from Class V wells are authorized by rule without having to obtain an individual waste discharge license. The Department determined 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, it follows under the rules that the public informational meeting requirements of Chapter 2 §13(A) would not be invoked. The Department recommends that the Board find the same conclusion.

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 of 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 at the project site 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 cover letter with the September 12, 2014 application provided responses to the application deficiencies noted in the Department's August 27, 2014 letter.

Although the record does not include explicit documentation stating that the Department waived the pre-submission meeting, 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 would have had little effect in achieving the purposes of Chapter 2 §10(A)(2). As discussed above, the Department recommends that the Board find that the project meets the meeting and notification requirements of Chapter 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, all signify that the application was technically 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 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 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 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.

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, the application is incomplete. Based on the evidence in the record, the Department determined that the September 12, 2014 application meets the requirements set forth in Chapter 2 §11(B), and was therefore complete for processing. The Department recommends that the Board find the same conclusion.

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; and
- Special Condition 13 - Submit all information included in the VRAP.

The sufficiency of the requirements of these Special Conditions is also an issue raised by the appellants. The appellants also argue that the submissions required in Special Conditions 3, 6, 7, 8, 9, 10, and 13 should have been included as part of the application.

The record contains information included with the application that sufficiently addressed the Stormwater Standards for a determination of completeness to be made. A number of the Special Conditions imposed here are routinely attached to Stormwater permits to provide additional assurance of compliance with the standards. These include providing erosion control details to contractors (Special Condition 3), 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, but given the past activities on this site, they provide extra assurance that the stormwater management plan will not result on groundwater impacts (Special Conditions 6, 7, 8, and 10), to assure compliance with Chapter 500 and additional Department Rules that the project triggers (Special Conditions 3, 4, 6, 7, 8, 9, 10, and 12), and to address the concerns 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 is operating. Special Conditions 8 and 10 do require revised plans. Lastly, Special Condition 13 requires duplicates of materials being filed under a different Department program, the VRAP, to be sent to the Bureau of Land Resources, for the ease of both Department staff and members of the public who are interested in this project to access them.

The Department determined 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, and 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). The Department recommends that the Board find the same conclusion.

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).

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. After a review of the Special Conditions, the Department determined that none of the conditions results in the submission of significant new information or a substantial modification of the proposed project. The Department recommends that the Board find the same conclusion.

4) Post-decision submissions:
The appellants contend that the permit violates the rule requiring notice to parties of 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 there is no requirement for the licensee 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. 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 all documents submitted to the Department to demonstrate compliance with Special Conditions 8 and 10.

Department approval of Special Conditions 8 and 10 requires the licensee submit this information with a Condition Compliance permit application. For a Condition Compliance permit application, the rules for processing a permit application, Chapter 2, apply, and anyone may submit comments on this application. In this case, the licensee has submitted its Condition Compliance application and supporting documentation and the appellants have submitted comments.

The remaining Special Conditions in the permit do not require Department review and approval, 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 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 Department determined that the notice requirement of Chapter 3 §30(A) has been met and that the permit provided the parties, including the appellants and the general public the

opportunity to comment on the information submitted by the licensee as required by Special Conditions 8 and 10. The Department recommends that the Board find the same conclusion.

Department Recommendation: After reviewing the permitting record, the arguments of the appellants, and the licensee's and Intervenor's responses, the Department recommends that the Board deny the appellants' request to reverse the Department's decision or remand the Order back to the Department.

Estimated Time for Consideration of the Matter: 2-3 hours