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A. H. Smith Assoc. Ltd. Part. v. Maryland Dept. of the Env't, 695 A.2d 1252 (Md. Ct. Spec. App. 1997)

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the ownership of the gristmill lots. The court reasoned that when the gristmill owner relinquished his one-half interest in the sawmill property back to the original owner, he merged that land under a single owner. Any flowage right to the dam that might have existed with the gristmill property ended with that merger.

Joseph A. Dawson

MARYLAND

A. H. Smith Assoc. Ltd. Part. v. Maryland Dept. of the Env't, 695 A.2d 1252 (Md. Ct. Spec. App. 1997) (affirming the imposition of civil fines for violation of consent order and wastewater discharge).

A.H. Smith Associates Limited Partnership ("Smith"), owned and operated a sand and gravel processing facility. The facility operated by Smith required a National Pollutant Discharge Elimination System ("NPDES") permit for discharges of wastewater. The Maryland Department of the Environment ("MDE") administered the NPDES for the state of Maryland as authorized by the Environmental Protection Agency. In March 1991, prior to the issuance of a permit, MDE and Smith entered into a consent order allowing for the discharge of wastewater. Both the consent order and NPDES permit authorized the discharge of wastewater, consisting of sand and gravel, wash water, and stormwater runoff. This discharge was subject to a daily maximum and a monthly average maximum effluent limitation for total suspended solids ("TSS"), and an effluent limitation on turbidity with a daily maximum and a monthly average limit. MDE monitored these limits once per week utilizing a grab sample. A grab sample consists of a container filled directly from the outflow of the source at a given point in time. During the period of the consent order and later after issuance of the permit, MDE personnel found numerous violations of the daily and monthly effluent limitations for either TSS, turbidity, or both.

MDE filed suit in the circuit court for Prince George's County seeking \$297,000 in civil penalties and an injunction against further violations of the permit. The court imposed \$49,000 in fines against Smith, but refused to issue an injunction. Smith appealed alleging: the trial court abused its discretion in construing the consent order and permit language in favor of MDE, thereby improperly imposing liability; the trial court erred in concluding that the Appellant violated both the consent order and the permit; and the trial court abused its discretion in awarding \$1,000 per violation despite clear and uncontroverted mitigating factors in favor of MDE. Finding no error on the part of the trial court, the appellate court affirmed.

Smith's appeal contended the state's sampling methods did not

comply with the language of the consent order and Discharge Permit and that a grab sample is not "any given sample representing 24-hours flow" and, thus, is insufficient to be the basis for a finding that Smith exceeded the effluent limitations in the consent order and permit. The court rejected Smith's theory, noting, . . . "MDE would be required to obtain an unspecified number of samples over a twenty-four hour period and then average the results obtained . . . this is not what is called for under the applicable terms of the [c]onsent [o]rder and permit." The court reasoned that under EN § 9-331(4), MDE may require a permit holder "[t]o sample discharges in accordance with the methods, at the locations, at the intervals, and in the manner [MDE] requires." The MDE imposed grab samples as a requirement upon Smith under both the consent order and permit. Smith could only obtain the permit if it accepted those conditions, which it did.

Additionally, the court held that under the consent order, Smith contractually agreed that grab samples would determine violations. As to the amount of the penalty for each violation, the court found Smith agreed to accept liability of \$1,000 for each violation waiving any right to contest the amount of the penalty. The court found no abuse of discretion by the trial court's refusal to release Smith from its bargain. As to permit violations, the trial court was entitled to impose fines up to \$360,000. The court also found no abuse of discretion in the trial court's consideration of three factors: (1) the amount of the penalty to which Appellant had agreed in the consent order; (2) the factors applicable to the imposition of fines in administrative adjudications as set forth in EN § 9-342(b); and (3) the court's decision that it would not impose more than one fine per day regardless of the number of permit terms contravened on that day. The court rejected Smith's argument that foreign courts have faced more egregious cases and imposed lesser fines on a percentage basis.

James Fosnaught

MICHIGAN

K & K Constr., Inc. v. Department of Natural Resources, 575 N.W. 2d 531 (Mich. 1998) (holding that a trial court must use a balancing test to determine whether a denial by the Department of Natural Resources for permit to fill wetlands constitutes a categorical taking, and must consider the property as a whole in its analysis).

J.F.K. Resort Company ("JFK") owned eighty-two contiguous acres of property divided into four parcels. Some of the parcels contained wetlands. JFK had previously developed one of the parcels. The remaining three undeveloped parcels were at issue in this case. K & K Construction Company ("K & K"), as general contractor, and J.F.K., as