

STATE OF VERMONT

SUPERIOR COURT  
Orleans Unit

CIVIL DIVISION  
Docket No. 246-11-16 Oscv

Masse vs. State of Vermont

**ENTRY REGARDING MOTION**

Count 1, Appeal - Environmental Court (246-11-16 Oscv)

Title: Motion for Summary Judgment (Motion 2)  
Filer: State of Vermont  
Attorney: Laura Bucher Murphy  
Filed Date: January 20, 2017

VERMONT SUPERIOR COURT

APR -3 2018

FILED  
ORLEANS UNIT

Response filed on 02/21/2017 by Attorney Brice C. Simon for Plaintiff Conrad Masse  
Response filed on 08/14/2017 by Attorney Brice C. Simon for Plaintiff Conrad Masse

**The motion is GRANTED.**

Plaintiff Conrad Masse seeks review of the order he received from the Vermont Department of Fish and Wildlife – Agency of Natural Resources (“ANR”) on October 11, 2016. Pursuant to Rule 75 of the Vermont Civil Rules of Procedure, he requests an appeal and reversal of Defendant ANR’s administrative decision to remove water withdrawal system and rock dam installed in his private pond located in Craftsbury, Vermont. He claims ANR’s order is arbitrary and capricious, and to be required to follow it would be unduly burdensome to him. Defendant argues it is within its statutory authority and discretion, via 10 V.S.A. § 4607, to issue the order, because those constructions obstruct both water flow and bar the passage of fish through Seaver Brook. Plaintiff requested a jury trial to decide the merits of his claim. Defendant moves for summary judgment. Plaintiff filed a response opposing the motion.

Procedural Standard

Summary judgment is granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, . . . show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law.” V.R.C.P. 56(c)(3); *King v. Gorczyk*, 2003 VT 34, ¶ 7, 175 Vt. 220, 224 (2003). The nonmoving party is entitled to the benefit of all reasonable doubts and inferences. *King*, 2003

VT 34, ¶ 7. Summary judgment will be denied if either a material fact is genuinely disputed or the moving party is not entitled to judgment as a matter of law. See *id.*

In this instance, the Court's examination is further cabined by Rule 75, which allows judicial review of governmental administrative decisions only "if such review is otherwise not available by law." While the case law interpreting Rule 75 has insulated the overwhelming majority of discretionary administrative decisions made by state agencies from judicial review, the Court may still review quasi-judicial decisions in accordance with the principles of certiorari review. *Rheaume v. Paillto*, 2011 VT 72, ¶ 11, 190 Vt. 245, 250. The Court established this matter is reviewable solely through Rule 75 in a prior entry order. Entry Order, Docket No. 246-11-16 Oscv (March 1, 2018). Both parties agree that writ of certiorari is the only available method to review the matter under Rule 75.

The scope of certiorari review under Rule 75 is very narrow. The Court will not interfere with an agency's determinations unless it has been shown that the agency clearly and arbitrarily abused its authority. See *Vermont State Employees Ass'n, Inc. v. Vermont Criminal Justice Training Council*, 167 Vt. 191, 195 (1997); see also *Moleworth v. University of Vermont*, 147 Vt. 7 (1986) (certiorari review "confined to addressing substantial questions of law affecting the merits of the case.").

#### Factual Background

On June 25, 2014, ANR received a complaint that Conrad Masse "had done extensive work in Seaver Brook" in order to supply his commercial fishing operation. ANR began a correspondence with Conrad Masse and Mark Masse, who owns the adjoining property, about the water withdrawal system and rock dam that Conrad Masse constructed around 1990. Agency officials expressed concern that the structures were causing low water flow and obstructing the passage of fish native to the stream. Mark expressed interest to cooperate with the agency. Conrad wrote to Mark and asserted his right to have the dam and withdrawal pipe, and that he would seek prosecution if Mark attempted to remove the structures. Sometime after, ANR sent employees to the site multiple times to inspect the possible obstruction. The agency sent a letter to Mark and Conrad Masse on June 10, 2015, requesting that they cooperate with the agency to remove the structures to return water flow and fish passage to the area. After meeting with Fish and Wildlife representatives and Mark on August 20, 2015,

Conrad agreed to propose a de minimus water removal and compliance with the help of a consultant.

Conrad hired Matt Murawski to consult on achieving water flow and fish passage compliance. Mr. Murawski contacted ANR and stated that he observed a bypass to the right of the dam that he believed occurred naturally, and that he thought the bypass would allow fish passage under most flow conditions. Mr. Murawski also stated that Conrad might offer expanding that side channel as a way of increasing water flow and fish passage, to comply with ANR regulations. On July 22, 2016, Fisheries Biologist Jud Kratzer visited the site to examine the then existing conditions of the dam and compared them to a video of dam conditions that Mark had recorded weeks prior. Mr. Kratzer concluded that the rock dam obstructs fish passage in low flows regardless of the side channel and that minnows are impeded during all flow conditions.

ANR sent Conrad a letter on September 14, 2016, stating that the expected de minimus water withdrawal rate for Seaver Brook (a 5.6 square-mile watershed) is 12 gallons per minute. ANR informed Conrad that a withdrawal rate greater than the de minimus rate will “impact the resource at low flows and is not in compliance with the hydrology criteria of the water quality standards.” It also relayed Mr. Kratzer’s conclusions regarding fish passage. The letter concluded with a statement that the property “falls well short of compliance with applicable requirements.”

On October 11, 2016, the Fish and Wildlife Department issued an “Order for the Removal of a Fish Obstruction” to Conrad Masse, calling for removal of 9.9 cubic yards of the rock dam and water withdrawal structure by November 4, 2016. Mr. Masse filed a request to review, reverse, and dissolve the order with the Environmental Division of the Superior Court. The action was dismissed in Environmental Court and transferred to the Civil Division on November 9, 2016.

#### Analysis and Opinion

Plaintiff argues that ANR’s order should be dismissed because he has been denied due process by the “arbitrary and capricious nature of the decision”, which he claims was arrived at without reference to any standards or principles. He contends that ANR is, without sufficient notice or reason, employing a new standard of de minimus water flow, which prejudices him because the rock dam complied with the prior standards that were in place when the dam was

first constructed in 1993. He further claims that ANR's failure to consider the preconstruction and postconstruction approvals issued by the Department of Fish and Wildlife is without reason and not entitled to deference by the Court. Defendant argues it has statutory authority to issue its order and that its decision is entitled to deference. The Court agrees.

Essentially, Plaintiff seeks relief that is not available through this Court. ANR is within its statutory purview to order the removal of the rock dam after concluding that it obstructs the passage of fish. 10 V.S.A. § 4607. The agency's record of numerous site visits since 2014 and observations made by its experts is sufficient basis for its conclusions that the order is based on. Furthermore, as Defendant claims, this Court has limited authority to review agency decisions. *Vermont State Employees Ass'n*, 167 Vt. at 195.

The Vermont Supreme Court effectively foreclosed the issue of the scope of the Court's review of this instant case with its decision in *Plum Creek Maine Timberlands, LLC v. Vermont Department of Forest, Parks and Recreation*, 2016 VT 103, 203 Vt. 197<sup>1</sup>. There, the court reviewed an adverse inspection report issued by Vermont Department of Forests, Parks and Recreation (FPR)'s that concluded that company and landowner Plum Creek violated its forest-management plan and failed to comply with minimum acceptable standards during its timber harvest. Consequently, the Department of Taxes removed the land from the current-use, tax-incentive program it was enrolled in and levied a tax assessment. *Plum Creek*, 2016 VT at ¶ 1. The trial court reversed those administrative decisions and FPR appealed, arguing that the trial court failed to give appropriate deference to FPR's determination of the proper methodology for measuring compliance with the forest-management plan. *Id.* The Supreme Court agreed and reversed.

"FPR's decision on the methodology for determining compliance was entitled to deference, and Plum Creek had the burden to show it was 'wholly irrational and unreasonable in relation to its intended purpose.'" *Id.* at ¶ 28 (quoting *ANR Permits*, 2014 VT 50, ¶ 17, 196 Vt. 467). The court concluded Plum Creek failed to meet that burden and determined that FPR's conclusions using its methodologies was sufficient to issue the order. *Id.* at ¶¶ 35–39. Notably,

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<sup>1</sup> While this Court seriously questions the logic followed by the Supreme Court in *Plum Creek* in its view of the standard of review of Agency decision-making and agrees with the dissent of Justices Dooley and Skoglund, this is not a Rule 74 case but rather is a Rule 75 case with a much narrower standard of judicial review.

the Supreme Court afforded considerable deference to FPR's methodologies, even though the evidentiary hearing was pursuant to Rule 74, and thus subject to de novo review by the court. *Id.* at ¶ 23; 32 V.S.A. §§ 4461(a), 4467. This instant case was initiated pursuant to Rule 75, which affords the Court a much narrower review.

Given its limited powers of review, the Court concludes ANR's order is within its statutory authority and Plaintiff has not demonstrated that decision is arbitrary and unreasonable in relation to its intended purpose. Nor has Plaintiff shown that ANR's requirements are without basis. Therefore, ANR is entitled to summary judgment.

#### Conclusion

For the abovementioned reasons, Defendant's Motion for Summary Judgment is *granted*.

Electronically signed on April 02, 2018 at 04:17 PM pursuant to V.R.E.F. 7(d).



Robert R. Bent,  
Judge

#### Notifications:

Brice C. Simon (ERN 4545), Attorney for Plaintiff Conrad Masse  
Laura Bucher Murphy (ERN 5042), Attorney for Defendant State of Vermont  
Justin E. Kolber (ERN 4303), Attorney for party 2 Co-counsel  
Interested Person Mark Masse