organization or within the unit of the organization within which the instant offense was committed (a) participated in, (b) ordered, directed, or controlled the conduct of others in the commission of, or (c) consented to the misconduct underlying the instant offense and that individual 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.

§ 9E1.2 **Term of Probation**

(a) When a sentence of probation is imposed, the term of probation shall be the same as specified in § 8D1.2 and Commentary.

§ 9E1.3 **Conditions of Probation**

(a) The conditions of probation shall be the same as described in § 8D1.3.

§ 9E1.4 **Recommended Conditions of Probation**
(Policy Statement)

(a) The court may order the organization to publicize as described by § 8D1.4(a).

(b) If probation is imposed because the court finds the conditions described in § 8D1.1(a)(1) or (2) exist, then the conditions of probation described in § 8D1.4(b) may be imposed.

(c) If probation is imposed because the court finds that the organization does not have an effective program to prevent and detect violations of law, or that changes are necessary within the organization to reduce the likelihood of future criminal conduct, or that the conditions described in § 9E1.1(b) exist, the conditions of probation described in § 8D1.4(c) may be appropriate. The following conditions of probation may also be appropriate:

(1) the costs of any experts engaged by the court shall be paid by the organization;

(2) in order to monitor the organization's compliance with the approved program, the court may order the organization to submit to inspection of its facilities, testing, and monitoring of its operation.

Commentary

Application Note:

When probation is imposed in accordance with § 9E1.1(b) or because the court finds that conditions described in § 8D1.1(a)(3) or (6) exist, Application Notes (1) and (2) to § 8D1.4 are incorporated here.

§ 9E1.5 **Violations of Conditions of Probation - Organizations** (Policy Statement)

Apply § 8D1.5 and Application Note.

PART F - SPECIAL ASSESSMENTS AND COSTS

§ 9F1.1 **Special Assessments**

Chapter 8, Part E, § 8E1.1 is incorporated by reference.

§ 9F1.2 **Assessment of Costs**

Chapter 8, Part E, § 8E1.3 is incorporated by reference.

COMMENTS BY WMX TECHNOLOGIES, INC.

ON THE

DRAFT GUIDELINES FOR THE

SENTENCING OF ORGANIZATIONS CONVICTED OF ENVIRONMENTAL CRIMES

PRESENTED BY THE UNITED STATES SENTENCING COMMISSION

July 19, 1994

These comments are submitted by WMX Technologies, Inc., the nation's largest environmental services company. WMX Technologies and its subsidiaries (WMX) provide a wide variety of services, including storage, treatment and disposal of solid, hazardous, infectious and radioactive wastes and wastewaters, waste-to-energy plants, remediation projects, and industrial cleaning and other services. As such, WMX operates in an intensely regulated arena and, therefore, has considerable interest in the final Advisory Working Group proposal, which has been submitted for comment by the United States Sentencing Commission. WMX appreciates the opportunity to offer these comments and hopes they will be of assistance to the United States Sentencing Commission as it considers how best to prepare guidelines for sentencing organizations convicted of environmental crimes.

WMX supports establishing sensible and workable guidelines for the sentencing of such organizations. The Advisory Working Group has clearly made a major effort to tackle the extremely difficult and complex task of preparing such guidelines. WMX commends the Working Group for its efforts in this important and difficult area.

However, as discussed below, several portions of the proposed guidelines need significant revision. WMX has particular concerns with those parts of the proposal that limit mitigation of a base offense level penalty to a maximum of 50%, allow potentially unfair and unlawful use of prior settlements and other quasi-enforcement proceedings in determining the appropriate offense level, and provide for an inflexible definition of an adequate compliance monitoring program.

WMX's specific comments, identified by part and section numbers in the draft guidelines, are as follows:

1. Part B, Section 9B2.1. The offense listed in Section 9B2.1(b)(2), "Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification," is too broadly defined; it fails to recognize the wide variation in risk posed to health or the environment by materials that are "hazardous

waste." Some wastes are hazardous because they contain extremely dangerous chemicals (e.g., dioxins, PCBs, etc.). However, other wastes are categorized as hazardous because they were derived from the treatment of other hazardous wastes. This latter category can include hazardous wastes which present virtually no risks at all. The sentencing court should be given greater flexibility in sentencing to reflect the degree of risk posed by a particular hazardous waste.

Moreover, this offense does not distinguish among the many ways hazardous wastes can be "mishandled." Some kinds of mishandling pose serious risks of harm, while others create virtually none. For example, if a load of drummed hazardous wastes is stored for a brief period of time in an on-site parking area, because the facility's storage area is temporarily full, and if the parking area is asphalted and has adequate containment for any spill, such a management practice may result in criminal liability. However, this violation involves virtually no risk; criminal sanctions that start at 15-25% of the statutory maximum would be inordinate.

To address those violations which involve almost risk-free conduct, due to either the innocuous nature of the waste or the minimal impact of the violative conduct, WMX suggests another offense category be created: "Simple Mishandling of a Hazardous Substance," with a base offense level of three. This offense would not include any criminal activity that (1) resulted in any type of discharge, (2) created any "substantial likelihood of death or serious bodily injury," or (3) caused disruption of public utilities or evacuation of a community. (These are aggravators for the existing Mishandling of Hazardous or Toxic Substances or Pesticides category.) The court would impose penalties under this provision for criminal conduct creating extremely low levels of risk.

2. Part E, Sections 9E1.1 and 9E1.2(b). Under the proposed sentencing guidelines, the lowest possible fine is 10% of the maximum statutory fine. In this regard, the guidelines unaccountably are more strict than the existing sentencing guidelines, which allow for penalties to be as little as 5% of the maximum fine. (Indeed, in some cases, U.S. Sentencing Commission guidelines would allow for a judge to impose no fine at all.) There is no justification that would support such a distinction between environmental crimes and other crimes. The guidelines applicable to organizations convicted of environmental crimes should allow a reduction to 0-5% of the maximum statutory fine.

In a similar vein, the draft guidelines unduly limit mitigation to not more than 50% of the offense level, after

application of any aggravating factors.[1] The mitigating conduct set out in the guidelines should be strongly encouraged. It is in everyone's interest that organizations have top quality environmental programs, cooperate with prosecuting authorities, report violations voluntarily, and extend remedial assistance to victims of any criminal activity. To limit the mitigation available for such conduct contradicts sound public policy. Moreover, it is inconsistent with the existing organizational sentencing guidelines, which (as noted above) provide for mitigation of a fine to as little as 5% of the statutory maximum. The draft guidelines should be amended to make them consistent in this regard with the existing sentencing guidelines.

3. Part C, Section 9C1.1(b). The draft guidelines provide for increased penalties because of an organization's prior criminal history. While conceptually such an aggravating factor is appropriate, there are a number of instances when strict applicability of this aggravating factor would cause an unjust result. For example, waste treatment and disposal companies face, from time to time, charges that their transportation units have violated an environmental regulation in transporting solid or hazardous wastes. In many states (e.g., Ohio, Illinois, and Louisiana), such matters are handled as civil administrative cases, with small fines in the two-to-four-figure range. However, in a small minority of states, such matters are handled as criminal cases. For instance, in Michigan, some hazardous waste transporter violations, including strict liability matters, are handled as criminal misdemeanors. The draft guidelines would command the imposition of this aggravator for a five year period following such a conviction, without an examination of its seriousness. This result is unduly harsh.

In addition, the aggravating factor applies even if only one environmental conviction, no matter how minor, has occurred in the preceding five years. The commentary for the prior civil compliance history aggravator wisely notes that, "because of their scale or constant involvement with environmental regulation," some organizations should not be penalized additionally for having a prior record of civil adjudications. A similar recognition is warranted in the case of minor criminal convictions, particularly when they involve strict liability statutes. WMX therefore recommends that this aggravating factor be amended to allow for increases of from 0 to 4 levels and that commentary be added

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[1]The text of §9E1.2(b) says that "in no event shall a fine determined under this Chapter be reduced as the result of mitigating factors to a level below fifty percent (50%) of the Offensive Level calculated in Part B and C." Since the Part C calculations already take into account mitigating factors, this text does not make sense. Presumably, the drafters meant to say "...the Offense Level calculated in Part B and §9C1.1."

explaining that a sentencing court should impose no additional penalty as a result of a criminal history, should it find that the aggravator, in light of the size and nature of the defendant's business and/or the nature of the criminal history, ought not be applied.

4. Part B, Sections 9B2.1(b)(2)(iv) and (3)(iv). The guidelines provide for an increase in the base offense level for an offense involving actions conducted without a required permit or in violation of an existing permit. While there are cases when the application of such an aggravating factor is appropriate, it is unjust to increase a fine on this basis where the underlying crime charges the defendant with acting either without a required permit or in violation of an existing permit. Since the lack of a permit or the disobedience of a permit's requirements forms a key element of the crime, there is no justification for aggravating the penalty on the basis of those same facts. WMX recommends that the text of the guidelines be amended to provide that no increase would be imposed when the underlying offense charges actions were taken without a required permit or in violation of a permit.

5. Part C, Section 9C1.1(d). The guidelines allow an increase in a penalty when the offending conduct was the subject matter of a prior notice of violation for "the same offense conduct." While this aggravating factor may be appropriate in some cases (e.g., a continuous discharge of a hazardous substance into a river), there are other situations where it would not be appropriate. For example, assume a company convicted of improper packaging of hazardous wastes on August 15 had been served with a notice of violation for another alleged incident of improper packaging on August 1. The company may well be innocent of wrongdoing in the earlier incident, while being guilty of a violation on August 15. The mere fact that the illegal conduct on August 15 is of the same type that was said to have occurred on August 1 does not justify increasing the penalty imposed for the August 15 incident. In the cases of continuous conduct, it is not unreasonable to assume that the finding of guilt would constitute in effect a determination that the prior conduct, referenced in the notice of violation, had occurred. However, such a conclusion cannot be drawn for discontinuous acts, even of the same type.

In addition, it bears remembering that a notice of violation is frequently nothing more than a regulatory agency's opinion that a regulated party has violated some legal requirement. In most instances, unless the agency chooses to follow up that notice with some sort of enforcement action, the party has no right to contest the notice, nor any ability to expunge the notice. Depending on the facts, therefore, it could be a deprivation of due process to use a notice of violation as a basis for increasing a penalty. WMX recommends that the text of this aggravating factor be amended to provide that no aggravation be allowed for notices of violation for discontinuous offense conduct. As an alternative, WMX suggests

that this aggravating factor be changed to give the defendant a right to contest any notice of violation which the prosecution proposes to use to aggravate the penalty. This latter solution satisfies due process concerns, although it adds a level of complexity to the sentencing hearing.

6. Part D. Part D commendably attempts to establish stringent standards for a high-quality compliance monitoring program. But it does so in an overly rigid fashion, suggesting that the science of compliance monitoring has been fully developed. This is far from the case. Compliance programs in leading companies continue to evolve and improve. WMX expects its own and other companies' efforts to improve systems for assuring compliance with complex environmental laws will result in new and better ways to accomplish this very complex goal. Part D stifles creative efforts, as companies will be reluctant to explore new compliance assurance mechanisms for fear that those innovations will be grounds for denial of mitigation under these guidelines. WMX therefore urges the Commission to instill greater flexibility in Part D, to allow sentencing courts to award mitigation to companies whose compliance systems meet the spirit of these stringent standards, if not their exact letter.

WMX also has more specific comments on Part D, as follows:

Paragraph (a)(1) requires line managers, including executive and operating officers at all levels, to routinely review environmental monitoring and auditing reports. This would be an excessive and unnecessary burden on the senior officers of a major national or multinational corporation with large numbers of facilities. The guidelines should be flexible enough to allow responsible senior officers to regularly review summary information or exception-based reports regarding the environmental compliance of company operations.

Paragraph (a)(2) could be interpreted as obliging a company to adopt standard operating procedures, based on analysis and design of its work functions, as necessary to achieve, verify, and document environmental compliance in the course of performing the routine work of the company. If so, this requirement would be too prescriptive. Most environmental requirements can be interpreted and met without special interpretation in standard operating procedures. In addition, standard operating procedures may not be the most effective means to assure, document, and verify compliance. Often these procedures end up on the bookshelf collecting dust. Other more effective systems exist and continue to evolve and should be permitted by the guidelines. For example, WMX uses a computer-based system called the Compliance Management System for assigning environmental requirements to its employees and documenting completion of compliance assurance tasks. To reflect the existence of differing, meaningful compliance systems, and the continuing evolution of these systems, WMX believes the

guidelines should establish a performance standard instead of a method for ensuring compliance to allow flexibility and innovation. The guidelines should be clarified to require a system that will identify requirements, define necessary procedures, assign responsibility, provide reminders of when action is required, and document compliance.

Paragraph (a)(3)(i) demands frequent, including random, and when necessary, surprise audits and inspections. The value of such a provision is questionable. While surprise audits can be valuable in some contexts (e.g., when serious, intentional wrongdoing is suspected at the facility being investigated), good quality audits generally require the active participation of the management of the audited location. WMX conducts environmental audits of our major facilities on a regular frequency (every one to three years). For minor facilities we conduct random audits, i.e., we audit a certain number of facilities selected without discrimination every year. In order to prepare for these audits, auditors must receive from facility personnel considerable documentation and information about the facility, its permits, and the regulations that govern its operations. In addition, the participation of facility staff during the course of an audit greatly aids the auditors in identifying and evaluating compliance issues. Because they are not scheduled in advance, surprise audits can occur without key facility personnel being available, which can make the audit much less successful in this regard. Without the assistance and the cooperation of facility staff, an audit would be less able to evaluate the facility's compliance with environmental requirements and its compliance management systems. Therefore, the guidelines should allow either random or frequent audits, depending on the complexity of the regulatory environment in which a facility operates.

Paragraph (a)(3)(i) states that audits of principal operations and all pollution control facilities must be performed to assess, in detail, their compliance with all applicable environmental requirements. An audit where compliance with every requirement is verified (a compliance verification audit) is necessary where there is no formal compliance program in place. However, where there is regular on-site self-auditing and use of a system like the WMX Compliance Management System, a higher level "systems audit" is often a better choice. In a systems audit, the auditors determine whether there are systems in place that will assure continuous compliance with individual requirements. Then they sample compliance to determine if the system is operating effectively. The systems audit finds both the root cause and the symptom. This kind of an audit is both more efficient and effective. It takes less time to do and focuses corrective action on compliance systems that will prevent recurrence of compliance issues. The guidelines should allow for a systems audit.

In Paragraph (a)(3)(ii), the guidelines mandate 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 or history of such operations or facilities suggests a significant potential for non-compliance. While WMX agrees that some operations require the continuous presence of trained environmental professionals, it is not always necessary. At many of our smaller facilities, where the Compliance Management System mentioned above has been installed, we have found that operations personnel are able to maintain compliance without the need for continuous on-site assistance from environmental professionals. The Compliance Management System is installed and kept up-to-date at these sites by environmental professionals from an office that services several facilities. They also participate in regular self-audits and inspections of these facilities. It is suggested that the guidelines require regular rather than continuous on-site monitoring by specifically trained compliance personnel.

In addition, the guidelines should be clear that the ultimate responsibility for compliance rests with the management of the operation. Trained environmental professionals should be available to provide assistance but should not relieve the operation manager of compliance responsibility.

Finally, Paragraph (a)(4)(iii) says that a company must have systems or programs that are adequate to evaluate employees and agents sufficiently to avoid delegating significant discretionary authority or unsupervised responsibility to persons with a propensity to engage in illegal activities. WMX does not know of any company having a program that satisfies this criterion; indeed, it is doubtful that any testing protocol exists that reliably predicts propensity to act unlawfully. WMX suggests the language be revised to require, at most, that a company avoid delegating significant discretionary authority or unsupervised responsibility to persons it has reason to believe to be unable or unwilling to obey the law.

7. Part C. The guidelines provide no mitigation of penalties for either collateral consequences of a conviction or the defendant's actions following the crime. Companies which do a significant amount of business with state and federal government agencies can be adversely impacted by laws which limit or even prohibit those agencies from doing business with companies convicted of certain kinds of crime. In addition, convicted organizations may be barred from receiving state or federal environmental permits essential to staying in business. At the time of sentencing, such impacts have not yet occurred and may not occur. Nonetheless, the seriousness of these collateral effects of a conviction merits the sentencing judge taking them into consideration in arriving at an appropriate penalty. WMX

recommends an additional factor be established as part of the §9E1.2 general limitations to allow consideration of such collateral impacts when the court finds them more likely than not to occur in the future.

In addition, the guidelines should be amended to provide that mitigation should be afforded a defendant which has spent significant amounts of money correcting the harm that its crime has caused. While there is a proposed mitigating factor in Section 9C1.2(c), concerning remedial assistance to victims of crime, this mitigator is too narrow. Public policy should encourage companies where crimes have caused harm to take prompt action to remediate any damage caused by that violation. WMX recommends a mitigating factor for such expenditures be available; the scope of Section 9C1.2(c) should be expanded accordingly.

8. Part E, Section 9E1.2(c). This portion of the draft guidelines would establish a floor below which a fine could not go, based in part on the "costs directly attributable to the offense." This concept has the potential for "double counting" and is bad public policy.

Double counting results if those costs reflect the expense of environmental remediation and, as will almost always be the case, they are ultimately borne by the party responsible for the damage - the defendant. Under this guideline, then, the defendant will pay this sum twice - once by way of reimbursement and once by way of a fine. Moreover, since it will be EPA or the state equivalent which is paying initially for the remediation, there is no incentive to keep those costs under control.

Secondly, if the remedial activity is undertaken by the defendant, he will minimize the amount of money spent on remediation because of his knowledge that, the greater the costs of remediation, the greater the fine he will pay. This is the wrong message to be sent to the party who is most likely to be held civilly responsible for the remedial activity.

9. Part F. While the Environmental Sentencing Guidelines are in many respects virtually identical to the Organizational Sentencing Guidelines (which set forth in great detail the circumstances under which probation should be or must be imposed for other serious federal crimes), they vary from that framework in a number of meaningful ways. The net result of such departures is to greatly increase the likelihood of the imposition of probation based upon unbounded discretionary standards.

First, the Organizational Guidelines provide at §8D1.1(a)(1) that the Court shall order probation if such sentence is "necessary" to receive payment of restitution, enforce a remedial order, or insure completion of community service; and at

§8D1.1(a)(6) if "necessary" to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct. The Environmental Guidelines counterparts at §§9F1.1(a)(1) and (4) inexplicably substitute "advisable" for "necessary." Necessity is a more typical standard for judicial determinations. Instead, the Environmental Guidelines allow a Court to impose probation even when it is not necessary, but only advisable based on unknown criteria. Such standardless discretion will lead to widely variant treatment of offenders, which strikes at the heart of the purpose of sentencing guidelines.

Second, the Organizational Guidelines, at §8D1.1(a)(4), require probation where similar misconduct occurs within the past 5 years, as determined by a criminal adjudication. The Environmental Guidelines counterpart at §9F1.1.(a)(5) would extend prior misconduct to mere civil or administrative adjudications under federal or state law. This change would not only alter the meaning of prior "misconduct" in a criminal setting, but would create harsh results for companies in the environmental services field where such adjudications are commonplace. This again will lead to widely aberrant results in the imposition of sentencing.

Third, the Organizational Guidelines at §8D1.1(a)(5) provides that a Court shall impose probation if an individual within high level personnel (i.e., individuals who have substantial control or set policy) of the organization or the unit where the offense was committed, participated in the misconduct and within the past 5 years such individual engaged in similar misconduct, as determined by a criminal adjudication.

§9F1.1(a)(6) of the Environmental Guidelines depart from this in two meaningful ways. Not only does it extend to prior misconduct of a civil or administrative nature, but it also abandons any recognized personnel definition ("high level," "substantial authority," etc.) and instead includes any "officer," "manager," or "supervisor," without regard to their level of authority or responsibility, who engaged in similar misconduct. Thus, a Court must impose probation if anyone with any undefined responsibility is previously "involved" in a similar civil or administrative adjudication under either federal or state law.

The end result is that probation for environmental crimes is much more likely than any other crime under the Organizational Guidelines, which, because of its loosely drawn conditions, already provides far more discretionary sentencing than previously established by statute. The potential circumstances under which probation will be considered will be much broader and the discretion to impose it will have far fewer standards. These departures will make challenging probation on appeal nearly impossible, will lead to widely variant results in sentencing and in the end will cause needless and costly expenditures of scarce judicial and company resources. WMX recommends the Commission

consider deleting these departures and revising the draft guidelines, to make them consistent with the existing Organizational Guidelines in this regard.

10. Part C, Section 9C1.1(c). As noted above, WMX has serious reservations on the wisdom of using "prior civil or administrative adjudications" as aggravating factors for criminal matters. Assuming that such matters are retained as aggravators, WMX suggests that they be defined to include only those contested legal proceedings that involved a trial and a finding by a judicial officer or judge of a violation by the defendant. The scope of these adjudications should not incorporate civil consent agreements or decrees, for then the draft guideline would be overly broad, act contrary to public policy and could violate important constitutional rights to due process and equal protection.

First, many companies agree to settle doubtful or even meritless enforcement cases (civil and criminal) because the expense of litigation greatly exceeds the proposed penalty. In addition, some companies settle cases because State agencies, as a matter of policy or law, refuse to issue necessary permits until all outstanding enforcement matters are resolved. For example, 6 NYCRR §621.3(f) empowers the New York State Department of Environmental Conservation (NYSDEC) to refuse to issue a permit or permit renewal to any entity so long as there is an enforcement matter pending against that organization. Any company needing a permit to stay in business in New York will have a powerful incentive to settle cases brought by the NYSDEC, regardless of their merits. In short, civil consent decrees and agreements do not represent reliable indicators of an organization's actual compliance with its legal obligations.

Second, the use of prior consent decrees and agreements to penalize entities later found guilty of a crime creates a strong disincentive against settlements of enforcement cases. Organizations will be less willing to resolve a borderline civil matter if they know that settlement can be used later to aggravate a criminal penalty. This result will mean that enforcement agencies will have to devote more resources to litigate cases which might otherwise be settled.

Third, using consent decrees and agreements (as well as findings of guilt based on nolo contendere pleas) in federal court or federal agency enforcement cases that occurred prior to the effective date of these draft guidelines raises serious questions of fairness, including constitutional due process issues. A company that agrees to a negotiated settlement of a federal enforcement case does so on the basis of knowing precisely what the penalty in that case will be. It is unfair and a denial of due process for the federal government to use that prior settlement as an aggravating factor in a later federal case, when the settling company had no way of knowing such use of the settlement would

occur in the future. The federal government should honor its prior agreements; these guidelines would allow it to breach them.[2]

11. Part C. WMX urges the Commission to add a mitigating factor for cases of environmental crimes committed by "rogue" employees. There have been a number of convictions involving companies where the actual criminal conduct was committed by low-level employees, acting both in violation of explicitly stated company policy and not in the interests of the company. While it may be appropriate in some instances to impose criminal sanctions on corporations for acts committed by such employees, the penalty in such cases should be mitigated. It is virtually impossible for any organization to prevent such "rogue" employees from committing their criminal acts. Some recognition of that fact ought to be taken into account in sentencing.

12. Part C, Section 9C1.2(a). The guidelines establish high thresholds for environmental compliance programs that qualify convicted defendants for the mitigator afforded for such programs. However, under the guidelines, the offense level for eligible companies can be as little as only three levels out of the maximum of eight allowed. In view of these high eligibility standards, a company having a qualifying compliance program should receive at least a substantial majority of the maximum mitigation available. WMX recommends that the range of allowable mitigation be adjusted to provide that the minimum mitigation for eligible companies be at least 6 levels.

13. Other Comments. On February 22, 1994, a number of former officials of the Justice Department's Environmental and Natural Resources Division and the Office of General Counsel of the USEPA commented on these draft guidelines to the United States Sentencing Commission. A major component of their comments concerned the lack of accountability for two central factors in establishing a base offense level: the degree of culpable knowledge and the foreseeability of harm. WMX joins these officials in their concerns about the absence of such factors in setting a base offense level. WMX urges the Commission to consider carefully the comments provided by these former government officials and to work with them and others to establish appropriate factors in the guidelines for culpability and foreseeability.

WMX also supports the draft guidelines rejection of a "simple mechanical counting rule" for prior civil adjudications, as discussed in the commentary to Section 9C1.1(c). Companies operating waste treatment and disposal businesses function under an extremely complex and frequently ambiguous and ever-changing

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[2]In order to use a settlement as an aggravating factor in subsequent criminal sentencing, the government may seek to include clarifying language to that effect in the settlement agreement. In that case, the defendant agreeing to the settlement will be on notice that it may face higher penalties in the future because of the settlement, and can choose to accept such a possibility, or litigate the matter.

regulatory system, which often imposes sanctions on a strict liability, "no fault" basis. (In numerous instances, waste disposal companies have full-time on-site agency environmental inspectors, whose principal task is to monitor compliance by the facilities.) In addition, the size of a company, the number of facilities it runs, the variety of pollutants it manages, etc., can all impact its compliance record. It would be unjust to look solely at some absolute measure of adjudications to determine the quality of a company's compliance record. WMX urges the Sentencing Commission to retain the concepts contained in Comment 1 to Section 9C1.1(c).

WMX values the opportunity to make these comments to the United States Sentencing Commission on this important topic.

MEMORANDUM

Number of Pages: 1

To: Phyllis J. Newton, Staff Director
From: Lyle Brecht c/o Blue Heron Group 410-472-2680
Date: April 19, 1994
Subject: Comments on November 16, 1993 Report from Advisory Group on Environmental Sanctions

I applaud the Advisory Group's well-considered and innovative draft proposal concerning environmental criminal violations. Par. 9B1.1 should be especially helpful in prosecuting organizations with criminal intent.

However, I have concerns that for other organizations, who inadvertently transgress environmental laws, the proposed sentencing guidelines do not adequately redress the following issues which have been the bane of enforcement since the very first environmental regulations were promulgated: (1) adequate incentives to engage in the most environmentally sound activities are no where to be found in the sentencing guidelines, and (2) the definition of what constitutes environmental transgressions is fairly fluid.

The proposed guidelines rely entirely on punitive disincentives, primarily financial, and are compensatory derived. The assumption is that the guidelines should, after all, apply to those cases which are brought in front of a judge. However, the loss in this prevailing logic is that the consequence of breaking the law is addressed directly, but the consequence of doing one's best for the environment is not.

One way through this prevailing logic, at least for business violations, is to assign the fines collected for criminal behavior to those convicted businesses' competitors, either as tax credits or outright distributions. Businesses in that industry with violations in the previous five years would not be eligible for the payments. Also, fines and legal fees should be collected as additional tax revenues so that these expenses are not subsidized by taxpayers or viewed by the offending party as "just another cost of doing business."

I also urge the Commission to consider other financial and non-financial consequences for environmental criminal violations including: (1) full disclosure in public financial statements and mandatory press releases, (2) appropriate limitations and amendments of state incorporation charters, (3) mandatory severance of employment and ownership of shares in lieu of a jail sentence, (4) a surcharge tax on the price of products sold, or on the revenues of the offending firm for a period of years, as opposed to a one-time fine.

Part of the problem the court encounters is the environmental regulations themselves. There are so many regulations that often the clear standards that citizens expect from law do not exist. Instead, a fog of unintelligibility replaces a firm definition of right and wrong. What replaces it is a maze of ever changing "acceptable tolerances" and "sliding targets." Enforcement is often discretionary and partial.

CIEA
COALITION
FOR IMPROVED
ENVIRONMENTAL
AUDITS

March 31, 1994

Ms. Tracey Dickerson
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2500 -- South Lobby
Washington, D.C. 20002

Dear Ms. Dickerson:

On behalf of the Coalition for Improved Environmental Audits ("CIEA"), we submit the following comments on the U.S. Sentencing Commission's November 1993 working draft of recommended sentencing guidelines for organizations convicted of environmental crimes. The CIEA membership appreciates the opportunity to comment on these guidelines.

CIEA membership includes corporations and trade associations committed to establishing useful and effective environmental and health and safety auditing programs. To encourage such programs, CIEA advocates the creation of a legal privilege to protect against the unwarranted disclosure of environmental audits. CIEA's comments do not address the guidelines as a whole, but rather are specifically focused on the need for the guidelines to encourage environmental auditing through adoption of an environmental audit privilege.

COMMENTS

1. The U.S. Sentencing Commission Should Amend the Proposed Environmental Sentencing Guidelines to Specifically Include an Environmental Auditing Privilege

Given the growth and complexity of environmental laws and regulations, responsible organizations must utilize environmental audits as a tool to help ensure environmental compliance and avoid the risk of civil or criminal penalties. Environmental audits are "systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements." 51 Fed. Reg. 25,004 (July 9, 1986). Environmental audits are the best means for an organization to evaluate candidly its level of compliance and implement any corrective actions that are necessary to come into compliance.

Regulated entities are currently caught in a "Catch-22." On the one hand, in order to be truly useful to an organization, an environmental audit needs to be brutally honest in its evaluation of an organization's compliance status. Honest and objective reports are the best means to encourage organizations to make the necessary changes to bring them into

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compliance with environmental laws and avoid penalties. However, on the other hand, brutally honest auditing often puts companies at risk that outside sources will use the internally prepared environmental audits to the detriment of the organization that prepared the audit. Under the current laws in most jurisdictions, enforcement officials and private plaintiffs may obtain an organization's environmental audits and use them to prove both the existence and corporate knowledge of environmental violations. As a result, many organizations have been deterred from performing effective and candid self audits, thereby depriving themselves, the surrounding community and the environment of the benefits that audits provide.

To extract the full benefit from an environmental audit, an organization must be able to candidly evaluate its environmental performance without fear that the information will be used by outside sources, especially by government agencies to bring enforcement actions. The only way to accomplish this goal is for the courts and government agencies to establish a legislative privilege for environmental audits.

The creation of an auditing privilege would encourage the very type of auditing envisioned by the U.S. Environmental Protection Agency and the U.S. Sentencing Commission. The creation of an audit privilege would allow organizations to prepare objective audits that accurately critique an organization's compliance status without the fear that the information would be used against them. This, in turn, would foster "full and frank" communications within an organization, leading to higher levels of environmental compliance.

CIEA members support the Commission's recognition of the importance of environmental audits and the use of "frequent auditing" as a mitigating factor to lessen the penalty assessed against an organization convicted of an environmental crime. Pursuant to section 9C1.2 of the guidelines, a court, after determining a defendant's base fine, may mitigate the penalty if, among other criteria, the organization demonstrates that prior to the offense it was committed to environmental compliance. CIEA believes that a corporation which can demonstrate that it has adopted and implemented a comprehensive environmental compliance program that includes systematic environmental auditing, should be entitled to protection against the unwarranted disclosure of those audits. Anything less will result in audits which fail to achieve their intended purpose. The Commission should further encourage effective auditing by specifically providing for an auditing privilege. Such a privilege would end the uncertainties surrounding whether such audits are privileged or whether the information is discoverable, and give organizations the flexibility they need to effectively evaluate and correct any compliance problems.

2. The Commentary to Section 9C1.2(b) Should Clarify that an Organization's Failure to Disclose an Environmental Audit Would Not be Considered a Failure to Cooperate With the Appropriate Authorities

Section 9C1.2(b) provides that a court may reduce an organization's base fine by three to six levels if the organization can demonstrate that:

> (a) prior to an imminent threat of disclosure or government investigation, and (b) within a reasonably prompt time after becoming aware of the offense, [the organization] reported the offense to appropriate governmental authorities, [and] fully cooperated in the investigation. . . .

The Commentary to this section states that before a court may apply the three to six level reduction, the "court must determine that the organization has fully cooperated with the exception of supplying the names of individuals or privileged information." In addition, in order for the court to determine that an organization fully cooperated with the government authorities, it must also conclude that the organization "provided all pertinent information known to or ascertainable by it that would assist law enforcement personnel in identifying the nature and extent of the offense."

Because the laws in most jurisdictions do not recognize a privilege for environmental audits, pursuant to the Commentary, an organization that does not voluntarily disclose the results of its environmental audits would be precluded from having its base fine mitigated, even if that organization had implemented a systematic auditing program. Such a result would further discourage organizations from conducting useful environmental audits. If the only "benefit" derived from an audit program is to provide outside sources with information necessary to initiate a suit against the organization, then there is no incentive for an organization to conduct a thorough and accurate audit. Given the voluminous nature of environmental regulations, even the most environmentally responsible organizations, when audited, will periodically identify areas of non-compliance.

To encourage all organizations to implement auditing programs, the guidelines should be drafted in a way that encourages organizations to perform audits by rewarding those organizations that utilized audits prior to the violation that led to the conviction. Organizations that have implemented an auditing program should not be punished to the same degree as organizations that choose to forego auditing altogether.

Therefore, the Commission should amend the Commentary to 9C1.2(b) to establish that environmental audits are considered "privileged" for purposes of section 9C1.2(b), and that an organization that meets the criteria of this section remains eligible for mitigation, regardless of whether it discloses the actual auditing conclusions to outside sources.

3. The Commentary to Section 9D1.1 Should Clarify That Environmental Audits are Privileged And Are Not Subject to Disclosure

Pursuant to section 9C1.2, a court may mitigate an organizations criminal penalty provided that it determines that an organization, prior to the particular offense, was committed to achieving environmental compliance. In order for a court to conclude that an organization was committed to environmental compliance, it would have to determine that the seven factors established under section 9D1.1(a) were satisfied. Pursuant to section 9D1.1(a)(3), the court would have to conclude, *inter alia*, that the organization had designed and implemented, with sufficient authority, personnel and other resources, the systems and programs that are necessary for "frequent auditing."

The overriding purpose of section 9D1.1 is to encourage organizations actively to engage in those activities that help ensure environmental compliance and to reward those organizations that have implemented auditing programs. As discussed above, the best means to encourage auditing is to prevent outside sources from obtaining audits and using the audited information against an organization that is actively engaged in an effort to improve its compliance status. A qualified privilege would not shield organizations that perform "sham" audits, provided that such a privilege was tied to the determination that an organization was truly engaged in a remedial effort. For example, only those organizations that actively apply their audits to correct a given compliance problem as part of ongoing remedial efforts would qualify for the privilege. This can be assured if the company demonstrates compliance with the criteria for environmental compliance programs established under section 9D1.1(a).

A qualified audit privilege would encourage more organizations to implement auditing programs and result in less violations in the future. Moreover, as qualified, the privilege would not undermine the effectiveness of these guidelines by allowing organizations that are not otherwise committed to environmental compliance to qualify for an audit privilege.

Therefore, CIEA recommends that the Commission amend section § 9D1.1 to establish a qualified environmental audit privilege, provided that audits are prepared as a part of a comprehensive environmental compliance program that meets the requirements of section 9D1.1(a).

We hope that you find these comments helpful during your review of the working draft of the sentencing guidelines for organizations convicted of environmental crimes. If

you have any questions or would like us to provide additional information, please do not hesitate to contact us.

Sincerely,

JOHN L. WITTENBORN
STEPHANIE SIEGEL
Counsel

CATERPILLAR®

Caterpillar Inc.

100 NE Adams Street
Peoria, Illinois 61629

March 29, 1994

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

To Whom It May Concern:

Enclosed please find six (6) copies of the Comments of Caterpillar Inc. to the "Proposals to U.S. Sentencing Commission by Advisory Working Group on Environmental Offenses" issued on November 16, 1993. We appreciate the opportunity to submit these comments.

Please note that the comment itself is only eight (8) double-spaced pages in length. Appendices to the comment include a "redline" version of the Advisory Working Group's Proposal that shows the differences between the proposal and the Working Group's previous draft issued in March of 1993. That "redline" may be a useful reference for the Commission.

Thank you very much for your interest in this matter. If you have any questions, please do not hesitate to contact the undersigned.

Yours sincerely,

David E. Howe
Senior Attorney

Legal Services Division
Telephone: (309) 675-5795
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Encl.

COMMENTS OF CATERPILLAR INC.

TO "PROPOSALS TO U.S. SENTENCING COMMISSION

BY ADVISORY WORKING GROUP ON ENVIRONMENTAL OFFENSES"

ISSUED NOVEMBER 16, 1993

Caterpillar Inc. appreciates the opportunity to submit its comments on the "Proposals to U.S. Sentencing Commission by Advisory Working Group on Environmental Offenses" issued on November 16, 1993 (the "Proposal").[1] In support of these

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[1]For purposes of this Comment, and for the convenience of the reader, the following terms are used:

Working Group	The Advisory Working Group on Environmental Offenses for the U.S. Sentencing Commission
Original Comments	Caterpillar Inc.'s Comments to the Draft Proposal submitted on May 10, 1993
Commission	The U.S. Sentencing Commission
Draft Proposal	The "Draft of 'Recommended Sentencing Guidelines Setting Forth Criminal Penalties for Organizations Convicted of Federal Environmental Crimes'" prepared by the Working Group and released for comment on March 5, 1993
Existing Guidelines	The current Sentencing Guidelines as applied to organizational crimes
Officials' Comment	Comments of Former Ranking Justice Department and EPA Officials on Draft Environmental Guidelines Prepared by Advisory Working Group on Environmental Sanctions
Dissent	Dissenting Views by Lloyd S. Guerci and Meredith Hemphill, Jr. dated December 8, 1993

Comments, Caterpillar has attached as Appendix A a "redline" version of the Proposal that highlights all differences between the text of the Draft Proposal and the current Proposal.

I. INTRODUCTION

Caterpillar believes that the potential impact of the Commission's work in this area cannot be understated, and appreciates the Commission's willingness to solicit comments on the Working Group's Proposal early on in its deliberative process. It is hoped that the Commission will bring a fresh perspective and approach to this issue and that any proposals issued by the Commission for comment will not repeat the mistakes of the Working Group. More importantly, it is hoped that the Commission will give serious consideration to the comments of Caterpillar and others, so that the process of soliciting comments will not be given the appearance of being a meaningless procedural hurdle.[2]

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[2] A review of the Redline shows that the Proposal contains almost no substantive changes from the text of the Draft Proposal, even after submission of over one hundred comments and the testimony of over 30 individuals that were almost universally critical of the Draft Proposal. Significantly, in the face of overwhelmingly negative comments, the only substantive change to the Draft Proposal's provisions concerning Compliance Programs, Probation and Aggravating or Mitigating Factors was the removal of scienter from consideration as an aggravating or mitigating factor. The actions of the Working Group, and its insistence on keeping its deliberations secret, suggest that its members have had no intention to take the pervasive and often thoughtful comments of interested parties into account in their deliberations.

Lamentably, lack of any substantive change in the Working Group's Proposal from its previous draft render Caterpillar's Original Comment to the Draft Proposal as applicable today as it was in May of 1993, and it has been attached hereto as Appendix B and is incorporated herein by reference in order to ensure that it is properly before the Commission. Caterpillar's remaining comments will highlight those areas of the Proposal that are of particular concern to Caterpillar.

II. CULPABILITY AND SERIOUSNESS OF THE OFFENSE

One of the fundamental flaws of the Draft Proposal is its failure to adequately address issues of culpability and the seriousness of the offense in question. The Draft Proposal fails to adequately address difficulties in applying the culpability of individuals within an organization to the organization itself, especially in areas where the individual is a "rogue" or where the individual's conduct occurred in spite of the best efforts of the organization to detect and prevent it.

Caterpillar's Original Comment pointed out many such defects in the Draft Proposal,[3] including the fact that the Draft Proposal's

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[3] Original Comment at 21-26. In its Original Comment, Caterpillar discussed the almost universal applicability of Aggravating Factors and the almost universal unavailability of Mitigating Factors under the scheme set forth in the Draft Proposal. Id. at 22-32. With exception of the deletion of the sections dealing with scienter, none of the aggravating or

provisions concerning scienter would hold an organization responsible for the actions of even one employee, no matter how low that employee is in the organization, and regardless of whether the employee was a "rogue" or whether the organization had used reasonable efforts to detect and prevent the conduct in question. Difficulties with the definition of "intentional" conduct were also discussed.

However, Caterpillar never considered that the Working Group's response to Caterpillar's and other comments would be to totally delete the concept of "scienter" from consideration as a factor in sentencing. Its attempt to base sentencing on factors that do not include reasoned application of the degree of culpability of the organization or the actual seriousness of the offense defies common sense.

III. COUNT STACKING, GAIN-LOSS CONSIDERATIONS AND UNIVERSALLY HIGH FINES

Caterpillar agrees with the Dissent that the provisions concerning count stacking, inappropriate use of gain and loss in fine calculations and the use of a scheme of fines that "start

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mitigating factors was modified in any substantive manner. In fact, the only concern expressed by Caterpillar that was addressed in any positive manner involved protection or waiver of privilege. This issue was addressed only in the explanatory comments to the Proposal.

high and go higher"[4] are unwarranted and ill conceived.[5] Caterpillar further believes that the comments of several former Justice Department and EPA Enforcement Officials to the Draft Proposal are just as applicable today as they were in May of 1993:

> We do not believe that these differences in treatment between environmental violations and other organizational violations are justified. Although the draft offers no reasons for these changes, the implicit unifying rationale seems to be that environmental violations should be dealt with more harshly than other organizational violations. Of course, serious environmental violations deserve strong punishment. But we see no general reason why environmental violations that occur in connection with otherwise legitimate business or other organizational activity should, as a class, be treated more harshly than other criminal violations. The imposition of disproportionately harsh criminal sanctions seems especially anomalous in light of the stiff civil penalties and restoration and damage liabilities that are regularly imposed by the government on environmental violators, in addition to criminal sanctions.

Officials' Comment at 20.

IV. COMPLIANCE PROGRAMS

Caterpillar's Original Comment devoted eleven pages to a discussion of the draconian and unworkable nature of the Draft Proposal's compliance program provisions. Original Comment at 10-21. Specifically, Caterpillar's five primary concerns are

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[4]Dissent at 2.

[5]Dissent at 7-16, 19-21. See also, Officials' Comment, passim. Both the Dissent and the Officials' Comment are adopted and incorporated herein by reference.

that: (1) the standards imposed are virtually impossible to meet; (2) a firm's compliance with those standards will always be reviewed in an adversarial context utilizing 20-20 hindsight; (3) failure to meet such standards, which are not required by law, can actually serve to increase a fine;[6] (4) imposition of these standards as conditions of probation amounts to prosecutorial overkill; and (5) as another commentator to the Draft Proposal put it, imposition of these standards constitutes "a misguided [and unwarranted] attempt to 'micromanage' companies' programs."[7]

Notwithstanding these criticisms, the requirements for compliance programs in the Proposal differ from those set forth in the Draft Proposal in only three respects. First, the introductory paragraph of that section contains added language indicating that if the difficult to achieve minimum requirements are met, the degree to which a mitigating credit is available is dependent on "the pervasiveness and consistency with which resources and management processes are applied throughout the organization, and the rigor with which processes and systems are designed and

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[6]This raises very serious Constitutional questions. For example, a sentencing system mandating a stiffer fine or penalty based on the absence of something (namely, an environmental compliance program) that is not required under any law to begin with seems difficult to justify in a Constitutional sense.

[7]Testimony of Stephen Ramsey, Vice President, Corporate Environmental Programs, General Electric Co., as reported in BNA's Environmental Reporter, May 14, 1993 (bracketed material added).

applied." Proposal at Section 9D1.1. This requirement actually serves to increase the uncertainty that will exist as to the application of the guidelines and the sentences that may be imposed, a result that is diametrically opposed to the bases for adopting guidelines in the first place.[8]

The second change amounts to the addition of four words to the text concerning training and evaluation that adds nothing substantive.

The third change concerns a credit for "additional" approaches, and also adds nothing substantive because: (1) it is difficult to think of any standard more difficult to meet than the other requirements for effective compliance programs under Section 9D1.1; and (2) for the credit to apply, the organization must meet "a very heavy burden of persuading the court that its additional program or component contributes substantially to achieving the fundamental objectives of environmental compliance." Proposal Section 9D1.1(a)(8). With requirements like this, why should an organization even bother making an attempt to meet them?

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[8]One of the primary purposes of adopting sentencing guidelines to begin with is to increase certainty and fairness in sentencing. Under the Proposal, it is clear that precisely the opposite will happen. Sentencing hearings can be expected to become a focal point of controversy, and lengthy and expensive (in terms of both time and money for all involved) sentencing hearings are certain to result from application of the guidelines as drafted.

In summary, these "changes" to the Draft Proposal actually change nothing. The Working Group's efforts to date have been both profoundly disappointing and completely frustrating to anyone hoping that the comments submitted to date might have an effect.

V. CONCLUSIONS

It is clear that the Proposal, like the Draft Proposal, is fundamentally flawed. Caterpillar agrees with the Dissent that the Proposal should be scrapped, but feels it would not be acting as a good citizen if it did not offer a suggestion as to how to proceed.

Simply stated, Caterpillar does believe that many aspects of the Original Guidelines are workable in the context of organizational environmental crimes. As an example, the Original Guidelines' treatment of corporate culpability for individual wrongdoing, and its delineation of the nature and contents of corporate compliance programs, while not perfect, appear to be at least workable. The Original Guidelines should be used as a starting point, and departures should be dealt with only in the area of clear and identified inadequacies, such as problems with gain/loss considerations and problems with applicability to "negligence" or "strict liability" crimes.

Nevertheless, Caterpillar also believes that wholesale departure

from the Original Guidelines, especially for the purpose of rendering punishment for environmental crimes universally harsher, is not the answer. Accordingly, the Proposal should be scrapped.

Respectfully submitted,

Caterpillar Inc.

CHEMICAL MANUFACTURERS ASSOCIATION

David F. Zoll
Vice President-General Counsel

October 4, 1994

The Honorable William H. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002

Dear Chairman Wilkins:

The Chemical Manufacturers Association (CMA) submits these comments on the revised draft environmental guidelines proposed by the U.S. Sentencing Commission's Advisory Working Group (AWG) on Environmental Sanctions (November 13, 1993). CMA strongly recommends that the Commission abandon the approach recommended in the AWG report, and undertake a more rigorous study of the need for and basis of sanctions for environmental crimes committed by organizations. CMA would welcome the opportunity to participate in the Commission's further review of organizational environmental sentencing guidelines.

CMA is the non-profit trade association whose member companies represent 90 percent of the productive capacity for basic industrial chemicals in the United States. CMA commented and testified in the development of the individual sentencing guidelines (Chapter 2Q), and submitted comments on both the Commission's and AWG's prior efforts to detail environmental sentencing guidelines for convicted organizations.

CMA is particularly concerned that the relative lack of comment on the AWG's report might be seen as public acquiescence to the recommended approach. The report ignores the overwhelmingly critical public comment received on its initial draft. The most serious problems with the AWG report include the failure to account for the existing civil and administrative environmental enforcement system; creation of rigid new requirements for corporate environmental compliance programs; and unjustified changes in the mitigating factors available to organizations.

CMA urges the Commission to reject the AWG's revised draft guidelines. Federal courts and the American public would be better served by an entirely new review of sentencing for environmental crimes.

2501 M Street, NW, Washington, DC 20037 Telephone 202-887-1350 Fax 202-887-1237

A. The AWG Report Ignores Culpability in Sentencing for Environmental Crimes

The major shortcoming of the AWG report is that it would assess the most punitive sentences possible without paying attention to the defendant's culpability. After devising a system that substantially departs from the existing Chapter 8 (Organizational Sentencing) guidelines, the AWG would consider culpability only as an aggravating factor.

The AWG report assumes, without support, that environmental crimes are so morally reprehensible that they merit a significantly more punitive approach in sentencing than other organizational offenses. Although certain environmental offenses involve willful decisions, the vast majority do not exhibit the specific intent common to other crimes addressed by the Sentencing Guidelines. In fact, judicial interpretations of many environmental criminal laws have effectively rendered them general intent crimes. Knowledge that an act is illegal is not required, and the sole distinction between civil and criminal behavior is at the discretion of the prosecutor. See, e.g., Memorandum from E. Devaney, Director, EPA Office of Criminal Enforcement, Jan. 12, 1994, at 5 ("The environmental statutes do not require proof of specific intent.").

The more appropriate approach to prevent unfair sentences in crimes with a low degree of culpability is to draw basic distinctions between environmental offenses based on the degree of scienter involved. This approach could provide sentencing courts with the necessary discretion to impose little or no penalty in cases of low culpability.

B. The AWG has Failed to Articulate a Basis for Separate Environmental Guidelines

The AWG report takes at face value the need for separate guidelines covering environmental crimes committed by organizations. No evidence supports this need, and in fact the AWG failed to articulate a basis for an entirely separate set of environmental guidelines at all. The AWG's report lacks any meaningful discussion of the Working Group's rationales, and no record of the Working Group's debate is available to the public.

From 1988 through 1991, the federal government charged 480 businesses and individuals with criminal environmental violations, a 225 percent increase over the previous 4 year period. Although specific data on these cases is very limited, the sentences (or plea bargains) established for those convicted appear generally to reflect the seriousness of the offense and the defendant's culpability. In the few cases where sentences were judicially determined, none of the sentencing courts indicated that a problem existed with disparity or disproportionality in environmental sentencing. This contrasts sharply with the substantial record supporting the individual sentencing guidelines.

The extraordinary dissenting report filed by two AWG members, Lloyd Guerci and Meredith Hemphill, Jr. (December 8, 1993), is an important indication that the AWG's report does not have widespread support. For example, the dissent recognized that demonstrable harm was present "in substantially less than 10 percent of the criminal cases," yet the report fails to articulate a factual -- or even philosophical -- basis for the suggested approach.

The Commission should also evaluate experience under the existing Sentencing Guidelines for non-environmental offenses by organizations and individuals. There is some irony in the fact that the AWG is proposing environmental sentencing guidelines that appear to be at least as arbitrary and inflexible as the guidelines criticized by many in the Federal judiciary and prosecutorial ranks.

We strongly recommend that the Commission abandon the AWG proposals, and make a determination of need before embarking on yet another review of sentencing for organizations convicted of environmental crimes.

C. The AWG Recommendations Would Result in Excessive, Punitive Sentences

The majority of the public comment on the AWG's initial draft guidelines raised the concern that the suggested approach would result in excessive, punitive sentences, particularly when compared to the existing Chapter 8 guidelines. The AWG's November, 1993, report does nothing to mitigate that effect.

The punitive effect of the AWG report is exacerbated by the cumulative impact of the specific recommendations. Ninety percent of all environmental violations are handled by efficient civil and administrative penalty systems which have not been factored into the guidelines. The AWG would limit mitigating reductions to 50 percent of the base fine, ten times more stringent than under the Chapter 8 guidelines. It limits the mitigating effect of an internal compliance program to circumstances where a defendant has satisfied every one of the criteria for such a program, a much more restrictive approach than is the case under Chapter 8. Sentences under the AWG would, in all but a very few cases, be made at the statutory maximum.

The AWG report fails to take proper account of multiple counts, and vests virtually unbridled discretion in prosecutors to bring repetitive and unwarranted charges. The authority of the judiciary to check that power is severely constrained under the proposed guidelines. The report departs from the existing Chapter 3 Guidelines for grouping offenses, yet offers no reason why those guidelines are unworkable in the environmental context. CMA is particularly concerned that these elements could result in unfair sanctions for unintentional violations of the environmental laws, further undermining the effort to promote uniformity and consistency in federal sentencing.

The AWG's punitive approach is also reflected in the aggravating factor to be applied to offenses committed by a person with "supervisory responsibility." Organizations would face increased penalties even if the individual whose acts are used to impute criminal liability was not a "high-level" official, or an individual with "substantial authority" as required in the existing Chapter 8 guidelines. Violations by first-line supervisors could thus subject a company to criminal sanctions, even though an internal compliance program establishes the intent of upper management to prevent illegal activities.

Given the significant departure from existing sentence law and practice recommended in the AWG report, and the harsher sentencing rules that would result, CMA suggests that the Commission set aside the report. A new review of environmental crimes and sentencing is warranted before the Commission proceeds with new guidelines.

D. The AWG Recommendations are a Disincentive to Effective Compliance Programs

CMA is particularly concerned that, if implemented, the AWG recommendations would discourage the development of effective internal compliance programs. That result certainly would be contrary to the AWG's intent.

A compliance program would no longer be weighed by the sentencing court, but rather would count toward mitigation only if the program met all seven of the AWG criteria. This requirement is unfair, and unrealistic. Organizations have spent considerable resources developing compliance programs that are unique to their corporate structures and culture, and which include mechanisms for effective monitoring, reporting and remediating potential problems. Those programs should not be lightly disregarded by the Commission. At a minimum, any new sentencing guidelines should allow substantial credit for each element of an effective program that is reflected in the internal compliance effort.

The AWG report properly recognizes that internal audit programs are an essential component of corporate compliance programs. Audits allow a company to honestly evaluate its compliance efforts and take steps to remedy apparent problems. Yet several aspects of the AWG report are a disincentive to honest self-evaluation efforts.

The AWG's commentary implies that failure to disclose an internal environmental audit may be considered a failure to cooperate with the government. Federal sentencing guidelines should recognize and give effect to the public policy principle that environmental self-evaluations will be more effective, and lead to greater compliance efforts, if they are afforded some protection from disclosure.

Moreover, the AWG recommendations make meaningless distinctions between "auditing" and "inspections," "monitoring," "tracking," and "checks." Professionals in the environmental auditing community regard "auditing" as the generic term that subsumes all of these activities, and most definitions of the term (e.g., 1986 EPA Audit Policy) are sufficiently broad to encompass all these activities. Existing internal corporate compliance programs similarly cover all these activities. CMA suggests that the artificial distinctions contained in the AWG report could be resolved by reference to "effective environmental management systems," thereby identifying the programs for what they are, and removing the possibility of confusion over what constitutes an effective "auditing" program. In addition, the distinction between "auditing" and "inspection" programs (as apparently used by the AWG) might refer to "assessments." The Commission might include a comment that clarifies that the section refers generically, not specifically, to "auditing" efforts.[1]

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[1] The AWG recommendations are rife with uncertainties caused by the lack of definition. For example, the report uses the term "economic gain" while the existing guidelines address "pecuniary gain." Are the terms synonymous? Both the AWG's initial draft and final report referred to the illegal export of "hazardous substances," the proper "disposal" of which could not be determined. The term "hazardous substances" is a term of art that applies to goods, not necessarily to the wastes that might be "disposed." As a result, it is not clear whether the AWG intends to focus on illegal exports of wastes or goods. At a minimum, these uncertainties are likely to cause considerable confusion for sentencing courts.

Earlier this year, the Coalition for Improved Environmental Audits (CIEA), in which CMA participates, submitted detailed comments to the Commission on the potential impact of the recommended Guidelines on internal corporate audit efforts. CIEA Comments, March 31, 1994. CMA endorses these comments, and commends them to the Commission's attention.

In summary, CMA believes that the AWG final recommendations constitute an inadequate basis on which to adopt additional sentencing guidelines applicable to organizations convicted of environmental crimes. CMA strongly recommends that the Commission undertake a new review of sentencing in this area. CMA looks forward to working with the Commission in the development of sentencing guidelines that reflect actual sentencing experience, culpable knowledge, and practical compliance considerations.

For your further information, we have enclosed a copy of CMA's comments on the Advisory Working Group's draft recommendations, dated May, 1993. If CMA may provide additional information on its comments, please contact Michael P. Walls, or James W. Conrad, Jr., of CMA's Office of General Counsel.

Sincerely,

David F. Zoll
Vice-President and
General Counsel

Enclosure

cc: USSC Commissioners

COMMENTS OF THE

CHEMICAL MANUFACTURERS ASSOCIATION

ON THE

WORKING DRAFT RECOMMENDATIONS

ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS
UNITED STATES SENTENCING COMMISSION

David F. Zoll
Vice-President and
General Counsel

Michael P. Walls
Senior Assistant General Counsel

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202/887-1100

Dated: May 7, 1993

EXECUTIVE SUMMARY

The Chemical Manufacturers Association (CMA) welcomes this opportunity to comment on the draft recommendations of the Advisory Working Group on Environmental Sanctions, issued March 5, 1993. CMA is concerned that the Group's recommendations compound multiple assumptions about environmental crimes and sentencing. These assumptions have lead to a recommended sentencing approach that is excessively punitive.

CMA is a non-profit trade association whose member companies represent 90 percent of the productive capacity for basic industrial chemicals in the United States. Our interest in the federal sentencing guidelines follows the industry's considerable experience in and commitment to implementing the federal environmental laws. Indeed, CMA's members have been leaders in establishing programs to maximize environmental protection through our Responsible Care® program.

The working draft assumes that environmental guidelines are required to ensure uniformity and proportionality in sentencing, which is the purpose of the Sentencing Commission's activities. However, there is no evidence of widespread disparities in organizational environmental sentences. In fact, the working draft will promote disparity in sentencing for environmental violations.

The Working Group's recommendations also appear to be built on the premise that environmental crimes are fundamentally different in nature and scope from other crimes. However, there is no evidence or logical reason to conclude that environmental crimes are so different that they warrant a radical departure from existing methods for determining applicable fines for organizations. Even where there are reasonable differences in environmental crimes that merit a different sentencing approach, the working draft adopts an misguided approach.

The Working Group recommendations will require resource-intensive proceedings, and may be a practical burden to sentencing courts. Economic gain calculations alone will force both defendants and the courts to pursue exhaustive post-conviction hearings.

The excessively punitive effect of the Working Group draft is further magnified through several other requirements which depart significantly from existing sentencing practice. These include 1) a mandatory limit on downward departures; 2) significant restrictions on mitigating factors; and 3) mandatory probation in virtually every environmental prosecution, among others. CMA's comments address these and other recommendations that, in our view, complicate the problems inherent in sentencing for environmental violations.

BEFORE THE
ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS
UNITED STATES SENTENCING COMMISSION

COMMENTS OF THE
CHEMICAL MANUFACTURERS ASSOCIATION

I. INTRODUCTION

The Chemical Manufacturers Association (CMA) welcomes this opportunity to comment on the draft recommendations of the Advisory Working Group on Environmental Sanctions. The Group's recommended approach would establish methods for determining criminal fines to be imposed on organizations convicted of environmental violations that are significantly different than the current fine guidelines for other organizational crimes. The recommendations would compound invalid assumptions about environmental crimes and organizational defendants, resulting in a sentencing approach that is excessively punitive, resource intensive, and intrusive in internal compliance programs.

CMA is a nonprofit trade association whose member companies represent 90 percent of the productive capacity for basic industrial chemicals in the United States. Our industry has considerable experience in implementing the federal environmental laws. Few other industrial sectors are so broadly and deeply regulated. More importantly, the U.S. chemical industry has a long-standing commitment to full compliance with environmental laws. Through voluntary initiatives such as CMA's Responsible Care® program, our member companies have made public commitments to improve their performance in health, safety and environmental protection. The industry's implementation experience and commitments are directly affected by the Working Group's recommended sanctions for environmental violations.

The criminal law serves several well-established policy purposes, which CMA fully supports. Criminal enforcement can punish egregious environmental violators, deter illegal behavior by others, protect against additional violations by a culpable defendant, and promote adherence to the regulatory structure. The working draft recommendations, however, appear to focus on a single policy purpose -- punishment -- without regard to the uniformity and proportionality goals set by Congress in adopting the Sentencing Reform Act of 1984. CMA believes that the Working Group should consider fundamental modifications in its proposed approach before forwarding its report to the Commission.

II. GENERAL COMMENTS

A. Guidelines for Sentencing Organizations Convicted of Environmental Crimes Are Not Necessary.

The Working Group has apparently assumed that mandatory guidelines for environmental crimes are necessary to ensure uniformity and fairness in sentencing. This assumption is simply not supported by the available evidence.

Only one reference to organizational sentencing is made in the otherwise comprehensive legislative history of the Sentencing Reform Act. See S.Rep. No. 98-225, 166 (1983); reprinted in 1984 U.S. Code Cong. & Ad. News 3183, 3349. The essential point of that legislative history is that the Congress recognized that statutory discretion is afforded judges in sentencing organizations. Judges are authorized to apply a range of penalties, including those deemed necessary under the circumstances. 18 U.S.C. at §3551(c). Significantly, §3551 is merely a list of authorized sanctions; the

provision does not require guidelines for its implementation. The legislative history makes clear that the Working Group is considering a sentencing-system that Congress never contemplated in establishing the program.

In comments filed on the U.S. Sentencing Commission's 1991 proposed guidelines for sentencing convicted organizations, CMA suggested that mandatory sentencing guidelines were not yet required. Our recommendation was based on the lack of any meaningful experience in sentencing organizations convicted of environmental crimes. There was no evidence to suggest that environmental sentences were in any way disproportionate or not uniform. The Sentencing Commission's internal study, Cohen, Report to the U.S. Sentencing Commission on Sentencing of Organizations in Federal Courts, Preliminary Draft (1988), concluded that "it is difficult to make statistically valid generalizations" about organizational crimes. Id. at 9. In the interim since the existing organizational guidelines were adopted, the record has not changed for environmental violations.

Indeed, the sentences in the relatively few environmental organizational cases seem to match up well with apparent intent and foreseeable severity of any harm. CMA recommends that the Group re-evaluate the decision to submit guidelines for the Commission's consideration. Policy statements, rather than mandatory guidelines, are a better way to promote uniformity and proportionality in environmental sentencing.

The lack of an effective, publicly-available record of the Working Group's supporting rationale makes it impossible for the interested public to make constructive comments on the proposal. No written

rationale accompanies the Working Group recommendations other than the sparse application comments following each section. It is not clear what data, if any, the Group considered in formulating its recommendations. The Group's view of environmental crimes and sentencing must, in short, be inferred entirely from the working draft provisions.

CMA strongly suggests that the Working Group's final recommendations to the U.S. Sentencing Commission squarely address the uncertain need for additional environmental fine guidelines. Environmental sentencing should be viewed as an iterative process that builds on the experience gained by sentencing courts; we encourage the Group to recognize this fact in its final report.

B. Environmental Crimes are not So Fundamentally Different that a New Approach to Sentencing is Warranted.

Another important, albeit erroneous, assumption appears in the Working Group recommendations: Environmental crimes are so different from other crimes that they warrant a significant departure from current sentencing practice. CMA believes that in most respects there is no reason for differentiating environmental crimes from other organizational violations. Certainly no reasons have been articulated, much less supported, by the Working Group.

Environmental crimes can, of course, be distinguished from "other" organizational crimes in several key respects. An extensive regulatory corrective and civil penalty system underlies the environmental area. Unlike other crimes where a defendant's pecuniary gain is roughly equal to the victim's loss, it is much more difficult to calculate gain and loss in the environmental area. Most environmental crimes are

"general" intent crimes, and do not require a specific state of mind in order to obtain a conviction.

These few distinguishing characteristics do not require significant upward departures from existing sentencing practice. To the contrary, it was a concern that the existing guidelines would impose excessively punitive fines (requiring, perhaps, downward departures) that caused the Commission to defer environmental sentencing for future consideration. See Zornow, Guidelines Don't Fit Environmental Cases, Nat'l L.J., Mar. 2, 1992 at 19.

The Working Group should recognize that many elements in the existing guidelines for organizational sentencing are equally applicable to environmental sentences. The aggravating and mitigating factors in the existing organizational guidelines should also apply to environmental sentencing. The process for imputing liability in an organizational context also applies to environmental violations. The conditions for probation -- discretionary under the existing guidelines -- are no different for environmental than for other crimes. CMA believes that the case for treating environmental crimes in a significantly different manner has not been made.

The draft recommendations also differentiate environmental crimes from other organizational violations in their disparate approach to punishment. For example, the recommendations would include costs attributable to the offense in addition to economic gain, a clear departure from current sentencing requirements under both the existing guidelines and the Alternative Fines Act. 18 U.S.C. §3571 et seq. Downward adjustments for mitigating factors would be limited to 50% of the base fine, ten times more stringent than is allowed for other

organizational sentences. Mitigating credit for an internal compliance program would be denied unless the program met all of the criteria established by the Group, another significant departure from existing practice, which affords a court discretion in weighing the effectiveness of the organization's program. CMA is not aware of any data suggesting that environmental crimes must be treated in this excessively punitive manner -- particularly when criminal sanctions for such violations are backed up by a comprehensive system of civil and administrative penalties. In brief, the draft recommendations will treat organizations convicted of environmental crimes unfairly.

C. The Proposed Recommendations are Complex and Impractical.

The Working Group recommendations also reflect a disturbing assumption that considerable resources are available for sentencing organizations convicted of environmental crimes. The assumption is reflected in a sentencing approach that will require courts to conduct extensive sentencing hearings -- hearings which may in fact be more complicated than the trial of the underlying offense. If anything, recent experience indicates that considerable additional resources will not be available to the courts for the complex, impractical approach recommended in the working draft. See, e.g., Budget Crunch Said to Imperil Civil Jury Trials, Leg. Times, Apr. 5, 1993 at 1.

One resource implication imposed by the working draft results from uncertainties in the use of key terms. How does "economic gain" in the draft differ from "pecuniary gain" used in the existing guidelines and

statute? What constitutes a "hazardous substance" or "other environmental pollutant?"[1]

Another resource implication arises from the valuation of economic or pecuniary gain. Congress and the U.S. Sentencing Commission have recognized that determining pecuniary gain or loss can unduly complicate and prolong the proceedings, and provided alternatives for sentencing organizations in these circumstances. 18 U.S.C. § 3571(d); U.S.S.G. § 8c2.4. The Working Group's recommendations do not recognize the potential complexity in calculating the social and environmental costs of the violations. These questions will only be resolved, in particular cases, following extensive and contentious supplemental proceedings.

The draft recommendations do not reflect several practical realities. The working draft looks to traditional "line management" in assessing the extent to which knowledge of a violation will be imputed to an organization, and in determining the effectiveness of internal compliance programs. See, e.g., Step II(a) ("substantial authority" personnel). However, traditional management structures are being abandoned by corporations seeking to meet the challenge of the global marketplace. See, e.g., T. Peters, Liberation Management (1992)(describing in many case studies the corporate trend toward small, integrated business units lacking traditional management

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[1]Problems with the latter question are exacerbated in Application Note 9, relating to the illegal export of hazardous "substances" when it cannot be determined that they were properly disposed of. The term hazardous "substances" is a term of art that applies to goods, not necessarily wastes (see 42 U.S.C. §9601(14)), so it is not clear what the Working Group's concern is.

structures). The distinction among personnel with or without "substantial authority" is increasingly blurred; the Working Group should consider affording sentencing courts the flexibility to account for organizational structures.

The draft guidelines hold organizations to standards of behavior that are unattainable as a practical matter. To the extent prior conduct is relevant (and it may well be), the guidelines should focus on knowing, willful violations of law.

The mechanistic approach adopted in the working draft increases the complexity, rather than objective uniformity, of the organizational sentencing guidelines. This approach is fundamentally at odds with Congressional intent as expressed in the Sentencing Reform Act. The Working Group's recommendations should promote uniformity and proportionality in sentencing for environmental violations. In order to achieve those goals, the recommendations must also be capable of practical application. As drafted, the recommendations are not oriented toward the practical realities of sentencing.

III. SPECIFIC COMMENTS

The excessively punitive effect of the Working Group assumptions is compounded in each of the sections that make up the working draft. In the following sections CMA comments on each of the recommended sentencing steps.

A. Base Fines Should be Determined Primarily by Reference to the Defendant's Culpability.

The working draft would establish the base fine at the greater of 1) economic gain plus costs attributable to the offense or 2) a percentage of the maximum statutory fine that may be imposed. The

apparent assumption is that environmental sentencing should focus on the harm resulting from the offense, rather than the degree of culpable mental state of the defendant. CMA believes that this approach to establishing the base fine will lead to grossly disproportionate and excessive sentences.

The existing guidelines determine the base fine as the larger of "pecuniary" gain or costs attributable to the offense. As noted earlier, CMA is not convinced that environmental violations are so different that gain and costs must be added together to determine a fair sentence. See, e.g., 18 U.S.C. §3572; U.S.S.G. § 8c2.4.

There are fundamental difficulties in quantifying the various factors in the economic gain and cost components in the proposal. For example, there is no provision detailing how the apparent risks of harm could be calculated, and how those risks are then quantified for the purposes of the base fine. CMA suggests that the difficulties inherent in the concepts of economic gain and attributable costs alone mandate a focus on culpability as a factor in base fine calculations.

The difficulties inherent in the process of assessing damages to natural resources have arisen in a number of contexts. See, e.g., Notice of Proposed Rulemaking for Natural Resources Damage Assessments under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 56 Fed. Reg. 19,752 (April 29, 1991). The fundamental flaw in such proposed assessment methodologies is that they fail to take account of the defendant's culpable knowledge. As a result, the technical assumptions made in quantifying the harm may cause the ultimate penalty to be completely out of proportion to the actual or foreseeable harm.

It is difficult to understand how including costs in the determination of the base fine serves as a deterrent, because they are to be calculated without any reference to the defendant's culpable state of mind. Many of these violations, after all, are essentially accidents -- committed without the specific intent attributable to other crimes. CMA believes that a fairer approach would be to use culpable knowledge as the primary component in the calculation of the base fine. In doing so, the Working Group will ensure that fines for environmental sentences more closely track the seriousness of the offense and a defendant's state of mind.

The Working Group's draft suggests that some form of economic model has been considered. CMA is part of a multi-association coalition which has submitted separate comments detailing problems with the so-called Economic Benefit of NonCompliance (BEN) model. CMA encourages the Working Group to take those comments into account in its further consideration of the base fine calculations. See also, Fuhrman, Getting It Right: EPA's 'Ben' Model Still Needs Work, 23 Env't Rep. (BNA) 3100 (April 2, 1993).

The Working Group has specifically requested comment on whether human health effects should be included in the calculation of the base fine. CMA opposes including specific measures of human health effects in the calculation of the base fine. To the extent that there are serious health impacts of an environmental violation, they should be accounted for in an aggravating factor.

CMA agrees with the Working Group that sentencing courts should have the ability to reduce the base fine in cases where "unnecessary or repetitious counts" appear. The potential for significantly

disproportionate sentences is most apparent in "per-day" sanctions for environmental violations, particularly under the recommended alternative in Step I(a)(2). Chapter 3 of the existing sentencing guidelines contains well-established principles for grouping offenses; CMA suggests that there is no sound policy reason to discard these principles for environmental crimes.

In the proposed alternative to the economic gain calculation, the maximum statutory fine is used to establish the fine range. The statutory maximum apparently includes the maximum penalty for every day of a multi-day violation. The proposal also incorporates the Alternative Fines Act, which could also be read to mandate excessively high maximum fines for these violations, at levels clearly out of proportion to the foreseeable harm and culpable behavior of the defendant. Depending on the circumstances, the results could easily violate the Commission's goal of proportionality in sentencing. The excessively punitive nature of this approach is exacerbated by the recommendation that downward adjustments resulting from grouping offenses be used "sparingly."

In short, the Working Group's base fine recommendation should be reworked.

B. Aggravating Factors Should be Consistent with Existing Practice.

CMA's primary concern with the aggravating factors identified by the Working Group relates back to the difficulties inherent in establishing a base fine. In CMA's view, the recommended base fine determination is so inherently flawed that it is not possible to

suggest meaningful percentage reductions for the aggravating factors identified by the Working Group.

CMA is concerned that the recommended aggravators place too much emphasis on harm, rather than organizational culpability. To the extent that harm is considered an aggravating factor, the focus should be on foreseeable harm as an element in assessing a defendant's culpable state of mind.

CMA also suggests that it is not appropriate to attribute the prior civil adjudications and criminal convictions of subsidiaries to a convicted organization, even in those instances where there is not "separate management." The prior civil penalty history of a company may in fact be relevant as an indication of an organization's culpability, but care must be taken in defining what is "similar misconduct" for the purposes of this factor. For example, prior adjudications for minor, civil reporting violations could be used as an inappropriate means of exacerbating a criminal sentence for failure to report. Moreover, in most environmental cases there will be no finding of culpable knowledge on the part of the defendant, yet that violation history will be accepted as an aggravating factor.

The aggravating factor for any civil or criminal violation of federal or state environmental law in the previous five years leads to other excessively punitive results. Step V of the working group recommendation similarly requires that a court impose an order of probation when it finds the organization has had similar criminal, civil or administrative compliance problems in the previous five year period.

Under our current statutory regime, virtually any violation has the potential to be considered a criminal act. Two simple wastewater permit excursions within five years can then lead to aggravating the base fine or mandatory probation; the possibility mounts geometrically with the number of facilities operated by an organization. Aggravation on the basis of prior compliance must be drawn very narrowly to avoid unfairness in sentencing.

CMA also recommends that the Working Group consider the potential effect of its recommended aggravating factors on administrative enforcement. Currently, administrative efforts constitute 90 percent of the federal government's environmental enforcement activities, with a very high percentage of those cases settled by administrative consent orders. With the potential that every administrative order will be considered as part of a defendant's "relevant" compliance history, there will be a greater incentive to litigate each and every administrative violation to the fullest extent possible, simply to avoid a determination of administrative liability used as a later predicate for aggravating a criminal fine.

The Working Group has requested comment on increases in the base fine for offenses which occur without a required permit. The draft defines the absence of a permit as any activity conducted without governmental authorization, and treats violations governed by permit more harshly than those governed by regulation or statute. CMA suggests deleting this aggravating factor. The violations charged in any particular case should already reflect the absence of any permit. The aggravator thus "double-counts" a defendant's behavior.