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*Agency of Natural Resources*

April 27, 2009

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

Re: Rivers Development, LLC, Dockets No. 7-1-05 & 69-3-07 Vtec

Dear Ms. Fletcher:

On behalf of the Agency of Natural Resources, enclosed please find our  
*RESPONSE TO THE NEIGHBORS' PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW*

Please contact me at 241-2681 if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "MS", with a long horizontal flourish extending to the right.

Michael Steeves, Esq.  
Environmental Litigation Attorney

cc: Service List



ENVIRONMENTAL COURT  
STATE OF VERMONT

In re: Appeal of Rivers Development, LLC  
7-08 Vtec

Dockets No. 7-1-05, 68-3-07, & 157-

CERTIFICATE OF SERVICE

I hereby certify that a copy of The Agency of Natural Resources' *RESPONSE TO THE NEIGHBORS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW* was sent on April 27, 2009, by U.S. Mail, postage prepaid, to the following:

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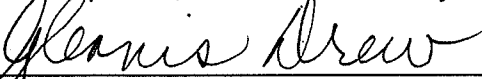
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Dated April 27, 2009 at Waterbury, Vermont,

  
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Glennis Drew, Legal Secretary  
Agency of Natural Resources' Environmental Litigation Division  
103 South Main Street □ Waterbury, VT 05671-0301

**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'  
RESPONSE TO THE NEIGHBORS' PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

The Agency of Natural Resources ("ANR"), by and through counsel Michael Steeves, respectfully submits the following Response to the Neighbors' Proposed Findings of Fact and Conclusions of Law.

**MEMORANDUM**

In their Proposed Findings of Fact and Conclusions of Law, the Neighbors argue that this Court must determine on its own what water discharge permits are appropriate for the rock extraction and processing quarry ("Quarry") in Moretown, Vermont proposed by Rivers Development LLC ("Rivers"). Neighbors' Proposed Findings of Fact and Conclusions of Law, March 27, 2009, at p. 113 (hereafter "Neighbors' Proposed Findings"). The Neighbors also contend, both explicitly and implicitly, that ANR's approval of Rivers' coverage under the Vermont National Pollution Discharge Elimination System ("NPDES") Multi-Sector General Permit ("MSGP") is deficient despite the fact that this permit approval was never appealed. *Id.* at 105-117. In support of this argument, the Neighbors rely almost exclusively on an outdated interim procedure

and the misinterpretation of rules related to indirect discharge permits while ignoring applicable federal and state regulations and rules and ANR's technical determinations.

**I. ANR'S APPROVAL OF RIVERS' MSGP COVERAGE AND RELATED TECHNICAL DETERMINATIONS ARE ENTITLED TO SUBSTANTIAL DEFERENCE.**

The Neighbors argue that this Court "must determine for itself which ANR regulations and permits apply." Neighbors' Proposed Findings at p. 113. In support of this argument, the Neighbors cite to cases defining the jurisdictional limits of Act 250 review. *Id.* at p. 111-113. However, the issue in this case is not whether the Court has the jurisdiction to consider applicable ANR rules, regulations, and water discharge permits in determining compliance with Act 250 Criteria 1 and 1(b), rather the issue is the standard of proof and the level of deference associated with ANR's MSGP coverage approval.

In Act 250 cases, a discharge permit issued by ANR creates a rebuttable presumption that waste materials and wastewater can be disposed of without undue water pollution. 10 V.S.A. § 6086(d). Agencies' technical determinations related to permit approvals "shall be accorded substantial deference by the commissions." *Id.* The substantial deference standard extends to appeals of Act 250 decisions before this Court. 10 V.S.A. § 8504(i). Therefore, in an Act 250 appeal, ANR's technical determinations associated with permit approvals must be accorded substantial deference by this Court, even if these determinations would be accorded no such deference upon direct appeal. *See In re: Unified Buddhist Church, Inc.*, Docket # 191-9-05 Vtec, slip opinion at p. 9

(Vt. Env'tl. Ct. Jan. 2, 2008) (holding that ANR's Indirect Discharge Renewal Permit is accorded substantial deference in an Act 250 appeal).

In the present case, ANR's technical determinations associated with the issuance of MSGP coverage for the Quarry are entitled to substantial deference. 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. 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. While Rivers is required to monitor for the presence of non-stormwater discharges, ANR has not identified any non-stormwater discharges associated with the Quarry operations. R-101. Rivers submitted a Stormwater Pollution Prevention Plan ("SWPPP") with its application, which 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).

Despite ANR's findings, and despite the fact the Neighbors chose not to appeal ANR's issuance of MSGP coverage, the Neighbors are now arguing that this Court must "determine for itself" which regulations and permits apply to the Quarry without any deference to ANR's permit decision. Such an argument amounts to nothing more than a collateral attack on ANR's MSGP issuance.

**II. THE NEIGHBORS' CONTENTION THAT THE STORMWATER PONDS WILL DISCHARGE PROCESS GENERATED WASTEWATER AND NON-SEWAGE WASTE IS WITHOUT MERIT.**

In arguing that the MSGP is improper, the Neighbors contend that Rivers must obtain direct, indirect, and Underground Injection Control Program ("UIC") permits for water discharges from the Quarry. Neighbors' Proposed Findings at p. 102-109, 113-117. In support of their argument, the Neighbors rely on the misinterpretation of rules related to indirect discharge permits and an outdated UIC interim procedure while ignoring federal and state rules, regulations, and permits directly related to stormwater discharges. A careful review of these applicable rules and regulations reveals that the Neighbors' arguments lack merit.

**A. ANR's Indirect Discharge Rules Exempt Stormwater from Indirect Discharge Permitting Requirements.**

The Neighbors argue that the "MSGP does not and cannot cover quarry discharges, which are *specifically defined* by the State of Vermont as 'non-sewage waste' (Vermont Indirect Discharge Rules, effective April 30, 2003, at § 14-405(a))." Neighbors' Proposed Findings at p. 116 (emphasis added); *see also Id.* at p. 105, Finding 429 (stating that the Indirect Discharge Rules define quarry discharges as non-sewage waste). Without further explanation, the Neighbors appear to argue that the proposed stormwater retention ponds will contain non-sewage waste and therefore Rivers is required to obtain an indirect discharge permit. Despite the Neighbors' assertion to the contrary, the term "quarry discharge" is not defined anywhere in the Indirect Discharge

Rules. However, the term “non-sewage waste” is defined within the definition section of the rules. Non-sewage waste means “any waste other than sewage which may contain organisms pathogenic to human beings but *does not mean stormwater runoff*.” § 14-300(27) (emphasis added). This definition makes no mention of quarry discharges. Furthermore, the rules expressly exclude stormwater discharges from indirect permit requirements. §14-607(b)(6). Indirect Discharge Rule Section 14-405, cited by the Neighbors as the only support for their contention that quarry discharges are defined as non-sewage waste, merely explains that indirect discharge permits may be required for the land application of certain non-sewage wastes, including quarry discharges that are composed of non-sewage waste. The provision in no way redefines the term “non-sewage waste.” Additionally, the Indirect Discharge Rule cited by the Neighbors in support of their assertion that an indirect discharge permit is required for the Quarry pertains only to discharges associated with the *land application* of non-sewage waste. § 14-405(a).

In order to determine the types of quarry discharges that may require an indirect discharge permit, one must look to the MSGP itself and the corresponding state and federal regulations. The MSGP is the appropriate permit for a direct discharge of stormwater, groundwater seepage, or mine dewatering discharges from a stone or rock quarry to waters of the state. R-102 (MSGP § J.3). The Environmental Protection Agency (“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 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).

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) (emphasis added).

Based on EPA’s definition of process generated wastewater, water used in air emissions control may be considered non-sewage waste, and a discharge associated with air emissions control may need an indirect discharge permit.<sup>1</sup> However, in this case, neither Rivers nor ANR has identified any discharges of process generated wastewater associated with air emissions or dust suppression. R-101 (Response Summary at 4). While Rivers has proposed to use water for dust suppression, the SWPPP and BMPs submitted with Rivers’ application include procedures to prevent any runoff or discharges associated with dust suppression. R-100. Furthermore, 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. R-102 at 30.

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<sup>1</sup> Water used for dust suppression while drilling is considered to be part of the mining process and therefore it is not process generated wastewater as defined by 40 C.F.R. § 436.21. See R-101 (Response Summary at 4).

**B. The Neighbors' Sole Reliance on an Outdated Interim Procedure is Misguided.**

The Neighbors assert that the Quarry will discharge process generated wastewater and that contention appears to be entirely based on ANR's "Interim Procedure for Permitting Stormwater Discharges through the Underground Injection Control (UIC) Program," March 28, 2006 ("UIC Interim Procedure"). However, reliance on this guidance document is misguided and ignores existing rules, regulations, permits, and ANR's own assertions the UIC Interim Procedure is outdated and inaccurate.

The UIC Interim Procedure was an informal guidance document adopted prior to the promulgation of the MSGP as guidance in navigating the regulatory maze of the UIC, indirect, and direct permitting programs in ANR's Wastewater Management Division. *See* R-101 at 8 and R-102. As it was adopted prior to the MSGP, the UIC Interim Procedure was never intended to address NPDES stormwater permitting requirements as administered by ANR's Water Quality Division. *See* R-101 at 8. The fact the MSGP was not promulgated until August 18, 2006 explains why some quarries, such as the Carrara dolomite quarry, received UIC permits prior to 2006.

Additionally, the UIC Interim Procedure incorrectly interprets EPA's regulations in 40 C.F.R Part 436 regarding process generated wastewater, and this incorrect interpretation was identified by ANR in the Response Summary for Rivers' MSGP coverage. *See* R-101 at 8-9. While the UIC Interim Procedure at p. 3 notes that "[f]ederal regulations (40 C.F.R. Part 36) consider rainwater to be 'process wastewater' if

it comes into contact with the working face of the quarry, sand pit, or gravel pit," there is absolutely no support for that contention in the applicable regulations. See 40 C.F.R. § 436.21. In acknowledging the error, ANR stated:

[w]hereas the procedure currently states that rainwater coming into contact with the quarry floor is process wastewater, it should state that rainwater that comes into contact with the quarry floor is considered to be "mine dewatering water." Mine dewatering water that then comes in contact with process wastewater is considered process wastewater under 40 C.F.R. Part 36, otherwise it is eligible for coverage under the MSGP. The Department has acknowledged this omission in the current procedure, and has commenced work on an updated procedure.

R-101 (Response Summary at 8-9). As the EPA specifically defines process generated wastewater to exclude water used in mining, and the MSGP provides coverage for discharges of stormwater, groundwater seepage, and mine dewatering, interpreting process generated wastewater to include any rain water that comes into contact with the quarry face would render Section J of the MSGP and 40 C.F.R. Part 36 meaningless, and no quarry would ever be eligible for MSGP coverage in Vermont.

To the extent that the Neighbors argue that UIC permits are required regardless of the presence of process generated wastewater, the UIC program is only intended to regulate wells designed to actively inject wastewater into the ground, and it was never meant to extend to incidental seepage of stormwater. Such a distinction has been recognized by ANR:

[a] quarry or sand and gravel pit is not, by the mere fact of its existence, an "injection well" under the UIC Program. An injection well is defined in part as "an opening in the ground used as a means of discharging waste." Although quarries and sand and gravel pits can be argued to be "openings in the ground," they are not originally created for the purpose of "discharging waste." It is unreasonable to interpret these UIC definitions to mean that any hole in the ground collecting stormwater runoff automatically qualifies as an "injection

well." Under such an interpretation, a pothole on Interstate 89 collecting stormwater runoff could constitute an injection well and require a permit. Such absurd interpretations would do nothing to further the goal of the federal and state UIC Programs to protect groundwater and public health.

UIC Interim Procedure at p. 2. As explained above, requiring a UIC permit for every hole or pond would create an absurd result, and the UIC program would subsume every other ANR water discharge program. This is especially true in the case at hand, where Rivers has designed a stormwater retention system using BMPs that incorporate recommendations from the MSGP and the Vermont Stormwater Management Manual. See R-100.

Finally, the Underground Injection Control Rule recognizes that an expansive interpretation of the UIC requirements could lead to absurd results and regulatory duplicity by providing the Secretary of ANR with the authority to permit discharges through other regulations. § 13.UIC.3 (effective December 7, 1982). For these reasons, the Court should conclude that UIC Interim Procedure does not accurately reflect the stormwater regulatory scheme as administered by ANR's Water Quality Division.

Dated April 27, 2009 at Waterbury, Vermont.

Respectfully submitted,

Vermont Agency of Natural Resources

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