

State of Vermont
WATER RESOURCES BOARD

Re: Hannaford Bros. Co. and Lowes Home Centers, Inc.
Docket No. WQ-01-01

CHAIR'S ORDER
(Issued Oct. 6, 2004)

On December 12, 2000, the Vermont Agency of Natural resources (ANR) issued a state operational stormwater discharge permit (Operational Permit) to Hannaford Bros. Co. and Lowes Home Centers, Inc. (Hannaford and Lowes) for the discharge of stormwater from a proposed commercial complex in South Burlington, Vermont. Conservation Law Foundation (Appellant or CLF) appealed the Operational Permit to the Water Resources Board (Board) on January 11, 2001. On January 18, 2002, the Board issued a decision affirming in part and modifying in part ANR's issuance of the Operational Permit and granting the Operational Permit with amendments to permit conditions 10 and 14. *In re Hannaford Bros. Co. and Lowes Home Centers, Inc.*, No. WQ-01-01, Findings of Fact, Conclusions of Law, and Order (4-1 decision). CLF appealed to Superior Court, which affirmed the Board's decision. No. 280-02 CnCv (Apr. 30, 2003). CLF then appealed the Superior Court's decision to the Vermont Supreme Court, which has not yet heard arguments in the case. *Appeal docketed*, No. 2003-539 (Dec. 4, 2003).

On July 10, 2003, ANR approved a Notice of Intent filed by Lowes for coverage under a construction general permit authorizing Lowes to discharge stormwater during construction of its commercial project in South Burlington. In a decision issued August 26, 2004, the Board reversed ANR's decision authorizing Lowes to discharge construction runoff under ANR's construction general permit. *In re Lowes Home Centers, Inc.*, No. WQ-03-15. Lowes has recently appealed the Board's decision to the Vermont Supreme Court. *Appeal docketed*, No. 2004-417 (Sept. 24, 2004).

On September 3, 2004, CLF filed an Emergency Petition for Declaratory Ruling in the above-referenced matter. Board Chair John F. Nicholls issued a Chair's Order on September 8, 2004, establishing September 22, 2004 as the deadline for any party wishing to file a response to do so. On September 22, 2004, Hannaford and Lowes filed a Motion for Immediate Dismissal of Appellant's Petition for Declaratory Ruling, and ANR filed an Opposition to the Conservation Law Foundation's Emergency Petition for Declaratory Ruling.

In its Petition for Declaratory Ruling, CLF asks the Board to declare that Hannaford and Lowes have not complied with Condition 10 of the Operational Permit and further asks the Board

to declare that construction activities commenced at the South Burlington site are not subject to a final, valid authorization to discharge. The Board amended condition 10 of the Operational Permit in its January 18, 2002 decision by requiring Hannaford and Lowes to submit to the Secretary of ANR or the Secretary's designee certain revised plan sheets to accurately reflect the size and invert elevation of a bypass pipe. In addition, condition 10 of the Operational Permit, as amended by the Board, requires the Secretary or the Secretary's designee to review and approve those drawings and to incorporate them into the Operational Permit. CLF alleges, among other things, in its Petition for Declaratory Ruling that ANR's review and approval of the revised plans was not sufficient, that the Environmental Analyst who reviewed and approved the revised plans was not an authorized designee of the Secretary of ANR, and that CLF was not notified of this review and approval of the revised plans and therefore had no opportunity to challenge this action directly.

Having considered CLF's Petition for Declaratory Ruling and the responses filed by Hannaford and Lowes and ANR, the Chair concludes that the Board does not have jurisdiction over CLF's Petition and that this matter must therefore be dismissed. The Board was divested of jurisdiction over the Operational Permit when CLF appealed to Superior Court and subsequently to the Vermont Supreme Court, where this permit is now under review.

Accordingly, it is hereby **Ordered**:

1. CLF's September 3, 2004 Emergency Petition for Declaratory Ruling is hereby **dismissed** for lack of jurisdiction.
2. Any objections to this Order must be filed within **10 days**.

Dated at Montpelier, Vermont, this 6th day of October, 2004.

WATER RESOURCES BOARD
By its Chair

/s/ John F. Nicholls

John F. Nicholls