Water Law Review

Volume 5 | Issue 2 Article 34

1-1-2002

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that the stipulated penalties imposed under the Decree were reasonable because the penalties directly related to the environmental harm caused by A&A, and the amount assessed was less than 10 percent of the statutory authorized penalty.

The court addressed A&A's second argument, noting that, although the Decree provided for the extension of deadlines in the event of a Force Majeure, the provision required A&A to notify the EPA in writing if it intended to invoke the provision. Therefore, because A&A did not comply with the Decree's procedural requirements, it could not claim impossibility. Moreover, because the flood occurred seven months after the Decree's deadline, the court reasoned that the flooding did not warrant an excuse for the delay and, therefore was irrelevant. Thus, the court affirmed the district court's judgment.

Christopher A. Griffin

United States v. Chemetco, Inc., 274 F.3d 1154 (7th Cir. 2001) (holding: (1) section 309(c)(2) of the Clean Water Act ("CWA") was unambiguous; (2) Congress intended the number of violation days to be a sentencing factor and not an element of a CWA offense; and (3) the fine imposed by the district court did not exceed the prescribed statutory maximum penalty).

Chemetco plead guilty to violating section 301 of the CWA. The district court ordered Chemetco to pay a fine based on the number of days it violated the CWA. Chemetco appealed its sentence, arguing that the district court misinterpreted the CWA and that the court's findings violated the rule set forth in *Apprendi v. New Jersey.*

Chemetco obtained a permit from the Illinois Environmental Protection Agency ("EPA") allowing construction and operation of a storm-water runoff control system. Chemetco also installed, without a permit, a secret pipe running from its property to a ditch tributary. For a period of ten years, Chemetco used the secret pipe to illegally release water containing toxic metals, until United States and Illinois EPA agents discovered it.

Chemetco was indicted for conspiring to violate the CWA and knowingly violating section 301 of the CWA. After conducting an investigation, the government recommended fining Chemetco for 949 days of violation. According to its calculations, Chemecto argued it was only liable for 71 days of violation. Chemetco also objected to the government's findings, citing the Supreme Court's recent decision in *Apprendi.* Chemetco further claimed that the government had to prove the number of days of violation beyond a reasonable doubt, and it had to be charged in the indictment with each day of violation.

The district court found that the indictment was sufficient because it informed Chemetco of the charges and put it on notice of the potential maximum penalty. Further, the district court found that

Apprendi did not apply; therefore, the number of days of violation under the CWA was a sentencing factor the court could find by a preponderance of the evidence. Accordingly, the district court found there were 676 days of violation and sentenced Chemetco to a fine of $33,275,000. Chemetco appealed that sentence.

The issue in this case was whether the number of days Chemetco violated the CWA is an element of a CWA offense or a sentencing factor. Due process requires the government to prove each element of an offense beyond a reasonable doubt. After the government has met this burden and an offender is found guilty of a crime, however, courts can apply sentencing factors based on a preponderance of the evidence to increase the offender's punishment. The court of appeals held that it was important to determine whether the number of days Chemetco violated the CWA was an element of a crime or a sentencing factor. If the number of violation days belonged in the former category, then it was reversible error for the district court to calculate the number of violation days based on a preponderance of the evidence.

The Supreme Court has ruled that, within certain constitutional limits, Congress can identify which factors are elements of a crime and which are sentencing factors. Therefore, the court of appeals had to first determine Congress' intent. The court determined that if the number of days of violation was a sentencing factor, then the next inquiry became whether such a determination comported with the constitutional limits elucidated in *Apprendi.*

To determine whether Congress intended the number of violation days to be a sentencing factor or an element of a crime, the court of appeals considered the language of the statute. When the language of a statute is clear and unambiguous, courts must give effect to its plain meaning unless doing so would "thwart the purpose of the overall statutory scheme."

The court of appeals concluded that the language of section 309(c)(2) was unambiguous. Thus, the court held it had to give effect to the statute unless doing so was inconsistent with the overall statutory scheme of the CWA. The court found CWA's statutory scheme was clear, as section 301 and other sections define what constitutes a violation and section 309 establishes penalties for these violations. Thus, because the clear and unambiguous language of section 309(c)(2) comported with the overall statutory scheme of the CWA, the court concluded Congress intended the number of violation days to be a sentencing factor and not an element of a CWA offense.

Moreover, the court of appeals held the plain language of the CWA contradicted Chemetco's argument that each day of violation was a separate offense. Section 309(c)(2) allows district courts to impose fines "per day of violation," thereby implying that violations may span more than one day. Given that generally a court should not construe a statute in a way that makes words or phrases meaningless or superfluous, the court found Chemetco's argument unavailing.

Chemetco further argued that its sentence violated the rule announced by the Supreme Court in *Apprendi.* In that case, the Supreme Court held any fact that increased the penalty for a crime *beyond the prescribed statutory maximum* had to be proven beyond a reasonable doubt. Chemetco claimed the CWA had a statutory maximum penalty: $50,000 per day of violation. The court held that even if Chemetco's argument was taken as true, it would not mandate a reversal because an *Apprendi* violation only occurred when the imposed sentence *exceeded* the prescribed statutory maximum. Chemetco had urged the district court to find seventy-one days of violation, which would yield a fine range of $342,500 to $3,425,000. The court's fine of $3,327,500 was less than what Chemetco contended was appropriate. The court of appeals concluded, therefore, even if the CWA had a statutory maximum penalty, the district court's fine did not exceed the limit ($3,425,000) in the present case. Accordingly, the court of appeals affirmed Chemetco's sentence.

Gloria M. Soto

NINTH CIRCUIT

Sierra Club v. Whitman, 268 F.3d 898, (9th Cir. 2001) (holding Environmental Protection Agency's refusal to take action against alleged violations of the Clean Water Act was discretionary and not subject to judicial review).

The Sierra Club and an individual citizen (collectively "Sierra Club") sued the Administrator of the Environmental Protection Agency ("EPA"), Christine Todd Whitman ("Whitman"), and others for failing to take action against the operators of a wastewater treatment plant allegedly polluting the Santa Cruz River in violation of the Clean Water Act ("CWA"). The CWA authorizes any citizen to sue the Administrator of the EPA for failure to perform any act or duty deemed "not discretionary" under the act.

The treatment plant ("Plant"), located in Southern Arizona, served a relatively small population of Americans and Mexicans, and had a National Pollution Discharge Elimination System ("NPDES") permit that expired in 1996. The Plant continued to operate and discharge pollutants thereafter while a new NPDES permit was on appeal. According to the lower court's findings from January 1995 to 2000, the facility violated its permit limitations 128 times.

The Sierra Club based its suit on the theory that the CWA required Whitman to find a violation and file suit against the Plant. It focused on language in the CWA that provides, whenever "the Administrator finds that any person is in violation" of permit conditions, the Administrator "shall issue an order requiring such person to comply. . . or . . . shall bring a civil action." The court pointed out the language