

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

IN RE: PETITION FOR DECLARATORY RULING

**Office of Water Resources Rhode Island Pollutant Discharge Elimination
System Storm Sewer Program – MS4 Permit Requirements**

ANSWER

I. INTRODUCTION

On or about February 25, 2014, the Rhode Island Department of Environmental Management (“DEM”) received a Petition for Declaratory Ruling to review several issues related to the scope and extent of certain municipalities’ authority and obligations under a DEM-issued permit to regulate storm water (the “Petition”).

The Petition was submitted by the Valley Alliance for Smart Growth, Inc. (“VASG”), a Rhode Island non-profit corporation, whose members live and/or work in the Blackstone Valley Region and use and enjoy surface and ground water in the Blackstone Valley Region.

The Petition was submitted to DEM pursuant to R.I.G.L. §42-35-8, which states, “each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency orders in contested cases.” DEM reviewed the Petition in accordance with Rule 6.00 of the Administrative Rules of Practice and Procedure for the Department of Environmental Management (the “Administrative Rules”).

According to Rule 6.00(c)(4) of the Administrative Rules, the DEM requested additional time to respond to the Petition by letter dated March 11, 2014. This request

was granted by VASG by letter dated March 18, 2014 and VASG agreed to an extension for the response of May 2, 2014. This Answer is now being provided in accordance with the 6.00 of the Administrative Rules.

II. VASG'S PETITION

The Petition seeks a declaration of whether, pursuant to the Rhode Island Pollutant Discharge Elimination System Regulations ("RIPDES Regulations") and the RIPDES General Permit for Storm Water Discharge ("MS4 permit"), Rhode Island municipalities designated as operators of a regulated small separate storm sewer system ("MS4s"):

1. Are required by law to obtain permit coverage under the MS4 permit;
2. Pursuant to the MS4 permit requirements; regulated MS4s have the authority and an obligation to enforce the provisions of a Storm Water Pollution Prevention Plan ("SWPPP") for construction activities disturbing land greater than 1 acre; and
3. MS4 SWPPP enforcement is not dependent on a RIDEM finding of SWPPP violation(s), non-compliance or deficiency(s) nor is a RIDEM finding of SWPPP violation(s), non-compliance or deficiency(s) a condition precedent for a MS4 finding of SWPPP violation(s), non-compliance or deficiency(s).

Pursuant to Rule 6.00(a) of the Administrative Rules of Practice and Procedure for the Department of Environmental Management (the "Administrative Rules"), "[a]ny person who alleges that a rule, statute or order, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights of the petitioner, may in accordance with R.I. Gen. Laws §42-35-8 and these regulations, petition the

director for a declaratory ruling as to the applicability of any statute, any provision or rule or order of the agency.”

III. DECISION

Based on the information provided in the Petition, and the language contained in Rule 6.00 of the Administrative Rules, the declaration sought by VASG is not properly before DEM because the relief sought does not concern whether a “rule, statute or order, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights of” VASG. Administrative Rules, Rule 6.00(a). In short, the Petition is misplaced.

VASG points to the RIPDES regulations and the MS4 permit as the “rule, statute or order” whose application “interferes with or impairs” its “members’ use and enjoyment of...surface and ground waters...by the degradation of surface and ground water caused by storm water laden pollution runoff from roadways and other impervious and semi-impervious [surfaces], such as construction activities.” Petition, p. 4. However, application of the RIPDES regulations and the MS4 permit do not interfere with or impair use and enjoyment, to the contrary, the intent of the regulations and the permit are to protect the uses in the Petition. Further, DEM questions VASG’s assertion that the MS4 permit is an appropriate subject for which a declaratory ruling is appropriate.

The purpose of a declaratory ruling by DEM is for an interested party with legal standing to obtain a decision on how the application of a rule, order or statute interferes with their rights. While DEM considers the portions of the RIPDES regulations that VASG cites in the Petition to be “rules,” as defined by the Administrative Procedures Act and the Administrative Rules, application of the RIPDES regulations to municipalities does not “interfere with or impair” VASG’s legal rights, as asserted. Interference and/or

impairment is a required condition precedent for declaratory judgment. This is contrary to the assertions in the Petition; that degradation of surface and ground water which "affects VASG members' ability to fully utilize these waters" is a result of application of the RIPDES regulations. It is the RIPDES regulations that, when applied, are intended to prevent degradation. There is no interference or impairment caused by DEM applying the RIPDES regulations to municipalities. Therefore, a declaratory ruling cannot be appropriately rendered here.

The Petition contemplates the issue that municipalities "are not complying with their MS4 permit requirements insofar as the enforcement of SWPPPs," but this also does not fit into the declaratory ruling regime created by the Administrative Procedures Act. According to RIGL §42-35-8, the statute governing DEM's declaratory ruling process, "[e]ach agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency." RIGL §42-35-8, "Declaratory rulings by agencies."

Also, provided in the Administrative Procedures Act is a section dealing with definitions, RIGL §42-35-1. Pursuant to that definitions section, the term "order" means "the whole or a part of a final disposition, whether affirmative, negative, injunctive or declaratory in form, of a contested case" and the term "rule" means:

"each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include: (1) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public, or (2) declaratory rulings issued pursuant to § 42-35-8, (3) intra-agency memoranda, or (4) an order." RIGL §42-35-1 (10), (8).

DEM does not consider the MS4 permit to be either an "order" or a "rule," as those terms

are defined in the Administrative Procedures Act. Rather, the MS4 permit fits the definition of "license," described by the Administrative Procedures Act as "the whole or part of any agency permit, certificate, approval, registration, charter, or similar form of permission required by law..." RIGL §42-35-1(4). As a result, DEM cannot make any findings with respect to the MS4 permit in the context of the declaratory rulings section of the Administrative Procedures Act because it is not an order, statute or rule.

IV. CONCLUSION

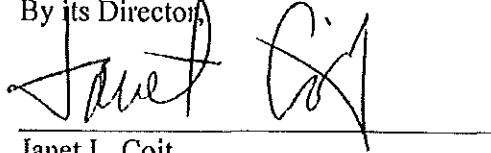
In accordance with Rule 6.00(c)(3) of the Administrative Rules, the Director of DEM considered the Petition and all documents submitted in support or opposition thereof, and hereby finds:

1. The petitioner, VASG, is not in fact an interested person whose legal rights are interfered with or impaired by application of a statute, rule or order of DEM;
2. The MS4 permit is not a rule, order or statute, as defined in the Administrative Procedures Act and the Administrative Rules, and therefore;
3. DEM declines to issue a declaratory ruling on the Petition.

Pursuant to Rule 6.00(d) of the Administrative Rules, the public file containing this and all other Declaratory Rulings is maintained and available for review at the DEM's Administrative Adjudication Division offices at 1 Capitol Hill, Providence, RI 02908.

RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL
MANAGEMENT

By its Director,



Janet L. Coit
235 Promenade Street
Providence, RI 02908-5767
(401) 222-2771 (P)
(401) 222-6802 (F)

CERTIFICATION

I hereby certify that I caused a true copy of the within Declaratory Ruling to be forwarded via regular mail, postage prepaid on this 2nd day of ~~April~~ ^{May}, 2014, to:

Christopher A. D'Ovidio, Esq.
Merolla & Accetturo
469 Centerville Road, Suite 206
Warwick, RI 02886

