

6. Criterion 1(D) (Floodways)

I. Requirements for Issuance of Permit

10 V.S.A. § 6086(a)(1)(D) provides that before granting a permit, the applicant must demonstrate that; "(i) the development or subdivision of lands within a floodway will not restrict or divert the flow of flood waters, and endanger the health, welfare or safety of the public or of riparian owners during flooding; (ii) the development or subdivision of lands within a floodway fringe will not significantly increase the peak discharge of the river or stream within or downstream from the area of development and endanger the health, welfare or safety of the public or of riparian owners during flooding."

II. Burden of Proof

The burden of proof is on the applicant. 10 V.S.A. §6088(a)

III. Analysis

ANR determines if project is in a "floodway"

ANR must make the threshold determination of whether the project is in a "floodway" or "floodway fringe." See *In re Woodford Packers, Inc.*, 2003 VT 60 ¶¶ 12-13.

- i. **Floodway.** Act 250 defines "floodway" as "the channel of a watercourse which is expected to flood on an average of at least once every 100 years and the adjacent land areas which are required to carry and discharge the flood of the watercourse, as determined by the secretary of natural resources with full consideration given to upstream impoundments and flood control projects." 10 V.S.A. 6001(6)(emphasis added).
- ii. **Floodway fringe.** Act 250 defines "floodway fringe" as "an area which is outside a floodway and is flooded with an average frequency of once or more in each 100 years as determined by the secretary of natural resources with full consideration given to upstream impoundments and flood control projects." *Id.* § 6001(7)(emphasis added).

Because the statute places the responsibility for these determinations in the Secretary of ANR, they are not subject to review by the Commission. See, by analogy, *Re: Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order at 9 (May 18, 2001) (a structure is listed on the State register as an historic site, Act 250 has no discretion to declare such structure not to be historic)

Inquiry

- A. Is the development or subdivision located in a “floodway”? If so:
1. Will the proposed development or subdivision restrict or divert the flow of flood waters?
 2. Diversion is permissible provided that it does not endanger the health, welfare or safety of the public or of riparian owners during flooding. See *In re Woodford Packers, Inc.*, 2003 VT 60 (affirming Environmental Board denial of application to build a retirement community with building in the floodway).
- B. Is the development located in a “floodway fringe” as defined at 10 V.S.A. §6001(7)? If so:
1. Will the proposed development significantly increase the peak discharge of the river?
 2. Increase in peak discharge is permissible provided it will not endanger the health, welfare or safety of the public or of riparian owners during flooding.

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