VERMONT SUPERIOR COURT
Environmental Division
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Docket No. 21-ENV-00080

BLSGP Application of Pesticides (Request for Threatened & Endangered Takings Permit)

DECISION ON MOTION TO DISMISS

Title: Motion to Dismiss (Motion: 6)
Filer: Kane Smart, Esq., Catherine Gjessing, Esq.
Filed Date: August 8, 2022

Appellant's Memorandum in Opposition to Motion to Dismiss, filed on September 22, 2022, by Attorney Ronald A. Shems.

Agency of Natural Resource's Reply in Support of Motion to Dismiss, filed on October 4, 2022, by Attorney Kane Smart and Catherine Gjessing.

INTRODUCTION

The Vermont Natural Resources Counsel and Center for Biological Diversity (together, Appellants) appeal a July 18, 2021 decision of the Agency of Natural Resources (ANR) declining to require the Brandon-Leicester-Salisbury-Goshen-Pittsford Insect Control District (the District) to obtain an Incidental Takings Permit pursuant to 10 V.S.A. Ch. 123 (Protection of Endangered Species) for its pesticide application program.

Presently before the Court is ANR's Motion to Dismiss this appeal pursuant to Vermont Rules of Environmental Court Proceedings (V.R.E.C.P.) Rule 5(c) and Vermont Rules of Civil Procedure (V.R.C.P.) Rule 12(b)(1). ANR asserts that Appellants' appeal is outside the scope of this Court's jurisdiction, as it seeks to compel ANR to exercise discretionary enforcement powers. Appellants oppose the motion, classifying their appeal as not one based in ANR's enforcement authority, but one based in ANR's permitting authority. In the alternative,

Appellants assert that the Petition and this appeal sought not agency action, but a declaratory judgment pursuant to 8 V.S.A. § 808.

For the reasons set forth below, we conclude that Appellants' appeal asks the Court to review a discretionary enforcement decision and is outside the scope of this Court's jurisdiction. Thus, we **GRANT** ANR's motion and dismiss this appeal.

In this proceeding, Appellants are represented by Ronald A. Shems, Esq. ANR is represented by Kane Smart, Esq. and Catherine Gjessing, Esq.

Legal Standard

When evaluating a motion to dismiss for lack of subject matter jurisdiction, this Court accepts uncontroverted factual allegations as true and construes them in the light most favorable to the nonmoving party. Rheaume v. Pallito, 2011 VT 72, ¶ 2, 190 Vt. 245. Unlike an analysis under V.R.C.P. Rule 12(b)(6), when considering a motion to dismiss for lack of subject matter jurisdiction, the Court may consider exhibits outside the complaint. *See* Conley v. Crisafulli, 2010 VT 38, ¶ 3, 188 Vt. 11 (citing Makarova v. United States, 201 F.3d 110, 113 (2d Cir. 2000)).

Background

In May 2019, Appellants and other interested persons contacted ANR, through employees with the Department of Fish and Wildlife, and asserted that the District's spraying of certain pesticides was a violation of 10 V.S.A. Ch. 123, which is Vermont's laws regarding the protection of endangered species. Specifically, Appellants asserted that the spraying was negatively impacting the five bat species listed as threatened and endangered in Vermont. This was, they alleged, a "take" as that term is defined by Chapter 123, and in violation of Chapter 123. Appellants asserted that the District required an Incidental Takings Permit to continue spraying.

The Commissioner of the Department of Fish and Wildlife wrote to Appellants and stated that there was no evidence of a take. Appellants concurrently contacted the Chair of the Vermont's Endangered Species Committee (ESC) and requested that the ESC review the

spraying.[1] Following a series of meetings on the issue, in March 2021, the ESC issued a written recommendation to the Secretary of ANR (the Secretary) recommending that the Secretary require a takings permit for the prior to pesticides spraying by the District. On March 23, 2021, Appellants wrote in support of the ESC's recommendation that the District "should be required to commence the incidental take permitting process" (the Petition). Petition at 3.

On July 18, 2021, the Secretary issued a fifteen-page written decision declining to require the District to obtain an Incidental Takings Permit prior to continuing to spray on the grounds that there was not sufficient scientific evidence that the District's spraying resulted in a take of the bats, or posed a risk to said bats. Appellants appealed this decision here.

Discussion

ANR asserts that the decision to decline to require the District to obtain a permit prior to spraying is an enforcement decision not subject to judicial review. We agree.

The United States Supreme Court, interpreting the Administrative Procedures Act, has held that "an agency's decision not to prosecute or enforce, whether through the civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). This is because "an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise," including:

> assess[ing] whether a violation has occurred, . . . whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all.
>
> Id.

The Court went on to note when an agency does not act, "it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe

[1] The ESC is a statutory committee consisting of 9 members that "advise[s] the Secretary [of ANR] on all matters relating to endangered and threatened species, including whether to alter the lists of endangered and threatened species, how to protect those species, and whether and where to designate critical habitat." 10 V.S.A. § 5404. The Secretary of ANR may issue an Incidental Takings Permit "[a]fter obtaining the advice of the Endangered Species Committee." 10 V.S.A. § 5408(b). Advice from the Endangered Species Committee is not required for the Secretary to bring an enforcement action against alleged violators of Chapter 123. See 10 V.S.A. § 5403(d).

upon areas that courts often are called upon to protect." Id. at 832 (emphasis in original). This principal has been upheld over time. See Massachusetts v. E.P.A., 249 U.S. 497, 527 (2007) (citing Chevron U.S.A. Inv. V. Nat. Res. Defense Council, Inc., 467 U.S. 837, 842—845 (1984) ("[A]n agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities" and "discretion is at its height when the agency decides not to bring an enforcement action, [such that] an agency's refusal to initiate enforcement proceedings is not ordinarily subject to judicial review."); see also Riverkeeper, Inc. v. Collins, 359 F.3d 156, 158 (2d Cir. 2004) (applying these standards to conclude that an agency's denial of a "request for enforcement action" is not within a court's jurisdiction).

This Court has applied these standards to discretionary enforcement decisions taken by ANR. In re R.L. Vallee, Inc. et al MS4, No. 122-10-16 Vtec, slip op. at 3—4 (Vt. Super. Ct. Envtl. Div. May 2, 2017) (Walsh, J.) (citations omitted). In so doing, we noted that part of the reason that an agency's decision as to whether to enforce is akin to prosecutorial discretion. Id. (citing Heckler, 470 U.S. at 832). Prosecutorial discretion is recognized in Vermont as a decision "entitled to great deference." Office of State's Attorney Windsor Cty. v. Office of Atty. Gen., 138 Vt. 10, 13–14 (1979).

Thus, if ANR's decision in this matter is one of enforcement, this Court is without jurisdiction to review it. We therefore turn to the substance of the decision within the context of Chapter 123.

a. Legal Framework

When interpreting a statute, this Court's objective "is to construe and effectuate the legislative intent behind the statute." State v. Hurley, 2015 VT 46, ¶ 9, 198 Vt. 553. This is first done by looking "to the plain meaning to derive the intent of the Legislature." Cornelius v. The Chronicle, Inc., 2019 VT 4, ¶ 18. "[I]f the plain meaning resolves the interpretation issue, we generally look no further." Rutland Herald v. Vermont State Police, 2012 VT 24, ¶ 12, 191 Vt. 357 (citation omitted). If, however, the statute is ambiguous, "we consider the statute's subject matter, effects and consequences, as well as the reason and spirit of the law." Id. We are further directed to "construe statutes to avoid rending one part mere surplusage," In re Jenness, 2008 VT 117, ¶ 24, 185 Vt. 16. At all times there is a general "presumption . . . against

a statutory construction that would lead to . . . absurd results." TD Banknorth, N.A. v. Dep't of Taxes, 2008 VT 120, ¶ 32, 185 Vt. 45 (quotation omitted).

Pursuant to 10 V.S.A. § 5403, "[e]xcept as authorized by [Chapter 123], a person shall not . . . take . . . wildlife . . . that are members of a threatened or endangered species . . .." A "take" or "taking" within the context of Chapter 123 is defined as:

> (A) With respect to wildlife designated a threatened or endangered species, means:
>
> (i) pursuing, shooting, hunting, killing, capturing, trapping, harming, snaring, or netting wildlife;
>
> (ii) an act that creates a risk of injury to wildlife, whether or not the injury occurs, including harassing, wounding, or placing, setting, drawing, or using any net or other device used to take animals; or
>
> (iii) attempting to engage in or assisting another to engage in an act set forth under subdivision (i) or (ii) of this subdivision (18)(A).

10 V.S.A. § 5402(18)(A).

"The Secretary may bring an environmental enforcement action against any person who" takes designated wildlife without authorization to do so pursuant to Chapter 123. 10 V.S.A. § 5403(d). Authorization to take designated wildlife would include an "authorized taking," the definition of which is not relevant here, or an "incidental taking." See 10 V.S.A. § 5408. An incidental taking is allowable if "(1) the taking is necessary to conduct an otherwise lawful activity; (2) the taking is attendant or secondary to, and not the purpose of, the lawful activity; (3) the impact of the permitted incidental take is minimized; and (4) the incidental taking will not impair the conservation or recovery of any endangered species or threatened species." 10 V.S.A. § 5408(b). To lawfully conduct an incidental taking, however, the person or entity must obtain an Incidental Takings Permit (ITP). 10 V.S.A. § 5408(b); see also 10 V.S.A. § 5408(h) (setting forth the permit application requirements).

ANR has clear discretion to pursue enforcement of violations under Chapter 123. Section 5403(d) states that ANR "may bring an environmental enforcement action" against alleged violators. The word "may," as opposed to "shall," is indicative of a legislative intent to provide ANR with discretion to determine whether enforcement actions should be brought. See Vallee, Inc. MS4, No. 122-10-16 Vtec, slip op. at 3 (May 27, 2017) (citing Town of Calais v.

Cty. Rd. Comm'rs, 173 Vt. 620, 621 (2002); In re Treetop Dev. Co. Act 250 Dev., 2016 VT 20, ¶ 13 and n. 4 (reargument denied Mar. 25, 2016)).

There are a few types of environmental enforcement actions that ANR can take under Chapters 201 and 211 of Title 10 when faced with a potential for a violation or evidence of an actual violation. See 10 V.S.A. § 5403(d) (referencing enforcement actions under Chapter 201 and 211). Should ANR determine that a violation may occur, it may issue a potential violator a warning. 10 V.S.A. § 8006(a). The warning sets for the prospective violation, along with a description "of the potential enforcement actions that may be taken if the violation occurs." Id. If ANR believes that a violation occurred, ANR may then issue a notice of violation, which sets forth the terms of the violation, along with a description of the "course of action to address the alleged violation; and, if appropriate, specific timelines and directives to achieve compliance." 10 V.S.A. § 8006(b). In this context, ANR could direct a would-be violator to apply for a permit prior to undertaking any potentially violative action, or direct a violator to apply for an after-the-fact permit, among other potential courses of action as applicable. There no provisions within Chapter 123 or Chapter 201 and 211 that allows ANR to force an entity or person to obtain a permit for actions it believes would result in a violation of the chapter outside these enforcement provision.

b. The Petition

Appellants assert that the Petition was a request to ANR that, "based upon the evidence of risk of injury to listed bat species posed by spraying of adulticides by the District, ANR must require a permit under the ESA for future spraying." Appellant's Opposition to Motion to Dismiss, p. 2. Because the Petition requested that the District obtain a permit, Appellants assert that the Petition not a request for ANR to undertake an enforcement action but for ANR to undertake a permitting action. Put another way, however, Appellants assert that the District would be in violation of Chapter 123 should spraying occur in the absence of a permit. Based on the applicable provisions of law cited above, and the reasons set forth below, this a distinction without difference. Practically, Appellants request ANR issue the District a warning under 10 V.S.A. § 8006(a), which is an act of enforcement within ANR's discretion.

Appellants argue that the proper, and requested, form of action ANR should take is to inform the District that it cannot continue to spray unless and until it receives a permit under Chapter 123 and invite the District to apply for a permit. Appellants assert that, if the District didn't then apply for a permit, ANR could issue a permit for the activity without the District having submitted any application. Appellants state that ANR can inform the District, or any potential violator, that it needs a permit and it should apply for one as set forth by the provisions in 10 V.S.A. § 5408(h). If the District, or any entity, did not then submit such an application, Appellants assert that, because ANR "may permit" incidental takings, ANR has the authority and ability to issue a permit in absentia and without the § 5408(h) required application materials. There is no authority for ANR to issue permits sua sponte and without the statutorily required application.[2] We will not read one in and decline to grant ANR the authority to permit and condition activities in the absence of an application complying with § 5408(h).

Because ANR cannot issue a permit without an application being submitted, the only manner ANR can require a party to apply for a permit non-voluntarily would be to move through enforcement channels. In the present instance, assuming ANR concluded that a violation would occur if the District sprayed without a permit, the manner ANR could grant Appellants' request is to potentially issue a warning under § 8006(a) directing the District to apply for a permit before spraying, or if spraying occurred without a permit, a notice of violation under § 8006(b). See supra p. 6 (describing the warning and notice of violation process). Thus, because the only way that ANR could grant Appellant's requested action is to take enforcement action, we conclude that Appellant's request is one for enforcement which this Court is without authority to review.

Alternatively, Appellants assert that the Petition was "a request for a declaratory judgement to guide future action of ANR, the District and other similarly situation parties."

[2] In fact, we note that Appellant's reading of the statute both renders the § 5408(h) application mere surplusage, in violation of the traditional rules of statutory construction. We further note that this interpretation is bordering on absurd, as it proffers that because ANR had discretion in making permitting decision under § 5408(b), it somehow has the authority to issue those permits without the presence of the would-be permittee or appropriate materials to base its permitting decisions thereon.

Appellants' Opposition to Motion to Dismiss, at 4. Appellants base this assertion in the fact that the Secretary classified the Petition as akin to such a request in her Decision. We disagree with this classification of the Petition and request on appeal.

Prior to addressing this argument, we note that this is a de novo appeal. Therefore, "all questions of law or fact as to which review is available shall be tried to the court, which shall apply the substantive standards that were applicable before the tribunal appealed from." V.R.E.C.P. 5(g). We are therefore not bound by any of the Secretary's legal or factual determinations.

Title 8, Section 808 states that:

> Each agency shall provide 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, and may so provide by procedure or rule. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

8 V.S.A. § 808.

Appellant's petition requests action, not a declaration of the applicability of § 5408(b) to the District, or any other "similarly situated" party for that matter. We reach this result based on Appellant's own filings in this case.

Appellants have not cited that they are requesting a declaratory judgment under § 808 in either their Petition, Notice of Appeal, Statement of Questions and do not otherwise reference a request for such a declaration in the bulk of their opposition to this motion. Instead, these documents, along with the Petition itself, show that Appellants were requesting that ANR take affirmative actions to require the District to obtain a permit and were appealing the "failure to act" to this Court.

The Petition states that it seeks to "acknowledge the important role Vermont's environmental enforcement process here plays in the national environmental conversation" and further "urges [ANR] . . . to uphold their mandate to protect threatened and endangered species." Appellant's March 24, 2021 Petition, p. 5. Appellant's request for action is further addressed on appeal to this Court. Appellant's Notice of Appeal indicates that they are appealing the Secretary's failure to require a permit under 10 V.S.A.§ 8503. See Appellant's Notice of Appeal, p. 1 (". . . the Secretary made the decision not to act."). We, therefore,

conclude that Appellant's have not requested or appealed a declaratory judgment as set forth in 8 V.S.A. § 808.[3]

While the Court notes that the Secretary issued a lengthy written response to the Petition laying out the reasons why it was declining to require the District to obtain a permit, and the Court will not address the merits of such a response, the Court notes that the issues substantively raised by this action are important ones. The environmental laws that ANR is tasked with administering and enforcing address concerns impacting Vermont greatly. While it may be very possible that the Secretary is correct in her analysis and conclusion that the District does not require a permit here, we understand that there may be circumstances in which an agency's decision not to enforce may be in error. The Court urges all parties to thoughtfully and thoroughly consider all investigations of potential violations of Vermont's environmental laws to ensure the protection of the state's environment, public welfare, and safety.

This matter is therefore **DISMISSED**. All other pending motions before the Court are, therefore, **MOOT**. This concludes the matter before the Court. A Judgement Order accompanies this decision.

Electronically signed this 26th day of January 2023 pursuant to V.R.E.F. 9(D)

Thomas G. Walsh, Judge
Superior Court, Environmental Division

[3] Nothing in this decision, however, would impact Appellant's ability to pursue a more appropriate declaratory ruling under 8 V.S.A. § 808, or another applicable provision of law, in accordance with the rules and procedures required by ANR, which would allow Appellants the ability to pose the question of the applicability of § 5408(b) to the District.