members of the substantial authority personnel of the organization participated in, condoned, solicited, or concealed the criminal conduct, or tolerated conditions or circumstances that created or perpetuated a significant risk that criminal behavior of the same general type or kind would occur or continue.

Manager

The increase specified in the table below for participation of a supervisor of the organization applies only if: a supervisor of the organization, who lacked the authority or responsibility to be classified as a member of the organization's substantial authority personnel, but had the supervisory responsibility to detect, prevent, or abate the violation, participated in, condoned, solicited, or concealed the criminal conduct, or recklessly tolerated conditions or circumstances that created or perpetuated a significant risk that criminal behavior of the same general type or kind would occur or continue.

Number of employees	Substantial authority personnel	Supervisor
more than 1000	increase by 6 levels	increase by 4 levels
500 to 999	increase by 5 levels	increase by 3 levels
50 to 499	increase by 4 levels	increase by 2 levels
10 to 49	increase by 3 levels	increase by 1 level

Commentary

Comment: The term "substantial authority personnel" is defined in application note 3(c) to §8A1.2. The determination of an individual employee's status within the organization should be made on a case-by-case basis. However, for the purposes of environmental sanctions, plant managers and senior environmental compliance personnel will almost invariably be deemed "substantial authority personnel." In determining the extent to apply this factor under this provision, the court should look to the extent, duration and pervasiveness of any managerial involvement and the level of the specific employee involved. ~~The determination of an employee's status within the organization must be done on case by case basis~~.

(b) Prior Criminal Compliance History

If the organization committed any part of the instant offense less than ~~5~~ 10 years after a criminal adjudication of violation of federal, state or local environmental law, increase by ~~2 to 4~~ 3 levels; however if the prior adjudication is for similar misconduct at the same facility, increase by 5 levels.

Commentary

Comment 1: A prior criminal adjudication includes an adjudication of an offense which occurs at the same or a different location or facility, and includes convictions under Title 18 where the underlying behavior involves noncompliance with environmental statutes or regulations, e.g., 371, 1001, 1341. "Similar misconduct" includes similar actions or omissions at the same or different location or facility and without regards to whether such prior misconduct was adjudged a violation of the same statutory provision as the instant offense.

~~Comment 2: For purposes of subsections (e) and (f), the term organization includes subsidiaries (including subsidiaries where the ownership is less than 100%) where the subsidiary is not "separately managed" by independent management.~~

c) Prior Civil Compliance History

If the number, severity, or pattern of the organization's prior civil or administrative adjudications within the five years prior to the ~~date of the~~ instant ~~conviction~~ offense, when considered in light of the size, scope and character of the organization and its operations, reveals a disregard by the organization of its environmental regulatory responsibilities, increase by **1** level. If the organization's prior civil or administrative adjudications reveals similar misconduct, increase by **2** levels.

Commentary

Comment 1: In applying this provision, the court should undertake a qualitative assessment of the organization's prior environmental regulatory history under federal or state law over the five years prior to the instant ~~conviction~~ offense. Because organizations differ materially in the size and scope of their operations, a simple mechanical counting rule for past adjudications has been rejected. For some organizations, because of their scale or constant involvement with environmental regulation, a prior history of civil or administrative adjudications may not merit significant enhancement of the Base Offense Level under this provision. Conversely, a prior serious violation or a pattern of less serious adjudications (even by a very large organization) may show inattention to the organization's regulatory responsibilities or even a willingness to accept fines as a cost of doing business. In either case, this would indicate the need for enhancement of the penalty. An organization's prior history may also indicate types of offenses that it should have taken special care to prevent. The recurrence of similar misconduct can be highly probative evidence of an organization's disregard of its corporate responsibility and its failure to take all necessary steps to prevent continued misconduct.

Comment 2: In applying this provision, the court shall not include judicial orders for which aggravators have been applied under subsection (d). However, an organization may be subject to both the aggravators under subsections (c) and (d) when the conduct involves different judicial or administrative orders or injunctions.

Comment 3: A prior administrative or civil adjudication includes judicial consent decrees and administrative orders on consent. It also includes an adjudication of an offense which occurs at the same or different location or facility. "Similar misconduct" includes similar actions or omissions at the same or different location or facility and without regard to whether such prior misconduct was adjudged a violation of the same statutory provision as the instant offense.

d) Violation of an Order

If the commission of the instant offense violated a judicial order or a condition of probation, increase by 3 levels. If the commission of the instant offense violated an administrative order, a cease and desist order, or occurs following a notice of violation for the same offense conduct, increase by 1 level.

Commentary

Comment: EPA approves of this comment as written by the Advisory Group.

e) Concealment

If, knowingly, any employee or agent of the organization sought to conceal the violation or to obstruct administrative, civil, or criminal investigation of the violation or prosecution or sentencing, by furnishing inaccurate material information or by omitting material information, increase by 3 levels. However, if the employee or agent is a member of a substantial authority personnel, increase by 5 levels.

Commentary

Comment: This aggravator would not apply to offenses treated under subsection (b) where the predicate offense involves the same concealment conduct.

This aggravating factor relates to non-privileged information, or for any information for which the privilege has been waived that is either required by law to be furnished or given voluntarily by any employee or agent of an organization to a federal, state or local official or agency. It includes information furnished in either

written or oral form. The provision is not to be construed as a disclosure requirement where none otherwise exists; however, if disclosure is either legally required or voluntarily made, knowing efforts to mislead regulatory authorities by furnishing inaccurate material information or omitting material information shall be a basis for increasing the fine level.

f) Absence of Compliance Program or Other Organized Effort
EPA recommends no changes to this guideline.

§ 9C1.2 - Mitigating Factors in Sentencing - The Agency proposes the following alternative language for this Guideline for the reasons discussed below:

a) Commitment to Environmental Compliance

If the organization demonstrates that, prior to the offense, it had committed the resources and the management processes that were reasonably determined to be sufficient, given its size and the nature of its business, to achieve and maintain compliance with environmental requirements, including detection and deterrence of criminal conduct by its employees or agents, reduce by 4 levels. This reduction shall not apply however, if an individual who occupies a Substantial Authority Position or higher within the organization participated in, was aware of, or was willfully ignorant of the offense. In order to grant any mitigation under this provision, the court must conclude that all of the factors described in Part D were satisfied.

Commentary

Comment: "Substantial Authority Personnel" of the organization is defined in the Commentary to § 8A1.2 (Application Instructions - Organizations).

Section 9C1.2(b) - Cooperation and Self-Reporting

(1) If the organization (a) prior to an imminent threat of disclosure or government investigation, and (b) immediately after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation including identifying all participating individuals, clearly took all reasonable steps to asses responsibility within the organization and prevent recurrence, reduce by 8 levels; provided, however, that no credit shall be given for mere compliance with an applicable federal reporting requirement.

(2) If the organization pleaded guilty before the government was put to substantial effort or expense in preparing for trial, fully cooperated with the prosecution from the inception of the

investigation, and took all reasonable steps to assess

responsibility within the organization and prevent recurrence, reduce by 3 levels if the total offense level is above 16, or 2 levels if it is below 16.

Commentary

Before applying an eight-level mitigation under subsection (b), the court must determine that the organization has fully cooperated with the prosecution. To "fully cooperate," the organization must provide all pertinent information known to or ascertainable by it that would assist law enforcement personnel in identifying the nature and extent of the offense.

Section 9C1.2(c) - Remedial Assistance: This should be deleted.

EPA's Explanation for Proposed Changes

The Agency strongly opposes the potential eight-level reduction in the Advisory Group's proposed guidelines for commitment to environmental compliance. Such a reduction equals the entire base offense level for all offenses involving hazardous substances, toxic pollutants or pesticides, and exceeds the base offense level for crimes involving other pollutants. Moreover, the reduction almost equals the nine-level knowing endangerment increase. This reduction also greatly exceeds any reduction available to individual defendants. See Advisory Group's proposed § 9B2.2(b)(ii). To be fair to individual defendants, consistent with other Guidelines, and to avoid lengthy sentencing hearings, EPA proposes a four-level reduction which matches the aggravation increase for the failure to have such a compliance program. The Agency suggests replacing the sliding scale approach proposed by the Work Group with an equally weighted aggravating and mitigating factor on this subject.

EPA considers § 9C1.2(b)(1), Cooperation and Self-reporting, to be extremely important and therefor proposes an increase in the proposed reduction to eight, provided that the cooperation occurs as soon as the violation is discovered and is unequivocal. EPA opposes giving any credit whatsoever to an organization which actively withholds pertinent information about the identity of responsible individuals involving the commission of crimes. Indeed, such a reduction would reward conduct which still leaves the United States with the substantial expense of a continued investigation and potential trial. It would send the message that protecting those who commit illegal acts constitutes both acceptable and rewardable conduct. Given that EPA's proposed reduction equals or exceeds the base offense level for most

environmental crimes, the proposed change emphasizes the benefit of prompt and complete cooperation. Lesser or equivocal cooperation demonstrates a corporate attitude inconsistent with all out effort to mitigate the effects of the crime. In this regard, EPA propose a clearer delineation between those organizations that provide all information, including the identity of employees involved in the crime and any documents of other information they possess, whether a technical claim of privilege exists or not, with those who hold back information which the government must then obtain by other means, including a potentially lengthy investigation.

Guideline § 9C1.2(b)(2) concerning guilty pleas, as proposed by EPA, is consistent with the normal reduction for acceptance of responsibility available to individuals. Organizations and individuals convicted of the same offense should be treated the same in the guidelines whenever possible. More than a two or three level reduction is not justified because the United States may still have be put to the expense and effort of a substantial grand jury investigation and indictment and the assistance need not be immediate under the Advisory Group's approach. Indeed, it can occur after the organization has assessed its chances of winning at trial and reluctantly determined that a plea is its only realistic option.

EPA recommends the deletion of § 9C1.2(c) Remedial Assistance. What is described in the Workgroup's proposal is mitigation of losses attributable to an environmental offense that should be the subject of restitution. The organization should not benefit from merely doing promptly what it is obligated to do anyway to make the victims of its wrongdoing whole again.

Alternatively, the Commission may want to consider allowing a two-level reduction for the performance of a substantial pollution prevention project. EPA recommended this as a basis for a departure in the Agency's proposed organizational guideline submitted to the Work Group. Such mitigation is akin to Chapter 8's § 8C4.9 - Remedial Costs that Greatly Exceed Gain. To do so would be consistent with the national environmental policy of encouraging the use of pollution prevention, whether in the form of public awareness projects, pollution prevention, and/or pollution reduction endeavors. EPA is structuring its enforcement program in a way that will promote pollution prevention goals by enhancing the desire of the regulated community to reduce its potential liabilities and the resulting costs of noncompliance. EPA believes that an emphasis on preventing pollution at the source can help reduce or eliminate root causes of some violations and thereby increase the prospects for continuous future compliance. To warrant such a reduction, a project should not reward the defendant for undertaking measures which are obviously in the organization's self-interest (e.g., updating or modernizing a facility to become more competitive), or which are already required by law.

PART D - COMMITMENT TO ENVIRONMENTAL COMPLIANCE

The Advisory Groups' factors for determining environmental compliance, the burden placed on the defendant to show substantial commitment to each factor, the definition of "environmental requirements", and use of organizational size are consistent with EPA's proposed guidelines submitted to the Advisory Group. As noted above, EPA suggests that the Commission consider including a two-level reduction for performance of a substantial pollution prevention project.

PART E - FINE CALCULATION AND GENERAL LIMITATIONS

Section 9E1.1 - Fine Calculation: EPA strongly believes that 18 U.S.C. § 3571(d) should be included in the Guidelines as an alternative method of calculating the maximum statutory fine. Therefore, the language to the contrary contained in Application Note 2 should be deleted. A new Application Note 2 should read:

In determining fines, the statutory maximum fine is multiplied by the minimum and maximum percentage figures from the range for a particular offense level. The statutory maximum fine may be calculated by three methods, whichever produces the highest number: use of the fine provisions of the substantive statute under which the defendant has been convicted, application of 18 U.S.C. § 3571(c), or application of 18 U.S.C. § 3571(d).

It is unclear from the draft Guideline whether in using § 9E1.1, the court should 1) calculate a fine range by multiplying the minimum and maximum percentages set forth in the table and then would pick from the range, or 2) pick a percentage figure from the range for an offense level and multiply that percentage by the statutory maximum to produce a specific number. The proposal's Application Note 2 does not provide clear guidance on that point.

Section 9E1.2(a-d) - General Limitations:

(a) EPA agrees with the general concept set forth in § 9E1.2(a).

(b) The wording in this provision is confusing. It is not clear whether the Workgroup meant to limit the maximum reduction to 50 percent of the offense level calculated after applying both § 9B (Determining the Fine - Base Offense Level) and § 9C (Aggravators and Mitigators) or just §9B. Also, it is confusing as to whether the workgroup meant to limit the reduction to 50 percent of the "offense level" for "regular" offenses, but to 50 percent of the "final fine" for knowing endangerment offenses. EPA recommends

that the Commission calculate the maximum reduction for all offenses in the same manner to eliminate complexity and confusion. We support limiting the reduction to 50 percent of the base offense level calculated under §9B.

(c) The Agency believes that a floor for a fine reduction set at economic benefit isn't really punishment, but instead is merely recapture of ill-gotten gains. We propose striking the bracketed language regarding "costs" in this section and limit it to pecuniary gain. Section 8C2.9 supports this position since it requires the court to "add to the fine" any gain to the organization not paid as restitution or other remedial measures.

EPA proposes the following alternative language that addresses this concern:

In no event may a fine determined under these guidelines be reduced as the result of mitigating factors determined under § 9C to a level less than a) fifty percent (50) of the Base Fine determined under § 9B or b) the pecuniary gain plus 40 percent of the gain, whichever is greater.

This language is taken from EPA's alternative proposal, p. 18 (§ 9C3.1 - Limitation on Cumulative Effect of Mitigating Factors), and attempts to incorporate the limitation concepts contained in proposed § 9E1.2(b-c) in one provision. Of course, this language does not differentiate between reductions in knowing endangerment cases and other cases as the workgroup's proposal does. It does, however, specify that the limitation is keyed to reduction of the Base Fine (§9B) before application of any mitigators (or aggravators for that matter). We have used pecuniary gain rather than economic benefit since that is the term used in 18 U.S.C. § 3571. We would also recommend inclusion of the Commentary and example which appears at p. 18 of EPA's alternative proposal submitted to the Workgroup (§ 9C3.1 - Limitation on Cumulative Effect of Mitigating Factors).

(d) EPA disagrees with the "significant part" language in this provision, and instead supports adoption of the Chapter 8 language contained in § 8C3.3. We also suggest that the Commission look at the Application Notes 1-2 contained in EPA's proposal on p. 19, particularly number two which prohibits allowing businesses to remain in operation while in non-compliance with environmental laws and regulations.

Section 9E1.2 - Application Notes: - The Notes should be revised based on the Agency's comments on Parts A and B, above. Assuming that the proposed Chapter 9 contemplates application of the minimum and maximum percentages for a particular offense level to produce a guideline fine range, the Guidelines should include a "policy statement" similar to that in Chapter 8 to guide the court's discretion in selecting a fine within the range.

PART F - Probation

Section 9F1.1(a)(5) - Imposition of Probation. Civil and/or administrative adjudications are not taken into account in determining when probation should be imposed. We believe they should. A key issue in the probation decision is whether the defendant should be kept under court supervision in order to reduce the likelihood of its repeating its unlawful behavior. Prior environmental violations, even though the government may have chosen to pursue them civilly or administratively, suggest a pattern of misbehavior, hence an increased need for supervision until such time as the court may conclude that the defendant can be trusted to conduct itself in a lawful manner.

Section 9F1.1(a)(6) - Imposition of Probation: This paragraph expands the reach of its Chapter 8 counterpart by considering the prior behavior of managers and supervisors (instead of just "high-level personnel" as in Chapter 8). EPA endorses this more inclusive approach. Basically, the actions of managers and supervisors are as much a reflection or organizational attitudes as are those of people above them in the hierarchy -- perhaps more so. If managers and supervisors are involved in unlawful actions, plainly those above them have failed to convey a policy of compliance with the law, whether or not the "high-level personnel" were directly involved in violations. Also, by extending its reach to unlawful action ordered, directed, controlled, or consented to (rather than only participated in), the proposal recognizes the fact that supervisory personnel may be behind violations even though they may not take a direct hand in them.

Application Note 2 to § 9F1.4 - Additional Conditions of Probation: This note should make clearer that employees may not be made the scapegoats for organizational violations. Thus, the sentence should be changed from "... the offense is attributable to the actions of a particular employee" to read " . . . the offense is clearly against established policies of the organization and is attributable . . . ."

Finally, EPA suggests, as it did in its proposal to the Advisory Group, that the Commission authorize courts to take into account the views of EPA or other environmental regulatory agencies in establishing conditions of probation. The Commission has already endorsed this concept in § 8D1.4 (Recommended Conditions of Probation), Application Note 1, which states that "the court should consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense".

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 7 ...

OFFICE OF ENFORCEMENT

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Dear Advisory Working Group:

I am pleased to enclose EPA's final written comments on the Advisory Working Group's proposed sentencing guidelines for organizational defendants convicted of environmental crimes. The Agency's final comments take the form of a working draft of guidelines, and represent EPA's attempt to combine the existing Chapter 8 guidelines for organizational defendants with certain aspects of the Working Group's proposal. EPA does not believe that environmental crimes are so unrelated to other offenses that they require separate guidelines based on substantially different factors. Consequently, our working draft relies heavily on the Chapter 8 guidelines.

I must note, however, that EPA's proposal reflects an attempt by the Agency to develop organizational guidelines for environmental crimes around which the Advisory Working Group and the U.S. Sentencing Commission may reach a consensus. Thus, EPA's proposal should be viewed in its entirety. EPA believes the draft's viability is lost if certain elements from the proposal are taken piecemeal and inserted into proposed guidelines based on fundamentally different philosophical or pragmatic approaches to sentencing organizations convicted of environmental crimes.

Along those lines, EPA points out that the Agency has struggled with making the guidelines more sensitive to organizational size and economic power. We have made certain of the base fine adjustments sensitive to size of the organization; however, we are not satisfied that even our proposal provides enough consideration of the differences in size among organizations. We remain convinced that size must be taken into account in order to fashion a sentence which is both just and provides sufficient punishment to act as a deterrent to the defendant and to others similarly situated.

EPA looks forward both to testifying at the May 10 public hearing concerning the Working Group's proposal and EPA's suggested revisions and continuing to work with the Advisosry Workgroup in this important task.

Sincerely,

Earl E. Devaney

Earl E. Devaney, Director
Office of Criminal Enforcement

Enclosure

cc: Neil S. Cartusciello, Chief, DOJ/ECS
Scott Fulton, Acting AA, OE
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Kathleen A. Hughes, Actiang Director, OCE/CECD

EXPLANATORY NOTES TO EPA'S WORKING DRAFT OF ORGANIZATIONAL SENTENCING GUIDELINES FOR ENVIRONMENTAL OFFENSES

PART A - GENERAL APPLICATION PRINCIPLES

EPA's working draft uses a numbering system assuming these provisions were incorporated as Chapter 9 of the Guidelines. We found that numerous technical additions would be necessary to fully implement the environmental organizational guidelines and, for the most part, have used the structure of Chapter 8 to do so.

§ 9A1.1 - Applicability: This provision follows the Chapter 8 counterpart.

§ 9A1.2 - Application Instructions: This section is derived from the Chapter 8 counterpart, and provides a "roadmap" of the relevant sections necessary to implement a sentence. Some provisions are incorporated by reference from Chapter 8; the remaining sections appear in this chapter and are specifically applicable only to environmental cases.

§ 9A1.2(a) This section refers to remedial orders, etc. The Commission's draft did not include these essential provisions.

§ 9A1.2(b) This section references several Chapter 8 provisions such as Criminal Purpose Organizations, Preliminary Determination of Inability to Pay a Fine, Determining a Fine, and Departures, which were not included in the Sentencing Commission's draft. The references to "Step I", "Step II" etc., as used in the Commission's draft, have been dropped to avoid confusion.

§ 9A1.2(c) and (d) These sections reference the Probation options and etc., which are incorporated from § 8D1.1 of Chapter 8.

PART B - REMEDYING HARM FROM CRIMINAL CONDUCT

§ 9b1.1 - Remedying Harm from Criminal Conduct: This section incorporates the restitution, remedial order and community service authority provided in Chapter 8. No counterpart appeared in the Workgroup's draft. The importance of these issues to the organizational sentencing process dictates that these subjects be addressed before reaching the matter of fine calculation.

PART C - FINES

§ 9C1.1 through § 9C2.2 - These sections incorporate Chapter 8 provisions which were neither incorporated nor addressed in the Working Group's draft, such as Criminal Purpose Organizations, etc.

§ 9C2.3 - Calculating the Base Fine: This section uses the terms "pecuniary gain" and "pecuniary loss" rather than the terms "economic gain" and "costs", and defines the concepts somewhat differently (see below). EPA prefers those terms because they are used at 18 U.S.C. § 3571, which can be further defined for the purpose of these guidelines. EPA has followed the Advisory Working Group's draft in requiring the Base Fine to be based on a combination of gain and loss.

§ 9C2.3(a)(2) This subsection discards the Working Group's concept of an Offense Type chart, with its percentage of statutory maximum fines. EPA believes that the use of an offense level table, based on offense levels derived from Chapter 2, Part Q, is preferable. EPA believes that corporations and individuals should be sentenced based on similar factors. Moreover, EPA believes that Part Q represents a workable framework that should be maintained.

Application Note 1. This provision is identical to the Chapter 8 provision, and ensures that the offense level and aggravating and mitigating factors will be determined by taking into account the actions of all agents of the organization.

Application Note 2. This Note simply adopts Chapter 8 definitions where used, and permits terms to be further defined for purposes of this Chapter 3, 4, and 5. These Notes adopt the grouping concept from Chapter 3 of the Guidelines. EPA has discarded the Working Group's concept, which prohibited grouping in calculating the Base Fine, then required all counts to be grouped (even counts which would not be grouped under Chapter 3 for the purpose of applying aggravating and mitigating factors, and then, in Step I(b), allowed the court to throw out any counts which it found were "unnecessary or repetitive". EPA found the Working Group's approach difficult to understand, hard to implement, and would likely result in substantial disparity in sentencing as well as increased litigation. EPA feels that grouping represents a rational framework for structuring organizational sentences.

Application Note 6. "Pecuniary gain" is defined here to ensure that all avoided or delayed expenditures or economic benefits accruing to convicted organizations are included, such as hazardous waste disposal, pollution control technology expense, and operation and maintenance costs, etc.

Application Note 7. "Pecuniary loss" is defined to include all forms of environmental harm, and is deliberately not restricted to "material degradation", which must be "extended or widespread," according to the Working Group's draft. This section also incorporates a broader definition of environmental harm, including using a definition of bodily injury from Chapter from Chapter 8. This section continues the Commission's concept of allowing a court to avoid getting bogged down in particularly difficult loss calculations.

Application Note 9. This section makes clear that clean-up costs are a substitute for direct means of measuring environmental harm, and ensuring that the harms are not double counted.

Application Note 10. EPA included costs borne by the defendant in pecuniary losses, since these are a more readily determinable measure of the harm than the monetary costs of direct environmental harm. The Working Group's draft excluded these costs entirely, which is inappropriate since "repair" costs are a normal alternative measure under existing guidelines where the direct harm may be hard to calculate. See § 2B1.1, Application Note 2. The Working Group's draft also gave a double credit by excluding such costs here, and allowing a mitigating factor adjustment in Step II for the same thing.

Application Note 11. This Note ensures that no double counting occurs for bodily injury damages.

Application Note 12. This section ensures that a defendant's cleanup costs are not used to cancel out pecuniary gain.

§ 9C2.4(a) and (b) - Aggravating and Mitigating Factors (Culpability Score): This section is derived from Chapter 8 (§ 8C2.5 (a) and (b)) and provides a basis for taking into account the size of a corporation in determining the fine to be imposed. The Chapter 8 Guidelines, relying upon a point system, provide a simple and direct basis for determining how a corporation's size will affect the fine that is to be imposed. This system has been used since the Guidelines first became effective and courts, prosecutors, defense attorneys, and probation officers are familiar with this method.

The Advisory Group's proposal is much more complicated and is based upon a percentage multiplication factor that is cumbersome to use and still undefined. Because the Advisory Group's proposal does not recommend the percentage multiplicative factor that is to be used in determining how a corporation's size is an aggravating factor, EPA recommends the utilization of the Chapter 8 Guideline's method. The Application Notes to this section, follow the

pertinent Notes in Chapter 8 and have been amended to reflect that environmental compliance personnel will be deemed substantial authority personnel. (Application Note 1)

§ 9C2.4(c) - Prior Compliance History: This section was modified from its Chapter 8 counterpart to include a "prior criminal adjudication" of federal or state law as an aggravating factor. Thus, a corporate defendant's prior civil or criminal misconduct will be included as an aggravating factor based upon the point system described within Chapter 8. This language is more expansive than both the Chapter 8 Guidelines and the Working Group's proposal because any "criminal adjudication" as opposed to "similar misconduct" (presumably relating to any environmental crime) is considered an aggravating factor.

The Application Notes have been changed to reflect the usage of a "prior criminal adjudication" in assessing corporate compliance history (Application Notes 3 and 5). In addition, the Application Notes reflect that any "prior criminal adjudication" or any "prior administrative or civil adjudication" is not limited to a specific facility (Application Notes 5 and 6). A large corporation may have several facilities whereas a small corporation may only have one facility. By utilizing the complete compliance history of the corporation, as opposed to the compliance history of the offending facility, differences in size are further reduced. Because EPA believes that the complete compliance history of a corporate defendant should evaluated to determine the compliance history, EPA recommends the utilization of this factor in assessing this aggravating factor.

§ 9C2.4(d) - Existence of and/or Violations of Orders: This section has been adopted from its Chapter 8 counterpart. However, it has been revised to reflect EPA's regulatory role. Thus, a corporation is assessed two points (2 points) if it violates any unilateral order issued by the Agency (i.e., consent decree or cease and desist orders) or one point (1 point) if the corporation had been issued a unilateral order or had entered into an administrative or judicial order for similar misconduct within five years of the commission of the instant crime. The Application Note has been revised to reflect this recommended change.

§ 9C2.4(e) - Obstruction of Justice and Concealment: This provision has been adopted from the Chapter 8 Guidelines. It has been modified to reflect two important changes that bear on environmental cases. First, § 9C2.4(e)(1) has been modified from its Chapter 8 counterpart to include "with knowledge thereof or failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance" as recommended by the Advisory Group's proposal. The number of points as an aggravating factor has been increased from two points (2 points) to three points (3 points) reflecting this additional factor. EPA recommends the adoption of this additional factor to prevent

corporate defendants from "consciously avoiding" their responsibilities to detect, correct, or prevent violations of environmental statutes.

Second, EPA recommends the adoption of § 9C2.4(e)(2) to ensure that the corporation or its agents will not conceal any information relating to the criminal activities of the corporation at any stage of a criminal investigation, prosecution, or sentencing. Concealment of this nature is viewed as a one point (1 point) aggravating factor. The Application Notes (Application Note 2) have been modified to reflect these revisions.

§ 9C2.4(f) - Self-Reporting, Cooperation and Acceptance of Responsibility: Portions of this section (§ 9C2.4(f)(1 and 2) have been adopted from the Working Group's proposal. However, the points assigned are adopted from the Chapter 8 Guidelines. The Advisory Group's proposals are more precise in assessing the factors that should be considered in evaluating this aggravating factor. However, EPA recommends the retention of § 8C2.5(g)(3) and utilizing that provision instead of the Advisory Group's proposed revision. The Application Notes have been derived from the Chapter 8 Guidelines.

§ 9C2.4(g) - Effective Compliance Program: This section reflects EPA's belief that if a defendant has made a commitment to a compliance program and the violation occurred in spite of that compliance program, up to three points (3 points) should be subtracted as a mitigating factor. However, EPA believes, as did the Working Group (Step II (i) Absence of Compliance program or other Organized effort) that at the other extreme, if a defendant has failed to make a commitment to a compliance program or has not instituted any program to detect environmental violations, up to three points (3 points) should be added as an aggravating factor. (The Advisory Group's proposal had recommended an undefined aggravating multiplier.). Guideline § 9C2.4(g)(4) refers to the factors that should be considered in determining environmental compliance. These factors are identical to the factors described in the Advisory Group's proposals. These factors provide a succinct basis to evaluate the effectiveness of environmental compliance and ensure uniformity in evaluating environmental compliance.

The Application Notes have been revised to reflect the changes that EPA recommends. Application Note 1 is a revision of the Advisory Group's proposal (Step II (i)(Comment 1)) relating to the rebuttable presumptions that a corporate defendant has or did not have an effective environmental compliance program. Application Notes 2, 3 and 4 are derived from the Chapter 8 Guidelines. Application Note 5 is EPA's recommendation of how the size of a corporate defendant can be taken into account in evaluating its compliance program. The remaining Application Notes are derived from the Advisory Group's proposed Step III Factors for

Environmental Compliance and the commentary that followed. EPA recommends that these comments be modified to ensure that "environmental requirements" include the legal requirements of any local, state or federal statute, regulation, permit, judicial or administrative decree, order and agreement, or other similar means. In this fashion, the corporate defendant's compliance with other governmental entities is considered in assessing its compliance program and history.

Background: This section is adopted from the Advisory Group's background section, which is, in turn, adopted from the Chapter 8 Guidelines background section (§8 C2.5(g)).

§ 9C2.4(h) - Repetitive Conduct: EPA recommends the addition of this aggravating factor because not all repetitive conduct is included as an enhancement in the base offense calculations.

§ 9C2.4(j) - Bodily Injury: EPA recommends the addition of this aggravating factor because it is not always included as an enhancement factor in the base offense calculations.

§ 9C2.5 - Determining and Implementing the Sentence of a Fine: This entire section is derived from the Chapter 8 Guidelines § 8C2.6 -§ 8C2.10 and § 3C.1- § 3C.2 in their entirety.

GENERAL LIMITATIONS

§ 9C3.1 - Limitation on Cumulative Effect of Mitigating Factors: This section follows the Commission's draft in setting a floor for penalty reduction to 50% of the Base Fine. This section differs from the Working Group in how to set a floor for economic gain/pecuniary gains. EPA believes that merely recouping economic gains is not a deterrent, and therefore our provision ensures that the fine cannot go below 140% of pecuniary gain.

§ 9C3.2 - Inability to Pay: This section follows Chapter 8 in requiring the court to adjust a fine if it interferes with restitution, and allowing the court to reduce the fine if the fine would put a non-criminal purpose organization out of business. EPA differs with the Working Group that the fine should be reduced if it would merely affect "a significant part" of the defendant's business operations. This phrase is subject to widely varying interpretations, and would be used to shield a parent company from paying a fine even if its overall operations were unaffected by the fine.

Application Note 2: This Note is intended to clarify that a convicted organization which intends to install equipment or otherwise pay substantial amounts to achieve compliance, is not entitled to a reduction in a fine in exchange for merely doing what the law

PART D - DEPARTURES

EPA believes the following grounds for departures from Chapter 8 are equally relevant to the sentencing of an organization for an environmental offense and has incorporated them into its working draft:

1. § 8C4.1 - Substantial Assistance to Authorities;
2. § 8C4.3 - Threat to National Security;
3. § 8C4.5 - Threat to a Market;
4. § 8C4.6 - Official Corruption;
5. § 8C4.7 - Public Entity;
6. § 8C4.10 - Mandatory Programs to Prevent and Detect Violations of Law; and
7. § 8C4.11 - Exceptional Organizational Culpability.

EPA substituted the one more environmentally specific Guideline § 9D1.2 - Extreme Harm to the Environment or Public Health, for the two more general Chapter 8 grounds for departure, § 8C4.2 - Risk of Death or Bodily Injury, and § 8C4.4 - Threat to the Environment. Both of these factors are taken into consideration to a large extent in determining the fine.

§ 9D1.1 - Performance of a Substantial Pollution Prevention Project: This section is included in lieu of Chapter 8's § 8C4.9 - Remedial Costs that Greatly Exceed Gain, in order to be more consistent with the national environmental policy of commitment to encouraging the use of pollution prevention, whether in the form of public awareness projects, pollution prevention, and/or pollution reduction endeavors. EPA is structuring its enforcement program in a way that will promote pollution prevention goals by enhancing the desire of the regulated community to reduce its potential liabilities and the resulting costs of noncompliance. EPA believes that an emphasis on preventing pollution at the source can help reduce or eliminate root causes of some violations and thereby increase the prospects for continuous future compliance.

A downward departure on the basis of this type of project should only be upon the motion of the government in order to ensure that there is enforcement consistency and substantial merit to the project. The government can best assess whether there has been compliance with federal policy governing such projects, such as whether such activity would primarily have the effect of rewarding the defendant for undertaking measures which are obviously in the organization's self-interest (e.g., update or modernize a facility to become more competitive). The government can best identify a pollution prevention project that may warrant a departure regardless of the size of the organization.

In the civil enforcement context, the civil penalty cannot be reduced by a defendant's undertaking a pollution prevention project below a level which fails to capture the organization's economic benefit of non-compliance plus some appreciable portion of the

gravity component of the civil penalty. If this were otherwise, such projects would become a possible incentive to circumvent compliance requirements in the belief that a substantive penalty ultimately could be avoided through subsequent performance of meritorious deeds. Furthermore, the absence of this limitation could result in a criminal penalty being less than that incurred for a civil violation, although the latter represents less culpable wrongdoing.

PART E - PROBATION

EPA substantially incorporated the present Guidelines governing probation for organizations found in Chapter 8. Certain aspects of the Working Group's proposal relating to imposition of probation and conditions of probation that EPA endorses were combined with the Chapter 8 Guidelines.

PART F - SPECIAL ASSESSMENTS AND COSTS

EPA incorporated the same Guidelines from the present Chapter 8, with the exception of § 8E1.2 - Forfeiture, since the environmental statutes do not have provisions authorizing forfeiture.

TABLE OF CONTENTS
CHAPTER 9
SENTENCING OF ORGANIZATIONS - ENVIRONMENTAL

CHAPTER NINE - SENTENCING OF ORGANIZATIONS - ENVIRONMENTAL

PART A - GENERAL APPLICATION PRINCIPLES

§ 9A1.1 APPLICABILITY OF CHAPTER NINE

This chapter applies to the sentencing of all organizations for felony and Class A misdemeanor offenses under environmental statutes.

Commentary

Application Notes

1. "Organizations" is defined at § 8A1.1, Application Note 1.

2. "Environmental statutes" include 7 U.S.C. Sections 136-1361; [etc.]

§ 9A1.2 APPLICATION INSTRUCTIONS

(a) Apply § 9B1.1 (§§ 8B1.1-.4) concerning the sentencing requirements and options relating to restitution, remedial orders, community service, and notice to victims.

(b) Calculate a fine under this chapter:

(1) Apply § 9C1.1 (§ 8C1.1, Criminal Purpose Organizations), if appropriate.

(2) Apply § 9C2.1 (§ 8C2.2, Preliminary Determination of Inability to Pay Fine) to determine whether an abbreviated fine determination procedure is appropriate.

(3) Apply § 9C2.2 (§ 8C2.3) to determine the Offense Level from Chapter Two, Part Q.

(4) Calculate the Base Fine in accordance with § 9C2.3.

(5) Apply "Aggravating and Mitigating Factors" in accordance with § 9C2.4 to determine the "culpability score".

(6) Apply § 9C2.5, "Determining and Implementing the Fine" (§§ 8C2.6-.9).

(7) Apply § 9C3.1-.2 ("General Limitations").

(8) Apply § 9D1.1-.3, "Departures", if warranted.

(c) Determine the options and requirements of Probation in accordance with § 9E1.1.

(d) Apply § 9F1.1, "Special Assessments, Forfeitures, and Costs".

PART B - REMEDYING HARM FROM CRIMINAL CONDUCT

§ 9B1.1 REMEDYING HARM FROM CRIMINAL CONDUCT

Apply §§ 8B1.1 - 8B1.4 concerning restitution, remedial orders, community service, and notice to victims.

PART C - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATION

§ 9C1.1 CRIMINAL PURPOSE ORGANIZATION

Apply § 8C1.1, "Criminal Purpose Organization", if appropriate.

2. DETERMINING THE FINE - ENVIRONMENTAL OFFENSES

§ 9C2.1 PRELIMINARY DETERMINATION OF INABILITY TO PAY FINE

Apply § 8C2.2, "Preliminary Determination of Inability to Pay Fine".

§ 9C2.2 OFFENSE LEVEL

Apply § 8C2.3 and Chapter 2, Part Q, to determine the base offense level and any adjustments.

§ 9C2.3 CALCULATING THE BASE FINE

(a) The Base Fine is the greater of:

(1) the pecuniary gain to the organization plus the pecuniary loss attributable to the offense; or

(2) the amount from the table in § 8C2.4(d) (Offense level Fine Table) corresponding to the offense level determined in § 9C2.2, above.

Commentary

Application Notes

1. The term "defendant" includes any agent of the organization for whose conduct the organization is criminally responsible.

2. Terms used in this chapter which are defined in Application Note 3 to § 8A1.2 shall have the meaning provided therein, except as amended or further explained in this chapter. Application Note 2 to § 8A1.2 is incorporated by reference. When provisions of the existing guidelines are incorporated by reference, the incorporation includes all commentary, application notes and background statements unless otherwise noted.

3. For each count covered by this guideline, use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline. In determining the offense level under this section, do not apply the adjustments in Chapter Three, Part A (Victim-Related Adjustments), Part B (Role in the Offense), or Part E (Acceptance of Responsibility).

4. Where there is more than one count covered under this guideline, apply Chapter Three, Part D (Multiple Counts) to determine the combined offense level for those counts. If application of Part D results in more than one group of counts, calculate a fine for each group of counts.

5. Where the offenses of conviction include counts governed by this chapter as well as other counts, determine whether the counts are closely related under § 3D1.1 and treat such closely related counts as provided therein. If counts remain ungrouped with the environmental counts, determine a fine for the environmental and non-environmental counts separately.

6. "Pecuniary gain" is defined at § 8A1.2, Application Note 3(h), and includes the economic benefits, including interest, that an offender realized by 1) avoiding or delaying expenditures including direct costs (e.g., hazardous waste disposal costs), and capital costs (e.g., pollution control technology) necessary to comply with the environmental statute, based upon the estimated cost of capital to the offender; 2) the continuing expenses (e.g. labor, energy, leases, operation and maintenance) the offender avoided or delayed by noncompliance; and 3) other profits attributable to the offense.

7. "Pecuniary loss" is defined at § 8A1.2, Application Note 3(i). For purposes of this section the term includes all damages caused by the offense, and includes 1) environmental harm, including but not limited to natural resource damages, property damage, anticipated and past cleanup or other remedial costs, and costs of abating any threat to the environment; 2) harm to human health, including but not limited to death, bodily injury, medical expenses, and costs of abating any threat to human health. The term "pecuniary loss" includes any such costs described above which were, or will be borne by the defendant. The term "bodily injury" is defined in § 1B1.1, Application Note 1(b), and includes harm such as exposure to substances which will or may cause injury in the future.

8. If any component of pecuniary loss is not reasonably quantifiable, or such calculation would unduly prolong sentencing, use only the remaining components for measuring pecuniary loss.

9. Pecuniary losses should not include damages to any portion of a natural resource which was or will be remediated since those costs will be included as cleanup costs.

10. Remedial costs include costs borne by the defendant. Including such costs does not punish a defendant for taking remedial action, but simply substitutes the more easily determined cleanup costs for that portion of the harm caused by the defendant.

11. If pecuniary loss is used to calculate the Base Fine, no adjustment for Bodily Injury should be made in § 9C2.4, Aggravating and Mitigating Factors.

12. Pecuniary gain may not be offset by a defendant's losses (such as clean-up expenses, loss of goodwill, etc.)

§ 9C2.4 AGGRAVATING AND MITIGATING FACTORS (CULPABILITY SCORE)

(a) Starting Point

Start with 5 points and apply subsections (b) through (j) below.

(b) Involvement In or Tolerance of Criminal Activity

Apply § 8C2.5(b) in accordance with the following Commentary.

Commentary

Application Notes

1. "Substantial authority personnel," "condoned," and "willfully ignorant of the offense," are defined in the Commentary to § 8A1.2 (Application Instructions - Organizations). The determination of an individual employee's status within the organization should be made on a case-by-case basis. However, for the purpose of environmental sanctions, plant managers and senior environmental compliance personnel will almost invariably be deemed at least "substantial authority personnel."

2. For purposes of subsection (b), "unit of the organization" means any reasonably distinct operational component of the organization. For example, a large organization may have several large units such as divisions or subsidiaries, as well as many smaller units such as specialized manufacturing, marketing, or accounting operations within these larger units. For purposes of this definition, all of these types of units are encompassed within the term "unit of the organization."

3. "High-level personnel of the organization" is defined in the Commentary to § 8A1.2 (Application Instructions - Organizations). With respect to a unit with 200 or more employees, "high-level personnel of a unit of the organization" means agents within the unit who set policy for or control that unit. For example, if the managing agent of a unit with 200 employees participated in an offense, 3 points would be added under subsection (b)(3). If the organization had 1,000, employees and the managing agent of the unit with 200 employees was also within high-level personnel of the entire organization, 4 points, rather than 3 points, would be added under subsection (b)(2).

4. Pervasiveness under § 9C2.4(b) will be case specific and depend on the number, and degree of responsibility, of individuals within substantial authority personnel who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. For example, if an offense was committed in an organization with 1,000 employees but the tolerance of the offense was pervasive only within a unit of the organization with 200 employees (and no high-level personnel of the organization participated in, condoned, or were willfully ignorant to the offense), 3 points would be added under subsection (b)(3). If, in the same organization, tolerance of the offense was pervasive throughout the organization as a

whole, or an individual within high-level personnel of the organization participated in the offense, 4 points (rather than 3) would be added under subsection (b)(2).

Background: The increased culpability scores under subsection (b) are based on three interrelated principles. First, a defendant is more culpable when individuals who manage the organization or who have substantial discretion in acting for the organization participate in, condone, or are willfully ignorant of criminal conduct. Second, as organizations become larger and their managements become more professional, participation in, condonation of, or willful ignorance of criminal conduct by such management is increasingly a breach of trust or abuse of position. Third, as organizations increase in size, the risk of criminal conduct beyond that reflected in the instant offense also increases whenever management's tolerance of that offense is pervasive. Because of the continuum of sizes of organizations and professionalization of management, subsection (b) gradually increases the culpability score based upon the size of the organization and the level and extent of the substantial authority personnel involvement.

(c) Prior Compliance History

If more than one applies, use the greater:

(1) If the defendant (or separately-managed line of business) committed any part of the instant offense less than 10 years after (A) a criminal adjudication based on a violation of federal or state law or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 1 point.

(2) If the defendant (or separately-managed line of business) committed any part of the instant offense less than 5 years after (A) a criminal adjudication based on a violation of federal or state law; or (B) civil or administrative adjudication(s) based on two or more separate instances of similar misconduct, add 2 points.

Commentary

Application Notes

1. "A separately-managed line of business" is a subpart of a for-profit organization that has its own management, has a high degree of autonomy from higher managerial authority, and maintains its own separate books of account. Corporate subsidiaries and divisions frequently are separately-managed

lines of business. In determining the prior history of an organization with separately-managed lines of business, only the prior conduct or criminal record of the separately-managed line of business involved in the instant offense is to be used. In the context of an organization with parately-managed lines of business, in making the determination whether a violation of a condition of probation involved engaging in similar misconduct, only the prior misconduct of the separately-managed line of business involved in the instant offense is to be considered.

2. In determining the prior history of an organization or separately-managed line of business, the conduct of the underlying economic entity shall be considered without regard to its legal structure or ownership. For example,if two companies merged and became separate divisions and separately-managed lines of business within the merged company, each division would retain the prior history of its predecessor company. If a company reorganized and became a new legal entity, the new company would retain the prior history of the predecessor company. In contrast, if one company purchased the physical assets but not the ongoing business of another company, the prior history of the company selling the physical assets would not be transferred to the company purchasing the assets. However, if an organization is acquired by another organization in response to solicitations by appropriate federal government officials, the prior history of the acquired organization shall not be attributed to the acquiring organization.

3. "Similar misconduct" and "prior criminal adjudication" are defined in the Commentary to § 8A1.2 (Application Instructions - Organizations).

4. Under subsection (c)(1) and (c)(2), the civil or administrative adjudication(s) must have occurred within the specified period (ten or five years) of the instant offense.

5. A prior criminal adjudication includes an adjudication of an offense which occured at the same or a different location or facility.

6. A prior administrative or civil adjudication includes an adjudication of an offense which occured at the same or a different location or facility.

(d) Existence of and/or Violations of Orders

If more than one applies, use the greater:

(1) (A) If the commission of the instant offense violated an administrative order, a cease and desist

order, a consent decree, a consent order, a judicial order or injunction (other than a condition of probation) or occurs following a notice of violation for the same offense conduct, or (B) if the organization (or separately-managed line of business) violated a condition of probation by engaging in similar misconduct, i.e., misconduct similar to that for which it was placed on probation, add 2 points.

(2) If the commission of the instant offense violated a condition of probation, add 1 point.

(3) If the defendant (or a separately-managed line of a business) had received or entered into an administrative or judicial order for similar misconduct with a federal or state regulatory agency within five years of the commission of the instant offense, add 1 point.

Commentary

Application Note

1. Subsection (d)(3) recognizes that the great majority of environmental enforcement actions occur in administrative or civil judicial forums and are settled without the formal adjudications referred to in subsection (c). The existence of such orders is to be taken into account when the prior enforcement actions concern misconduct similar to the offense conduct.

(e) Obstruction of Justice and Concealment

(1) If the defendant willfully obstructed or impeded, attempted to obstruct or impede, or aided, abetted, or encouraged obstruction of justice during the investigation, prosecution, or sentencing of the instant offense, or with knowledge thereof, failed to take reasonable steps to prevent such obstruction or impedance or attempted obstruction or impedance, add 3 points.

(2) If the defendant sought to conceal the violation or to obstruct administrative or civil investigation of the violation by knowingly furnishing inaccurate material information or by knowingly omitting material information, add 1 point.

Commentary

Application Notes

1. Adjust the culpability score for the factors listed in

test of whether the defendant has disclosed all pertinent information is whether the information is sufficient for law enforcement personnel to identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct. However, the cooperation to be measured is the cooperation of the defendant itself, not the cooperation of individuals within the organization. If, because of the lack of cooperation of particular individual(s), neither the defendant nor law enforcement personnel are able to identify the culpable individual(s) within the organization despite the defendant's efforts to cooperate fully, the defendant may still be given credit for full cooperation.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthful admission of involvement in the offense and related conduct ordinarily will constitute significant evidence of affirmative acceptance of responsibility under subsection (f), unless outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility.

This adjustment is not intended to apply to a defendant that puts the government to its burden of proof at trial by denying the essential factual elements of guilty, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations, a defendant may clearly demonstrate an acceptance of responsibility for its criminal conduct even though it exercises its constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to its conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pretrial statements and conduct.

4. In making a determination with respect to subsection (f), the court may determine that the chief executive officer or highest ranking employee of an organization should appear at sentencing in order to signify that the defendant has clearly demonstrated recognition and affirmative acceptance of responsibility.

(g) Effective Compliance Program

1. If the defendant made a commitment to environmental compliance prior to commission of the offense, and had instituted an effective program to prevent and detect violations of law, but the offense occurred despite this program, subtract up to 3 points.

2. If the defendant has failed to make a commitment to environmental compliance, and has not instituted an effective program to prevent and detect violations of law, add up to 3 points.

The fact that the defendant has been convicted of an environmental offense raises a rebuttable presumption that the defendant's commitment to environmental compliance did not substantially satisfy all of the factors described in subsection (h).

Provided, that subsection (1) does not apply if an individual within high-level personnel of the organization; a person within high-level personnel of the unit of the organization within which the offense was committed where the unit had 200 or more employees; or an individual responsible for the administration or enforcement of a program to prevent and detect violations of law participate in, condoned, or was willfully ignorant of the offense.

Provided further, that subsection (1) does not apply if, after becoming aware of an offense, the defendant unreasonably delayed reporting the offense to appropriate governmental authorities.

3. The court must conclude that the following factors were substantially satisfied, at a minimum, in determining that the defendant has made a commitment to environmental compliance.

(i) Line Management Attention to Compliance.

In the day-to-day operation of the organization, line managers, including the executive and operating officers at all levels, direct their attention, through the routine management mechanisms utilized throughout the organization (e.g. objective setting, progress reports, operating performance reviews, departmental meetings), to measuring, maintaining and improving the organizations's compliance with environmental laws and regulation. Line managers routinely review environmental monitoring and auditing reports, directs the resolution of identified compliance issues, and ensure application of the resources and mechanisms necessary to carry out a substantial commitment.

(ii) Integration of Environmental Policies, Standards, Procedures.

The organization has adopted, and communicated to its employees and agents, policies, standards and procedures necessary to achieve environmental compliance, including a requirement that employees report any suspected violation to appropriate officials within the organization, and that a record will be kept by the organization of any such reports.

To the maximum extent possible given the nature of its business, the organization has analyzed and designed the work functions (e.g. through standard operating procedures) assigned to its employees and agents so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization.

(iii) Auditing, Monitoring, Reporting and Tracking Systems.

The organization has designed and implemented, with sufficient authority, personnel and other resources, an auditing program with the following components:

(1) frequent auditing (with appropriate independence from line management) and inspection (including random, and when necessary, surprise audits and inspection of its principal operations and pollution control facilities to assess, in detail their compliance with all applicable environmental requirements and the organization's internal policies, standards and procedures, as well as internal investigations and implementation of appropriate follow-up countermeasures with respect to all significant incidents of non-compliance. The audit process is characterized by:

a. explicit high-level personnel support for environmental auditing, and commitment to follow-up on audit findings;

b. an environmental auditing function, with appropriate independence from line management, and independent of audited activities;

c. adequate team staffing and auditor training;

d. explicit guidelines regarding audit program objectives, scope, resources, and frequency;

e. a process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives;

f. a process which includes specific procedures to promptly prepare candid, clear, and appropriate written reports on audit findings, corrective actions, and schedules for implementation.

(2) continuous on-site monitoring, by specifically trained compliance personnel and by other means, of key operations and pollution control facilities that are either subject to significant environmental regulation, or where the nature and history of such operations or facilities suggests a significant potential for non-compliance;

(3) internal reporting (e.g., hotlines), without fear of retribution, of potential non-compliance to those responsible for investigating and correcting such incidents;

(4) tracking the status of responses to identified compliance issues to enable expeditious, effective and documented resolution or environmental compliance issues by line management;

(5) redundant, independent checks on the status of compliance, particularly in those operations, facilities or processes where the organization knows or has reason to believe, that employees or agents may have, in the past, concealed non-compliance through falsification or other means, and in those operations, facilities or processes where the organization reasonably believes such potential exists.

(iv) Regulatory Expertise, Training and Evaluation.

The organization has developed and implemented, consistent with the size and nature of its business, systems or programs that are adequate to:

(1) maintain up-to-date, sufficiently detailed understanding of all applicable environmental requirements by those employees and agents whose responsibilities require such knowledge;

(2) train, evaluate, and document the training and evaluation, of all employees and agents of the organization, both upon entry into the organization

and on a refresher basis, as to the applicable environmental requirements, policies, standards (including ethical standards) and procedures necessary to carry out their responsibilities in compliance with those requirements, policies and standards; and

(3) evaluate employees and agents sufficiently to avoid delegating significant discretionary authority or unsupervised responsibility to persons with a propensity to engage in illegal activities.

(v) Incentives for Compliance.

The organization has implemented a system of incentives, appropriate to its size and the nature of its business, to provide rewards (including, as appropriate, financial awards) and recognition to employees and agents for their contributions to environmental excellence. In designing and implementing sales or production programs, the organization has insured that these programs are not inconsistent with the environmental compliance programs.

(vi) Disciplinary Procedures.

In response to infractions, the organization has consistently and visibly enforced the organization's environmental policies, standards and procedures through appropriate disciplinary mechanisms, including, as appropriate, termination, demotion, suspension, reassignment, retraining, probation, and reporting individuals' conduct to law enforcement aut orities.

(vii) Continuing Evaluation and Improvement.

The organization has implemented a process for measuring the status and trends of its effort to achieve environmental excellence, and for making improvements or adjustments, as appropriate, in response to those measures and to any incidents of non-compliance. If appropriate to the size and nature of the organization, this should include a periodic, external evaluation of the organization's overall programmatic compliance effort, as reflected in these factors.

Commentary

Application Notes

1. This section creates a rebuttable presumption that the program was not effective or did not exist. The defendant may rebut this presumption by presenting evidence that the organization had developed an effective environmental compliance program, which, if implemented, could have reasonably be expected to detect environmental violations if fully implemented. If the defendant presents such evidence, the prosecution may present evidence showing that while the defendant may have had an environmental compliance program, it was not effective as designed or implemented.

2. In order to grant any mitigation under subsection (g), the court must conclude that all of the factors described in § 9C3.4(g), Factors to Consider in Determining Environmental Compliance, were substantially satisfied.

3. The second proviso in subsection (g) contemplates that the organization will be allowed a reasonable period of time to conduct an internal investigation. In addition, no reporting is required by this proviso if the organization reasonably concluded, based on the information then available, that no offense had been committed.

4. "Appropriate governmental authorities," is defined in the Commentary to § 9C2.4(f).

5. Subsections (1) and (2) allows the court a range to use in determining the number of points to add or subtract, depending on the effectiveness of, or the lack of an environmental compliance program. In determining the number to apply, the court should consider the size of the organization, the likelihood that certain offenses may occur because of the nature of its business, and the prior history of the organization.

6. Ordinarily, organizations with larger numbers of operating facilities or pollution control activities and obligations should have more extensive and sophisticated environmental management systems, programs and resources of the nature described in this commentary than would be expected of similar, but smaller organizations. Similarly, organizations whose business activities may pose significant risks of harm to human health or the environment from non-compliance with environmental requirements (e.g., manufacture, use or management of hazardous products, materials or wastes) should have more extensive and sophisticated systems, programs and resources than would be expected of comparably sized organizations in less risky types of business.

Small organizations should demonstrate the same degree of commitment to environmental compliance as larger ones, although generally with less formality and less dedicated resources (if any) than would be expected of larger organizations. While each of the functions and objectives described above should be substantially satisfied by all organizations, the small organization typically will rely on management personnel, operations personnel or others to assume compliance support responsibilities in addition to their routine duties, and will have less sophisticated systems for establishing compliance procedures, auditing and tracking compliance issues, training employees and carrying out the other programmatic components of their compliance effort. For example, in a very small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business. In appropriate circumstances, this reliance on existing resources and simple systems can demonstrate the same degree of commitment that, for a much larger organization, would require, for example, a full-time audit department, a training staff, an active compliance monitoring staff, and computer systems for tracking the resolution of compliance issues.

An organization's prior history may indicate types of offenses that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

The essential requirement is that each defendant must demonstrate, through appropriate documentation, that the resources and management processes it utilized were reasonably determined to be sufficient to perform the basic functions described above.

An effective compliance program is one that has been reasonably designed, implemented, and enforced so that it generally will be effective in preventing and detecting criminal conduct.

7. In order to evaluate the demonstration of a defendant's environmental compliance commitment, the documentation of its program or other organized effort, and the prosecution's challenges thereto, the court may engage such experts as it finds necessary, and the cost of such experts shall be paid by the defendant. In its selection of such experts, the court shall consider the recommendations of the prosecution and the defense.

Any experts engaged by the court shall be given access to all information provided by the defendant in support of its demonstration or its documentation, and to such other information as the court deems necessary for the expert to make an effective evaluation, taking into account any claims of privilege by the defendant.

9. "Environmental requirements" include all legally enforceable environmental compliance obligations imposed by federal, state or local statute, regulation, permit, judicial or administrative decree, order and agreement, or other similar means.

(h) Repetitive Conduct

If the offense was ongoing, continuous or repetitive and did not involve an actual release, discharge or emission as described in § 2Q1.2(b)(1) or § 2Q1.3(b)(1), add 2 points.

(i) Bodily Injury

If the offense resulted in a substantial likelihood of "bodily injury", as defined in § 1B1.1, application Note 1, add 1 point. This factor does not apply when the base fine is calculated using the pecuniary gain or pecuniary loss method and in doing so included bodily injury as an element of either.

§ 9C2.5 **DETERMINING AND IMPLEMENTING THE SENTENCE OF A FINE**

(a) Using the culpability score from § 9C2.4 (Culpability Score) and applying any applicable special instructions for fines in Chapter Two, determine the applicable minimum and maximum fine multipliers from the table in § 8C2.6.

(b) Apply § 8C2.7 (Guideline Fine Range - Organizations).

(c) Apply § 8C2.8 (Determining the Fine Within The Range - Policy Statement).

(d) Apply § 8C2.9 (Disgorgement).

(e) Apply § 8C2.10 (Determining the Fine for Other Counts).

(f) Apply § 8C3.1-.2.

Commentary

Application Note

§ 8C2.8(b) permits the court to consider the relative importance of any factors used to determine the range, including pecuniary gain and loss. In that regard, the court should sentence a defendant at the high end of the range when the defendant's conduct was repetitive in nature and/or caused or threatened to cause significant harm to the environment or public health.

3. **GENERAL LIMITATIONS**

§ 9C3.1 **Limitation on Cumulative Effect of Mitigating Factors**

In no event may a fine determined under these guidelines be reduced as the result of mitigating factors to a level below the greater of 1) fifty percent (50%) of the Base Fine or 2) the pecuniary gain plus 40 percent of the gain.

Commentary

1. To assure an adequate deterrent, the above provision specifies a floor below which the fine cannot be further reduced as the result of mitigating factors. The floor will be set at the greater of 50 percent of the Base Fine or the amount of pecuniary gain plus 40 percent. This floor applies regardless of which alternative under § 9C2.3 is used to determine the Base Fine. This limitation will ensure that a defendant surrenders all pecuniary gain plus an additional 40 percent of that gain as punishment since recoupment of only economic benefit would not provide deterrence.

Example: Assume that in a given case the Base Fine was $1,000,000 and that the defendant organization realized a pecuniary gain of $600,000. On these facts, even if mitigating factors would reduce the fine to $400,000, the fine could not be reduced below $840,000 (the sum of the pecuniary gain, $600,000, plus $240,000 (40%). If there was no pecuniary gain, the fine could not be reduced below $500,000 (i.e., 50% of the Base Fine of $1,000,000).

§ 9C3.2 **Inability to Pay**

Apply § 8C3.3, "Reduction of Fine Based on Inability to Pay."

Commentary

Application Notes:

1. This provision is intended to reduce a fine only when necessary to avoid jeopardizing the continued existence of a non-criminal purpose organization. It is not intended to permit a parent company to shield itself from penalties imposed on its subsidiaries, divisions, wholly-owned companies and any other entity subject to corporate control for whom the parent is criminally responsible.

2. A reduction in the amount of the fine is not authorized under this guideline in order to permit a defendant to remain in business while continuing to violate environmental laws and regulations. In circumstances where a defendant will go out of business if forced to pay a fine and expend substantial monies to achieve compliance with the law, an installment schedule for paying the fine and a remedial order, pursuant to § 9B1.1, maybe appropriate.

PART D - DEPARTURES FROM THE GUIDELINE FINE RANGE

Introductory Commentary

The Introductory Commentary to § 8C4, Departures From the Guideline Fine Range, is equally relevant to the sentencing of an organization for environmental offenses and is incorporated in Chapter 9 by reference. The grounds for departure set forth in § 8C4.1, .3, .5 -.7, and .10-.11 (policy statements) are incorporated by reference. The court may take these factors into consideration in departing from the guideline fine range to the extent permitted in Chapter 3.

§ 9D1.1 Performance of a Substantial Pollution Prevention Project (Policy Statement)

(a) Upon the motion of the government stating that the defendant is, will or has performed a pollution prevention project that will substantially reduce or eliminate the generation of hazardous substances, pollutants or contaminants in excess of legally required reductions or eliminations, the court may depart from the guidelines.

(b) In evaluating a defendant's pollution prevention project, the court should solicit and consider the views of the U. S. Environmental Protection Agency.

(c) In departing from the guideline fine range, the court shall maintain the fine generally at a level which captures the organization's economic benefit of noncompliance plus a percentage of the gain.

Commentary

1. The Commission believes that an emphasis on preventing pollution at the source can help reduce or eliminate root causes of some violations and thereby increase the prospects for continuous future compliance. While a sentencing court is constrained from requiring (i.e., imposing unilaterally) pollution prevention activities in the absence of statutory, regulatory, or permit language, it would be a strong inducement for such projects, if, on the motion of the government, a departure from the guideline fine amount is allowed on the basis of the performance of a substantial pollution prevention project by an organizational defendant. This would be appropriate because such an undertaking would have to significantly involve more than just rectifying the offense harm to warrant any adjustment in the fine.

To ensure that there is substantial merit to such projects and that there is compliance with federal policy governing them, such as whether the primary effect would be to reward the defendant for undertaking measures that are obviously in the defendant's self-interest, this departure is contingent on a motion by the government.

2. Such projects are incidental to the correction of the violation itself and to addressing the harm attributable to the violation. They would include the use of procedures, practices, or processes that reduce or eliminate the generation of hazardous substances, pollutants and contaminants at the source. Pollution prevention encompasses both the concepts of volume reduction and toxicity reduction. Within the manufacturing sector, pollution prevention includes activities such as input substitution or modification, product reformulation, process modification, improved housekeeping, and on-site closed-loop recycling. They have the effect of reducing the amount of pollution that would otherwise be discharged into the environment substantially beyond what would be achieved through compliance with any discharge limitations. Factors to be used in evaluating pollution prevention projects include the amount of reduction or elimination measured in terms of the defendant's overall generation of those substances, the substances' toxicity or harm to the environment or public health, the amount of the defendant's expenditures involved in the reduction or elimination and the degree to which the reduction or elimination would have been legally required in the future. A public acknowledgement that the project was in conjunction

with a criminal enforcement action would have to be included as part of a pollution prevention project.

§ 9D1.2 **Extreme Harm to the Environment or Public Health**

If the offense resulted in extreme harm to the environment or to public health, an upward departure may be warranted.

Commentary

1. Harm to the environment or to public health is generally not an element of most environmental prosecutions, with the exception of "knowing endangerment" or "negligent endangerment" cases. Chapter 2, Part Q, provides for an upward adjustment in the offense level when the offense results in substantial expenditure for cleanup, evacuation of a community, or death or serious bodily injury. Section 9C2.4(j) provides an adjustment based on bodily injury. Section 9D1.2 is limited to those cases involving extreme harm to the environment or to public health, which the court finds on the record, involve circumstances not adequately taken into account by Chapter Two, Part Q or the calculation of the Base Fine under § 9C2.3.

§ 9D1.3 **Other Grounds for Departures**

The grounds for departure set forth in §8C4.1,. 3, .5 - .7, and .10 - .11 (Policy Statements) are incorporated by reference. The court may take these factors into consideration in departing from the Guideline fine range, to the extent permitted in Chapter 8.

PART E - PROBATION

§ 9E1.1 **Imposition of Probation**

(a) The court shall order a term of probation if the court finds that the conditions described in § 8D1.1(a)(1),(2),(3),(6),(7),(8) exist.

(b) The court shall order a term of probation if the court finds that:

(1) the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal, civil, or administrative adjudication and any part of the misconduct underlying the instant offense occurred after the adjudication; or

(2) any officer, manager, or supervisor within the