

**State of Vermont
Water Resources Board**

Re: Lowe's Home Centers, Inc.

Docket No. WQ-03-15

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

I. INTRODUCTION

This is an appeal to the Water Resources Board (Board) from the approval of Notice of Intent (NOI) #1076 for coverage under General Permit No. 3-9001 (2003)(General Permit) issued by the Commissioner of the Department of Environmental Conservation of the Agency of Natural Resources (ANR) to Lowe's Home Centers, Inc. (Lowe's). The approval authorizes Lowe's to discharge stormwater to Potash Brook, from a site off of Route 7 in South Burlington, Vermont during the construction of a Lowe's Home Center store (Project).

II. PROCEDURAL HISTORY

On July 10, 2003, ANR approved the NOI. The Conservation Law Foundation (CLF) appealed approval of the NOI to the Board on August 7, 2003.

A Prehearing Conference Report and Order was issued on September 23, 2003, identifying issues on appeal and setting a prehearing schedule, among other things. On October 1, 2003, Lowe's filed an objection to the Prehearing Conference Report and Order, and a Motion to Dismiss the appeal based on its claim that CLF lacked standing. The Board deliberated on Lowes' filing on November 13, 2003 and issued a Memorandum of Decision on November 14, 2003 overruling Lowes' objections and denying Lowes' Motion to Dismiss CLF for lack of standing.

On January 12, 2004, Lowe's filed an Objection to Scheduling Order and Motion to Clarify. The Board deliberated on Lowes' Objection and Motion on February 17, 2004. On February 24, 2004 the Board issued a Memorandum of Decision denying Lowes' objection to a December 2003 Scheduling Order. The Board also ruled that ANR's approval of the NOI is not entitled to any presumption of validity and that Lowe's bears the burden of proof on the issues on appeal.

On April 20, 2004, Board Chair John F. Nicholls convened a second prehearing conference in South Burlington, Vermont. The Board conducted a site visit on the same date. On April 26, 2004, a Second Prehearing Conference Report and Order was issued ruling on evidentiary objections and setting a proposed hearing agenda. No objections were filed to the Second Prehearing Conference Report and Order.

The Board convened a merits hearing on June 1, 2004 and commenced deliberations immediately after the hearing. The Board also deliberated on August 3, 2004 and August 24, 2004, declared the record complete and adjourned the hearing.

III. ISSUES

The issues on appeal are as follows:

1. Does the discharge from Lowe's construction site "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards" and therefore require an individual permit? General Permit 3-9001(2003) IC(6); see also *id.* IV.
2. Does the discharge comply with the terms and conditions of the General Permit?
3. Can the discharge be authorized under the VWQS as a so-called "Limited Duration Activity"?
4. Can the discharge be authorized under the General Permit prior to final approval of the Erosion Prevention and Sediment Control Plan and submission and approval of the Special Winter Erosion and Sediment Control Plan?

(Prehearing Conference Report and Order at 4 (Sept. 23, 2003).)

IV. FINDINGS OF FACT

Proposed findings of fact included in this decision are granted, and those not included are denied. See *Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 241-242 (1997); *Petition of Village of Hardwick Electric Department*, 143 Vt. 437, 445 (1983); see also 3 V.S.A. § 812 (agency decisions must include rulings on proposed findings submitted in accordance with agency rules). Facts stated in the procedural history section above are incorporated in these findings.

1. The Project site is in a 30-acre shopping center in South Burlington, Vermont known as the Southland Plaza, on the west side of Route 7, Shelburne Road, about half a mile south of Interstate 189.
2. Lowe's proposes to build its new Lowe's Home Improvement Center in the Southland Plaza shopping center. An existing Hannaford grocery store is located to the north of the proposed Lowe's project, across Hannaford Drive. A K-Mart shopping center is located to the northeast of Southland Plaza. A wooded area containing railroad tracks abuts Southland Plaza to the west.

3. The Project covered by the ANR authorization “will consist of clearing land and constructing a retail building with associated utilities, drives and parking areas.”
4. Construction of the Lowe’s project will include clearing, grading and excavation that will result in the disturbance of five or more acres of total land area. The total area of disturbed land will be approximately 13.5 acres.
5. Stormwater runoff from construction at the Project site will discharge to an unnamed tributary of Potash Brook, which then flows to Shelburne Bay and Lake Champlain.
6. Potash Brook is listed as an impaired waterbody for sediment due to urban runoff, land development and erosion, on the State of Vermont 2002 303(d) List of Impaired Surface Waters, Part A, at 9-10 (2002)(waterbody ID#05-11). ANR has not established a pollutant load allocation or total maximum daily load (TMDL) for Potash Brook.
7. Shelburne Bay is listed as an impaired waterbody for phosphorus. A TMDL has been established for Shelburne Bay.
8. Construction at the Project site will not involve discharges other than stormwater, except for discharges from excavation dewatering.
9. Stormwater runoff from construction at the Project site will not be to Class A waters, to Outstanding Resource Waters or to Class One wetlands.
10. Construction at the Project site will not involve a discharge from a federally-owned facility.
11. Construction at the Project site will not involve stormwater runoff from landfills or mining areas, including gravel pits.
12. Construction at the Project site will neither jeopardize the continued existence of any State or federally listed threatened or endangered species, nor result in the destruction or adverse modification of critical habitat.
13. Construction at the Project site will involve disturbance of land within 50 feet of the top of the bank of a stream channel, and disturbance of three Class Three wetlands, in the general vicinity of Potash Brook. It will not disturb any land within 50 feet of the top of the bank of any other surface waters, including wetlands.

14. On May 13, 2003, District Environmental Commission #4 issued Amended Land Use Permit #4C0238 approving the Project.
15. On October 17, 2002, the United States Army Corps of Engineers authorized the above-referenced wetland impacts pursuant to Section 404 of the Clean Water Act. The Class Three wetlands that will be impacted by the Project are approximately one-quarter acre in size.
16. Lowe's has submitted a written Stormwater Pollution Prevention Plan and Erosion Prevention and Sediment Control Plan (Stormwater Plans) pursuant to Part III of the General Permit.
17. The Stormwater Plans were prepared by Deluca-Hoffman Associates, Inc., primarily by Todd P. Morey, P.E., who is now employed by Lowe's.
18. Mr. Morey was assisted by Jeffrey A. Nelson, a hydrogeologist and principal of Pioneer Environmental Associates, LLC. Mr. Nelson worked with ANR staff and Deluca-Hoffman Associates, Inc. on the Stormwater Plans.
19. The Stormwater Plans incorporate a 37-sheet set of full-sized site plans.
20. Construction at the Project site will be phased and sequenced to keep the area of disturbed soils left open to erosion at any given time to a minimum.
21. Construction at the Project site is planned such that disturbed soil will be protected and stabilized as soon as possible.
22. Earthwork on the Project site is scheduled for completion and the Project site will be stabilized no later than October 15.
23. Lowe's commenced construction in May, 2004, after the site visit and before the hearing in this matter.
24. Stormwater treatment and erosion control measures will be instituted in phases during construction on the Project site.
25. Pursuant to the Stormwater Plans, practices including the following will be utilized throughout the construction process: grading, berms and swales, silt fencing, stone check dams, crushed rock and rip-rap, erosion control blankets, and temporary stabilization through seeding.

26. Soil and other earth moved as part of the site work on the project will be stockpiled only in designated areas with appropriate silt fencing and erosion controls. Otherwise, it will be taken off site or repositioned on site as part of the planned site work.
27. After initial grades are established during construction, a sediment swale will be installed in the eastern portion of the Project site. This swale is designed to treat stormwater before it is released to the existing stormwater pond located on the neighboring Hannaford parcel.
28. As construction progresses, the temporary soil stockpile on the western portion of the Project site will be removed and used elsewhere. At that time, a sediment trap will be constructed in the western portion of the Project site. Again, this sediment trap is designed to treat stormwater before it is released to the pond at the existing Hannaford site. At this time, construction of the two-level retention pond on the western portion of the Project site (the "Lowe's Pond") will commence.
29. The Lowe's Pond will act as a two-level, interconnected stormwater retention pond during construction. The lower level will become an operational wetland pond upon completion of the Project.
30. When the Lowe's Pond is completed, a temporary plug will be removed, and the drain pipe from the sediment trap will be connected to piping that leads to the Lowe's Pond for the purpose of stormwater treatment going forward.
31. ANR evaluates the adequacy of stormwater retention pond capacity by applying the standard of 67 cubic yards per acre (or 1800 cubic feet) of drainage area established by the current Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites.
32. The United States Department of Agriculture's Handbook 703 entitled, "Predicting Soil Erosion by Water: A Guide to Conservation Planning with the Revised Universal Soil Loss Equation (RUSLE)," states on page 15 that:

RUSLE is an erosion model designed to predict the longtime average annual soil loss (A) carried by runoff from specific field slopes in specified cropping and management systems as well as from rangeland. Widespread use has substantiated the usefulness and validity of RUSLE for this purpose. It is also applicable to nonagricultural conditions such as construction sites.

Certified Professionals in Stormwater Quality are trained in the RUSLE method for estimating sediment runoff from construction sites that remain undisturbed for a one-year period.

33. ANR does not utilize modeling when evaluating plans for stormwater treatment on construction sites because modeling measures total sediment volume, which is not necessarily the same as sediment yield that discharges into the receiving water.
34. Modeling of sediment runoff from construction sites is problematic given the ever-changing nature of construction sites and the variability of storm events.
35. RUSLE modeling is not designed to predict runoff from a variable, active construction site.
36. ANR conducted a site-specific evaluation of Lowe's erosion and sediment control plans to determine their adequacy, but did not use quantitative modeling of stormwater or sediment runoff in doing so.
37. Lowes' handwritten, preliminary sizing calculations dated February 24, 2003 and April 11, 2003 contain a math error, which leads to a substantial understatement of the volume of the proposed treatment system.
38. Subsequent final calculations for determining retention pond capacity and design were conducted on April 11, 2003 with the assistance of HydroCAD software, which is computer-assisted design software.
39. These final calculations led to a design of the Lowe's Pond with a cumulative storage of the upper level (i.e., Pond 1-P) being 74,258 cubic feet , and a cumulative storage capacity of the lower level (i.e., Pond 11-P) being 62,732 cubic feet. Thus, the combined capacity of the two levels of the Lowe's pond is greater than 130,000 cubic feet.
40. These final calculations increased the number of perforations in the perforated riser on the wet-pond discharge pipe over the number that was in the preliminary design.
41. It is not clear whether these final calculations were based in any part upon the erroneous hand calculations. Some of the numbers in these calculations are strikingly similar to those in the HydroCAD calculations on which the plans were based, and some of the hand and HydroCAD sheets bear the same date.

42. The Stormwater Plans include the requisite location map, existing conditions site plan, grading plan, erosion prevention and sediment control site plan, and narrative briefly describing the strategy for erosion control.
43. The Project site will discharge stormwater directly to waters impaired by sediment. The discharge from the Project site will contain sediment resulting in an increase in turbidity.
44. A ten-year storm event would be likely to cause violations of the Vermont Water Quality Standards (VWQS) for sediment and turbidity, and any significant storm event would be reasonably likely to cause a discharge of sediment from the Project resulting in an increase in turbidity.
45. The Stormwater Plans include a plan for event-based monitoring of the turbidity in the receiving stream, above and below the discharge, and the turbidity of discharge from detention basins, if any (the "Monitoring Plan"). The Monitoring Plan identifies nine monitoring stations at which turbidity will be monitored on a regular basis. The Monitoring Plan is Attachment C to the Stormwater Plans, and includes a photo map of the monitoring stations.
46. The monitoring stations are known as TM-1 through TM-9. TM-1 is at the outlet of the level spreader associated with sediment trap 2. TM-2 is at the toe of the fill slope associated with the filling of the existing swale. TM-3 is at the discharge point for sediment trap 1, also known as CB-6. TM-4 is at an intermittent tributary of the Potash Brook, at the railroad tracks. TM-5 is at the outlet of the existing Hannaford stormwater basin. TM-6 is at the swale below Fayette Drive, at the south end of the site. TM-7 is at a small tributary of Potash Brook, near Brewer Parkway, immediately across the street from the entrance to the K-Mart plaza. It is not indicated on the map. TM-8 is on the Potash Brook, immediately upstream of the Hannaford basin outlet, and is incorrectly labeled as TM-7 on the map. TM-9 is also on the Potash Brook, immediately downstream of the existing Hannaford basin outlet. It is incorrectly labeled on the map as TM-8.
47. Whenever a field monitoring test reveals turbidity in excess of 10 nephelometric turbidity units (NTU), a sample of water will be sent for lab tests.
48. If lab testing of any such sample exceeds 200 milligrams per liter of total suspended solids (TSS), then an on-site conference will be convened to which ANR will be invited. This on-site conference is intended to develop a written response plan, if needed, to address the discharge of TSS above the target value.

49. As of the date of the hearing, the following information had been collected from the monitoring stations:

Station	Turbidity (NTU) on each Sampling Date			
	7/11/2003	7/22/2003	7/24/2003	5/24/2004
TM-2	11.4	56.6	25.6	10.8
TM-4	48.9	40.0	20.8	17.9
TM-5	6.7	11.2	11.8	3.4
TM-6	-	-	-	13.0
TM-7	-	8.4	19.1	0.8
TM-8	16.2	6.8	13.6	13.4
TM-9	14.9	6.7	12.1	13.6
Total Rainfall for Event (inches)	0.64	0.52	1.25	1.9

50. The turbidity of samples taken at several of the monitoring stations on May 24, 2004 exceeded the 10 NTU value. As of June 1, 2004, there had been no on-site conference to develop a response plan. However, there is no indication that lab results had been received on or before June 1, 2004 to show that TSS in any sample exceeded 200 milligrams per liter.

V. CONCLUSIONS OF LAW

A. Standard of Review and Burden of Proof

The Board is required by statute to hear this appeal *de novo*. 10 V.S.A. § 1269. Thus, "the Board does not review ANR's prior decision to determine whether ANR acted properly," but instead "the Board hears the case as if there had been no prior proceedings." *Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook*, Nos. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact, Conclusions of Law, and Order at 15 (Vt. Water Res. Bd. June 2, 2003)(citing *In re Deerfield Hydroelectric Project*, Nos. WQ-95-01 and WQ-95-02 (Consolidated), Chair's Evidentiary Rulings at 4 (Vt. Water Res. Bd. Feb. 5, 1997); *In re Killington, Ltd.*, 159 Vt. 206, 214 (1992)).

Lowe's bears the burden of proving by a preponderance of the evidence that its construction discharge complies with the terms and conditions of the General Permit. 10 V.S.A. § 1263(b)(issue on appeal from approval for coverage under general permit); *See also Re: Hannaford Bros. Co. and Lowe's Home Centers, Inc.*, WQ-01-01, Memorandum of Decision at 19 (Vt. Water Res. Bd. Jun. 29, 2001)(applicant bears burden of proof in individual discharge permit appeal); *In re Lamoille Hydroelectric Project*, Docket Nos. WQ-94-03 and WQ-94-05, Findings of Fact, Conclusions of Law, and Order at 46 (Vt. Water Res. Bd. Nov. 5, 1996). Compliance with the General Permit includes the other issues identified in the Prehearing Conference Report and Order, such as whether Lowe's is eligible for General Permit coverage in the first instance. Each issue is addressed below.

B. Issue #1 - Whether the Discharge will Cause or have Reasonable Potential to Contribute to a Violation of the Vermont Water Quality Standards.

The General Permit expressly excludes from coverage any discharge that will "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards." General Permit, Part I, Section C(6). Although the General Permit is not on appeal here, the Board notes that this requirement is consistent with the federal Clean Water Act. *See* 33 U.S.C. § 1311(b)(1)(C)(requiring point-source discharges to meet state water quality standards); 40 C.F.R. § 122.44(d)(requiring water-quality based effluent limitations above and beyond technology-based effluent limitations for point-source discharges with "reasonable potential" to cause or contribute to violations of state water quality standards.); *see also Re: Stormwater NPDES Petition*, No. WQ-03-17, Memorandum of Decision at 5 (Apr. 1, 2004)(discussing federal Clean Water Act requirements).

Runoff from the project will discharge into Potash Brook via an unnamed tributary, and then into Shelburne Bay of Lake Champlain. Potash Brook is listed as an impaired water for sediment due to urban runoff, land development and erosion. No TMDL has been established for Potash Brook. It is undisputed that the discharge from Lowe's construction has reasonable potential to contribute sediment to the Potash Brook. Therefore, the discharge will cause or have reasonable potential to cause or contribute to a violation of the VWQS. *Re: Hannaford Bros. Co. and Lowe's Home Centers, Inc.*, No. WQ-01-01, Memorandum of Decision at 18 (Vt. Water Res. Bd. Jun. 29, 2001)(new or increased discharge of pollutants of concern into impaired waters that lack necessary pollutant load allocations violate the VWQS)(hereinafter *Hannaford/Lowe's*)(citing *Re: Pyramid Company*, No. WQ-77-01, Findings of Fact, Conclusions of Law, Discussion and Order (Vt. Water Res. Bd. Jun. 2, 1978))(cited in *Re: Morehouse Brook, Englesby Brook, Centennial Brook, and Bartlett Brook*, Nos. WQ-02-04, WQ-02-05, WQ-02-06, and WQ-02-07 (Consolidated), Findings of Fact,

Conclusions of Law, and Order at 30-32 (Vt. Water Res. Bd. June 2, 2003)(holding that ANR may not lawfully issue a permit for a new or increased discharge of pollutants of concern into impaired waters for which no cleanup plan has been established)). This renders Lowes' discharge ineligible for coverage under the General Permit pursuant to Part I, Section C(6).

It is worth noting that this case differs from the recent *Hannaford/Lowe's* case in several respects. In *Hannaford/Lowe's* the applicant had submitted evidence of existing and projected pollutant loadings to prove that its operation would not increase the discharge of pollutants of concern, and the Board ultimately approved the individual permit on appeal. *Hannaford/Lowe's*, Findings, Conclusions and Order at 19-22. By contrast, no such evidence was submitted in this appeal, which concerns the construction phase of the proposed Lowe's project and whether the discharge from that construction complies with the terms and conditions of the General Permit. 10 V.S.A. § 1263(b). By its terms, the General Permit cannot cover any discharge that will "cause, or have reasonable potential to cause or contribute to, a violation of water quality standards." General Permit, Part I, Section C(6).

The Board's determination that Lowes' construction discharge does not comply with the General Permit, specifically, Part 1, Section C(6) as discussed above and Part IV as discussed below, does not foreclose Lowe's from applying for an individual permit.¹

C. Issue #2 - Does the Discharge Comply with the Terms and Conditions of the General Permit?

1. Provisions Requiring Compliance with VWQS

Lowe's has failed to prove that its construction discharge is not likely to cause or contribute to a VWQS violation. This renders the discharge ineligible for coverage under Part I, Section C(6) of the General Permit, as discussed above. It also violates Part IV of the General Permit, which prohibits any discharge that will "cause or have a

¹ In its individual permit application, Lowe's would do well to include all calculations and plans needed to demonstrate that the design of the temporary sediment basin, including its sizing and the elevation of the primary outlet pipe, is sufficient in light of the error in the hand calculations. As discussed above, this construction discharge is ineligible for coverage under the General Permit, so the Board does not reach the question of whether the math error has any material effect on the design Lowes' stormwater controls. In the interest of efficiency and economy, however, the Board notes that Lowe's may avail itself of this opportunity to improve and clarify its plans.

reasonable potential to cause or contribute to, a violation of water quality standards . . .
.” Other General Permit provisions at issue are discussed below.

2. Part I, Section C(8)(Disturbance Within 50 Feet of Surface Waters)

CLF argues that this discharge violates Part I, Section C(8) of the General Permit, which expressly excludes from coverage certain discharges into impaired waters where the construction activity disturbs land within 50 feet of surface waters. The exclusion applies to:

Stormwater runoff to waters impaired by pollutants associated with construction runoff where the activity results in a land disturbance within 50 feet of the top of bank of surface waters, including wetlands, except where necessary for the reconstruction of existing roads and the construction of bridges, stream crossings, minor shoreline access ways, and components of stormwater management systems which by necessity must be located in this zone. Exceptions also include activities that have been permitted with a setback of less than 50 feet from the top of bank under [Act 250], under the Vermont Wetland Rules, and, for Class Three Wetlands, under federal Clean Water Act Section 404. These exceptions apply only insofar as the activity otherwise qualifies.

General Permit, Part I(C)(8).

There is no dispute that this project has both an Act 250 and a Section 404 permit. But CLF argues that the exclusion requires a threshold showing of necessity, because the last sentence says that the exceptions to the exclusion “apply only insofar as the activity otherwise qualifies.” CLF misreads the exclusion. The final sentence of Part I Section C(8) means that the exceptions to the exclusion apply only insofar as the construction activity otherwise qualifies for coverage under the General Permit with regard to the preceding seven exclusions. Also, the necessity requirement in the first sentence does not apply to the second sentence excepting projects with Act 250 or Section 404 permits, because that sentence begins with the phrase – “Exceptions also include [projects with Act 250 or Section 404 permits].”

ANR’s interpretation of this section to apply only to wetlands “associated with” impaired waters is not supported by the plain language of the permit. The exclusion applies “to waters impaired by pollutants associated with construction runoff where the activity results in a land disturbance within 50 feet of the top of bank of surface waters, including wetlands.” This would apply to a discharge to stormwater-impaired waters, where land is disturbed within 50 feet of a wetland (subject to other exceptions in the

exclusion), regardless of whether that wetland is “associated with” the impaired water. Nothing in the language of the General Permit requires any nexus between the wetland or other surface water and the impaired water, and there is no ambiguity that would leave the provision open to more creative interpretation. Accordingly, Lowe’s has met its burden of proving compliance with Part I, Section C(8) of the General Permit.

3. Part III, Section B(1)-(4)(Erosion Prevention and Sediment Control Plan Requirements).

CLF argues that Lowes’ erosion prevention and sediment control plan does not comply with the General Permit because it does not “fit the development plan to the site,” “preserve natural drainageways,” “minimize areas of disturbed soil and unnecessary removal of existing vegetative cover,” “minimize the duration of soil disturbance,” General Permit at 6-7, Part III, Section B(1)-(4). This part of the General Permit requires that plans provide at least as much protection as provided for in the *Vermont Handbook for Soil Erosion and Sediment Control on Construction Sites* (1982, rev. 1987), or any update, and that plans “shall be developed” using the principles listed above. As set forth below, the Board concludes that the Project complies with these provisions of the General Permit.

Fitting the Development Plan to the Site

On the first principle, the General Permit describes on Page 6 that the plan “shall be designed to fit the topographic, soil and vegetative characteristics of the site.” Part III, Section B(1). CLF’s point that the construction project uses the entire Project site misses the mark. It is not the size of the project but its impact on certain protected resources that is at issue under this provision. The General Permit provides that “[e]xtensive soil disturbance on steep slopes, poorly drained soils, shallow-to-bedrock soils or highly erodible soils shall be avoided,” and that disturbance within 50’ of all waterbodies “shall be avoided except where necessary for the reconstruction of existing roads and the construction of . . . components of stormwater management systems which by necessity must be located in this zone.” *Id.* It is undisputed that the Lowe’s construction will cause disturbance within 50’ of wetlands, however, the Board concludes that given the size of the site this disturbance is consistent with the General Permit. Otherwise, the Project will not cause extensive disturbance on the resources protected by this provision except for highly erodible soils. Here, the soils on virtually the entire site are highly erodible, so disturbance is unavoidable. The construction discharge complies with Part III, Section B(1) of the General Permit.

Preservation of Natural Drainageways to Extent Feasible

Although Lowe's will fill in the natural drainage ways on the site and construct other ways to handle stormwater, the General Permit requires only that "natural drainage characteristics shall be maintained to the extent feasible." Given the relatively small size of the Project site, the Board concludes that Lowe's has maintained natural drainage to the extent feasible.

Minimization of Area of Soil Disturbance

The third principle requires the use of phasing or sequencing to minimize areas of soil disturbance at any given time. This construction project is phased, consistent with this provision. Also, given the relatively small size of the Project site the Board concludes that areas of soil disturbance will be minimized enough to comply with Part III, Section (B)(3), even during Phase I.

Minimization of Duration of Soil Disturbance

The fourth principle requires minimization of the duration of soil disturbance, and protection and stabilization of disturbed soil "as soon as possible." Part III, Section (B)(4). This principle emphasizes seeding and mulching of disturbed soils promptly, generally within 48 hours, and requires the use of temporary soil cover in areas where the finished grade has not been reached. *Id.* Despite the somewhat lengthy delays between construction phases, it is clear that the Project site will be temporarily stabilized between phases. This is sufficient to comply with Part III, Section B(4) of the General Permit.

4. Part V, Section E (Timing of Corrective Action)

CLF argues that the General Permit requires that corrective actions be taken immediately when there are "measurable amounts of sediment or sediment laden water leaving the construction site or any visible discoloration of surface waters (including wetlands)." (CLF's Proposed Findings & Conclusions at 19.) The General Permit requires, in relevant part, that:

Any evidence of measurable amounts of sediment or sediment laden water leaving the construction site or any visible discoloration of surface waters (including wetlands) shall be noted and immediate action taken to correct the discharge, including halting or reducing construction activities as necessary until the discharge and/or the condition is fully corrected.

General Permit, Part V, Section E. Lowes' monitoring plan provides that, should total suspended solids exceed 200 mg/l at any discharge point, an on-site conference must be convened within 3 days of "receipt of the sample result exceeding the target value," and a written response plan must be developed.

The General Permit requires immediate action when there is "any evidence" of "measurable amounts of sediment" leaving the construction site. There is no indication that the lab data in this case had been received as of the date of the hearing, one week after the storm event. Lowe's has met its burden of proving compliance with Part V, Section E of the General Permit.

D. Issue #3 - Can the Discharge be Authorized under the VWQS as a so-called "Limited Duration Activity"?

The Limited Duration Activity provision of the VWQS allows certain temporary violations of the quantitative VWQS. VWQS § 2-04(1). This provision applies, in relevant part, to "[c]onstruction . . . projects that occur in or immediately adjacent to waters [which] may result in unavoidable short term non-compliance with the turbidity, aquatic biota, wildlife, and aquatic habitat criteria," where certain conditions are met. *Id.* Although this was identified as an issue on appeal, Lowe's is not relying on this provision to demonstrate compliance with the terms and conditions of the General Permit. Therefore, this issue is dismissed from this appeal and the Board does not address whether the Limited Duration Activity provision would apply to this Project.

E. Issue #4 - Can the Discharge Be Authorized under the General Permit Prior to Final Approval of the Erosion Prevention and Sediment Control Plan and Submission and Approval of the Special Winter Erosion and Sediment Control Plan?

1. Erosion Prevention and Sediment Control Plan

There was some confusion in this appeal over whether Lowe's had filed complete and accurate plans with the Board. Although some of the plans were missing or garbled in Lowes' 8½ -by-11 exhibits, the oversized plans Lowe's filed with the Board show all phases of construction. As noted above, however, the plans may benefit from any corrections to the HydroCAD calculations necessitated by the error in the hand calculations. The plans might also be improved upon with additional detail and clarification (for instance, showing removal of the cap at the end of the pipe), but apart from any effects of the math error, the plans filed with the Board appear to be complete. To the extent that they are not complete, this raises the issue of conditions subsequent. A condition subsequent is a permit condition requiring that proof of compliance be submitted after the permit takes effect. Essentially, neither ANR nor the

Board can approve a project until the applicant proves compliance, and the applicant cannot prove compliance if it has not submitted plans that are complete in all material respects. Approving a project before an applicant submits complete proof of compliance also deprives other parties of notice of, and an opportunity to be heard on, that evidence. Thus, complete plans must be submitted and reviewed prior to approval of the project. Contrary to CLF's assertion, Lowes' plans show all phases of construction. The Board does not reach the issue of whether the plans are technically complete with regard to the math error because it is clear that Lowes' discharge does not comply with the General Permit.

2. Special Winter Erosion and Sediment Control Plan

It is undisputed that Lowe's has no Special Winter Erosion and Sediment Control Plan. However, the General Permit does not require one prior to issuance of approval to proceed. Part V, Section G of the General Permit allows any permittee to apply for an amendment if it needs to continue construction in the winter. The General Permit sets certain requirements for winter construction and provides that ANR may require an individual permit or suspend construction until the next construction season if there is a significant risk to water quality. General Permit, Part V, Section G. The lack of a Special Winter Erosion and Sediment Control Plan is not fatal to Lowes' application to proceed under the General Permit.

VI. ORDER

1. The discharge does not comply with the terms and conditions of the General Permit.
2. ANR's approval for Lowe's to proceed under the General Permit is REVERSED.

DATED at Montpelier, Vermont this 26th day of August 2004.

Water Resources Board
By its Chair

/s/John F. Nicholls _____
John F. Nicholls, Chair

Concurring:
David J. Blythe, Acting Member
Lawrence H. Bruce, Jr., Member
Michael J. Hebert, Member*
John D.E. Roberts, Vice Chair

* Member Hebert was unable to participate in the Board's August 24, 2004 deliberations, but has reviewed and joins in this decision.