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WP-89-04

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VERMONT SUPREME COURT

ENTRY ORDER

SUPREME COURT DOCKET NO. 91-530

MAY TERM, 1992

Georgia-Pacific Corporation and Simpson Paper (Vermont) Co., Inc.	APPEALED FROM:
v.	Washington Superior Court
Department of Environmental Conservation and Sierra Club	DOCKET NO. S473-89WnC

In the above entitled cause the Clerk will enter:

Plaintiffs appeal a Washington Superior Court judgment affirming a decision of the Vermont Department of Environmental Conservation (DEC). They seek to set aside continuous spillage conditions in a § 401 water quality certification, or, alternatively, seek a remand to the DEC for consideration of additional evidence, or a remand to superior court for de novo review. we affirm.

Plaintiffs' contention that the court's denial of their request to remand to the DEC for additional evidence and reconsideration was an abuse of discretion is without merit. A remand to an administrative agency is meant only as a "safety valve" to be used if justice so requires. In re Maple Tree Place, 156 **vt.** 494, 499 (1991) (quoting State ex rel. Gunstone v. Washinaton State Highway Commission, 72 Wash. 2d 673, 674, 434 P.2d 734. 735 (196711. The court found that plaintiffs had the opportunity, which they did not take, to present evidence of their management proposal to the DEC. Further, the court found that the additional proceedings would be a waste of time and expense and would most likely not change the result. These findings are not clearly erroneous and amply support the court's discretionary ruling.

Plaintiffs ***argue*** they were entitled to a de novo hearing on the merits in superior court. Plaintiffs, however, waived any opportunity for a de novo hearing with the court, as illustrated by the following exchange at a pending motions hearing:

> The Court: . . . It is your position that this is not a de novo hearing?
>
> Mr. Pearson: My position today is -- and if my feet were held to the fire, I don't think it is -- but I think on the other hand, an argument

could be made that the Rule 75 does not preclude a de novo hearing. It leaves it to other applicable law to decide what the hearing is. I think if we really want to work at it, we could make an argument that in this context a de novo hearing would be appropriate. I've yet to convince Washington counsel and my client one way or the other on that issue. My personal feeling is I think it probably is not a de novo hearing, although, as I say, I think an argument could be made, and I just haven't convinced them to forget about that little argument we could make and get on with the business of just having this heard on the administrative record.

. . . .

The Court: [I] t would appear that the only issue is whether the plaintiff has almost agreed that it's not going to be a de novo hearing. The State agrees that it's not going to be a de novo hearing? Yes.

. . . .

The Court: DO you [Sierra Club] -- is it your position that this is a de novo hearing or is this not?

Ms. Smith: It's the Club's position that this is a review of the administrative record.

The Court: Right. I think maybe we have an agreement.

At no further time was there consideration of whether review would be de novo. The court was never asked to rule, nor did it rule, on the de novo issue raised here.

Plaintiffs also argue for the first time on appeal that denial of a' remand to the DEC violated their constitutional rights. These challenges are likewise waived. In re Quechee Lakes Corp., 154 Vt. 543, 552, 580 A.2d 957, 962 (1990).

Plaintiffs lastly contend that the spillage requirement was not supported by the evidence and that it was beyond the DEC's authority under federal law to consider aesthetic and recreational factors as grounds for a spillage requirement. The Clean Water Act allows the state to impose conditions in a § 401 certification to ensure applicant's compliance with

certain criteria, including "any other appropriate requirement of State law." 33 U.S.C. § 1341 (d). Vermont's water quality standards promulgated in accordance with this Act require that the Connecticut River be managed for "water of a quality which consistently exhibits good aesthetic value . . and recreation." Vermont Water Quality Standards §3-03. The DEC spillage requirement was amply supported by the evidence. Not only were aesthetics and recreation considered relevant, ease of administration and monitoring were fostered by the requirement. See In re Sherburne, 154 Vt. 596, 607, 581 A.2d 274, 280 (1990) (added deference afforded agency determinations in highly technical fields).

Affirmed.

BY THE COURT:

Frederic W. Allen, Chief Justice

Ernest W. Gibson III, Associate Justice

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice

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