

NOW COME Thomas Allen, Robert Dansker, Jack Byrne, Virginia Farley, Doug Hall, Cindy Hall, June Holden Life Estate, Rick Hungerford, Rita LaRocca, Robert McMullin, Beverly McMullin, John Porter, Sandy Porter, Scott Sainsbury, Patricia Sainsbury, Benjamin Sanders, Denise Sanders, Karen Sharpwolf, Ruth van Heuven, Marten van Heuven, Wichard van Heuven, and Constance van Heuven, by and through their attorneys, David L. Grayck, Esq. and

Zachary K. Griefen, Esq., and Arthur Hendrickson, Pro Se, and Linda Hendrickson, Pro Se, collectively the "Neighbors," and they hereby file these proposed findings of fact and conclusions of law in the above-captioned dockets.

**I. BACKGROUND FACTS DERIVED FROM THE COURT'S PRETRIAL DECISIONS AND PARTIES' MOTIONS FOR SUMMARY JUDGMENT**

1. Appellant Rivers Development, LLC ("Rivers") is the owner of an approximately ninety-three acre parcel of land located in the Town of Moretown along the northerly side of Route 100B, about two and a half miles from Moretown village.
2. On May 17, 2004, Rivers submitted to the DRB a zoning and conditional use application and supporting materials for the construction of a rock processing quarry ("Quarry").
3. The DRB denied Rivers' zoning and conditional use application on December 10, 2004.
4. On October 18, 2005, Rivers submitted to the District Commission an Act 250 land use permit application for its Quarry.
5. The Commission denied Rivers' land use permit application on January 19, 2007.
6. Rivers' ninety-three acre parcel is presently wooded with a mixture of hard and soft woods and is improved only with internal woods roads. The Quarry footprint is proposed to encompass approximately seventeen acres of the parcel.
7. Quarry operations are proposed to include the clearing of vegetative cover, the stripping and storing of topsoil and overburden, drilling, blasting, excavating, crushing, stockpiling, loading, and hauling of rock.
8. The Quarry is proposed to have a maximum extraction rate of 75,000 cubic yards per year and is proposed to operate over an approximately thirty-three year period.

9. Rivers proposes to operate the Quarry from April 15 to December 15 each year, Monday through Friday, between 7:00 a.m. and 5 p.m., exclusive of state and federal holidays. Rivers pledges to limit blasting to Monday through Friday, between the hours of 10:00 a.m. and 4:00 p.m. Quarry employees will conduct maintenance activity at the site on Saturdays from 7:00 a.m. until noon. Rivers requests that off-season access to stockpiled materials be permitted, with the approval of the Department of Fish and Wildlife.
10. The Quarry is proposed to generate a maximum of fifty-four loaded dump trucks per day (i.e.: 108 one-way vehicle trips) and up to ten other vehicles (i.e.: twenty additional one-way vehicle trips for employees and other business invitees).
11. The majority of the trucks accessing the site would be "customer" trucks, i.e., trucks arriving unloaded and departing loaded with crushed rock. The number and size of customer trucks would not be under the control of Rivers.
12. Rivers proposes to operate the following equipment at the Quarry site: one hydraulic rock drill; one excavator; one bucket loader; one six by twenty foot triple deck screener; one yard/water truck; one backhoe; one crusher with a total capacity of one hundred cubic yards per hour; and other miscellaneous equipment as needed.
13. Quarry operations will generate noise, shock waves and vibrations from blasting and other quarry processes.
14. The closest point of the working Quarry is proposed to be 760 feet from Route 100B. Its access is proposed to be from Route 100B via an existing woods road, approximately 1,400 feet in length. This road would require improvements and grading in order to accommodate haul trucks. Significant ledge removal work is required on Route 100B in

order to satisfy the Vermont Agency of Transportation sight distance requirements for trucks exiting the Quarry via its access road.

15. The Mad River flows on the southerly side of Route 100B throughout the area in which the Quarry is located. The parcels to the east and west of the Quarry are improved with single family residences. The parcel adjacent to the Quarry to the north is a large wooded tract.
16. Four horse farms are located in the vicinity of the Quarry, across Route 100B to the south. Several of the horse farms have indoor and outdoor arenas, riding trails and pastures, and provide riding lessons and boarding. Two of the horse farms, owned by the Sainsbury and McMullin families, are adjacent to the Quarry parcel, with pastures on the southerly side of Route 100B.
17. The Quarry's reclamation plan does not return the site to original or natural contours, instead leaving the benched faces exposed. The stacked benches will leave an exposed rock face that will have a maximum height of 210 feet. A single bench level will be about fifteen feet in height; therefore, the maximum height of 210 feet of exposed face is approximately fourteen stacked benches.
18. The Zoning Regulations for the Town of Moretown ("Zoning Regulations") were adopted on March 7, 2000.<sup>2</sup> The proposed Quarry location is within the Agriculture-Residential Zoning District ("Ag-Res District"), as described in Zoning Regulations Table 2.3.
19. Moretown has a Town Plan which was drafted with the assistance of the Moretown Planning Commission and adopted by the Moretown Selectboard on August 27, 2002.

---

<sup>2</sup> The Zoning Regulations were further amended on July 21, 2003, although those amendments do not impact the material issues in these appeals.

The Town Plan also identifies the proposed Quarry site as being located within the Ag-Res District and adjacent to the Route 100B/Mad River Corridor, with view-shed and traffic impacts occurring inside the Corridor.<sup>3</sup>

20. On May 3, 2004, prior to the submission of Rivers' conditional use permit application, the Moretown Selectboard considered, under new business, the adoption of interim zoning amendments and how those amendments could relate to a potential quarry on the Rivers' property. The Selectboard did not take any action on the proposed interim zoning amendments during this meeting and decided instead to table further discussion on the matter.
21. On May 17, 2004, Rivers submitted to the DRB its zoning and conditional use application and supporting materials for the construction of the Quarry. The municipal application was signed by Rivers on May 4, 2004, the day after the meeting at which the Moretown Selectboard considered adopting an interim zoning amendment that would prohibit quarrying in the Ag-Res District.
22. Exhibits 2, 3(A), 3(B), 3(C), 3(D), 3(E), 3(F) and 3(G) of Rivers conditional use application, as submitted on May 17, 2004, failed to identify, describe or analyze the impacts attributable to the haul road improvements or the Route 100B ledge removal work.
23. On June 15, 2004, the Moretown Selectboard issued a Notice of Public Hearing "for the purpose of discussing the proposal and adopting Interim Bylaws for Rock and Stone

---

<sup>3</sup> The Planning Commission studied this Route 100B/Mad River Corridor in 1999-2000 and concluded that most of its defining features are located within a broad corridor defined by a distance of 300 feet east and west of the 100 year floodplain. The Quarry is located beyond 300 feet from the 100 year floodplain, however, the view-shed and traffic impacts will occur inside this Corridor.

Quarrying” set for July 6, 2004. The Notice advised that the interim zoning amendments would “prohibit rock and stone quarrying in the Agriculture/Residential and Preserve Districts of the Town of Moretown.”

24. On June 29, 2004, the Moretown DRB ruled Rivers conditional use application, as submitted on May 17, 2004, to be complete for the purposes of giving adequate notice to the Board and other interested parties of its development proposal.
25. On August 2, 2004, Moretown adopted the proposed interim zoning amendments to Section 3.5(A) of the March 7, 2000 Regulations. Section 3.5(A) was amended such that only the removal of soil, sand or gravel may be allowed as a conditional use in the Ag-Res District.
26. Moretown’s DRB denied Rivers’ zoning and conditional use application on December 10, 2004, asserting undue adverse impacts on the Town’s character, traffic, noise levels and water supplies.
27. Rivers appealed the DRB’s decision to this Court, which was assigned Docket No. 7-1-05 Vtec. With its notice of appeal, Rivers filed a motion to put that appeal on inactive status, pending Rivers’ application for an Act 250 permit to the District #5 Environmental Commission.
28. On April 8, 2005, Environmental Judge Meredith Wright granted Rivers’ motion to place its DRB appeal on inactive status, pending filing and consideration of Rivers’ application for an Act 250 permit.
29. On October 18, 2005, Rivers submitted an Act 250 Land Use Permit application to the District #5 Environmental Commission (“Commission”) for its proposed Quarry.

30. Rivers Act 250 application was assigned Application #5W1455. On January 19, 2007, the Commission issued its Findings of Fact, concluding that Rivers' proposal did not comply with 10 V.S.A. §6086(a)(10)("town plan"), and did not meet its burden of production with respect to 10 V.S.A. § 6086(a)(1)("air pollution"). As a consequence of the Commission's factual findings, no Act 250 permit was issued for Rivers proposed Quarry. The Commission also denied Rivers subsequent motion to alter the Commission's Findings of Fact.
31. Rivers then appealed the Commission's determinations to the Court; that appeal was assigned Docket No. 68-3-07 Vtec. Rivers then filed a motion to reactivate Docket No. 7-1-05 Vtec, and consolidate it with the newly filed Act 250 appeal (Docket No. 68-3-07 Vtec). This Court granted Rivers motion to reactivate and consolidate on July 3, 2007.
32. On April 15, 2004, Rivers submitted a proposed discharge plan for the proposed project (including plans dated April 12, 2004) and requested that the Agency determine that a direct discharge permit was not needed. At this point, Rivers apparently did not want to have to obtain a direct discharge permit for the Quarry.
33. On April 19, 2004, Randy Bean sent a letter on behalf of the Agency to Rivers noting that the Agency had determined that a direct discharge permit was not needed for the proposed project.<sup>4</sup>
34. On September 20, 2004, Rivers submitted revisions to its proposed discharge plan and asked the Agency to review these revisions. The Agency then conducted a site visit two days later, on September 22, 2004.

---

<sup>4</sup> Although the April 19, 2004 letter, as well as the September 27, 2004 letter, refers only to a "discharge permit," it is clear from the context that both of these letters were referring to direct discharge permits, as the Agency Commissioner noted in his December 13, 2004 letter.

35. On September 27, 2004, Randy Bean sent a letter on behalf of the Agency to Rivers noting again that the Agency had determined that a direct discharge permit was not needed for the proposed project, even as revised.<sup>5</sup>
36. On December 13, 2004, the Agency Commissioner noted that he had “determined that Randy Bean’s letter, dated September 27, 2004, that indicated that no direct discharge permit is needed for the proposed quarry project in Moretown[,] is correct and therefore constitutes the final decision of the Agency.”
37. No one appealed the decision that was noted in the September 27, 2004 letter and in the December 13, 2004 letter.
38. Rivers apparently later used the determination noted in the September 27, 2004 and the December 13, 2004 letters when Rivers made representations to the District Commission to show that no direct discharge permit was needed for the Quarry.
39. During the roughly three years between December 13, 2004 (when the Agency Commissioner confirmed that no direct discharge permit was needed) and December 28, 2007 (when Rivers filed an application for a direct discharge permit), Rivers made additional modifications to the proposed discharge design for its proposed project. The parties disagree about the extent of those modifications and when those modifications were properly brought to the attention of the Agency. Rivers presented some of these modifications in its application for a UIC permit, which was received by the Agency on May 9, 2006, and which contained plans that were dated May 5, 2006. The Agency disputes whether all of these modifications were clearly brought to the Agency’s attention in the proper format. In reviewing the May 9, 2006 application, the Agency determined

---

<sup>5</sup> See footnote 3 above.

on August 7, 2007, that the proposal did not require a UIC permit and (based upon the same proposal) the Agency then determined on October 15, 2007, that the project does require an indirect discharge permit. After these determinations were made, Rivers made additional modifications, although again the parties dispute how extensive those modifications were. The parties agree that the current discharge design involves a rise pipe outlet instead of a level spreader, although Rivers seems to argue that the two are functionally equivalent.

40. On December 28, 2007, Rivers submitted an application to the Agency for a direct discharge permit for a modified discharge design for the Quarry.
41. On March 3, 2008, Rivers amended its application for a direct discharge permit.
42. From April 20, 2008, through May 20, 2008, the Agency held the requisite 30-day public notice and comment period on Rivers' application.
43. On July 14, 2008, the Agency denied Rivers' application for a direct discharge permit. Rivers then filed a timely appeal of this denial with this Court (Docket Number 157-7-08 Vtec).
44. Chapter Four of the Town Plan, entitled "Natural and Cultural Resources", states that the DRB "shall, through the conditional use review process, ensure that the extraction of gravel and other mineral resources does not permanently scar the landscape."
45. The Moretown Zoning Regulations applicable to Rivers' municipal permit applications<sup>6</sup> state at § 4.10(B)(1) that "[n]o noise shall be permitted which is excessive at the property line or incompatible with the reasonable use of the surrounding area. Excessive noise

---

<sup>6</sup> This would be the Zoning Regulations adopted March 7, 2000 and not the amended Regulations finally adopted on August 2, 2004, while Rivers' application was under consideration. See Interim Decision of Jan. 8, 2008 at 6-9.

shall be considered a sound pressure level that exceeds 70 decibels at the property line on a regular or recurring basis.” (Emphasis added).

46. Rivers proposes that the Quarry will have a maximum extraction rate of 75,000 cubic yards of rock product per year and will operate over an approximately thirty-three year period. Rock extraction will be completed in six phases, with the order of phases depending on the physical characteristics of the site and the unearthed material.
47. Rivers’ reclamation plan does not return the site to its original or natural contours, instead leaving the benched faces exposed. The stacked benches will leave an exposed rock face that will have a maximum height of 210 feet. A single bench level will be about fifteen feet in height; therefore, the maximum height of 210 feet of exposed face is approximately fourteen stacked benches. Portions of the exposed benched faces will be visible from several places in Moretown, including the Moretown Common Road and Route 100B.
48. The proposed Quarry access will be from Route 100B via an existing woods road, approximately 1,400 feet in length. The access road to the Quarry will require improvements and grading in order to accommodate the haul trucks. Rivers proposes to remove approximately 895 feet of ledge along the northern edge of Route 100B to the east of the Quarry access road, so as to satisfy the Vermont Agency of Transportation sight distance requirements for trucks exiting the Quarry.
49. The Quarry will generate a maximum of fifty-four loaded haul trucks per day (i.e.: 108 one-way vehicle trips) and up to ten other vehicle trips (i.e.: twenty additional one-way vehicle trips for employees and other business invitees).

50. A haul truck produces noise greater than seventy decibels at a distance of fifty feet. However, as the distance and vegetation increase, and as the topography changes, the decibel level may decrease.
51. As shown on Rivers' "Project Overview Plan, Sheet 1 of 7", the distance from the Quarry haul road, where it intersects with Route 100B, to the Holden property line is approximately 225 feet. The distance from the haul road to the McMullin property line is approximately 150 feet.
52. Rivers proposes to operate the following equipment at the Quarry site: one hydraulic rock drill; one excavator; one bucket loader; one six by twenty foot triple deck screener; one yard/water truck; one backhoe; one crusher with a total capacity of one hundred cubic yards per hour; and other miscellaneous equipment as needed. Rivers has yet to purchase this equipment and cannot at this time identify the specific make and model of this equipment.
53. At least a portion of the proposed development will be located on slopes that are currently in excess of 25%.
54. The Moretown Town Plan states at page 35 that the DRB "shall, through the conditional use review process, ensure that the extraction of gravel and other mineral resources does not permanently scar the landscape." See Moretown Town Plan.
55. The proposed quarry, if approved and completed, will present an exposed rock face ranging up to 210 feet high, incorporating three acres of quarry benches (not all of which will have soil placed on them) and other visible land disturbances, including alterations to the profile of the hillside. See Rivers' "Project Summary of Quarry Activities and Related Impacts" dated September 30, 2005, provided to the District Commission below

as part of its Act 250 permit application and included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment B, and the attachments to Appellant-Rivers' Exhibit 24 submitted to the District Commission below and included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment C.

56. The proposed quarry will be in continuous operation for thirty-three (33) years. See Appellant-Applicant's "Project Summary of Quarry Activities and Related Impacts" dated September 30, 2005, provided to the District Commission below as part of his Act 250 permit application and included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment B.
57. The exposed rock face and/or quarry floor will be visible from many places within Moretown, including: the Moretown Common Road (a designated scenic road); Route 100B and a popular fishing hole near the intersection of Stevens Brook Road and Route 100B. See the attachments to Rivers' Exhibit 24 submitted to the District Commission below included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment C (as put into context by the Court's site visit of September 24, 2007) and the photographs taken by Arthur Hendrickson during the Court's site visit of September 24, 2007, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment G.
58. In addition to the exposed rock face, the proposed quarry will include a quarry pit at least 300 feet wide and 575 feet long. See Appellant-Applicant's "Project Summary of Quarry Activities and Related Impacts" dated September 30, 2005, provided to the District Commission below as part of his Act 250 permit application, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment B, at 4.

59. In addition to the exposed rock face and quarry pit, the proposed quarry will include an extensive road cut at least 895 feet long and up to sixteen feet high to increase sight lines at the intersection of the proposed haul road and Route 100B. See Appellant-Applicant's "Project Summary of Quarry Activities and Related Impacts" dated September 30, 2005, provided to the District Commission below as part of his Act 250 permit application, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment B, at 5 and the attachments to Appellant-Applicant's Exhibit 24 submitted to the District Commission below and included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment C.
60. The visual impact of the proposed quarry will be permanent.
61. The Moretown Zoning Regulations adopted by the Town on March 7, 2000, state at § 4.10(B)(1) that "[n]o noise shall be permitted which is excessive at the property line or incompatible with the reasonable use of the surrounding area. Excessive noise shall be considered a sound pressure level that exceeds 70 decibels at the property line on a regular or reoccurring basis." See Moretown Zoning Regulations adopted by the Town on March 7, 2000, filed with the Court on August 27, 2007 as Exhibit A attached to the Neighbors' Statement of Undisp. Facts and Mem. Of Law in Opp'n to Rivers' July 16, 2007 Mot. for Partial Summ. J.
62. The quarry, if approved and put into operation, is proposed to involve heavy truck traffic entering and leaving the quarry site, and therefore traveling back and forth over the property line, on a regular and reoccurring basis. See Applicant-Appellant's July 16, 2007 Statement of Undisputed Facts in the above-captioned dockets at ¶14.

63. Applicant-Appellant's noise expert, Dr. Mahendra Hundal, P.E., admits that a heavy truck produces noise greater than 70 decibels at 50 feet. Applicant's expert Dr. Hundal further admits that trucks will exceed the 70 decibels standard as they enter and exit the property. See Applicant-Appellant's "Noise Impact Study" submitted the DRB below, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment D, at 7 and 9.
64. It is therefore undisputed that the proposed quarry, if approved and put into operation, will result in noise that exceeds 70 decibels at Appellant-Applicant's property line on a regular or reoccurring basis.
65. As shown on Applicant-Appellant's "Project Overview Plan, Sheet 1 of 7" submitted to the District Commission below on October 18, 2005 as Exhibit 33 to Appellant's original Act 250 application, the distance from the proposed haul road to the Holden property line is 1.125 inches. As shown on the above-mentioned Project Overview Plan, Sheet 1, one inch equals 200 feet. The distance to the Holden's property line is 225 feet. Measuring from Appellant-Applicant's property line, as shown on the above-mentioned Project Overview Plan, Sheet 1, the distance to the McMullins' property line is .75 inches. The distance to the McMullins' property line is 150 feet. See Applicant-Appellant's "Project Overview Plan, Sheet 1 of 7" submitted to the District Commission below on October 18, 2005 as Exhibit 33 to Appellant's original Act 250 application, a full-size copy of which is included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment H.
66. The applicant admits that the noise level from trucks that will enter and exit the proposed quarry will be 78 decibels measured at a distance which is 200 feet away from the sound

source truck. See Applicant-Appellant's "Noise Impact Study" submitted the DRB below, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment D, at 9.

67. The noise level from the proposed quarry's trucks will exceed 70 decibels at the McMullins' property line.
68. The noise level from the proposed quarry's trucks will exceed 70 decibels at the McMullins' property line because the McMullins' property line is less than 200 feet from the proposed quarry's trucks as the trucks are proposed to enter and exit the proposed quarry.
69. In response to Question 7 of the Neighbors first set of discovery requests (regarding equipment), Appellant-Applicant Rivers admits that "Rivers has not determined what equipment it will use for, by or in preparation of the Project." See River's responses to the Neighbors first set of discovery requests, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment E, at 6.
70. In response to Question 8 of the Neighbors first set of discovery requests (regarding Material Safety Data Sheets), Appellant-Applicant Rivers admits that "Rivers has not and cannot determine every substance which will be used by for or in preparation, construction, and operation of the Project" and refuses to commit to "using any particular explosive, or any particular equipment." See River's responses to the Neighbors first set of discovery requests, included with the Neighbors' November 1, 2007 Motion for Summary Judgment as Attachment E, at 6.
71. During the Court's September 24, 2007 site visit, the Court asked Rivers' engineer Gunner McCain what the site would look like from the fishing hole near the intersection

of Stevens Brook Road and Route 100B. Mr. McCain replied “rock.” See Affidavit of Arthur Hendrickson, included with the Neighbors’ November 1, 2007 Motion for Summary Judgment as Attachment F.

72. Viewed from the fishing hole near the intersection of Stevens Brook Road and Route 100B, the proposed quarry will look like rock. The proposed quarry will also look like rock from Route 100B in the vicinity of the fishing hole near the intersection of Stevens Brook Road and Route 100B as well as from other viewing locations. See Affidavit of Arthur Hendrickson, included with the Neighbors’ November 1, 2007 Motion for Summary Judgment as Attachment F.
73. The Indirect Discharge Rules (effective April 30, 2003) state at §14-405(a) that “[i]ndirect discharge permits are required for the land application of Non-Sewage Wastes such as food processing wastes and other wastes, such as quarry discharges, that are applied to the surface of the land.”
74. Rivers Project, as currently designed, will collect quarry discharges in a holding pond on the quarry site.
75. Rivers admits in its answers to the Neighbors’ second set of discovery requests that it intends to suppress dust at the quarry site by drawing water from the holding pond and applying that water, sometimes mixed with calcium chloride, to the haul road, stockpiles, and quarry floor via a sprayer attached to a tank mounted on a truck.