an item not authorized by the warrant of attorney. If it is found to be the latter, the *entire* judgment *must* be stricken.

Although we have some misgivings that this extreme remedy is appropriate, we are found by the later precedential authority that we read to permit no discretion if an unauthorized item is found to be included within the judgment. That being the finding previously made herein, the entire judgment will be stricken.

ORDER OF COURT

NOW, October 11, 1988, the Court having considered Count 2 of the petition of Defendants William L. Cornett and A. Arlene Cornett to strike the judgment entered pursuant to confession of judgment on December 15, 1987, the answer thereto filed by Plaintiff, and having reviewed the briefs submitted by the parties, and having considered the oral argument presented in support thereof, it is ordered that the judgment entered in the above as to defendants William L. Cornett and A. Arlene Cornett, shall be stricken.

COMMONWEALTH, DEPARTMENT OF ENVIRONMENTAL RESOURCES v. BAUMGARDNER COMPANY, C.P. Franklin County Branch, Misc. No. 20 of 1986

Clean Streams Law - Summary Offense - Intent of Defendant

1. Where defendant was charged with exceeding the discharge limit of defendant's permit under the Clean Streams Law, the charge is criminal in nature and requires proof beyond a reasonable doubt.

2. Intent is not an element for offenses under the Clean Streams Law.

John McKinstrey, Esquire, Counsel for Plaintiff
Jan G. Sulcove, Esquire, Counsel for Defendant

WALKER, J., August 31, 1988:

On October 9, 1988, Durand Little, a water quality specialist with the Department of Environmental Resources ("DER"), conducted a routine inspection of the defendant, Baumgardner Company, an oil recycling facility. During the inspection, Little

noticed an oily substance flowing from the culvert on the north side of Pennsylvania Route 997. The water flowing from the culvert travelled under the road in a closed pipe and deposited into a small stream on the south side of Route 997. Upon examination of the stream, Little noticed an oily sheen on the surface of the stream, and an oily substance accumulating in pools on the stream's surface.

Little contacted the management, Dirk Baumgardner and plant manager Lawrence Clugston, at the defendant facility. Upon tracing the flow to its origin, Little, Baumgardner, and Clugston found that there was water flow from separators No. 1 and No. 3. The defendant facility has four (4) separator units. The separator units trap water run-off on the facility site from rainfall and other water sources, and separate the water from any oil or grease product. In the separator, the oil rises to the surface of the water. The water then exits the bottom through a baffle pipe into a drip box, and then travels underground in a closed piping system to the culvert, where the flows from all four (4) separators meet. From the culvert, the wate travels under Route 997 into the stream on the south side of the roadway. The flow from separator no. 3 was found by Little to be clear. The flow from separator no. 1, which was depositing into the drip box, was oily. Upon noticing this, the plant manager, Clugston, closed the discharge valve from the separator no. 1 and stopped the flow.

Little proceeded to take "grab samples" of liquid from the drip box at separator no. 1, and from a deep point in the stream on the south side of Route 997. The "grab sample" taken from the drip box measured 5,237 mg/l of oil or grease concentration, according to laboratory analysis for oil/grease/freon conducted under the supervision of Linda Cohen, DER laboratory supervisor. This concentration is well over 500 times the 10 mg/l permitted limit under the defendant's NPDES Industrial Discharge permit. The "grab sample" taken from receiving stream was analyzed under Cohen's supervision, and measured at a concentration of 1,758 mg/l, over 170 times the defendant's discharge permit limitation of 10 mg/l.

At the time Little took the "grab samples" from the drip box, the plant manager, while closing the flow from separator no. 1, suggested that there may be a leak in the baffle pipe inside the separator, permitting the escape of oil. There was no statement by the plant manager or any person employed by the defendant facility that any third party may have been involved in causing the

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Estate of Ruth S. Pfoutz, deceased, late of Chambersburg, Franklin County, Pennsylvania.
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Estate of Mary J. Rotz, deceased, late of Chambersburg, Franklin County, Pennsylvania.
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and
Robert Carl Rotz
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Estate of Mabel E. Williams, deceased, late of the Borough of Chambersburg, Franklin County, Pennsylvania.
Administrator:
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2/10, 2/17, 2/24/89

Estate of Robert E. Zeis, Jr., deceased, late of St. Thomas Township, Franklin County, Pennsylvania.
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oil to be flowing from separator no. 1, or "salting" the receiving stream or culvert area with oil.

Little returned to the defendant facility on October 10, 1985 for a follow-up inspection. The baffle pipe on separator no. 1 was being repaired because of a small leak, and the separator was not in operation. The receiving stream contained absorbent pads to collect the accumulated oil.

On February 25, 1986, DER filed charges against the defendant pursuant to Sections 301, 307, and 611 of the Clean Steams Law, 35 P.S. Section 691.1 *et seq.*, before District Justice Larry Meminger. DER charged the defendant with exceeding the discharge limit of 10 mg/1, as required by the defendant's permit. Summary trial commenced in the matter on April 1, 1986. The defendant was found guilty and sentenced to pay a fine of $1,000. A summary appeal was filed by the defendant on April 24, 1986. A trial *De novo* was held before this court on August 2, 1988.

Since the offense charged to the defendant by the DER is a summary offense, and thus, criminal in nature, the Commonwealth must prove beyond a reasonable doubt that the defendant did discharge waste products in violation of the defendant's permit, pursuant to the Clean Streams Law, 35 P.S. Section 691.1 *et seq. Commowealth v. Baumgardner Oil Co.,* 36 D.& C. 3d 496 (1984). However, intent is not an element of the offenses charged, for the offenses under the Clean Streams Law are malum prohibitum, and the intent of the defendant is wholly immaterial. *Commonwealth v. Sonneborn,* 164 Pa. Super. 493, 66 A. 2d 584 (1949).

The defendant claims that the Commonwealth has not proven beyond a reasonable doubt that there was a violation committed by the defendant, citing numerous points which will be addressed herein. However, the court disagrees. The Commonwealth has sufficient evidence to link the malfunction of separator no. 1, and the subsequent discharge of petroleum waste from the separator into the receiving stream, to the defendant facility. Therefore, the court finds that the issues presented by the defendant must fail.

First, the defendant claims that separator no. 1 could not have been discharging on October 9, 1985, because of a lack of rainfall after October 2, 1985. However, the defendant's witness, Elmer Baumgardner, never substantiated the lack of rainfall during the period by weather reports or local weather records. Without proof of such a critical fact beyond the memory of Elmer

Baumgardner, the court is inclined to find little credibility in the self-serving statement. Further, the Commonwealth produced a photograph (Exhibit 15) of the ground at the defendant's facility, which appeared to be moist and/or muddy. While not conclusive evidence, it certainly goes to rebut the defendant's claim of dry conditions. Likewise, Little recorded that he and Clugston stopped the flow, and that Clugston stated that separator was malfunc tioning and would be repaired. Exhibits 9, 11.

Second, the defendant claims that the Commonwealth has not proven that the matter in the samples were petroleum waste products. The defendant feels that the matter was decomposed foliage, fatty acids, fats, waxes, or other hydrocarbons. With this, the court cannot agree. Little stated that the physical appearance of the substance on the stream and flowing from the outflow pipe of separator no. 1 was "oil" and "oil sheen." Exhibit 9. There was a definite sheen of oil on the receiving stream's surface, as well as at the collection culvert on the north side of Route 997. Through visual examination, Little, a water quality specialist, concluded that the substance was petroleum waste. Laboratory analysts at DER conducted "OIL-GR FREON" testing on the two samples taken by Little, and found 5,237 mg/l and 1,758 mg/l of matter in the samples. The court feels that through the physical and visual analysis, as well as the laboratory testing performed by DER, the Commonwealth has sufficiently proven that the matter in the samples was an oil product. The defendant claimed that the sepator units are pumped and cleaned regularly, but brought fourth no evidence of how foliage or other matter got into the drip box. Likewise, the defendant cites no authority which states that the Commonwealth must go beyond the acts it performed in identifying the substance.

Third, the defendant argues that the sampling technique employed by Little was faulty. Specifically, the defendant claims that the volume of water taken by Little was insufficient, and that the place Little took his "grab samples" were improper. As to the appropriate volume of the sample to be tested, the court finds that the amount utilized in the DER testing taken by Little's "grab that the amounts utilized in the DER testing taken by Little's "grab samples" of October 9, 1985 to be appropriate. Linda Cohen, the DER lab supervisor, stated that the amount of liquid taken by Little in his "grab samples," 290 ml. and 490 ml., was adequate under the circumstances. Since the oily matter was visibly observable in the samples, large volume samples were not

needed to weigh the suspended material. N.T. at 68. "Samples and measurements taken as required herein shall be representative of the *volume* and *nature* of the monitored discharge." Exhibit 2 at p.5. (Emphasis supplied). Large samples are needed only when traces or minute particles of foreign matter are in the water. In essence, the "grab samples" taken and the testing procedure implemented[1] gave the defendant the benefit of the doubt if trace amounts were present. Thus, since the oily matter was visible in the samples taken from the stream and the drip box, the volume of water taken in the "grab samples" by Little was sufficient.

As to the appropriate place to take the "grab samples, " the court feels that the drip box and the receiving stream were correct locations. Samples are to be taken at the oufall of the separators and in the receiving stream. Exhibit 2 at pp. 2, 14. "At Outfall XXX" is defined as "a sampling location in the outfall line XXX downstream from the last point at which wastes are added to outfall line XXX, or otherwise specified." Exhibit 2 at p. 4. Thus, the drip box would be an appropriate place to take a "grab sample." The drip box is a point downstream from the outfall of separator no. 1. Likewise, the receiving stream is also downstream from the separator. The places from which the samples were taken by Little were appropriate. If the court were to follow the defendant's claim, the only appropriate place to take the smaple would be from the outfall pipe itself. This would require Mr. Little and all other DER water quality specialists to wait for rainfall at a site, and then travel to the site before the discharge from the separator's pipe ceases. Due alone to the unfeasibility and impracticality of the defendant's claim, the court feels certain that the legislature did not intend to require the rigorous exactitude encompased in the defendant's interpretation of the DER's sampling procedure.

The defendant's final claim is that water run-off from other properties flows into the stram, and thus, the oil in the stream is not the defendant's responsibility. Also, the defendant argues that people in the past have "salted" the stream with oil by

[1]When the foreign matter is visible and suspended in a sample, the "gravimetric" test is used, and smaller volumes of sample are adequate. To detect trace amounts of foreign matter, larger samples are needed, and the "UVLIR" test is utilized. The gravimetric test was utilized in our case.

dumping oil at the culvert on the north side of Rout 997. The court finds these claims to be without merit. The defendant presented no evidence of any recent "salting" which occurred, causing the oil to be in the stream on October 9, 1985. Likewise, the defendant's argument as to water run-off from other properties into the stream has a fatal flaw: the sample from the drip box, which was over 500 times the level of discharge allowed by the permit. With the results of the test from the drip box, the defendant has no one to point the finger at but itself. While oil in the stream or culvert may alone be insufficient to prove a violation beyond a reasonable doubt, *Cf. Commonwealth v. Baumgardner Oil Co., Supra,* the "smoking gun" is the excessively high test results from the outfall of defendants separator no. 1.

In conclusion, the court finds the defendant violated the stated provisions of the Clean Streams Law by releasing in excess of 10 mg/l of oil waste into a waterway of the Commonwealth. The malfunctioning separator no. 1, the test results from the "grab samples" taken from the drip box of no. 1 and the receiving stream, the oil sheen on the receiving stream, and other circumstances stated herein prove beyond a reasonable doubt that the discharge which polluted the stream came from the defendant's facility. No proof of intent on the part of the defendant is necessary. Just as the common law maxim states -"Sic utere tuo ut alienum non laedus" -- "So use your own property as not to injure your neighbor," so too must the defendant use its property in compliance with its permit limits, and not injure the waterways of the Commonwealth.

ORDER OF COURT

August 31, 1988, the defendant's appeal from the summary conviction for violation of Sections 301, 307, and 611 of the Clean Streams Law, 35, P.S. Section 691.1 *et seq.* is dismissed.

The defendant shall have ten (10) days from the date of this order to file post-trial motions in this matter, in accordance with Pa.R.Crim.P. 1123.