Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 10
Issue 1 *2002-2003*

Article 6

2002

Interpreting the Criminal Sentencing Provisions of the Clean Water Act: Lessening the Government's Burden of Proof at the Cost of Constitutional Rights. U.S. v. Chemetco., Inc.

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CASENOTE

INTERPRETING THE CRIMINAL SENTENCING PROVISIONS OF THE CLEAN WATER ACT: LESSENING THE GOVERNMENT'S BURDEN OF PROOF AT THE COST OF CONSTITUTIONAL RIGHTS

U.S. v. Chemetco, Inc.[1]

I. INTRODUCTION

U.S. v. Chemetco, Inc. involves issues arising during the sentencing of a scrap metal smelter under the criminal provisions of the Clean Water Act[2] ("CWA").[3] Following Chemetco's plea of guilty to knowingly violating the CWA by polluting without an appropriate permit, the United States sentenced the defendant based upon a preponderance of the evidence.[4] Chemetco appealed and, as a result, United States Court of Appeals for the Seventh Circuit became the first court to address the issue of whether the burden of proof under Section 309 (c)(2) is governed by the evidentiary standard of reasonable doubt, or merely upon the preponderance of the evidence. Additionally in this case, the Seventh Circuit became the first court to decide whether the United States Supreme Court's ruling in *Apprendi*[5] applies to sentencing under the CWA.

This note will argue that while the Seventh Circuit correctly ruled that the holding of *Apprendi* is inapplicable,[6] the court failed to address the constitutional issues raised by the Supreme Court, in its overview of prior case law contained in *Apprendi*, regarding the determination of whether a statutory provision constitutes an element of an offense or a sentencing provision.[7] The distinction is critical to this case, because an element of an offense must be proven by a reasonable doubt, but a sentencing factor may be proven merely by the preponderance of the evidence.[8] Therefore, the court's ruling sacrifices the defendant's constitutional rights in order to provide the government with an easier way of punishing criminal violations of the CWA.

II. FACTS AND HOLDING

A. Factual History

On September 12, 1986, the Illinois Environmental Protection Agency issued a permit allowing construction and operation of a storm-water runoff control system to Chemetco, a scrap metal smelter located in Hartford, Illinois.[9] Contract laborers were then hired by Chemetco to install this system.[10] The laborers were instructed by Chemetco to install a secret pipe on Chemetco's property running to a nearby ditch tributary.[11] After finishing the installation, the exposed sections

[1] 274 F.3d 1154 (7th Cir. 2001)
[2] 33 U.S.C. § 1319(c)(2) (2001).
[3] *See Chemetco*, 274 F.3d at 1158.
[4] *Id.* at 1156.
[5] *Apprendi v. New Jersey*, 530 U.S. 466 (2000).
[6] *Chemetco*, 274 F.3d at 1161.
[7] *See generally id.* at 1158-61.
[8] *See Apprendi*, 530 U.S. at 477-78.
[9] *Chemetco*, 274 F.3d at 1156.
[10] *Id.*
[11] *Id.*

of the secret pipe were covered with straw.[12] This secret pipe was not included in any blueprints or drawings kept by Chemetco, nor did Chemetco have a permit allowing it to discharge pollutants via this system.[13] Chemetco used the secret pipe to discharge water containing toxic metals, such as lead and cadmium, until September 18, 1996, when the pipe was discovered by the United States and the Illinois Environmental Protection Agencies.[14]

B. Procedural History

Chemetco, through a plea agreement, pleaded guilty to both conspiring to violate and knowingly violating the CWA, and pleaded "nolo contendere" to making false statements to government officials.[15] In accordance with the plea agreement, Chemetco acknowledged discharging pollutants via the secret pipe during at least some of the time during the ten-year period alleged in the indictment.[16] Chemetco also agreed that the fine recommended to the court would be based on the number of days for which a violation had occurred.[17] Further, both parties agreed that Chemetco would be liable for a fine of $2,500 to $25,000 "per day of violation" before February 4, 1987,[18] and for a fine of $5,000 to $50,000 "per day of violation" thereafter.[19] Thus, the only disputed question of fact was the number of days that a violation had occurred.[20]

Both parties prepared sentencing memoranda for the probation office in which they made recommendations for fine ranges.[21] The government recommended fining Chemetco for 949 days of violation, which consisted of 948 days when it rained during the period listed in the indictment, plus the day when officials first witnessed the pipe discharging pollutants. [22] Chemetco argued that there were fewer days of violation because the pipe did not discharge pollutants on every day that it rained, and thus there should only be seventy-one days of violation.[23] To support this contention, Chemetco's expert witness presented two alternative methodologies for calculating days of violation, and the company presented testimony of employees stating that the secret pipe could not have discharged pollutants on every day that it rained because on certain occasions the valve to the secret pipe was closed.[24]

The probation office issued its pre-sentence report (PSR) in which it concluded that there were 711 days of violation, yielding a fine range between $3,502,500 to $35,025,000.[25] Chemetco then filed an objection to the PSR, citing the Supreme Court's recent decision in *Apprendi*.[26] Chemetco claimed that it had to "be charged in the indictment with each day of violation" and that the number of days of violation had to "be proven by the government beyond a reasonable doubt."[27]

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[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* This lower value reflects Section 309(c)(2) 2 of the CWA before the passage of the Water Quality Act of 1987, which raised the level of fines to the current level. *See* Pub. L. No. 100-4, § 312, 101 Stat. 7; 33 U.S.C. § 1319(c)(1) (1982).
[19] *Chemetco*, 274 F.3d at 1156.
[20] *Id.* at 1156-57.
[21] *Id.* at 1157.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Chemetco*, 274 F.3d at 1157 (citing *Apprendi*, 530 U.S. at 477).

The district court rejected Chemetco's objection, finding that the indictment was sufficient given that it informed Chemetco of the charges and put Chemetco on notice of the maximum penalty.[28] Further, the court held that *Apprendi* did not apply to this case, and therefore the number of days of violation under the CWA was a sentencing factor that the court could find by only a "preponderance of the evidence."[29] At the sentencing hearing, the district court found by a preponderance of the evidence that there were 676 days of violation, resulting in a fine range between $3,327,500 to $33,275,000.[30] Accordingly, the district court levied a $3,327,500 against Chemetco, which Chemetco appealed.[31]

C. Legal Arguments on Appeal

On appeal, relying on the Supreme Court's decision in *Castillo v. U.S*,[32] Chemetco challenged the sentence ordered by the district court, arguing that Congress intended the number of days of violation to be an element of a CWA offense rather than a sentencing factor.[33] In *Castillo*, the court held that "although the language of 18 U.S.C. § 924(c)(1) (1994) was ambiguous, the structure of the statute clarified Congress's intent to create a new element of a separate offense."[34]

Chemetco argued in the alternative that Congress intended for each day of violation to be charged as a separate offense,[35] relying on a district court case from Pennsylvania, *U.S. v. Oxford Royal Mushroom Prods., Inc.*[36] In that case the court denied a motion to dismiss an indictment under the multiplicity doctrine because it concluded that whether the indictment charged the defendants with the days of violation separately, or with a single course of conduct, made no real difference because the CWA directs punishment for each day of violation.[37] Finally, Chemetco argued that treating the number of violation days as a sentencing factor does not comport with the constitutional limits as set forth in *Apprendi*. In that case, the court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime must be proved beyond a reasonable doubt."[38]

The Seventh Circuit rejected Chemetco's interpretation of Congressional intent, holding that because the "clear and unambiguous language of Section 309(c)(2) comports with the overall statutory scheme of the CWA," Congress intended the number of violation days to be a sentencing factor and not an element of a CWA offense.[39] The court was not persuaded by *Castillo*, believing it was inapposite to this instant case.[40] Similarly the court rejected Chemetco's assertion that Congress intended each day of violation to be charged as a separate offense, finding that reliance on *Oxford* was misguided, that the plain language of the CWA "contradicts" this argument, and that the practical results of using such a rule could not have been Congress' intent.[41] The Seventh Circuit also rejected Chemetco's assertion that the rules set forth in *Apprendi* are applicable in this case,

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[28] *Id.*
[29] *Id.* at 1157-58.
[30] *Id.* at 1158.
[31] *Id.*
[32] 530 U.S. 120 (2000).
[33] *Id.*
[34] *Chemetco*, 274 F.3d at 1159 (citing *Castillo*, 530 U.S. at 124-25).
[35] *Chemetco*, 274 F.3d at 1160.
[36] 487 F. Supp. 852 (E.D. Pa. 1980).
[37] *Id.* at 856.
[38] *Chemetco*, 274 F.3d at 1160 (citing *Castillo*, 530 U.S. at 490).
[39] *Chemetco*, 274 F.3d at 1159.
[40] *Id.*
[41] *Id.* at 1159-60.

because the CWA does not have a prescribed statutory maximum penalty.[42] Thus, the Seventh Circuit affirmed Chemetco's sentence.[43]

III. LEGAL BACKGROUND

Section 301 of the CWA provides that it is unlawful for any person to discharge a pollutant unless in compliance with the provisions of this Act.[44] One can achieve such compliance by obtaining a National Pollutant Discharge Elimination System permit from the United States Environmental Protection Agency, or from a qualified state agency.[45] Section 309(c)(2) establishes criminal penalties for "knowing" violations of Section 301 of the CWA, stating: "[a]ny person who . . . knowingly violates Section 301 . . . shall be punished by a fine of not less than $5,000 nor more that $50,000 per day of violation, or by imprisonment for not more that 3 years, or by both."[46]

The United States Supreme Court has ruled that, within certain constitutional limits, Congress can identify which factors are elements of a crime, and which are sentencing factors.[47] One such constitutional limit is the right to due process.[48] The Fifth Amendment's Due Process Clause requires that the government prove each "element" of an offense "beyond a reasonable doubt."[49] The historical foundation for this principle extends down centuries into the common law.[50] "The demand for a higher degree of persuasion in criminal cases has been recurrently expressed from ancient times, [though] its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798."[51] It is now accepted in common law jurisdictions as the measure of persuasion required of the prosecution.[52] The United States Supreme Court has explained the reliance on this standard, stating that it "reflects a profound judgment about the way in which law should be enforced and justice administered."[53] This practice also holds true when indictments are issued pursuant to statute.[54]

"Any possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding"[55] "[T]he English trial judge of the later eighteenth century had very little explicit discretion in sentencing."[56] The judge was simply to impose the sentence as proscribed by the appropriate substantive law.[57] Thus, "the judgment, though pronounced or awarded by the judges, [was] not their determination of or sentence, but the determination and sentence of the law."[58] However, "[b]oth before and since the American colonies became a nation, courts in this country and in England have practiced a policy under which a sentencing judge could exercise wide discretion in the sources and types of evidence used for

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[42] *Id.* at 1160.
[43] *Id.* at 1161.
[44] 33 U.S.C. § 1311(a) (2001).
[45] 33 U.S.C. § 1342 (2001).
[46] 33 U.S.C. § 1319(c)(2) (2001).
[47] *See Apprendi*, 530 U.S. at 485-490.
[48] *See generally id.*
[49] *Id.* at 477; *see also U.S. v. Gaudin*, 515 U.S. 506 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993).
[50] *Appendi*, 530 U.S. at 477.
[51] *Id.* at 478.
[52] *Id.*; *see also* C. McCormick, Evidence § 321, pp.681-682 (1954); 9 J. Wigmore, Evidence § 2497 (3d ed. 1940).
[53] *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968).
[54] *Apprendi*, 530 U.S. at 480.
[55] *Id.* at 478.
[56] *Id.* at 479.
[57] *Id.*
[58] *Id.* at 479-80.

assistance in determining the kind and extent of punishment to be imposed within limits fixed by law."[59] Thus, "the judge's task in sentencing is to determine, 'within fixed statutory or constitutional limits, the type and extent of punishment after the issue of guilt' has been resolved."[60]

The United States Supreme Court has made clear that due process extends, to some degree, "to determinations that go not to a defendant's guilt or innocence, but simply to the length of his sentence."[61] This "was a primary lesson" of *Mullany v. Wilbur*[62], a 1975 Supreme Court case in which the Court invalidated a statute because criminal law "is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability assessed."[63] The Court further reasoned that a State could not circumvent the protections afforded by the Due Process Clause merely by "characterizing [elements] as factors that bear solely on the extent of punishment."[64]

It was in *McMillan v. Pennsylvania*[65] that the United States Supreme Court first coined the term "sentencing factor" to refer to a fact that was not found by a jury, but that could affect the sentence imposed by the judge. In that case, the Court upheld the validity of a statute because the statute did not run afoul of the Court's previous admonitions against relieving the State of its burden of proving guilt, or tailoring the mere form of the statute solely to avoid concerns of infringement of the defendant's constitutional right to due process.[66] However, the Court did not budge from its position that (1) constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense,[67] and (2) that a state scheme that keeps from the jury facts that "expos[e] [defendants] to greater or additional punishment" may raise serious constitutional concern.[68]

In *Almendarez-Torres v. U.S.*, the Supreme Court created an exception to this historical practice by allowing a judge to increase punishment if the defendant had a prior conviction, based only on a preponderance of the evidence. The Court reasoned that the certainty that procedural safeguards attached to any fact of prior conviction mitigated the due process and Sixth Amendment concerns otherwise implicated in allowing a judge to determine a fact increasing punishment beyond the maximum of the statutory range.[69] However, the Court made clear in *Jones v. U.S.*,[70] that *Almendarez-Torres* "represents at best an exceptional departure from the historical practice that we have described."[71]

In 2000, the Supreme Court revisited this issue in *Apprendi v. New Jersey*.[72] The Court reexamined their previous cases in this area, and confirmed the validity of their opinion stated in *Jones*.[73] The Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and

[59] *Id.* at 481 (citing *Williams v. New York*, 337 U.S. 241 (1949)).
[60] *Id.* at 482 (citing *Williams*, 337 U.S. at 247).
[61] *Id.* at 484 (citing *Almendarez-Torres*, 523 U.S. at 251).
[62] *Mullaney v. Wilbur*, 421 U.S. 684 (1975).
[63] *Id.* at 697-698.
[64] *Id.* at 698.
[65] *McMillan V. Pennsylvania*, 477 U.S. 79 (1986).
[66] *Id.* at 86-88.
[67] *Id.* at 85-88.
[68] *Id.* at 88.
[69] *Apprendi*, 530 U.S. at 488.
[70] *Jones v. U.S.*, 526 U.S. 227 (1999).
[71] *Id.* at 248-49.
[72] *Apprendi*, 530 U.S. 466.
[73] *Id.* at 490.

proved beyond a reasonable doubt."[74] The Court also stated that the relevant inquiry, in deciding whether a statutory provision represents an element of an offense or a sentencing factor, "is not one of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict.[75] The Court further explained that "merely because the state legislature place[s] . . . [the] sentence enhancer within the sentencing provisions of [the statute], does not mean . . . it is not an essential element of an offense."[76] Thus the Court concluded that "the mere presence of this enhancement in a sentencing statute does not define its character."[77]

IV. INSTANT DECISION

In order to determine whether Congress intended the number of violation days to be a sentencing factor or an element of a crime, the Seventh Circuit first looked at the language of the statute.[78] The court found that the "per day of violation" language of Section 309(c)(2) "qualifies the term of punishment," thus the number of days that the violation occurred is a "factor to be determined after a "violation" has been established."[79] Therefore, the court concluded that the plain meaning of the language of the statute "expresses Congress's unambiguous intent."[80]

The Seventh Circuit then began its analysis of the language in context of the overall scheme of the CWA, stating that because the language of Section 309(c)(2) is unambiguous, it must give effect to it if doing so is "consistent with the overall statutory scheme of the CWA."[81] The court found the CWA's statutory scheme to be clear; with Section 301 and other sections defining what constitutes a violation, and Section 309 establishing penalties for these violations.[82] Thus, "[b]ecause the clear and unambiguous language of Section 309(c)(2) comports with the overall statutory scheme of the CWA," the court held that "Congress intended the number of violation days to be a sentencing factor and not an element of a CWA offense."[83] The court distinguished *Castillo* from the facts in the present case, because unlike the language and structure of the statute in question in *Castillo*, "the CWA's language is unambiguous and Section 309(c)(2) is an integral part of the CWA's penalty structure."[84]

Similarly, the Court rejected Chemetco's assertion that Congress intended for each day of violation to be charged as a separate CWA offense.[85] The court found Chemetco's reliance on *Oxford* to be "misguided,"[86] as it concluding that *Oxford* only shows that the indictment in this case "could have charged Chemetco for each individual day of violation without being defective, not that it had to charge individual days separately."[87] Further, the court concluded that the plain language of the CWA allowing fines per day of violation implies that violations may span more than one day.[88] Finally, the court rejected Chemetco's interpretation of the CWA because, under its interpretation,

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[74] *Id.*
[75] *Id.* at 494.
[76] *Id.* at 495.
[77] *Id.* at 496.
[78] *Chemetco*, 274 F 3d at 1158.
[79] *Id.* at 1159.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* at 1159-61.
[86] *Id.* at 1160.
[87] *Id.* at 1160.
[88] *Id.*

Chemetco would be subject to a prison term of 2,028 years, which the court believed was not likely to be the result intended by Congress.[89]

The Seventh Circuit found *Apprendi* to be inapplicable to this case because the CWA does not have a prescribed maximum penalty.[90] Even though the sentence imposed under Section 309(c)(2) of the CWA depends upon a factual finding, the court concluded that that "finding cannot increase the amount of the fine over a prescribed statutory limit."[91] Thus, the court found it proper for the district court to "find the number of violation days by a preponderance of the evidence."[92] Chemetco argued that the CWA does have a statutory maximum penalty of $50,000 per day of violation. However, the court, acknowledging this argument to be true, did not find that the limit was exceeded in this case, as the fine imposed by the district court, $3,327,500, was less than the upper limit of $3,425,000 recommended by Chemetco in its sentencing memoranda.[93] Further, the court held that Chemetco's argument would not mandate a reversal because of an *Apprendi* violation because that only occurs when the imposed sentence exceeds the prescribed statutory maximum.[94] Therefore, the court affirmed Chemetco's sentence.[95]

V. COMMENT

"The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure."[96] "The standard provides concrete substance for the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose enforcement lies at the foundation...of our criminal law."[97] It was on this principle that our criminal justice system was founded shortly after the creation of our democratic nation.[98] "This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of due process."[99]

Thus, our legal system realizes that there is a necessary requirement of removing any factual voids in criminal cases. Because within every criminal verdict there is a chance of deprivation of an individual's right, upon which this country was founded, we as members of this society need reassurance that those rights provided by the Constitution will not be taken away due to an error in fact-finding. The reasonable doubt standard "is a prime instrument for reducing the risk of...factual error."[100] Given that there is a margin or error in every litigation that both parties must take into account, where one party has at stake an "interest of transcending value," as does a criminal defendant, this margin is reduced by placing a higher burden of persuasion upon the prosecution.[101] Thus, the importance of requiring a high degree of persuasion in criminal proceedings as a foundation in our criminal justice system is evident. The Supreme Court has stated that these principles and concerns of due process relating to guilt and innocence also extend to determinations

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[89] *Id.*
[90] *Id.*
[91] *Id.* at 1161 (citing *U.S. v. Behrman*, 235 F.3d 1049, 1054 (7th Cir. 2000).
[92] *Chemetco*, 274 F.3d at 1161.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *McMillan*, 477 U.S. at 97.
[97] *Id.* (quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895)).
[98] *Apprendi*, 530 U.S. at 477.
[99] *In re Winship*, 397 U.S. 358, 362 (1970).
[100] *Id.* at 363.
[101] *Id.* at 372.

that simply go to the length of the defendant's sentence.[102] Further, the Supreme Court has stated that "[i]t would demean the importance of the reasonable doubt standard—indeed, it would demean the Constitution itself—if the substance of the standard could be avoided by nothing more than a legislative declaration that prohibited conduct is not an 'element' of a crime."[103]

In this case, the Seventh Circuit failed to consider these principles in its interpretation of Section 309(c)(2) of the CWA. The court reasoned that because the language was unambiguous and comported with the CWA's overall statutory scheme, Congress must have intended the number of violation days to be a sentencing factor rather than an element of a CWA offense. The court further supported its conclusion by relying on the fact that Section 309(c)(2) was an integral part of the CWA's penalty structure. However, this reasoning conflicts with the principles set forth by the Supreme Court in its line of cases dealing with the issue of deciding whether a statutory provision is a sentencing factor or an element of an offense.

A crime includes "every fact that is by law a basis for imposing or increasing punishment."[104] "One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element."[105] "Conversely, where a fact was not the basis for punishment, that fact was, for that reason, not an element."[106] Because Section 309(c)(2) states that the applicable fine will be based upon the number of days of violation, it is inconceivable that this language should not be interpreted as stating an element of an offense. If the prosecution were unable to prove at least one day of violation, there would be no basis for imposing any punishment whatsoever. There is no reason why this logic should not apply to those days beyond the initial day of violation. Also, the Seventh Circuit's reliance on the fact that Section 309(c)(2) is an integral part of the CWA's penalty structure is misguided, as the Supreme Court has expressly stated that this is in no way dispositive.

Further, the Seventh Circuit's result makes little practical sense. A defendant risks being fined $5,000 to $50,000 per day that for each day that the Court determines a violation occurred. A lower standard of required proof increases the risk that the defendant will be subject to extreme amounts of punishment based on a factual error. In this case Chemetco alleged that there were only 71 days of violation, while the government alleged that there were 949 days of violation. Thus there was a disagreement between the parties of 878 days, which could result in a variance in the range of the fine assessed of $42,400,00.

It is impossible to doubt that the legislature has concerns about the ability of the government to produce evidence pertaining to days of violation. Also, the need to protect the environment supports the contention of providing the EPA with a workable means of holding polluters liable, in hopes of deterring similar behavior. However, it seems incredulous to believe that these concerns merit such an invasion into an individual's Constitutional rights. An interpretation of Section 309(c)(2) that determines the "per day of violation" language to be an element of a CWA offense provides the government with a reasonable means of punishing polluters, while maintaining an individual's Constitutional rights.

The applicability of *Apprendi* to this case merits little discussion, as it is obvious that the CWA has no maximum penalty because the penalty imposed is dependant on the number of days of violation. However, the ramification of this decision could result in marked discussion for years to come. Understandably, the Seventh Circuit had little to guide its interpretation, as there were no

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[102] *Almendarez-Torres*, 523 U.S. at 251.
[103] *McMillan*, 477 U.S. at 102 (Stevens, J., dissent).
[104] *Apprendi*, 530 U.S. at 501.
[105] *Id.*
[106] *Id.* at 504.

precedents in the area of environmental law, and the legislative history of the CWA is silent as to this issue. However, the court did have guidance in the principles set forth in multiple cases decided by the Supreme Court pertaining to this issue. In a case such as this, the need for a complete discussion of all relevant concerns is undeniably great, as there is an excessive amount of ambiguity surrounding the issue in question. That need becomes even greater when the issue in question involves Constitutional concerns.

VI. Conclusion

Even if we believe that the Seventh Circuit arrived at the correct conclusion, the precedent which it has set for dealing with this type of issue could have disparate effects on other areas of environmental law, as well as criminal law in general. The court's failure to apply the principles set for by the Supreme Court, for dealing with distinguishing between sentencing factors and elements of an offense, does more than simply ignore existing precedent on the issue. It risks creating a new standard of statutory interpretation that could result in a break-down of the fundamental principles on which our criminal justice system was created, and continues to exist today.

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