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Agency of Natural Resources

March 27, 2009

Jacalyn M. Fletcher, Court Manager
Vermont Environmental Court
2418 Airport Road, Suite 1
Barre, VT 05641-8701

Re: Rivers Development, LLC
Docket Nos. 7-1-05, 68-3-07, & 157-7-08 Vtec

Dear Ms. Fletcher:

Enclosed please find a copy of the Agency of Natural Resources' Proposed Findings of Fact and Conclusions of Law.

Please contact me if you have any questions.

Sincerely,

Michael Steeves
Environmental Litigation Attorney

enclosure

cc: service list



**STATE OF VERMONT
ENVIRONMENTAL COURT**

In re: Appeal of Rivers Development, LLC
Rivers Development Act 250 Land Use Application

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Environmental Court
Docket Nos. 7-1-05, 68-3-07, &
157-7-08 Vtec

**THE AGENCY OF NATURAL RESOURCES'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. Introduction

This matter involves the consolidated appeals of decisions regarding a rock extraction and processing quarry ("Quarry") in Moretown, Vermont proposed by Rivers Development LLC ("Rivers"). The Agency of Natural Resources ("ANR") offers the following findings of fact and conclusions of law.

II. Criterion 1 – Air Pollution

Findings of Fact

1. ANR's Air Pollution Control Division requires an air pollution control permit for a rock crusher with a maximum capacity of greater than 150 tons per hour or a stationary reciprocating internal combustion with a brake horsepower output rating of greater than 450 hp. ANR-14.
2. Rivers will either: (1) use a rock crusher with a capacity less than 150 tons per hour; (2) sign a contract with a crushing company which has a permitted crusher; or (3) obtain a permit from the ANR for its own crusher if that crusher has a capacity greater than 150 tons per hour or stationary reciprocating internal

combustion with a brake horsepower output rating of greater than 450 hp. ANR-14.

3. Rivers will inform ANR of any equipment changes in the future which may require an air pollution control permit. ANR-14.
4. Rivers agrees to take reasonable precautions at all times to control fugitive particulate matter (dust) emissions from the site including the rock crushing equipment, haul roads, traffic areas, storage piles, exposed surfaces, and any site operations such as drilling, blasting, crushing, and processing of materials. ANR-14.

III. Direct Discharge Appeal and Criteria 1 and 1(B) – Water Pollution and Waste Control

Findings of Fact

5. On December 28, 2007, Rivers submitted an application to ANR for a direct discharge permit for the proposed Quarry. Rivers amended its direct discharge application on March 3, 2008.
6. On April 15, 2008, ANR issued a proposed denial of Rivers' direct discharge application.
7. On July 14, 2008, ANR issued a final denial of Rivers' application for a direct discharge permit, which Rivers appealed. Rivers' direct discharge application was denied pursuant to Section 1-04(A)(2) of the Vermont Water Quality Standards, which states that a new discharge of waste may only be allowed if:

There is neither an alternative method of waste disposal, nor an alternative location for waste disposal, that would have a lesser impact on water quality including the quality of groundwater, or if there is such an alternative method or location, it would be clearly unreasonable to require its use.

N-24 at 2.

8. On December 12, 2008, Rivers submitted to ANR a Notice of Intent (“NOI”) for coverage under the Vermont National Pollution Discharge Elimination System (“NPDES”) Multi-Sector General Permit (“MSGP”). R-100.
9. On January 8, 2009, ANR approved Rivers’ coverage under the MSGP and issued an Authorization to Discharge pursuant to General Permit 3-9003, Permit No. 4103-9003. R-101.
10. The MSGP, effective from August 18, 2006 to August 18, 2011, authorizes the discharge of stormwater associated with industrial activities from the Quarry to the Mad River. R-101, R-102. The Quarry is classified within Subsection J (mineral mining and dressing) of the MSGP as industry group 1429 (crushed and broken stone, not elsewhere classified) of the Standard Industrial Classification (“SIC”) code. R-102.
11. Rivers submitted a Stormwater Pollution Prevention Plan (“SWPPP”) with its NOI. R-100. The SWPPP includes an Erosion Prevention and Sedimentation Control plan (“EPSC”) and Best Management Practices (“BMPs”) that ANR has determined to be economically reasonable and appropriate in light of current industry practices as required by Section 2 of the MSGP. R-100 (Response Summary at 4).

12. Section 2.1.4.4 of the MSGP states that non-stormwater discharges to waters of the state that are not authorized under the MSGP are unlawful and must be eliminated. Rivers is required to monitor for the presence of non-stormwater discharges, and Rivers must certify that there are no non-stormwater discharges from the Quarry. The certification must include:

- the date of any testing or evaluation,
- a description of the results of any test or evaluation for the presence of non-stormwater discharges, and
- the actions taken to eliminate unauthorized discharges.

R-102 at 30.

13. Pursuant to Section 2.1.4.4 of the MSGP, the inability of the applicant to certify that there are no non-stormwater discharges from the Quarry is not a permit violation if the applicant notifies ANR:

- why certification was not possible,
- the procedure followed in any test attempt,
- the results of such test or other relevant observations, and
- any potential sources of non-stormwater discharges that have not been eliminated.

R-102 at 30-31.

14. In compliance with the MSGP, Rivers has notified ANR that “no certifications for non-stormwater discharges have been obtained for the Quarry as it is not yet operational.” R-100 at 18.

15. Under Section 2.2 of the MSGP, Rivers is responsible for maintaining all BMPs identified in their SWPPP including, but not limited to, BMPs associated with

the stormwater pond until the mining operation is terminated, the site is reclaimed, and MSGP coverage is no longer required. R-101, R-102.

16. Based on the information in Rivers' MSGP application, NOI, and SWPPP, ANR has determined that an individual discharge permit is not required for the Quarry. R-100 (Response Summary at 4).
17. No party appealed ANR's issuance of Authorization to Discharge Permit No. 4103-9003.
18. On January 9, 2009, Rivers filed a motion to dismiss its appeal of ANR's denial of the direct discharge permit application. That motion is pending before this Court.

Conclusions of Law

10 V.S.A. §6086(a)(1) requires a finding that the project "will not result in undue water pollution" based on consideration of "the nature of soils and subsoils and their ability to adequately support waste disposal; the slope of the land and its effect on effluents; the availability of streams for disposal of effluents; and the applicable health and environmental conservation department regulations." Criterion 1(B) (Waste Disposal) provides that:

A permit will be granted whenever it is demonstrated by the applicant that, in addition to all other applicable criteria, the development or subdivision will meet any applicable health and environmental conservation department regulations regarding the disposal of wastes, and will not involve the injection of waste materials or any harmful or toxic substances into ground water or wells.

10 V.S.A. §6086(a)(1)(B). The applicant has the burden of proof. 10 V.S.A. § 6088(a).

A discharge permit creates a rebuttable presumption that waste materials and wastewater

can be disposed of without undue water pollution. 10 V.S.A. § 6086 (d). In the present case, Rivers is relying on its MSGP coverage to demonstrate compliance with Criterion I(B).

The MSGP is a NPDES permit that covers new and existing discharges of stormwater from industrial facilities to waters of the state. Section 402 of the Clean Water Act authorizes state permit programs if approved by the Environmental Protection Agency ("EPA"). 33 U.S.C. § 1342. Vermont is a delegated state for the purposes of the Clean Water Act. In Vermont, the MSGP is generally governed by 10 V.S.A. §§ 1263, 1264, and 1264a. The Secretary of ANR has been granted authority to promulgate the MSGP "[a]s one of the principal means of administering an enhanced stormwater program." 10 V.S.A. § 1264(e)(2).

The MSGP is generally applicable to new and existing discharges of stormwater from mines, although different types of mines are treated differently by both EPA and the state. Appendix D of the MSGP details which industrial categories are covered as defined by SIC codes. Stone and rock quarries are identified as SIC code 1429 within subsection J of the MSGP. R-102 (Appendix D).

The MSGP is the appropriate permit for a direct discharge of stormwater or mine dewatering from a stone or rock quarry to waters of the state. EPA defines "mine dewatering" as "any water that is impounded or that collects in the mine and is pumped, drained or otherwise removed from the mine through the efforts of the mine operator." 40 C.F.R. § 436.21(b). Mine dewatering is a term that is specific to stone and rock quarries, and EPA has stated that the term "mine" as used in "mine dewatering" is limited

to an "area of land, surface or underground, actively mined for the production of *crushed and broken stone* from natural deposits." 40 C.F.R. § 436.21(d) (emphasis added). Mine dewatering discharges that are "composed entirely of stormwater and ground water seepage from construction sand and gravel, industrial sand, and crushed stone mining facilities" are covered under the MSGP. R-102 (MSGP § J.3).

However, mine dewatering discharges from stone or rock quarries that are commingled with discharges of process generated wastewater are not covered under the MSGP. R-102 (MSGP § J.7). EPA defines "process generated wastewater" as:

any waste water used in the slurry transport of mined material, air emissions control, or processing exclusive of mining. The term shall also include any other water which becomes commingled with such waste water in a pit, pond, lagoon, mine, or other facility used for treatment of such waste water.

40 C.F.R. § 436.21(e). A discharge of process generated wastewater may require an individual direct discharge, indirect discharge, or UIC permit. Discharges of stormwater or mine dewatering that are segregated from discharges of process generated wastewater may be authorized by the MSGP.

In the present case, ANR has determined that the MSGP is the appropriate discharge permit for the Quarry and that no other discharge permits are required based on the MSGP application materials submitted by Rivers. Rivers' SWPPP and BMPs contemplate discharges composed of stormwater and mine dewatering, and neither Rivers nor ANR has identified any discharges of processed generated wastewater that may require an individual permit. While Rivers will use water for dust suppression, such use will be limited to misting during dry conditions and it will not result in a discharge to waters of the state.

IV. Criterion 1(G) - Wetlands

Findings of Fact

19. Wetlands 2007-1, 2007-2, and 2007-3 are Class III wetlands located near or within the proposed Quarry site. R-98 at 2.
20. Rivers has agreed to provide a minimum 50-foot undisturbed buffer to wetlands 2007-1 and 2007-2. Additionally, Rivers has agreed to minimize impacts to wetland 2007-3 and its 50-foot buffer to the greatest extent possible. R-99.

V. Criterion 8(A) – Wildlife Habitat

Findings of Fact

21. Rivers submitted a Wildlife Habitat Management Plan dated January 31, 2006 to ANR's Department of Fish and Wildlife. R-21, R-22.
22. Rivers agrees to implement and comply with the Wildlife Management Plan agreed upon between Rivers and ANR. ANR-1.

VI. Requested Permit Conditions

ANR respectfully requests that the Court include the following conditions in any permit which may be issued as a result of the permit application process and this appeal:

1. In order to control fugitive particulate matter (dust) emissions from the Quarry, Rivers shall at least include the application of water or calcium chloride as necessary to the haul roads, traffic areas, and storage piles. Wet suppression shall be a minimum precautionary measure for all crushing equipment.

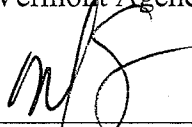
2. Rivers shall abide by Discharge Permit No. 4103-9003 and any subsequent discharge permit in place after the current permit expires, the Vermont Water Pollution Control Act, and the Vermont Water Pollution Control Permit Regulations.
3. Rivers shall provide a minimum 50-foot undisturbed buffer to wetlands 2007-1 and 2007-2. Additionally, Rivers shall minimize impacts to wetland 2007-3 and its 50-foot buffer to the greatest extent possible.
4. Rivers shall implement and comply with the Wildlife Management Plan agreed upon between Rivers and ANR.

Dated March 27, 2009 at Waterbury, Vermont.

Respectfully submitted,

Vermont Agency of Natural Resources

By:



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STATE OF VERMONT

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CERTIFICATE OF SERVICE

I hereby certify that a copy of The Agency of Natural Resources' Proposed Findings of Fact and Conclusions of Law dated March 27, 2009 was sent on March 27, 2009, by U.S. Mail, postage prepaid, to the following:

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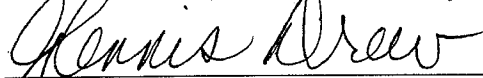
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Dated March 27, 2009 at Waterbury, Vermont,



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