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TIRE JOCKEY SERVICE, INC. V. COMMONWEALTH: IF A USED TIRE FALLS INTO PENNSYLVANIA AND NO ONE IS THERE TO REGULATE IT, WILL THE COURTS MAKE A SOUND?

I. INTRODUCTION

The Pennsylvania General Assembly enacted the Solid Waste Management Act (SWMA or Act) in 1980 to combat the health, environmental and economic hazards caused by inadequate solid waste management practices. While the SWMA contains an extensive list of definitions applying to words and phrases used in the Act, it neglects to define the simple, but critical, term "waste." As such, one must look to the associated Residual Waste Regulations (RWRs) for clarification as to what materials are to be regulated under the SWMA. Tire Jockey Service, Inc. (TJS), a New Jersey corporation, challenged the applicability of the SWMA and RWRs to discarded used tires accumulated at its Pennsylvania facility for processing.

In particular, TJS claimed used tires are not waste at all, as they fall under express exceptions to the definition of: (1) waste for materials that can be recycled by being employed as an effective substitute for a commercial product; and (2) processing for actions that merely constitute "sizing, shaping and sorting." Alternatively, TJS contended that its facility is also expressly exempted from regulation under the SWMA because it is a collection or processing center that handles only source-separated recyclable material. In response, the Pennsylvania Department of Environmental Protection (DEP) interpreted the SWMA and RWRs to include all discarded tires and tire derived materials, citing associated hazards to health and public safety to underscore a need for proper regulatory oversight.

2. See id. § 6018.103 (2003) (defining terms used in Act).
5. See id. at 1180-81 (citing central argument of TJS).
6. See id. at 1178 (noting exception to processing classification).
7. See id. at 1183 (discussing arguments in procedural history of case).
8. See id. at 1179 (noting position of DEP).
This Note reviews the Supreme Court of Pennsylvania’s decision to reinstate the Pennsylvania Environmental Hearing Board’s (EHB) order in *Tire Jockey Service, Inc. v. Commonwealth of Pennsylvania* (*Tire Jockey*), thereby upholding the applicability of the SWMA and RWRs to discarded used tires. Part II of this Note presents the relevant facts, associated arguments and procedural history of *Tire Jockey*. Part III presents background information essential to this Note’s perspective, addressing the role of the EHB, pertinent sections of the SWMA and RWRs, precedent used in the Supreme Court of Pennsylvania’s analysis and strict criminal liability under the Act. Part IV summarizes the Court’s reasoning in *Tire Jockey*. Part V analyzes the court’s position, commenting on similar initiatives in other areas of Pennsylvania environmental law and the particular importance of regulating used tire processing to ensure public health and safety. Finally, Part VI expounds on the potential impact of the Supreme Court of Pennsylvania’s decision to uphold a broad interpretation of the SWMA.

II. FACTS

Alfred J. Pignataro, Jr. (Pignataro) is the president and chief operating officer of TJS, a New Jersey waste tire processing corporation operating in Fairless Hills, Pennsylvania. TJS utilizes a patented tire processing method that involves large-scale acquisition of discarded whole used tires, segregating those that can be reused as automobile tires by means of visual inspection and inflation test-

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10. See id. (addressing classification of used tires as waste under SWMA and RWRs).
11. For a full discussion of case facts, see infra notes 16-42 and accompanying text.
12. For a full discussion of relevant background, see infra notes 43-108 and accompanying text.
13. For a narrative analysis of the court’s decision, see infra notes 109-31 and accompanying text.
14. For a critical analysis of the court’s decision, see infra notes 132-65 and accompanying text.
15. For a full discussion of impact, see infra notes 166-74 and accompanying text.
16. See *Tire Jockey Serv., Inc. v. Dep’t of Envtl. Prot.*, 915 A.2d 1165, 1169-70 (Pa. 2007) (citing facts of case). Mr. Pignataro is the president, chief operating officer and majority shareholder of Tire Jockey Services. *Id.* He is also responsible for daily operations of the company, located at the USX Industrial Park in Fairless Hills, Bucks County, Pennsylvania. *Id.*
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Pignataro was formerly the president and minority shareholder of Tire Derived Products, Inc. (TDP), a waste tire processing facility in Elizabeth, New Jersey. Though it never held a Certificate of Occupancy from the city, TDP operated until financial difficulties and disputes with the property owner led it to consider relocation. In September of 1999, Pignataro contacted the DEP and learned that a DEP permit would be necessary to open a tire processing facility in Pennsylvania. Despite denial of a requested grant and the fact that TJS had not applied for any of the required local or state permits, the company entered into a five-year lease at the Fairless Hills facility and began operations, accepting discarded whole tires in June of 2000.

Thereafter, the DEP inspected the Fairless Hills facility and, after observing ongoing residual waste processing, told Pignataro to cease operations until obtaining the requisite local and state permits. Following the inspection, the DEP filed a Notice of Violation (NOV), requesting that TJS submit a proposed plan and schedule for correcting the discovered violations. Two more DEP

18. See id. at *3 (noting cut components can be used as raw ingredients in products such as rubber mats, playground surfacing or tire-derived fuel).
19. See id. at *8 (noting TDP was originally located in Newark, New Jersey). TDP's operation procedure was similar to that of TJS. Id.
20. See Tire Jockey, 915 A.2d at 1170 n.3 (discussing Pignataro's operations in New Jersey). TDP vacated the Elizabeth facilities in April of 2000, leaving 100,000 waste tires at the site. Id. In December of 2000, the New Jersey Department of Environmental Protection (NJDEP) issued a notice of violation (NOV) for operating the facility without a permit and leaving a potentially hazardous situation. Id. In May of 2001, the NJDEP considered the site such a serious environmental threat that it sought remedy in the New Jersey Superior Courts. Id. After the City of Elizabeth spent $364,000 in 2001 to properly dispose of the remaining tires, the New Jersey Superior Court held TDP liable for $300,000 in statutory penalties. Id.
21. See id. at 1170-71 (citing fact that Pignataro was aware he needed DEP permit).
22. See id. (describing steps undertaken without proper permitting).
23. See id. at 1171-72 (discussing DEP's instructions to Pignataro). Specifically, DEP officials observed many cut, processed and baled used tires, as well as employees operating tire-processing machinery. Id. They referred Pignataro to the SWMA and RWRs, issuing a NOV on July 26, 2000 for operating the facility without a local Use and Occupancy permit. Id.
24. See id. at 1172 (requiring TJS to submit plan and schedule to correct violations). The NOV cited TJS for processing used tires without a residual waste-processing permit in violation of the SWMA and RWRs. Id.
inspections followed, where officials observed additional tires brought onsite since the DEP's initial inspection.25

After failing a subsequent fourth inspection, TJS applied for a determination of applicability under the DEP permit process, claiming the tires at the facility did not constitute waste as defined by DEP rules and RWRs.26 A fifth follow-up inspection revealed approximately fifty thousand tires at the site, of which Pignataro could not provide records evidencing the number of incoming and outgoing used tires at the Fairless Hills Facility.27 TJS then responded to a DEP request for more permit-related information by submitting an incomplete compliance history that failed to mention the previous NOVs issued to the facility.28 Pignataro also failed to disclose the existence of the TDP facility in New Jersey.29

On January 22, 2001, the DEP issued an Administrative Order and Civil Penalty Assessment, finding that TJS had operated a residual waste processing facility without a permit since June of 2000.30 Three subsequent inspections showed that TJS ignored the order and continued to bring additional tires into the facility.31 In May of 2001, New Jersey authorities informed the DEP of its actions against Pignataro and TDP, spurring the DEP to reject TJS’s permit application.32

TJS appealed the DEP’s order and permit denial to the EHB.33 TJS claimed its used tires are not waste as defined by the SWMA because they fall within SWMA exceptions for: (1) waste material that can be shown to be recyclable by being employed as an effective substitute for a commercial product; and (2) the processing of

25. See Tire Jockey, 915 A.2d at 1173 (stating DEP observations). Following the third failed inspection, the DEP issued a second NOV to TJS. Id.
26. See id. (explaining TJS claims).
27. See id. (describing findings at facility).
28. See id. (discussing TJS response to DEP request for additional information). TJS also failed to provide an accurate figure for required bonding, maintaining that bonding was only needed for waste tires and most or all of the tires at its facility were not waste tires. Id.
29. See id. (noting TJS failure to disclose New Jersey facility).
30. See Tire Jockey, 915 A.2d at 1174 (listing activities and associated violations).
31. See id. (showing TJS’ ignoring DEP Order).
32. See id. (citing actions undertaken in New Jersey as one reason for denial of permit). The DEP held that TJS failed to show its operations were in compliance with permit terms and conditions. Id. The DEP also noted that TJS’s deficient compliance history and divergent views on the issue of bonding contributed to the rejection. Id. Furthermore, TJS “demonstrated a lack of intention or ability to comply with environmental laws.” Id.
source-separated recyclable materials. After considering the plain language of the regulation and crediting the DEP's interpretation as reasonable, the EHB held that used tires do not fall within the claimed exceptions. To support its finding, the EHB looked at the explicit language and historical background of the RWRs and recent consistent precedent. In addition, the EHB also agreed with the DEP that source-separated materials include only those materials specifically listed in the regulation, citing environmental and safety hazards to further support refusal of TJS's expansionary interpretation.

TJS appealed to the Commonwealth Court of Pennsylvania, which vacated the EHB's order. The Commonwealth Court found that TJS does not process or reclaim used tires, but merely sizes, shapes and sorts them, activities considered inconsistent with the term "processing." The court also held that used tires are no longer waste "once it can be shown that the tires will be recycled by being used or reused as an ingredient in an industrial process to make a product or by being employed in a particular function or application as an effective substitute for a commercial product." The Commonwealth Court's decision broadly interpreted when, in the process of recycling, waste is no longer considered waste. The Supreme Court of Pennsylvania granted the DEP's appeal.

34. See id. (setting forth TJS's SWMA-related contentions).
35. See id. at *35 (stating conclusion on issue).
36. See id. at **31-35 (supporting decision to include accumulated tires under waste subject to SWMA). As consistent with the DEP’s view, the exception to SWMA coverage only applies when the material is actually being recycled or reused. Id. at *31. The DEP also made a conscious decision to tie the definition of waste to the manner in which the material is produced. Id. at *33. Despite amendment to the SWMA in 2001, this process-oriented approach was not changed. Id. at *34.
37. See id. at **35-38 (rejecting argument that waste tires constitute source-separated recyclable materials). The EHB found the DEP's interpretation here reasonable and gave it credit. Id. at *36. As the regulation itself does not include waste tires under its list of source separated recyclable materials, there is no mandate that the DEP or EHB transplant waste tires into the list despite the list's nonexclusive context. Id. In addition, source separated recyclable materials can be recycled without significant risk to human health and the environment, something that cannot be said for used tires. Id. at *37.
39. See id. at 1030 (finding that TJS' operations did not constitute "processing").
40. Id. at 1030 (stating reasoning behind holding).
41. See id. at 1029-30 (discussing timing issue in recycling process).
42. See Tire Jockey v. Dep't of Envtl. Prot., 915 A.2d 1165, 1178 (granting DEP's appeal).
III. Background

A. Role of the Department of Environmental Protection and the Environmental Hearing Board in Pennsylvania Environmental Regulation

The Pennsylvania DEP serves to “protect Pennsylvania’s air, land and water from pollution, and to provide for the health and safety of its citizens through a cleaner environment.” The EHB functions as a trial court with jurisdictional power limited to the review of final actions of the DEP. Appeals of EHB actions go to the Commonwealth Court of Pennsylvania and thereafter, if permitted, to the Supreme Court of Pennsylvania.

The EHB reviews cases de novo, basing its decisions solely upon the evidence before the Board. When assessing the plain language of a statute promulgated by the DEP, the EHB defers to the DEP’s interpretation of the regulation unless it is clearly erroneous. A reviewing court can disturb agency determinations only

44. See William Hofmann & Steven Horst, EHB Review, The EHB: DEP’s Friend or Foe? Environmental Hearing Board Review, 15 VILL. ENVTL. L.J. 173, 173 (2004) (describing original composition of DEP). The Pennsylvania DEP was originally bifurcated into two branches: a judicial branch represented by the EHB and a legislative branch composed of the Environmental Quality Board. Id. The two departments were separated in 1988 by the Environmental Hearing Board Act. Id.
45. See id. at 174 (describing appeal process and view of state courts on EHB decisions).
46. See id. at 175 (discussing EHB standard of review); see also Smedley v. Dep’t of Envlt. Prot., No. 97-253-K, 2001 WL 178234, at *14 (reviewing abuse of discretion standard). The EHB uses de novo review to ensure DEP decisions conform to the law and are otherwise reasonable and appropriate. See Hofmann & Horst, supra note 44, at 176 (citing reasons for utilizing de novo standard of review).
upon obvious abuse of discretion or arbitrary exercise of regulatory duties.48

B. The Solid Waste Management Act and the Residual Waste Regulations

The Pennsylvania General Assembly enacted the SWMA on July 7, 1980, and it endures virtually unchanged as Pennsylvania’s leading statute governing solid waste management.49 The Act regulates municipal, residual and hazardous waste while controlling all associated enforcement and permit processes.50 The threshold question for applicability of the SWMA to a party’s conduct is whether the involved material constitutes “waste.”51 The statute contains a broad definition of “solid waste,” but it neglects to define the basic term “waste.”52

Legislative intent behind the statute focused on the public health hazards, environmental pollution and economic loss created by inadequate solid waste practices.53 By establishing a cooperative state and local assistance program for comprehensive solid waste management, the SWMA aims to facilitate proper solid waste maintenance and resource conservation.54 While the DEP administers the SWMA, the Environmental Quality Board (EQB) has the power and duty to adopt rules and regulations to accomplish the Act’s purposes and carry out its provisions.55

The EQB enacted the RWRs to flesh out the SWMA by specifying general procedures and rules for residual waste processing, dis-

49. See 35 PA. STAT. ANN. § 6018.101-.103 (West 2003) (explaining history and enactment of SWMA); see also Hofmann & Horst, supra note 44, at 177 (noting history of SWMA).
50. See Hofmann & Horst, supra note 44, at 178 (defining scope of SWMA).
51. See Hofmann & Horst, supra note 44, at 178 (noting that applicability initially hinges on whether conduct involves waste by definition of statute).
52. See 35 PA. STAT. ANN. § 6018.103 (defining “solid waste” as “[a]ny waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials.”).
54. See id. § 6018.102(1)-(2) (listing purposes of SWMA).
55. See Hofmann & Horst, supra note 44, at 178 (noting means for implementing SWMA); see also 35 PA. STAT. ANN. § 6018.104 (delegating regulation of storage, collection, transportation, processing, treatment and disposal of solid waste to DEP); see id. § 6018.105(a) (delegating adoption of rules, regulations, criteria and standards under SWMA to EQB).
posal, transportation, collection and storage.\textsuperscript{56} In setting the applicability of the RWRs, the term "waste" is defined broadly as:

(i) Discarded material which is recycled or abandoned. A waste is abandoned by being disposed of, burned or incinerated or accumulated, stored or processed before or in lieu of being abandoned by being disposed of, burned or incinerated . . . .

(ii) Materials that are not waste when recycled include materials when they can be shown to be recycled by being:

(A) Used or reused as ingredients in an industrial process to make a product or employed in a particular function or application as an effective substitute for a commercial product, provided the materials are not being reclaimed . . . . Sizing, shaping or sorting of the material will not be considered processing for the purpose of the subclause of the definition.

(B) Coproducts

(C) Returned to the original process from which they are generated, without first being reclaimed or land disposed . . . \textsuperscript{57}

In applying this definition, pertinent sections of the RWRs expressly prohibit a person from operating a residual waste processing facility without first receiving a permit from the DEP.\textsuperscript{58}

C. Pennsylvania Case Law Defining Used Tires as Waste Under the SWMA

In 1992, the Commonwealth Court of Pennsylvania addressed whether a waste storage and disposal facility violated the SWMA by collecting tires from various commercial tire dealers and storing them in large, unfenced piles on the surface of its property without a permit.\textsuperscript{59} In \textit{Starr v. Department of Environmental Resources (Starr)},\textsuperscript{60} the Department of Environmental Resources (DER) issued an NOV to the petitioner facility on the premise that discarded tires consti-

\begin{itemize}
  \item \textsuperscript{56} See \textit{25 PA. CODE § 287.2 (2001)} (specifying scope of RWRs).
  \item \textsuperscript{57} \textit{Id. § 287.1} (defining "waste").
  \item \textsuperscript{58} See \textit{25 PA. CODE § 293.201 (2001)} (citing basic limitations and permit requirements of RWRs).
  \item \textsuperscript{60} 607 A.2d 321, 323 (Pa. Commw. Ct. 1992).
\end{itemize}
tuted "solid waste" under the SWMA. Petitioner contended that used tires were not "municipal waste" because they were a "marketable commodity capable of being profitably recycled for various further uses." The court rejected this argument, stating that the assumption runs contrary to the express legislative policy of the SWMA to correct unacceptable solid waste practices for the public's sake. In holding that the DER properly classified used tires as municipal waste subject to regulation, the court further noted the value-based analysis proposed by petitioner ignored the "absurd result that a party could escape environmental regulations by simply declaring [its] waste has value."

A month after the Commonwealth Court decided Starr, the Supreme Court of Pennsylvania addressed whether used tires should be regulated under the SWMA. In Booher v. Department of Environmental Resources (Booher), the Supreme Court of Pennsylvania granted petition for review of an EHB order on the grounds that petitioner lawfully disposed of used tires on his property because the SWMA and associated RWRs did not expressly include used tires as waste. The court cited Starr in holding that an accumulation of waste tires constitutes "municipal waste." As petitioner facility never obtained authorization from the DEP to store tires on his property, the EHB did not err in holding that the facility unlawfully deposited municipal waste in violation of the SWMA.

More recently, the Supreme Court of Pennsylvania reaffirmed the inclusion of used tires under the RWR's definition of waste. In

61. See id. at 322 (noting that DER considered discarded tires to be "waste" under SWMA).
62. Id. at 323 (stating petitioner's main contention that discarded tires were not waste); see also 35 Pa. Stat. Ann. § 6018.103 (defining "municipal waste" as "[a]ny garbage, refuse, industrial lunchroom or office waste and other material including solid...material resulting from operation of residential, municipal, commercial or industrial establishments and from community activities...").
63. See Starr, 607 A.2d at 323 (rejecting contention that used tires are not waste because they are capable of being recycled for future use); see also 35 Pa. Stat. Ann. § 6018.102 (stating legislative policy behind SWMA).
64. Starr, 607 A.2d at 324 (discussing problems with petitioner's value-based analysis).
66. See id. at 1101 (outlining contentions of charged facility). The petitioner was charged with accumulating tires and operating a solid waste storage, processing or disposal facility on his property without a permit in violation of § 601(1)-(2) of the SWMA. Id. at 1100. Following receipt of a NOV from the DER, petitioner continued accumulating tires, amassing approximately 200,000 by July 6, 1989. Id.
67. See id. at 1102 (noting recent holding of Starr as including waste tires under definition of municipal waste).
68. See id. (rejecting petitioner's contention that he was not guilty of opening and operating unlawful dumping and disposal facility in violation of SWMA).
Commonwealth v. Packer (Packer), the court found the defendant equipment operator guilty of dumping solid waste without a permit when he buried waste tires on his employer's property. In addressing whether an employee can be criminally liable for violating the SWMA, the court acknowledged that RWR language classifies an accumulation of waste tires as "residual waste" and consequently read that classification into the SWMA.

D. Strict Liability and the SWMA

When the Pennsylvania General Assembly enacted the SWMA, it included provisions for strict criminal liability to facilitate prosecution by allowing liability without evidence of intent. Section 6018.606(i) of the Act evidences the state's intent to dispense with a common law mens rea requirement and impose strict liability for specified offenses, including two of the SWMA's most frequently violated provisions. Violations of the SWMA are considered "public welfare offenses," justifying liability regardless of intent when violation "impairs the efficiency of controls deemed essential to the social order" and "consequences are injurious or not according to fortuity." Typically, public welfare offense statutes regulate "dangerous or deleterious devices or products or obnoxious waste materials." As the accused is usually in a position to prevent violation, courts have upheld strict liability in this context because penalties are generally small and conviction does not greatly damage an offender's reputation.

The roots of strict liability for environmental crimes in Pennsylvania extend as far back as the 1907 case Commonwealth v. Immel

69. 798 A.2d 192 (Pa. 2002).
70. See id. at 194-97 (holding used tire fits under definition of waste found in RWRs and SWMA).
71. See id. at 196-97 (citing definitions of waste under regulations and tying them to SWMA).
73. See id. § 6018.606(i) (including §§ 6018.401 and 6018.610 in strict liability scheme).
76. See id. (stating justification for eliminating mens rea element from public welfare offenses).
In Immel, the Supreme Court of Pennsylvania affirmed the defendant's conviction for polluting local waters and held that the requisite intent to place a poisonous substance in a water source did not necessarily require intent to harm the environment. By maintaining liability for damage done to local fish through harmful discharge, regardless of whether a defendant intended such harm, the court reasoned, "a sane man is presumed to intend the necessary or the natural consequences of his voluntary acts." Roughly eighty-five years later, shortly before the enactment of the SWMA, environmental catastrophe nearly struck central Pennsylvania, evidencing a dire need for strong criminal penalties and strict liability. In Commonwealth v. Scatena, the Supreme Court of Pennsylvania convicted multiple corporate and non-corporate defendants under the Pennsylvania Clean Stream Law for dumping untreated industrial and chemical wastes down a borehole connected to the Susquehanna River. The court held the widespread pollution of a major water source resulting from the discharge in question was enough in itself to establish liability.

Yet, the strict liability provisions of the SWMA are often challenged on due process grounds, most commonly as being void for vagueness for not sufficiently defining an offense so that ordinary people can understand what conduct is prohibited and avoid arbitrary and discriminatory enforcement. Due process of law is satisfied in this regard if the statute at issue "contains reasonable
standards to guide the prospective conduct."85 In *Baumgardner Oil Company v. Commonwealth* (*Baumgardner*),86 the petitioner oil-processing facility argued that the strict liability provisions of the SWMA were too vague to give fair notice.87 The Commonwealth Court rejected this contention, holding that the definitions within the SWMA provided sufficient guidance for an ordinary person to understand the extent of prohibited conduct.88

Moreover, the Commonwealth Court of Pennsylvania recently affirmed the constitutionality of SWMA strict liability with regard to vagueness in *Commonwealth v. Farmer*,89 upholding the Act’s applicability to a petroleum treatment facility.90 The facility claimed its processing was not overtly hazardous and various agency interpretations of the SWMA made the Act fatally overbroad.91 Relying on the reasoning of *Baumgardner* and other associated cases, the court upheld strict liability under the SWMA as constitutional.92

The petitioner in *Baumgardner* also challenged strict liability under the SWMA as imposing unconstitutionally harsh sanctions for a strict liability statute.93 The court rejected this claim as well, holding that the penalties under the SWMA are no harsher than those found in other federal strict liability statutes deemed constitutional.94 In support of this reasoning, the court cited *United States v. Freed* (*Freed*),95 where the United States Supreme Court upheld the constitutionality of a strict liability statute that imposed fines of up to $10,000 and maximum imprisonment for up to ten years for pos-

87. *See id.* at 620 (arguing vagueness of SWMA provisions), appeal denied, 612 A.2d 986 (Pa. 1992). *Baumgardner Oil Company* (*BOC*) collected used oil, reprocessing it for sale as fuel oil. *Id.* at 619. *BOC* was charged with Unlawful Management of Hazardous Waste, a second-degree felony, and several related misdemeanors. *Id.* at 620.
88. *See id.* at 622-23 (discussing whether statute should be void for vagueness).
91. *See id.* (stating contentions of facility that provisions of SWMA were overbroad).
92. *See id.* (noting consistent affirmation of certain strict liability enactments).
93. *See Baumgardner*, 606 A.2d at 621 (stating issue raised in case that SWMA sanctions were overly harsh).
94. *See id.* at 625 (comparing regulation at issue to federal possession of unregistered firearm). While due process may set some limits on the imposition of strict criminal liability, the United States Supreme Court has yet to expound any definite guidelines for curtailment. *Id.*
session of an unregistered firearm. In *Freed*, the Court affirmed multiple convictions for possessing and conspiring to possess unregistered hand grenades in violation of the National Firearms Act (NFA). The Court upheld strict liability in that instance because the regulatory measure was in the interest of public safety and it was reasonable to assume the statute provided adequate notice of the conduct's illegality.

In contrast to *Freed*, another federal opinion rejected the appropriateness of strict liability for felony conviction. In *Staples v. United States* (*Staples*), the United States Supreme Court reversed a conviction under the NFA for possession of an unregistered machinegun because, unlike possession of hand grenades, possession of a gun does not sufficiently notify its possessor of the likelihood of regulation. By requiring the government to prove *mens rea*, the Court distinguished the case from other precedent that affirmed strict liability under statutes regulating potentially harmful or injurious items. The Court further justified its rejection of strict liability by citing the potentially harsh penalty of up to ten years of imprisonment for violation of the provision at issue.

The Supreme Court of Pennsylvania addressed the scope of strict liability prosecution in *Packer*. By channeling the overarching goals of the SWMA, the court upheld strict criminal liability for any person dumping or depositing waste, including employees of...
waste disposal facilities.104 By not expressly limiting the liability to those with a duty to obtain a permit, the court reasoned that the General Assembly intended to punish all persons involved in the illegal dumping of solid waste105 and imposing liability in this manner would be consistent with the purposes of the SWMA.106 Nevertheless, a dissenting opinion in Packer expressed concern over the classification of SWMA violations as public welfare offenses, as such convictions carry harsh penalties and can be subsequently injurious to one’s reputation.107 Accordingly, affirmative defenses and specific jury instructions can appropriately alleviate these real effects of SWMA violation.108

IV. NARRATIVE ANALYSIS

In Tire Jockey Service, Inc. v. DEP, the Supreme Court of Pennsylvania reinstated the EHB’s order against TJS, finding that the trial court should have deferred to the DEP’s interpretation, as upheld by the EHB, because it was reasonable and consistent with the RWRs.109 In reaching its decision, the court looked at past holdings and held that the plain language of the regulation exempted material from classification as waste at the time it is recycled, not beforehand.110 Since used tires accumulated by TJS were not an ingredient in an industrial process or immediately usable as an effective substitute for a commercial product without some form of processing, the court held that the tires did not qualify for exception under the definition of waste and the trial court erred in holding otherwise.111

In addition, the court rejected the Commonwealth Court’s holding that the SWMA does not apply to TJS because they do not “process” or “reclaim” waste material, but merely size, sort and

104. See id. (holding legislature did not intend to limit liability under SWMA).
105. See id. at 199 (rationalizing reading of SWMA to apply to all involved in dumping solid waste without permit).
106. See id. at 198 (justifying imposition of liability); see also 35 PA. STAT. ANN. § 6018.102(4), (10) (West 2003) (citing legislative intent behind enactment of SWMA).
107. See Packer, 798 A.2d at 201 (Saylor, J., dissenting in part) (disagreeing with classification of SWMA violation as public welfare offense).
108. See id. (noting repercussions of conviction under SWMA).
110. See id. at 1187-88 (referencing precedent for including accumulation of used tires under definition of waste in SWMA); see also infra notes 59-71 and accompanying text.
111. See Tire Jockey, 915 A.2d at 1189 (agreeing with DEP that TJS’s used tires did not fit under exception to definition of waste).
shape it, which is expressly exempted from the definition of waste.\textsuperscript{112} According to the Supreme Court, TJS's conduct constitutes sufficient processing to fall outside the exception.\textsuperscript{113}

A. Exception for Materials Used or Reused in an Industrial Process or as an Effective Substitute for a Commercial Product

The Supreme Court of Pennsylvania found that TJS's used tires are indeed waste and deference is owed to the DEP’s interpretation of the RWRs because: (1) the regulations were consistent with the SWMA and properly issued in line with legislative rule-making power and procedure;\textsuperscript{114} and (2) the DEP interpretation was reasonable.\textsuperscript{115} Neither party contested the promulgation of the regulation at issue and its consistency with the SWMA.\textsuperscript{116} In addition, the court recognized that the DEP's stature as an enforcement branch of the state’s environmental administration puts it in the best position to interpret environmental regulations.\textsuperscript{117}

The court then assessed the reasonableness of the DEP’s position that TJS's operations do not fall under an exception to the definition of waste even if the used tires have a potential to be reused or recycled.\textsuperscript{118} The court held legislative findings behind the SWMA supported the inclusion of used tires as waste, noting that

\textsuperscript{112} See id. at 1190 (rejecting contention that TJS's used tires fit under exception for sizing, shaping or sorting).

\textsuperscript{113} See id. (noting that TJS processed tires to sufficient degree). TJS fell outside of the exception because its tires were not “ready for use as an effective substitute for a commercial product or as an ingredient in an industrial process.” Id.

\textsuperscript{114} See id. at 1186-87 (noting undisputed point that regulation is consistent with SWMA).

\textsuperscript{115} See id. at 1186 (citing test for agency deference). Regulations adopted pursuant to an agency's legislative power are valid and binding upon courts so long as they are: (a) adopted within the agency’s granted power; (b) issued pursuant to proper procedure; and (c) reasonable. Id.

\textsuperscript{116} See Tire Jockey, 915 A.2d at 1186 (discussing adequacy of RWRs). “[N]either party disputes that the regulation is consistent with the SWMA, was adopted within the granted power or was issued pursuant to proper procedure.” Id. Review must ensure that courts do not substitute their own judgment for that of an agency with legislative rule-making power. Id. In addition, a pronouncement must be so at odds with fundamental principles as to be an expression of whim rather than an exercise of judgment in order to qualify as abuse of legislative power. Id.

\textsuperscript{117} See id. at 1187 (describing DEP as having “the greatest working knowledge of and practical experience with the environmental regulations.”); see also 35 PA.STAT. ANN. § 6018.104 (West 2003) (stating DEP’s duty to administer and enforce solid waste management program).

\textsuperscript{118} See Tire Jockey, 915 A.2d at 1188 (assessing reasonableness of DEP interpretation).
improper waste practices can lead to public health hazards, environmental pollution and economic loss.\textsuperscript{119}

The court also recognized that precedent supported the inclusion of used tires under the SWMA's definition of waste.\textsuperscript{120} In \textit{Starr}, the Commonwealth Court of Pennsylvania upheld a similar contention to avoid a public health hazard and enjoin parties from escaping regulation by simply declaring their waste had value.\textsuperscript{121} The court's reasoning in \textit{Starr}, holding the accumulation of used tires fell under SWMA regulation, was approved by the Supreme Court of Pennsylvania in \textit{Booher} and more recently in \textit{Packer}.\textsuperscript{122}

Finally, the Supreme Court of Pennsylvania looked at the plain language of the exception at issue and noted its construction as exempting waste "when recycled," not before.\textsuperscript{123} The court held that the exception only applies to materials that are presently ready for use as ingredients in an industrial process or as effective substitutes for commercial products without any processing.\textsuperscript{124} The court noted that TJS processes its used tires to some degree when it visually inspects and pressure tests all incoming tires.\textsuperscript{125} This corresponds with the RWR definition of processing because TJS methods were "used for the purpose of reducing the volume or . . . to convert part or all of the waste materials for offsite reuse."\textsuperscript{126} In addition, the court doubted TJS's used tires can be considered ingredients in an industrial operation as addressed by the RWRs.\textsuperscript{127} No part of its operations involve an ingredient, defined as part of a

\textsuperscript{119} See \textit{id}. (citing General Assembly finding that equates poor solid waste practices with harm to public health, safety and welfare); see also 35 PA. STAT. ANN. § 6018.102 (West 2003) (listing purposes of SWMA).

\textsuperscript{120} See \textit{Tire Jockey}, 915 A.2d at 1187-88 (noting that court had previously considered accumulation of used tires "waste" under SWMA).


\textsuperscript{122} For a discussion of the Pennsylvania Supreme Court's application of \textit{Starr} in subsequent cases, see \textit{supra} notes 65-71 and accompanying text.

\textsuperscript{123} See \textit{Tire Jockey}, 915 A.2d at 1189 (addressing plain language of regulation's definition of "waste"); see also 25 PA. CODE § 287.1 (2008) (stating exception under definition of waste).

\textsuperscript{124} See \textit{Tire Jockey}, 915 A.2d at 1189 (interpreting express language of regulation).

\textsuperscript{125} See \textit{id}. (recognizing processing functions at TJS). Some tires are further sized, sorted, shaped, cut, shredded and baled. \textit{Id}.

\textsuperscript{126} 25 PA. CODE § 287.1 (2008) (defining "processing").

\textsuperscript{127} See \textit{Tire Jockey}, 915 A.2d at 1189 (addressing whether used tires can be considered ingredients in industrial operation).
mixture or compound, because the used tires are cut into new and separate products.  

B. Exemption for "Sizing, Shaping or Sorting"

The court next addressed whether TJS operations could meet the "sizing, shaping or sorting" exception to processing under the definition of "waste," as found by the Commonwealth Court. For the exception to apply, the used tires must be ready for use as an effective substitute for a commercial product or ingredient in an industrial process. As the reusable tires at TJS's facility required processing before meeting this requirement, the exception cannot apply.

V. CRITICAL ANALYSIS

A. Tire Jockey as Progression of Historical Support for Strong Environmental Regulation

The Supreme Court of Pennsylvania's decision in Tire Jockey, as viewed alongside its decisions in Booher and Packer, illustrates a conscious effort by the state to uphold and strengthen its environmental regulatory scheme. By sustaining the DEP's narrow interpretation of the simple term "waste," the court supported the enforcement power of the DEP and ensured that overreaching exceptions to the statutory law do not eviscerate its oversight. This strong stance is justified by the Pennsylvania Constitution itself, which asserts that the state's "people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment." This principle was incorporated and expounded upon in the SWMA so as to "protect the pub-

128. See id. (comparing TJS operations with dictionary definition of "ingredient"). American Heritage Dictionary defines ingredient as "an element in a mixture or compound." Id. (internal citations omitted).

129. See id. at 1190 (addressing whether TJS operations can be classified under exception to waste for sizing, shaping or sorting).

130. See id. (noting requirements of exception).

131. For a further discussion of the court's reasoning regarding exceptions, see supra notes 118-131 and accompanying text.

132. See Tire Jockey, 915 A.2d at 1190 (noting that DEP interpretation properly implements purpose of SWMA).

133. See id. (supporting holding by noting fear of evisceration of DEP power to enforce law).

134. PA. CONST. art. 1, § 27 (noting Pennsylvania's general stance on environmental conservation). "[T]he Commonwealth shall conserve and maintain [public natural resources] for the benefit of all the people." Id. The Pennsylvania Constitution also notes that the state's natural resources represent "the common property of all the people, including generations yet to come." Id.
lic health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage and disposal of all wastes." 135 Broad inclusion of materials under the definition of "waste" is also justified by the state's express desire to "provide a flexible and effective means to implement and enforce the provisions of [the SWMA]." 136

Tire Jockey furthers strong policy initiatives established in other areas of the law to bolster the state's environmental regulatory scheme. The Pennsylvania General Assembly established a sharp strict liability scheme under the SWMA, going as far as making it a felony for violating the Act. 137 In creating strict liability offenses, the Pennsylvania legislature manifested its intent to uphold liability for harm caused even if a violator uses the utmost care. 138 Strict liability under the SWMA persists in Pennsylvania jurisprudence despite fervent attacks for being inconsistent with the traditional mores of the legal principle; namely that penalties for violations be small and convictions not substantially damaging to the offender's reputation. 139

The Commonwealth Court of Pennsylvania's decision in Baumgardner serves as the state's seminal proclamation against challenges to strict liability for violations of the SWMA. 140 In upholding the constitutionality of strict liability in this context, the court maintained that: (1) the definitions contain reasonable enough standards for an ordinary person to understand what conduct is prohibited by the SWMA; 141 and (2) the penalties at issue are no harsher than those found in other federal strict liability statutes

136. Id. § 6018.102(5) (citing legislative desire for flexible means to effectively enforce SWMA).
137. See id. § 6018.606(f) (outlining felony offense for anyone who stores, transports, treats or disposes of hazardous waste within Commonwealth).
138. See id. § 6018.401(b) (extending liability related to "storage, transportation, treatment, and disposal of hazardous waste" even if violator "exercised utmost care to prevent harm"); see also Christ, supra note 78, at 116-17 (discussing public welfare offenses). Strict liability for public welfare offenses is predicated on a duty to society to refrain from causing harm, whereby the actual infliction of harm usually depends on mere chance. Id. at 117-18.
139. See Christ, supra note 78, at 117 (discussing primary justification for allowing exceptions to mens rea requirement of offense).
140. See id. at 120-21 (discussing Baumgardner and legality of strict liability).
deemed constitutional.142 Interestingly, the Baumgardner court relied on Freed to support the latter point, a case that broadly interpreted conduct falling under the definition of a public welfare offense and associated strict liability classification.143 By choosing the Freed interpretation over the strict construction of the term advocated in Staples, the Commonwealth Court firmly established its view of waste dumping as clearly encompassing "deleterious devices or . . . obnoxious waste materials" sufficient to provide owners with notice that they are responsible to the public to prevent hazards.144 As the United States Supreme Court has yet to expound definite limits to strict criminal liability, the Supreme Court of Pennsylvania's support of the SWMA's strict liability provisions shows legitimate conviction in the face of contrary positions.145

Yet, recent case law questions the continued validity of SWMA strict liability as a traditional public welfare offense. In Packer, the Supreme Court of Pennsylvania persisted in upholding the constitutionality of strict liability for SWMA violations, but a partially dissenting opinion voiced disapproval.146 Specific exception was taken with the classification of the SWMA as a public welfare offense, a categorization that historically required minimal penalties and slight overall impact on offenders to justify imposition of liability without intent.147 The Packer dissent advocated the use of affirmative defenses and enhanced jury instructions instead of strict liability, since the large penalties, i.e., long prison sentences and injury to professional or community reputation associated with SWMA vio-

142. See id. at 625 (comparing regulation at issue to federal possession of unregistered firearm).
143. Compare United States v. Freed, 401 U.S. 601, 612 (1971) (upholding strict liability for possessing hand grenades in violation of National Firearms Act where regulatory measure was in interest of public safety and provided reasonable notice that conduct prohibited was reasonably implied), with Staples v. United States, 511 U.S. 600, 618 (1994) (reversing conviction for possession of unregistered machinegun in violation of National Firearms Act because, unlike possession of hand grenades, gun possession does not sufficiently notify possessor of likelihood of regulation).
147. See id. at 201 (citing harshness of SWMA strict liability penalties). A first-time violation of SWMA § 610 is classified as a third-degree misdemeanor, carrying potential penalties of up to one year in prison and a fine between $1,000 and $25,000 per day for each violation. Id.
lation, seem to belie the appropriateness of strict liability.\textsuperscript{148} While the dissenting justice did not weigh in on the ultimate constitutionality of the SWMA's strict liability provisions, this skepticism suggests an uncertainty that may hinder Pennsylvania's future efforts to uphold its firm environmental position.\textsuperscript{149}

Though the Commonwealth Court's decision in \textit{Baumgardner} seems inapposite to its initiative in \textit{Tire Jockey}, it evidences an overarching state policy to stand behind environmental regulation as a means to support important legislative initiatives.\textsuperscript{150} Numerous Pennsylvania decisions have cemented this position, and recent questioning of strict liability under the SWMA necessitates reaffirmation of the court's commitment to environmental regulation.\textsuperscript{151} The Supreme Court of Pennsylvania's decision in \textit{Tire Jockey}, therefore, furthers the state's continued support of strict liability as a furtherance of environmental steadfastness.

B. \textit{Tire Jockey} as Evidence of a Pragmatic Approach to Solid Waste Regulation in Pennsylvania

The particular dangers of the waste involved in \textit{Tire Jockey} further illustrate the need for broad regulation in Pennsylvania to ensure dangerous residual waste does not evade regulation. Used tires, when accumulated, hold the frightening potential to catch fire and significantly threaten the surrounding environment.\textsuperscript{152} The chemical composition of petroleum-based tires makes them highly flammable, while their donut shape creates an airflow that can aggressively feed and sustain a blazing fire.\textsuperscript{153} Large tire fires can sometimes take as long as a year to extinguish, as evidenced by a 1998 blaze in California that consumed roughly seven million discarded tires.\textsuperscript{154} Burning tires affect the environment by producing hazardous smoke, causing showers of soot miles away from the burn.

\begin{footnotesize}
\begin{itemize}
\item 148. See id. at 202 (foreshadowing availability of limited affirmative defenses as future issue with regard to SWMA strict liability).
\item 149. See id. (withholding decision on constitutional questions for case where adequate record is presented).
\item 150. For a discussion of constitutional questions and interplay with legislative initiatives, see supra notes 59-108 and accompanying text.
\item 151. For a discussion of Pennsylvania Supreme Court precedent relating to strict liability, see supra notes 104-08 and accompanying text.
\item 153. See id. (explaining flammability of used tires).
\item 154. See id. (referencing tire fire in Tracy, California, where spark from farm machinery started one of nation's largest and longest running tire fires).
\end{itemize}
\end{footnotesize}
These fires also produce an oily runoff that contaminates nearby streams and aquifers.

Another problem associated with large accumulations of used tires is mosquitoes. Stagnant pools of water can create a flourishing breeding ground for the disease-carrying insects. This threat is especially meaningful for Pennsylvanians, as the original North American breeding ground for the deadly West Nile Virus was in fact located in a tire dump in Scranton, Pennsylvania. Infected mosquitoes are the primary source of the virus and become communicable when they feed on infected birds, thereby transferring the virus to humans and animals when taking blood. Roughly twenty percent of infected persons will experience mild symptoms such as fever and nausea, while about one in one hundred fifty infected persons experience permanent neurological damage sometimes resulting in death.

Though not explicitly mentioned in the opinion, the effects of this widespread viral epidemic may have loomed over the Supreme Court of Pennsylvania’s decision in Tire Jockey to include used tires under the definition of waste, thereby ensuring regulation and proper damage control. The EHB adjudicated Tire Jockey at the close of 2002, a year that realized 4,156 reported cases of human West Nile Virus infection and 284 fatalities nationally, as compared to only 149 cases of infection and eighteen fatalities from 1999 to 2001.

The most serious manifestations of West Nile Virus are human meningitis and encephalitis, or inflammation of the spinal cord and brain, respectively. The virus first appeared in North America in 1999, with encephalitis reported in both humans and horses.

The Center for Disease Control and Prevention notes that of the 4,156 reported cases in 2002,
lier, in perfect posture to recognize 2003’s national record of 9,862 reported cases of human West Nile Virus infection and associated Pennsylvanian records of 237 reported cases of infection and eight fatalities.\textsuperscript{163} Statistics for the years 2004 through 2006, while not at the epidemic levels of 2003, were still significant enough to warrant the court’s concern.\textsuperscript{164} In addition, the virus also affected the country’s horse population during this time period, even causing death in some cases.\textsuperscript{165}

VI. IMPACT

The Supreme Court of Pennsylvania’s holding in \textit{Tire Jockey} maintains the broad applicability of residual waste oversight and ensures that dangerous processing facilities will not slip by unregulated.\textsuperscript{166} Moreover, this policy is consistent with the Pennsylvania Constitution and legislative intent behind the SWMA.\textsuperscript{167} Additional support is found in recent environmental case law\textsuperscript{168} which reaffirms the dangers associated with the particular waste material for which exclusion is sought.\textsuperscript{169} By accepting narrow readings of environmental statutory language, Pennsylvania courts create less leeway for circumvention, ensuring that dangerous waste disposal

\begin{itemize}
\item[163.] See CDC, 2003 West Nile Virus Activity in the United States, http://www.cdc.gov/ncidod/dvbid/westnile/surv&controlCaseCount03_detailed.htm (last visited Oct. 21, 2008) (citing 2003 statistics both nationally and by state). The Center for Disease Control and Prevention notes that of the 9,862 reported cases in 2003, 69\% were reported as the milder West Nile fever while 29\% were reported as the neuroinvasive diseases meningitis or encephalitis. \textit{Id.}
\item[166.] For a narrative analysis of the court’s reasoning, see \textit{supra} notes 109-131 and accompanying text.
\item[167.] For a discussion of the constitution and the legislative intent behind the SWMA, see \textit{supra} notes 132-36 and accompanying text.
\item[168.] For a discussion of recent case law, see \textit{supra} notes 59-71 and accompanying text.
\item[169.] For a discussion of the dangers associated with the exclusion, see \textit{supra} at notes 152-165 and accompanying text.
\end{itemize}
facilities realize their "highest duty of responsibility" to safeguard the public from harm.\textsuperscript{170} This overarching policy is evident in the courts' treatment of strict liability under the SWMA, an issue consistently upheld despite fervent challenge.\textsuperscript{171}

Finally, Pennsylvania's deference to its administrative environmental scheme can be viewed as a trend that will persist. Future litigants challenging environmental provisions of Pennsylvania law should expect treatment in line with the state's firm support of environmental initiatives like strict criminal liability\textsuperscript{172} and narrow readings of statutory exceptions to regulations.\textsuperscript{173} In addition, Pennsylvania's stance parallels similar regulatory schemes of other states with regard to used tires and other waste products.\textsuperscript{174} The willingness of Pennsylvania courts to back environmental goals with such strength at this juncture is not only an encouraging prospect for the future of the state's natural realm and well-being of its citizens, but also a discouraging omen for prospective polluters.

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\textsuperscript{171} For a discussion of strict liability, see \textit{supra} at notes 72-108 and accompanying text.

\textsuperscript{172} See id.

\textsuperscript{173} For a general overview of the court's interpretation of the exceptions, see \textit{supra} notes 109-113 and accompanying text.

\textsuperscript{174} See John F. Bonfatti, \textit{Tired Tires: The Problem and Promise of Used Tires}, Buffalo News, Nov. 20, 2000, at 1A (discussing plight of New York State in addressing used tire problems). As of 2000, it was estimated that nearly 24 million used tires sat in tire dumps throughout New York, with another 12 to 15 million generated each year. \textit{Id.} Recent enactments have created a state Council on Scrap Tire Management and Recycling to help remedy the surplus of waste tires. \textit{Id.} Florida recently dealt with a similar problem, disposing of 25 million waste tires over seven years. \textit{Id.}

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