

July 25, 2012

Practice Groups:

**Environmental, Land
and Natural
Resources,
Government
Enforcement**

Sixth Amendment Requirement That Juries Find Facts Necessary to Impose Fines Above Statutory Maximum Raises New Questions for Environmental Prosecutions

By Barry M. Hartman, Jeffrey L. Bornstein, Christine Jochim Boote, Leanne E. Hartmann

On June 21, 2012, the United States Supreme Court ruled that under the Sixth Amendment, before a criminal fine can be imposed for multiple days of violations of the Resource Conservation and Recovery Act, a jury, not the judge, must find beyond reasonable doubt that violations occurred on each of the days for which a fine is to be based.¹ This raises new questions for many types of environmental statutes that authorize criminal fines based on “each day of violation.” Must each day of violation be alleged in a separate count of an indictment? Will the Alternative Fines Act provision allowing “doubling of losses or gains” from the violation remain a viable weapon in an environmental prosecutor’s arsenal? Will the presumption of multiday violations under the monthly averaging for discharge testing impact the need for a jury finding on each day of violation? This alert describes the case and discusses how these issues might arise.

The Case

Southern Union is a natural gas distributor that owned a subsidiary in Rhode Island. The subsidiary collected mercury under a proactive program designed to replace customers’ equipment containing mercury with equipment that does not contain mercury. Vandals broke into the subsidiary, took mercury from a locked storage area, and ultimately spread it around an area that included an apartment complex, potentially contaminating the area. The company was indicted for knowingly storing mercury (a hazardous waste) without a permit.² The indictment alleged that “on or about September 19, 2002 until on or about October 19, 2004,” this storage occurred in violation of the Resource Conservation and Recovery Act of 1976, as amended, 40 U.S.C. § 6928(d) (“RCRA”). The jury convicted on this count, with the verdict form indicating that the company had unlawfully stored the mercury during this time period. The jury was not asked to specify the number of days the violation continued, and the entire period was contained in a single count in the indictment. RCRA defines this crime as a felony and imposes fines of “not more than \$50,000 for each day of violation.” 40 U.S.C. § 6928(d). At sentencing, the probation officer assessed the maximum fine at \$38.1 million, using the 762-day period as the multiplier for the daily violation.

The issue before the Supreme Court was whether *United States v. Apprendi*,³ which held that all facts necessary to impose a sentence of imprisonment beyond the statutory maximum be found by a jury, extends to criminal fines as well, and thus requires that a jury make the specific factual determination regarding the number of days of violation upon which a fine is assessed.

The company argued that the number of days of violation is a necessary fact that must be found in order to impose the \$38.1 million penalty. The district court agreed, but also found that the jury had made the requisite finding from the “content and context of the verdict.” *Southern Union*, slip op. at 3. The jury was instructed, however, that it could convict if it merely found “at *some point*” that the

Sixth Amendment Requirement That Juries Find Facts Necessary to Impose Fines Above Statutory Maximum Raises New Questions for Environmental Prosecutions

mercury was illegally stored. Brief for Petitioner at 8, *Southern Union v. United States*, No. 11-94 (2012) (emphasis in original). The Court of Appeals found that the jury did not make the requisite finding, but affirmed the sentence because it held that *Apprendi* did not apply to cases imposing fines, as opposed to imprisonment.

The Supreme Court granted certiorari because of a conflict in the circuits regarding whether *Apprendi* requires a jury to make the factual findings needed to impose a fine. It resolved the split by holding that *Apprendi* extends to fines. The rationale of the majority (6-3) was straightforward, concluding that any fact that increases the penalty for a crime – imprisonment or a fine – beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. While *Apprendi* addressed imprisonment, the Court found no principled distinction for treating criminal fines differently. In both cases, the core concern was ensuring that the jury found beyond a reasonable doubt the key facts necessary to impose the maximum punishment. *Southern Union*, slip op. at 5. In this case, a single count for violating RCRA resulted in a maximum fine of \$38 million, far more than the \$50,000 per day of violation set forth in the statute.

Why does this matter in environmental cases?

Criminal statutes generally impose fines on a “per violation” basis. Environmental statutes are different – the major ones that contain felony-level sanctions impose fines “per day of violation.” Federal Water Pollution Control Act, 33 U.S.C. § 1319(c) (1990) (“Clean Water Act” or “CWA”); Solid Waste Disposal Act, 42 U.S.C. § 6928(d) (1986); Clean Air Act, 42 U.S.C. § 7413(e) (1990) (“CAA”).⁴ *Southern Union* raises a number of issues in the context of environmental prosecutions:

Will prosecutors return to the practice of massive, multiple-count indictments?

In this case, the indictment alleged in one count the entire period of time during which the illegal storage occurred. This is a far different approach than those used in the early 1990s, when prosecutors typically alleged multiple-count indictments, with each count relating to a different day of violation. *See, e.g., United States v. Robert McKiel, No. 89-24-N* (D.C. Mass. June 29, 1989) (alleging multiple Clean Water Act and RCRA violations in a 51-count indictment, based on 51 separate days of violations). Would charging Southern Union in a 762-count indictment have addressed the concern that the jury finds the facts necessary for each violation? Arguably it would, but not without complications. It may have raised concerns over improper charging under the multiplicity doctrine discussed in *North Carolina v. Pearce*, 395 U.S. 711, 717 (1991).

How will this impact the presumption that monthly average violations under the CWA presume 30 days of violations?

Under the Clean Water Act, some testing requirements yield results called “monthly averages” for particular constituents. 40 C.F.R. § 122.45 (2000). It is presumed that where testing reveals results in excess of monthly average limits, those limits were exceeded on each day of the month when the facility operated. *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 791 F.2d 304, 314-15 (4th Cir. 1986), *vacated on other grounds*, 484 U.S. 49 (1987). Will a jury be bound to find beyond a reasonable doubt that violations occurred on each day of the month when monthly averages are exceeded? Will this be sufficient to form the basis for 30 separate counts for purposes of sentencing?

Sixth Amendment Requirement That Juries Find Facts Necessary to Impose Fines Above Statutory Maximum Raises New Questions for Environmental Prosecutions

Will the Court's decision impact how the Alternative Fines Act will be used in environmental cases?

Criminal environmental cases have been some of the first and most common to seek to enhance fines by applying the “loss doubling” provision of the Alternative Fines Act (“AFA”). 18 U.S.C. § 3571. Under that provision, a convicted defendant may be assessed a fine up to twice the pecuniary gain or loss occasioned by the crime. This was used most notably in the *Exxon Valdez* case in 1991, where a single day of illegal discharge of oil under the Clean Water Act resulted in a criminal fine of \$150 million, based on estimates of the economic value of environmental harm caused by the spill. Government’s Memorandum in Aid of Sentencing at 15-16, *United States v. Exxon Corporation and Exxon Shipping Company*, No. 3:90-cr-00015 (D. Alaska 1991). It was also used in *United States v. BP Products North America*, 610 F. Supp. 2d 655 (S.D. Tex. 2009) (one felony under the CAA based on savings from non-compliance). It is also seen as a potential tool in other maritime pollution cases. See, e.g., *United States v. Fleet Mgmt. Ltd.*, 3:08-cr-00160-SI-2 (N.D. Cal. 2010) (\$8 million civil fine arising out of San Francisco Bay Oil Spill); *Alternative Sentencing Under the MARPOL Protocol: Using Polluters’ Fines to Fund Environmental Restoration*, 10 Hastings W.-N.W. J. Env. L. & Pol’y 1 (Fall 2003). Even “small” cases take advantage of this provision to enhance penalties. See Plea Agreement, *United States v. The Rockmore Company, Inc.*, No. 1-10-cr-10003-JLT (D. Mass. 2010) (\$300,000 for several violations involving sewage discharges). Most recently, its potential use is the subject of extensive speculation in the Deepwater Horizon criminal investigation.

The impact of the AFA on criminal environmental prosecutions should not be underestimated. It is often the unknown that allows prosecutors to threaten incredibly large sanctions, and compels companies to enter into plea agreements to reduce those uncertain exposures. Indeed, in cases reviewed for this alert, application of the AFA has always been based on agreements between the government and the defendant, since under the law, if the use of this provision will “unduly complicate the proceeding” at sentencing, the court can decline to consider these sanctions. 18 U.S.C. § 3571(d).

To the extent the use of the AFA in litigated environmental criminal cases is based on facts that demonstrate the cost of restoring or replacing resources damaged by the crime, will such a finding have to be made by a jury? It is widely understood that assessing natural resource damages from environmental disasters, such as spills, is a long, arduous process. And that is before those damages are quantified as a dollar figure. Even a cursory examination of natural resource damages cases demonstrates that they take years to assess.⁵ Will it ever be possible for a jury to make the requisite findings that allow imposition of the loss doubling provisions in a criminal case, where the statute of limitations (five years) and the Speedy Trial Act⁶ militate against long delays prior to prosecution? Will this limitation impact the level of fine that might be threatened by prosecutors based on the AFA? The majority opinion rejected these concerns, noting, among other things, that Congress retains the option to amend these statutes to constrain the discretion of judges at sentencing, and thus remove the need to find certain facts that trigger Sixth Amendment protections. *Southern Union*, slip op. at 15.

What's next?

It will take time to see how these questions are answered, but it is not necessarily the case that one must wait for the next potential environmental incident. It is entirely likely that some of the impacts of this decision will be reflected in prosecutorial decisions that may arise from the Deepwater Horizon

Sixth Amendment Requirement That Juries Find Facts Necessary to Impose Fines Above Statutory Maximum Raises New Questions for Environmental Prosecutions

investigation. Moreover, any company facing a current criminal investigation may need to consider the implications of this decision.

In the short term, juries may be asked to render special verdicts so that appropriate factual predicates will have been decided beyond a reasonable doubt. Plea allocutions may also need to be more detailed. The government may try to use evidentiary shortcuts embodied in regulations such as the monthly average calculations. But what is clear is that the ultimate facts will now need to be decided by a jury and not a judge at sentencing. To the extent that a defendant has a good defense on the merits, greater consideration may be given to bifurcation of liability and penalty in an effort to limit damage and/or penalty evidence that will otherwise need to be decided by the jury at the same time it decides whether to convict.

While *Southern Union* is an important sentencing development, it is also possible that the government will now consider adjusting its charging and plea processes in environmental cases, as it did following *Apprendi* in the context of controlled substances, and seek agreements from defendants on penalties, in order to try and eliminate sentencing concerns. This may provide opportunities for defendants in the negotiation process.

Authors:

Barry M. Hartman

barry.hartman@klgates.com
+1.202.778.9338

Jeffrey L. Bornstein

jeff.bornstein@klgates.com
+1.415.249.1059

Christine Jochim Boote

christine.boote@klgates.com
+1.202.778.9222

Leanne E. Hartmann

leanne.hartmann@klgates.com
+1.415.882.8162

Sixth Amendment Requirement That Juries Find Facts Necessary to Impose Fines Above Statutory Maximum Raises New Questions for Environmental Prosecutions

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.

¹ *Southern Union Co. v. United States*, No. 11-94 (June 21, 2012).

² The mercury that was stolen had been collected from customers' equipment and was intended for recycling, according to the company. Since it was apparently not recycled in a sufficiently timely fashion, the Court considered it discarded waste subject to federal permitting requirements. *Southern Union Brief* at 4-5.

³ 530 U.S. 466 (2000).

⁴ A review of federal criminal statutes reveals that only environmental statutes use the "per day of violation" language to impose criminal fines.

⁵ The M/B *Athos I* spill which occurred in November 2004 did not see a final report for natural resource damages restoration until September 2009. Available at <http://www.darrp.noaa.gov/northeast/athos/index.html>. The final restoration plan for the *Cosco Busan* spill that occurred in November 2007 was not finalized until March 2012. Available at <http://www.darrp.noaa.gov/southwest/cosco/index.html>.

⁶ 18 U.S.C. §§ 3161-3174.