environmental crimes are malum prohibitum. This is not a sufficient reason for an entirely new chapter in the Guidelines and in any event the fact that environmental crimes are malum prohibitum does not support the proposal. If anything, the fines for malum prohibitum offenses should be lower than those under Chapter 8, which subsumes some malum in se offenses; however, the proposal produces fines that are considerably higher than under Chapter 8.

The simple fact is that a number of work group members did not like Chapter 8, for reasons wholly unrelated to environmental law. For example, they opposed a number of provisions allowing the court to consider the culpability of the organization, to exercise discretion or to depart from the guidelines.

B. The Work Group Never Defined Heartland Offenses and Failed to Base the Proposal on Heartland Offenses

Assuming that environmental violations might justify some special treatment in the Guidelines, at the outset, one might ask "what are we dealing with?"

In its development of the Guidelines, the Commission stated that it "intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes." U.S.S.G. Chap. 1, Part A4(b). This presumes that the guidelines are predicated on heartland offenses. But, in its deliberations, the work group never defined the heartland environmental offenses.

Toward the end of its deliberations, following the public meeting on the draft proposal, the work group adopted Section 2Q,

Offenses Involving the Environment, to define the offense level for fines to be imposed on an organization. However, wildlife offenses were not addressed. Even assuming that Section 2Q appropriately defines and weighs the offense, far more was necessary. The group should have discussed variations on heartland offenses, in the organizational context, to determine the range of possible violations within a category of offenses, what aspects of the violations were significant, and how the guidelines should deal with various factual variations. This was not addressed. The group simply adopted, for various offense levels, a new system of fines based on a narrow range of percentages of the maximum statutory fines, as set forth in § 9E1.1 (without any empirical basis, as explained in Part III), dramatically curtailed the assessment of organizational culpability and adopted in its place a series of aggravators and mitigators without a culpability multiplier.

### C. The Work Group Failed to Base the Proposed Guidelines on The Proper Fundamental Considerations of The Seriousness of the Offense and the Culpability of the Organization

The two primary determinants of the fine imposed on organizations for environmental offenses should be the seriousness of the offense and the culpability of the offending organization. The final draft fails on both counts. Simply put, it is far too narrowly drawn on the issue of seriousness and totally misses the mark on the issue of culpability.

Seriousness of the offense

With regard to the seriousness of the offense, the draft does not adequately consider the broad range of violations within each category of violations in Section 2Q. The nature, degree, and duration of the violations vary widely, as does the potential, if any, for harm. This is demonstrated by two examples with two variations in each. First, assume that there is a discharge or emission of a substance. The release could amount to a large volume of a highly concentrated, highly toxic pollutant. Alternatively, the release could involve a small volume of dilute and marginally toxic material. Moreover, the circumstances of the release in terms of its likelihood to cause harm could be very different.

As a second example, assume that hazardous substances are stored in violation of permits at two different facilities. At one facility, assume further that the likelihood of a release is very high (such as is the case where there are highly corroded drums of waste), the material is very dangerous if breathed or ingested, and there is no mechanism to contain a spill. At the second facility, assume further that the likelihood of a spill is very small, the material is not dangerous unless consumed in large quantities and that containment walls would retain any release.

In each of the above two examples, the first violation is far more serious than the second. However, Section 9E1.1 of the

proposal allows for only a minuscule range in the fine for the particular categories of violation.

Culpability of the Organization

With regard to culpability, the guidelines must consider the fundamental fact that the organization's liability is vicarious liability. Corporate shareholders and directors should demand that management takes environmental matters seriously. But management cannot, within reason, always assure compliance. Chapter 8 takes organizational culpability into account in Section 8C2.5 et seq. In contrast, the proposal does not include any aspect of Sections 8C2.6-8C2.8. For this reason alone, the proposed guidelines are fatally flawed. To make matters worse, the final proposal deleted consideration of scienter, which was a potential aggravator and mitigator in the draft proposal of March 1993. This appears to flow from the Government's narrow view that scienter is irrelevant in sentencing except as the scienter requirement in a criminal statute dictates whether the crime is a felony or a misdemeanor under 18 U.S.C. § 3571(c). The Government's position would result in the treatment of different violations in much the same manner.4/

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4/ This was exemplified by answers to two hypotheticals posed to EPA at the public hearing on the work group's draft proposal. In the first, it was assumed that a truck driver backed up to river at night and knowingly discharged wastes into the river. In the second, it was assumed that the same truck driver drove in a rain storm, was involved in an accident and that chemicals from the damaged truck were discharged through a storm drain into the same river. The EPA representative simplistically referred to 18 U.S.C. § 3571(c), and concluded that (other facts being the same) the fine in the first example (a felony under 33 U.S.C. § 1319) should be almost double that in the second (a misdemeanor under

## II. There are Major Unsupported Differences Between Chapter Eight and the Work Group Proposal

Although it was suggested that the work group consider the applicability of Chapter 8 to environmental crimes by organizations early in the process, the work group never seriously evaluated the advantages and disadvantages of this approach. There was never a thorough discussion or report on this important question. The work group proposal modifies Chapter 8 without good reason.

In this part, we will first identify twelve differences between Chapter 8 and the work group proposal. The import and consequences of many of these are self-evident and, therefore, we will not elaborate upon them. The problems presented by several of the modifications of Chapter 8 warrant explanation, which will follow. Finally, we will note some concerns about how the proposal fits with Chapter 8.

### A. There are Major Differences Between Chapter 8 and the Proposal

Some of the more significant differences between Chapter 8 and the proposal are:

1. The work group proposal largely eviscerates the consideration of organizational culpability. It eliminates minimum and maximum culpability multipliers and the determination of the fine from within a range based upon these multipliers (see U.S.S.G. § 8C2.6 to § 8C2.8).

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33 U.S.C. § 407), because the only relevant distinguishing factors between the two was whether the violation was a felony or a misdemeanor under 33 U.S.C. §§ 1319, 407, and the associated maximum fines under 18 U.S.C. § 3571(c) for felonies are over twice those for misdemeanors. To the Government, culpability is only marginally relevant. We strongly disagree.

2. The work group proposal abandons the consideration of culpability scores in § 8C2.5(b) et seq. and instead adopts a system of aggravators to increase and mitigators to decrease the offense level.

3. The work group proposal imposes substantial limitations on the credit that an organization that is not particularly culpable can receive; while the maximum possible reduction of the fine is a multiple of 0.05 in § 8C2.6, the floor is limited to a multiple of 0.5 in § 9E1.2(b) of the work group proposal.

4. The work group proposal substantially modifies the effective program to prevent and detect violations of law (§ 8C2.5(f) and Application Note to § 8A1.2(k)). In its place, the proposal requires that the organization implement a "Cadillac" program which must meet the "gold" standard to receive mitigation credit. The program in the proposal exceeds excellent compliance programs in existence today. It has too high a threshold for credit and too many mandatory "command and control" requirements.

5. The work group proposal modifies the culpability score elements in § 8C2.5(b) et seq. Some of the modifications, such as to the self-reporting, cooperation, and acceptance of responsibility section (§ 8C2.5(g)), are substantial.

6. The work group proposal eliminates departures in § 8C4.

7. The work group proposal dramatically changes the determination of a fine from a dollar amount based upon an offense level (§ 8C2.4(d)) to a percentage of the statutory maximum based upon the offense level (§ 9E1.1).

8. The work group proposal (§ 9E1.1) imposes far greater fines on offenses of a particular level than § 8C2.4(d).

9. The work group proposal restructures the multiple counts provisions of § 8C2.3(b), to undercut the existing limits on fines where there is count stacking.

10. The work group proposal may include a provision, disputed by a large number of its members, that the fine should not be lower than economic gain plus remediation costs and other damages (§ 9E1.2(c) and § 9A Application Note 2(b)). Also, remediation costs are recovered civilly. Therefore, this amounts to double recovery. This exceeds § 8C2.4, under which the base fine is the greater of gain or loss.

11. Insofar as cleanup costs are a loss, which is disputed, the work group proposal eliminates requirements in § 8C2.4 that the "loss" was caused intentionally, knowingly or recklessly.

12. The work group proposal modifies § 8D1.4 to make environmental crimes the only area in the law with mandatory conditions of probation (§ 9F1.3(d)).

B. Consideration of Culpability is Improperly Limited

As explained in point I.C. above, the culpability of the organization should be a major determinant of the fine. The work group proposal severely limits the consideration of culpability. In particular, the work group proposal (1) eliminates minimum and maximum culpability multipliers and the determination of the fine from within a range based upon these multipliers (see § 8C2.6 to § 8C2.8); (2) imposes substantial limitations on the credit that an organization that is not particularly culpable can receive; while the possible reduction of the fine is a multiple of 0.05 in § 8C2.6, the floor is limited to a multiple of 0.5 in § 9E1.2(b) of the work group proposal; and (3) insofar as cleanup costs are a "loss", which is disputed, the work group proposal eliminates requirements in § 8C2.4 that the "loss" was caused intentionally, knowingly or recklessly. Also, the work group proposal eliminates departures. There is no basis for these changes.

These modifications reflect the views of some work group members that the discretion of the sentencing courts should be almost totally curtailed in imposing sentences in the environmental area. In contrast to these views, two federal judges who appeared before the work group expressed the view that given the broad range of facts in environmental cases, there

should be more discretion in sentencing for environmental crimes than other crimes.5/

C. The Provisions for Multiple Counts are Unjustified

As discussed in Point I above, the proposal does not provide for the proper consideration of particular offenses by an organization. But the determination of an appropriate fine for a particular violation is just the tip of the iceberg. Many if not most cases could involve multiple violations. In dollar terms, in many cases the biggest issue will be the fine generated by multiple counts.

The majority of the work group representatives believes that there is an very real possibility that outrageously high fines could be dictated through count stacking by prosecutors if the guidelines do not allow the district court to eliminate unfair treatment that might flow from count manipulation. This problem has been recognized in the past by the Commission. U.S.S.G. Chapter 1 Part A(4)(a); Chapter 3D; Application Note 6, Example 7 to § 3D1.2. In the environmental area, the government could readily stack counts. For example, each drum of illegally disposed waste could be a separate felony. Likewise, each day of violation associated with a continuous discharge could be a separate felony. The work group devoted considerable effort to developing an approach to deal with multiple counts, but no

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5/ We accepted that judgement, but the work group did not. The work group's proposal allows for far less discretion by the sentencing court than Chapter 8.

mechanistic methodology that would work well in all circumstances was agreed upon.

The work group's proposal rejects Sections 8C2.3 and 3D. § 9E1.2(a) and Application Note Comment 1. In its place is a scheme that appears to count all charges of conviction but allows for a partial reduction of counts where the offense is ongoing and does not involve independent volitional acts, subject to a floor that does not exist in Section 3D. Ibid. It appears also to "double count" repetitive violations, which initially are given a greater offense level than non-repetitive violations. (Compare § 9B2.1(b)(2)(B)(i)(a) with (b); in Section 2Q, repetitive violations have a higher offense level) There are at least five major deficiencies with the work group's proposal.

First, the "independent volitional act" provision severely and improperly limits the applicability of the provision. It is understood that facilities commonly operate while they are being brought into compliance, unless the releases of pollutants present a real health or environmental problem. Frequently, they are subject to civil actions for injunctive relief to assure compliance and for penalties that eliminate the economic benefit of the violation and further punish the company. Those penalties generally are well under $25,000 per day. Under the proposal, the company would be fined at very high levels per day for each day of violation for as many days as the government sought fit to charge in its indictment (assuming a conviction). This would force many companies to close and lay off workers while necessary

pollution control systems were added or perhaps to close permanently.

Second, where there were no independent volitional acts, the proposal does not direct the district court to combine counts, and merely establishes a floor that gives subsequent counts less fine potential than earlier counts. See § 9E1.2(a). This is inappropriate. The government could partially circumvent the limits on count stacking in the proposal by charging very large numbers of counts.

Third, the proposal failed to mention some agreements among work group members that some offenses should be grouped. For example, the group agreed that if a discharge into navigable waters were charged under two different laws, the convictions under the two counts should be grouped.

Fourth, the proposal assumes that multiple violations are worse than single violations. However, it is clear that in at least some circumstances multiple violations are not worse than single violations. Consider two examples, with two variations in each. First, suppose that a company fills in 5 acres of wetlands in one day. Alternatively, assume that the company fills in one-half acre of wetlands over ten separate days. There is no environmental difference, yet the guidelines would require the sentencing court to impose a fine in the second example for ten "volitional" acts that is ten times that in the first example. Secondly, assume that a company illegally discharges 500 gallons of wastewater into a river on one day. Alternatively, suppose

that the company discharges 50 gallons of the same wastewater per day for ten days. If there is any environmental difference, it is that the first "high dose" situation is worse, yet the guidelines would require the sentencing court to impose a fine in the second hypothetical that is greater than the first.

Finally, as is evident, the fine is largely a function of the number of counts that the prosecutor decides to charge. This places too much discretion in the hands of prosecutors.

D. The Compliance Program is Excessive

The work group properly concluded that effective programs to prevent and detect violations of the law are valuable and should be encouraged and given considerable credit. There was no showing, however, that the programmatic elements set forth in Chapter 8 were inadequate.

The proposed compliance program is excessive. Within the work group, this program was described as a "Cadillac" program or one with a gold standard. To receive any credit, the organization must substantially satisfy each of many requirements. There are seven factors; within the seven factors, there are numerous subfactors. Some have high thresholds such as "to the maximum extent possible." The threshold for any credit -- substantial satisfaction of each subpart -- simply is too high. Some mitigation, at a reduced level, should be available for good faith compliance efforts that meet most but not all of the factors, including subfactors. Good faith compliance efforts

reflect a lack of organizational culpability that should be recognized and rewarded.

The program also contains too many command and control requirements. This runs contrary to recognized management approaches that establish objectives and leave it to the entity to fashion a program that efficiently achieves those objectives.

In operation, the promise of reduced fines in the proposal is likely to be a Trojan horse. It is expected that the Government will take the view that if there was a violation, the organization's compliance program was flawed. If the program is flawed in this sense, the Government will oppose the organization's request for any credit in sentencing. It appears likely that the prosecutors will turn every sentence and clause of the compliance program provision in Chapter 9 against the organization whose employees violated the law and urge that the organization is not entitled to any mitigation credit. The words in proposed Chapter 9 Part D provide a vehicle for such arguments.

E. The Proposal Does Not Dovetail with the Existing Guidelines

If separate guidelines are adopted for environmental crimes, they must dovetail clearly with other Chapters of the Guidelines including Chapters 2, 3 and 8.

It is not clear how the work group's proposal fits with some components in Chapter 8, such as restitution and remedial orders (see § 8A1.2), preliminary determination of inability to pay (see § 8A1.2(b)(2)(A)) or implementation of the fine (see § 8C3.1 et seq.).

If the proposal is adopted, it would produce inconsistent analyses and results in criminal actions that, in addition to the organization convicted of an environmental offense, involve individuals convicted of environmental crimes or involve non-environmental offenses. First, if the guidelines for organizations and individuals convicted of environmental crimes differ (which would be the case if the proposal were adopted) in an action where both an individual and organization are convicted, there would be inconsistent treatment of them in sentencing on environmental offenses. For instance, the rules on multiple counts would be different for the individual (§ 3D) and the corporation (§ 9E1.2). Second, where the organization is sentenced for a non-environmental offense under Chapter 8 and an environmental offense under Chapter 9, there would be inconsistent analyses. This could occur not only when the case involves both environmental and non-environmental violations, but also when the "same" violation is charged under environmental and

non-environmental statutes, such as is possible with the crime of falsification. (See e.g., 18 U.S.C. 1001; 33 U.S.C. § 1319(c)(4)). The proposal takes a so-be-it approach. See § 9B2.1 Application Note 2. This is inappropriate.

III. The Fines Generated by the Proposal are Excessive and Not Based on Historical Data

A. Insofar as Fines Are Based on Offense Levels, the Fines Are Excessive

Under 28 U.S.C. § 994(m), the Commission is required to consider historical information. The work group did not do this. There are three likely sources of information: (1) records in the Commission's files, (2) records maintained by the Department of Justice's Environmental Crimes Section and (3) records maintained by the Environmental Protection Agency. The work group never considered the Commission's information, the Environmental Crimes Section of the Justice Department failed to respond to written requests for information and the EPA produced a computer printout that was not useful.

The work group's proposal produces fines that are out of line with those calculated under Chapter 8. For example, consider the "common" environmental offense, which would involve an unpermitted release of a pollutant or a hazardous substance (which is almost anything) and have an offense level of 14 to 16. Under Section 8C2.4(d), the base fine is $85,000 to $175,000. Under Section 9E1.1 of the work group proposal, it is 40 to 70 percent at the statutory maximum, or $200,000 to $350,000 for a felony, without consideration of aggravators. There is no basis

for predicating the fine on the statutory maximum and no basis for this difference.

The work group's proposal was not "tested" against possible or historic fact patterns from the Commission's files. A version of the guidelines developed by the work group in the summer of 1993 which was similar in many respects to the work group proposal, was evaluated by Commission Staff. That version produced fines which were very high -- at the statutory maximum level in most instances.6/

B. Cleanup Costs Should Not be Included in the Calculation of a Fine

The work group was divided on whether and, if so, what clean up costs, in what circumstances, are "losses" that should be included in calculating a fine.

Before turning to the specific issues, the general issues need to be made clear. There is no question whether a court can order restitution, or should be able to increase the fine as a departure where a discharge of contaminants causes a substantial problem. The issue, first, is whether in addition to paying for a cleanup (restitution) or for natural resources damages, the organization should be required to pay a fine equal to at least the costs of the cleanup or natural resources damages (which could be very substantial). If the organization may be subject to a fine that is a mathematical function of the cleanup costs,

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6/ Memorandum of Barry L. Johnson of September 3, 1993.

the second question is what scienter requirements must be established to impose such a fine.

Professor Saltzburg of the George Washington University Law School, who appeared before the work group, addressed the first issue. In his view, cleanup costs and natural resources damages should not be the controlling factor in determining the fine. He noted, for example, that the fine for Ashland Oil's oil spill onto the Ohio River from a tank that accidentally burst should not have been substantial. This is not to suggest that Ashland should have escaped unscathed. Ashland had paid tens of millions of dollars for the cleanup and provision of water to affected municipalities. It also was fined, but the amount properly did not approach much less equal its cleanup costs.

Clearly, the cost of cleanup is not a direct function of the seriousness of the violation or of the organizational culpability. It should not be a direct gauge of the fine.

With regard to the second issue, Chapter 8 limits consideration of the "loss" to the extent that it was "caused intentionally, knowingly or recklessly." § 8C2.4(a)(3). The proposal deletes this mens rea requirement. While we do not agree that cleanup costs are a loss, insofar as they are treated analogously to a loss, there is no basis for the deletion of the mens rea requirement.

## CONCLUSION

The Commission should reject the work group proposal.

# COMMENTS OF CATERPILLAR INC. ON DRAFT ENVIRONMENTAL GUIDELINES PREPARED BY ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

Submitted May 10, 1993

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COMMENTS OF CATERPILLAR INC. ON DRAFT
ENVIRONMENTAL GUIDELINES PREPARED BY
ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

Caterpillar Inc. appreciates the opportunity to submit comments to the "Draft of 'Recommended Sentencing Guidelines Setting Forth Criminal Penalties for Organizations Convicted of Federal Environmental Crimes'" (the "Draft") Prepared by the Advisory Working Group on Environmental Sanctions for the U.S. Sentencing Commission.

Caterpillar is not currently subject to any civil or criminal proceeding whereby any governmental entity is seeking fines or sanctions against it. Caterpillar also takes compliance with environmental laws very seriously and is constantly striving to improve its compliance efforts. Nevertheless, Caterpillar is deeply concerned about the implications and effect of the Draft on corporate compliance programs, and about many concepts in the Draft which would unnecessarily impose unrealistic, inflexible and unduly harsh burdens upon the business community.

Further, while Caterpillar commends the efforts of the Advisory Group in attempting to grapple with an extremely complex problem, it is clear that the difficulties which led to the exclusion of corporate environmental penalties from the original Sentencing Guidelines (the "existing Guidelines") are frequently ignored in the Draft. In fact, many of the Draft's provisions aggravate and magnify the very difficulties which led to exclusion of corporate

environmental sentencing from the existing Guidelines in the first place.

In reviewing the provisions of the Draft, moreover, it is apparent that little consideration has been given to the circumstances in which those provisions would be applied. It must be kept in mind that any provisions adopted will always be applied after the fact, and will always be applied either in adversarial situations or in the quasi-adversarial context of settlement negotiations. Thus, the potential for abuse of such guidelines by prosecutors "working in the rosy glow of twenty-twenty hindsight" is enormous.

Caterpillar adopts and incorporates by reference herein the Comments submitted by the Business Roundtable and the National Association of Manufacturers[1]. Subject to the exceptions noted hereinafter, Caterpillar also adopts and incorporates the very thoughtful Comment entitled "Comments of Former Ranking Justice Department and EPA Officials on Draft Environmental Guidelines Prepared by Advisory Working Group on Environmental Sanctions" (the "Officials' Comment").[2]

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[1] The "BRT Comment" and the "NAM Comment", respectively.

[2] The NAM Comment, the BRT Comment and the Officials' Comment are hereinafter referred to collectively as the "Other Comments".

In the interest of brevity, and because the Comments mentioned above do not necessarily address the practical impact of alterations to requirements for effective compliance programs or the specifics of various aggravating and mitigating factors, Caterpillar will limit its comments to those areas.

## I. EXECUTIVE SUMMARY OF OBJECTIONS TO THE DRAFT AS A WHOLE

The problems with the Draft are numerous; however, they can be summarized as follows:

1. The limitation on fine reductions based on mitigation credits, and the lack of limitation on fine enhancements, are unwarranted and unduly harsh.

2. Treatment of gain and loss issues is draconian and fails utterly to address the real problems with the use of these concepts as bases for assessing corporate environmental penalties.

3. Many aggravating factors are worded so that they would apply automatically and almost universally; all mitigating factors are worded so that their availability is largely illusory.

4. The changes to all aggravating and mitigating factors

are uniformly harsher and increasingly inflexible.

5. The changed requirements for effective corporate compliance programs impose impossible management, recordkeeping, monitoring and internal reporting burdens. Many of the requirements are unworkable.

6. The scheme as a whole either fails to take privilege into account or could be applied to render the availability of privilege largely illusory as a practical matter.

7. The practical application of the scheme in the prosecutorial negotiation and plea bargaining context gives unwarranted and virtually unlimited power to prosecutors. The possibility for prosecutorial abuse is significant.

8. The Draft, as written, would operate to chill internal reporting of problems by individuals, would hamper internal investigations and would also impair the ability of counsel to render legal advice concerning the compliance status of the corporation.

9. Any benefit to be derived from the existence of an effective compliance program is largely rendered

meaningless by the existence of other enhancers which can render a corporation increasingly liable for the actions of even single, low level individuals without regard to the efforts of the corporation to prevent such actions.

10. No explanation has been given for the uniformly harsher treatment of corporate environmental crimes as is evidenced throughout the Draft.

11. When the Draft is compared with the bases for inapplicability of the existing Guidelines to environmental criminal penalties (discussed in the following Section), it is clear that those concerns were either ignored, inappropriately dealt with, or actually heightened by the Draft.

12. The Draft appears to be an attempt to "legislate" in the area of both environmental crimes and criminal sentencing. In particular, the Advisory Group appears to have neglected to take into account the limitations imposed upon its activities inherent in the very laws creating the Sentencing Commission.

## II. BACKGROUND: THE BASES FOR EXCLUSION OF CORPORATE ENVIRONMENTAL PENALTIES FROM THE EXISTING GUIDELINES

Several reasons have been given for the exclusion of corporate violations of environmental laws from the provisions of the existing Guidelines. Many of these are aptly discussed in Sections I and II of the Officials' Comment; all arise from fundamental factors which distinguish environmental regulation (and environmental crimes) from other forms of criminal activity. A brief summary of the more telling of those reasons is appropriate here.

### A. DIFFICULTIES WITH INCORPORATING AND MEASURING CONCEPTS SUCH AS GAIN AND LOSS ("GAIN AND LOSS DIFFICULTIES")

The use of pecuniary gain or loss in environmental sentencing is inappropriate for several reasons, including: (1) difficulty in measuring gain or loss, and unsuitability of these concepts in the sentencing context; (2) inappropriateness as measures of the seriousness of an environmental crime (e.g., expenditure of large amounts to abate small risks); (3) availability of extensive civil and administrative remedies.[3]

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[3] Because this issue is discussed extensively in the Other Comments, no further discussion of Gain and Loss Difficulties is warranted here. See Officials' Comment at 6-9; BRT Comment at 9-11; NAM comment at 10-15.

## B. DIFFICULTIES WITH THE ROLE OF MENTAL STATE IN SENTENCING ("INTENT PROBLEMS")

Difficulties with respect to mental state arise from the fact that many environmental laws, being "health and welfare" laws, differ dramatically from most other laws in that criminal liability may be imposed based upon negligence and even "strict liability" concepts. This trend has blurred, if not eliminated, the element of culpable intent which has heretofore been a required element for criminal liability. This problem is further aggravated whenever corporations are held liable for the acts of their employees. The existing Guidelines did not adequately address "mental state" problems with respect to corporate culpability for violations of health and welfare statutes.

## C. DIFFICULTIES OF COORDINATION BETWEEN INDIVIDUAL AND CORPORATE CULPABILITY ("COORDINATION ISSUES")

A closely related difficulty concerns the extent to which, and the circumstances in which, a corporation may be deemed criminally liable for the actions of its employees or agents. The concept of vicarious criminal liability is complex in and of itself; applying that concept to "strict liability" or "negligence liability" crimes, especially in situations involving low level or even rogue employees would be extraordinarily onerous.

## D. SELF REPORTING, SELF DISCLOSURE AND COOPERATION CONCERNS ("REPORTING CONCERNS")

In an area of the law where disclosure and reporting obligations abound, and where failure to report may be criminalized, imposition of additional penalties for failure to report may result in "double counting" of a crime, while any mitigating factors based upon self reporting are rendered largely illusory due to the fact that no mitigation credit is available if self reporting is otherwise "required by law".

A further, and extremely significant, aspect of self reporting and, more particularly, of "cooperation" requirements is the possibility that disclosure of information protected by the attorney-client or self-evaluative privileges may be compelled. To the extent that federal environmental laws and the Federal Sentencing Guidelines seek to encourage internal investigations and assessments of compliance issues, attempts to compel disclosure of communications made during those processes would have a very definite tendency to chill the very processes that are purportedly being encouraged. In effect, the message would be "we encourage you to evaluate and investigate yourselves, but we will then compel you to turn over your privileged reports and use them as a road map for further investigation and, possibly, further charges."

E. DIFFICULTIES OF APPLICATION WITH RESPECT TO SMALL CORPORATIONS

A concern has been expressed that the existing Guidelines would impose an unnecessarily harsh burden upon smaller organizations having limited resources.

## III. THE DRAFT IMPOSES A STRUCTURE THAT IS UNIFORMLY HARSHER THAN THAT OF THE EXISTING GUIDELINES, AND FAILS TO ADDRESS ANY OF THE BASES FOR EXCLUSION IN ANY MEANINGFUL FASHION

The following analysis of the significant departures of the Draft from the provisions of the existing Guidelines demonstrates that: (1) the provisions of the Draft are uniformly harsher and more inflexible than those of the existing Guidelines; (2) the Draft largely ignores the Bases for Exclusion discussed in Section II, supra; (3) where the Bases for Exclusion are addressed in the Draft, the difficulties with the existing Guidelines are not dealt with in a manner which minimizes those difficulties. To the contrary, those problems are frequently aggravated; and (4) the one new provision which specifically addresses one issue in a positive manner (namely, a new mitigating factor based upon remedial efforts) is so limited in its availability that it is rendered largely illusory.

The uniformly more draconian provisions of the Draft have prompted the following conclusions in the Officials' Comment:

> 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.

Id. at 20.

## A. THE NATURE AND EFFECT OF REQUIREMENTS FOR EFFECTIVE COMPLIANCE PROGRAMS

### 1. Increased Detriment for Not Having A Compliance Program[4]

As was the case with the existing Guidelines, the Draft provides the possibility of a mitigation credit for an effective compliance program. (Step II(a)). However, unlike the existing Guidelines, the Draft would make the absence of an effective compliance program an Aggravating Factor. (Step II(i)).

No reason is given for inclusion of this provision. Further, Caterpillar is aware of no law which makes it a civil or criminal

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[4] The practical effect of the more limited benefits to be derived from having an effective compliance program is discussed in the Other Comments. See, e.g., NAM Comment at 18-20; BRT Comment at 13-14; Officials' Comment at 20. Accordingly, it will be discussed only peripherally here.

offense to fail to have a compliance program. To increase a fine or criminal penalty on the basis of something (the absence of an environmental compliance program) which is not and never has been a basis for a finding of culpable conduct, has significant constitutional ramifications and also defies common sense.

2. More Draconian Requirements for An Effective Compliance Program

Attachment A sets forth in detail the more significant differences between the requirements for an effective environmental compliance program described in Step III of the Draft and those set forth in Section 8A1.2, Application Note 3(k) of the existing Guidelines[5]. Those differences include, but are not limited to, stricter documentation requirements, "management" requirements, disciplinary requirements, audit requirements[6],

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[5] By this discussion, Caterpillar does not wish to create the impression that it opposes compliance programs or responsible environmental management. To the contrary, and as has been stated previously, Caterpillar takes compliance with environmental laws very seriously and is constantly striving to improve its environmental compliance efforts. Further, subject to the exceptions noted herein, Caterpillar generally supports the standards set forth in Application Note 3(k) to Section 8A1.2 of the existing Guidelines. What Caterpillar takes exception to here is the Draft's attempt to impose very harsh and specific management, reporting, monitoring and recordkeeping requirements upon all organizations throughout the United States in a manner which is inflexible, unduly burdensome and, to a great extent, unrealistic and unworkable.

[6] The Draft's imposition, for the first time, of a requirement of periodic external evaluations of the management of a large corporation (Step III(g)) is especially frustrating when it would be imposed even in the absence of a previous environmental crime and when no reason is given for this change.

performance measurement requirements[7] and reporting requirements. The more severe charges, as well as the burdens imposed by these changes, may be summarized as follows:

a. Documentation requirements

First, the myriad requirements for documentation and for elements of a compliance program mean that any corporation seeking to rely on the program must justify and document all aspects of its program. See attachment A.

For example, the Draft imposes a requirement that the environmental compliance aspects of even routine work must in all circumstances be "verified and documented". (Step III(b)). This places an unreasonable and unjustified recordkeeping burden on corporations.

More importantly, the documentation and justification required to establish an environmental compliance program would not

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[7] Devising any reasonably reliable, workable and realistic means for measurement of environmental compliance (as required under Step III(a)) is exceedingly difficult. Measurement of environmental performance is a field which is in its infancy, and meaningful and objective measurement standards are extremely difficult to develop or implement. Accordingly, development of such means may take years.

necessarily be limited to documentation concerning the activity in question. To the contrary, such a requirement could easily be used as the basis for a fishing expedition into the compliance status of other areas of an organization which are completely unrelated to the subject of a given proceeding.

The use of a compliance program would also have a substantial chilling effect on self-auditing programs, as it is possible, if not likely, that prosecutors would routinely request documents protected by the attorney client or self-evaluative privilege as a requirement for establishing the existence of an effective compliance program. Further, it is possible that environmental enforcement officials could routinely refuse to consider whether an effective compliance program exists unless the subject corporation waives the privilege.

As an example, XYZ corporation has an audit program which it uses for self evaluation and for correction of environmental problems. That program is run under the direction of in-house counsel, and the report is intended to, and does, provide the basis for in-house counsel's advice to management concerning the compliance status of audited facilities. In the course of an administrative proceeding, XYZ seeks a mitigation credit on the basis of the existence of an effective compliance program and otherwise cooperates with the government. The government refuses to agree to the availability of such a credit unless XYZ waives privilege

and produces all reports containing the results, the contents of audits and internal investigations (whether or not they relate to the offense or the facility in question). Further, the government informs XYZ that if the privilege is not waived, it will be put to substantial effort and expense in preparing for sentencing hearings, etc. and that XYZ will therefore be deemed not to have cooperated with the government and will lose the "cooperation" credit as well. XYZ is thus in the "Catch-22" situation of either waiving both the attorney-client and the self-evaluative privilege or losing two otherwise available mitigation credits. It is even possible that the overly zealous prosecutor would seek an increase of the penalty due to the "aggravating factor" of lack of an effective compliance program.

Such a scenario has other implications which will go far beyond that particular action. In particular, waiving such privilege will have a chilling effect on the free flow of information in

future audits and internal investigations, and will hamper in-house counsel's ability to render legal advice to management or to correct undisclosed problems.[8]

These potential problems have existed with respect to the existing Guidelines, and were one of the bases for making the existing Guidelines inapplicable to corporate environmental penalties. These problems, however, have not been addressed in the Draft and should be addressed.

b. The Requirement that Standards And Procedures Must Be "Necessary" to Achieve Compliance

Under the existing Guidelines, organizations must establish standards and procedures that are "reasonably capable of reducing the prospect" of noncompliance. (§8A1.2, Application Note 3(k)(1)). Further, "[f]ailure to prevent or detect the instant offense, by itself, does not mean that the program was not

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[8] The Draft suggests that a corporation, as a part of its own disciplinary measures, may be required to report suspected misconduct on the part of its employees to appropriate regulatory authorities. (Step III(f)). Such a requirement would have a substantial chilling effect on internal reporting of problems, and especially of "negligence" crimes. For example, if a potential violation results from negligence and an employee knows that, by reporting it to his or her superiors, there is a chance that he or she will be turned over to the authorities for criminal prosecution, that employee will naturally be extremely reluctant to report the problem. Thus, the problem will go unremedied and may get worse over time.

effective." Id., Application Note 3(k).[9]

In Contrast, the Draft requires that the standards and procedures adopted by a corporation must be "necessary to achieve compliance" (Step III(a)).

The result is a requirement which, when applied in a real-world setting, renders the requirements of Step III unattainable. This requirement is especially burdensome given the complex compliance issues that large companies must address.

Further, this requirement would certainly not achieve any meaningful coordination between individual and corporate culpability. To the contrary, this provision states, in effect, that if an individual commits an environmental crime in his

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[9] The Draft also suggests that a corporation must require "that employees . . . report a suspected violation to appropriate officials within the organization, and that a record . . . be kept by the organization of any such reports" (Step III(b)) imposes a standard which is, for all practical purposes, impossible to meet.

In typical situations in large manufacturing plants, if someone accidentally punctures a drum containing hazardous materials or drops and breaks a bottle containing a hazardous material, it could be extremely difficult to ascertain his or her identity, especially if other employees become aware that the "at fault" employee's name may be given to government authorities if his involvement is later discovered (e.g., Step III(f) of the Draft suggests that as a "disciplinary mechanism", it may be necessary to turn the employee's name over to enforcement agencies). Further, it would be impossible, as a practical matter, to discipline an employee for failure to report a suspected violation.

capacity as an employee, any compliance program of the corporation employing him will automatically fail to meet Step III standards.

c. Management Involvement

The Draft also requires that "in the day to day operation of the organization, line managers, including the executive and operating officers at all levels, [must] direct their attention . . . to . . . improving the organization's compliance with environmental laws." Such managers would also be required to "routinely review . . . reports, direct the resolution of identified compliance issues, and ensure application or the resources and mechanisms necessary to carry out a substantial commitment." (Step III(a)).

The Draft would also require that "[t]o the maximum extent possible . . . the organization [must analyze] and design . . . the work functions assigned to its employees and agents so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization." (Step III(b)).

These requirements describe an unachievable ideal and attempt to make it a requirement for all organizations. It is a certainty that no organization would ever be able to achieve this standard,

especially when such organization's efforts will typically be viewed in the context of twenty-twenty hindsight.

In fact, these requirements appear to be an attempt to impose the Advisory Group's environmental management concepts, which can best be described as a slapdash borrowing of certain elements of "Total Quality Management", upon every "line manager" at every organization which exists in United States. Such imposition blithely ignores the fact that management methods, responsibilities, authorities and constraints will vary from level to level, process to process, product to product, organization to organization, etc. The approach taken in the Draft is inflexible and unworkable. In addition, the Draft apparently assumes that for a compliance program to be effective, such management oversight must be on a "day-to-day", "routine" and apparently constant basis. Again, this assumption renders the requirements in Step III unworkable.

Finally, while these provisions arguably "address" issues of coordination between individual and corporate culpability, they appear to do so in such a fashion that any misconduct by an individual would almost universally be deemed a basis for corporate culpability as well, because any existing management systems would again be almost automatically deemed inadequate.

d. Imposition of Draconian Monitoring and Reporting Requirements

The continuous on-site monitoring requirement of Step III(c)(ii) of the Draft is impossible to meet and is potentially incredibly expensive. For example, doing spot monitoring of every hazardous air pollutant or criteria pollutant under the Clean Air Act for one source of emissions (such as a boiler) could easily cost $20,000 to $40,000. A recent Wall Street Journal article reports that it took months to monitor all potential emissions sources at a given facility. What Really Pollutes? Study of a Refinery Proves an Eye-Opener, Wall St. Journ., Mar. 29, 1993, at A1 col. 1. In many cases, there was no protocol or accepted test for such monitoring. Stated another way, audits of the scope envisioned in the Draft are impossible to perform using any kind of a cost effective basis or in any kind of meaningful time frame.

3. The Circumstances of Application of these Standards Will Result in Universal Inapplicability

In addition, consideration must be given to the circumstances in which compliance programs will be reviewed. They will always be reviewed in hindsight and will always be reviewed in the adversarial context or, at the very least, in the quasi-adversarial context of settlement negotiations. For these

reasons, and by virtue of the inflexible and virtually impossible to meet standards that the Draft would impose, it is indeed likely that the "availability" of a compliance program as a mitigating factor would amount to an illusion.

### 4. These Changes Do Not Reduce (And May Aggravate) the Difficulties With The Existing Guidelines Which Led To Exclusion of Corporate Sentencing for Environmental Crimes In The First Place

Finally, the Bases for Exclusion discussed in Section II, supra, are not addressed in any meaningful manner by the imposition of draconian requirements for an effective environmental compliance program. For example, the enhanced requirements further eliminate any meaningful distinction between civil and criminal misconduct (i.e., questions concerning the required mental state for "criminalizing" activities are not addressed or resolved by toughening these requirements). Problems with definition or loss or gain are also not resolved by making these requirements tougher. Questions or problems concerning the coordination between individual and corporate sanctions are also not addressed by the tougher requirements. Finally, while questions concerning the relevance of the size of a corporation are addressed in a limited way in Comment 3 to Step III of the Draft, the original Guidelines already stated that the formality and pervasiveness of a program would vary with the size of a corporation. § 8A1.2, Application Note 3(k)(i). As a result, stiffening and toughening these requirements for all corporations in the Draft does not

address these concerns in any meaningful way.

In actuality, the hindsight application of the requirements for an effective compliance program proposed by the draft increase the difficulties with coordination between individual and corporate culpability by effectively making it impossible for a corporation to have an effective compliance program. In addition, other aggravating factors, such as management involvement, scienter and concealment aggravators, fail to take the existence of a compliance program into account and base mandatory aggravation factors upon culpable conduct of even one individual, regardless of rank and regardless of any meaningful corporate "involvement" in the misconduct.

In sum, Step III of the Draft attempts to impose requirements for an effective compliance program that will, especially using "hindsight" application in the prosecutorial context, be impossible to meet. These requirements, moreover, either do not address or actually heighten the Reporting Concerns, Intent Problems and Coordination Issues which are some of the Bases for Exclusion of corporate environmental sentencing from the existing Guidelines. Accordingly, Step III should be scrapped.

## B. AGGRAVATING AND MITIGATING FACTORS

The Draft, like the existing Guidelines, provides that the base fine can be adjusted by application of various aggravating and mitigating factors. (Step II). However, the Draft uniformly modifies these factors to make application of the factors harsher and to provide for harsher penalties. In fact, the Draft would almost universally compel the application of some aggravating factors and the inapplicability of some mitigating factors.[10]

Again, these modifications either fail to adequately address the Bases for Exclusion discussed in Section II, supra, or they compound the problems that had led to exclusion of corporate environmental sentencing from the ambit of the existing Guidelines in the first place.

### 1. Management Involvement

The original Guidelines provide for an upward adjustment if a "high level" individual was involved, or if "tolerance of the offense by substantial authority personnel was pervasive throughout the organization." (§ 8C2.5). The Draft, on the other hand, would increase the penalty imposed if a single "substantial

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[10] See also, BRT Comment at 12-13.

authority" individual or a "corporate manager" is involved. (Step II(a))[11]. The accompanying comments also indicate that involvement of anyone other than a "loading dock foreman or night watchman" could trigger the aggravator. This factor further fails to take into account the degree of culpable intent of the employee, situations involving rogue employees, or the existence of an effective compliance program.

Again, no reason is given for these changes.

Finally, these changes do not reduce concerns based upon issues of scienter as an element of culpable corporate conduct or difficulties of coordination between individual and corporate culpability. To the contrary, by increasing fines to corporations if any employee other than a night watchman was "involved", regardless of questions of intent, application of this aggravating factor would effectively be automatic and universal. Stated another way, the Draft itself has fully justified the concerns of the business community that Sentencing Guidelines might be automatically used to hold corporations accountable for the actions of very low level individuals,

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[11] To the extent that "substantial authority figures" are not "line management" and have no authority in the area wherein a violation occurs, it is nevertheless arguable under Step II(a) that the aggravator would apply if even one such figure is deemed to have "condoned" or "recklessly tolerated", not the crime itself, but rather, "conditions which perpetuated a significant risk that criminal behavior . . . would occur." Application of this standard could well be universal.

regardless of the element of intent and in spite of everything a corporation might reasonably be expected to do to prevent such occurrences.

2. Scienter

The Draft imposes another change in this area. The existing Guidelines provide for an aggravator if an "individual within high-level personnel of the organization" participated in the conduct or if "tolerance . . . by substantial authority personnel was pervasive throughout the organization." (§ 8C2.5(b)). The Draft essentially transforms this aggravator into two aggravators: a "Management Involvement" aggravator (discussed in the preceding section) and a separate "Scienter" aggravator. (Steps II(a) and II(d)). Further, the scienter aggravator may be applied if even one employee, regardless of rank, participated.

Other problems, which render the application of this aggravator almost universal, stem from the definitions of the culpable conduct and intent used in Step II(d). First, the "knowledge" element applies to a person's "engaging in conduct". Simply stated, it is impossible for a person "unknowingly" to engage in conduct unless that person is mentally incompetent, sleepwalking or not in control of his body. Thus, the only real element of "intent" is whether the person took an action "under circumstances that evidenced at least a reckless indifference to

legal requirements." Since the term "reckless indifference" is undefined, it is open to interpretation by judges and prosecutors. Further, in the area of public health crimes, it is not difficult to imagine an over-zealous prosecutor taking the position that failure to know or look up the contents of any environmental statute by a person engaged in production or handling of waste would constitute "reckless indifference to legal requirements." See, e.g., United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ("where obnoxious waste materials are involved, . . . anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"). Consequently, there is again the significant potential that attempted application of this standard by prosecutors would be both automatic and universal.

Yet again, no reason has been given for this change. Yet again, difficulties with scienter and with coordination between individual and corporate culpability are dealt with in such a harsh, inflexible and universal fashion that the concerns of the business community have not been reduced, but have instead been fully justified.

Finally, the juxtaposition of this aggravator with the mitigating factor that is available only when "no employee" had culpable knowledge (Step II(m)) (and assuming the Step II(m) Absence of

Scienter mitigation factor could and would actually be applied in some situations) implies that base fines would either be automatically enhanced or automatically reduced. This not only raises questions as to what the base fine is supposed to be, it also is at odds with the purpose of the Sentencing Commission to provide an element of certainty and predictability in the area of criminal penalties. A scheme whereby fines can oscillate up or down depending upon the presence or absence of scienter or the presence or absence of an "effective" compliance program manifestly does not serve this purpose.

### 3. Concealment

The existing Guidelines provide that "obstruction of justice" on the part of the "organization" is an aggravating factor. (Step II(g)) The Draft extends this aggravator to concealment by "any employee", regardless of that employee's level and regardless of whether such conduct occurred in spite of the existence of a compliance program designed, among other things, to minimize that possibility. (Step II(g)). Further, the Draft does not provide an exception in the case of rogue employees. To the contrary, the comment to this section in the Draft indicates that the aggravator would apply even in situations where one employee withholds information from another employee. There is also an indication that such "concealment" also can be used as an

indicator of culpable knowledge under the "scienter" aggravator. See Comment to Step II(d).

The impact of this provision is that a corporation would be penalized for the actions of dishonest employees in spite of its best efforts to prevent such conduct. Application would also be virtually automatic and would apply almost universally, even in cases where, for example, one employee, regardless of rank and regardless of the existence of policies or procedures reasonably designed to prevent or deter such conduct, withholds, even from another employee, information that is required to be reported.

Again, no reason is given for this change. Again, this change fails to reduce, and, in fact, heightens and justifies, concerns with issues of corporate "scienter" and lack of coordination between individual and corporate "wrongs". Finally, application would be harsh and inflexible. The best efforts of corporations to prevent such problems would not count.

### 4. Absence of Permits

This aggravator (Step II(g)) has no analogue under the existing Guidelines, and no reason has been given for its inclusion. It does not address any of the Bases for Exclusion discussed in Section II, supra.

More importantly, existing legislative and regulatory scheme under most environmental laws is based upon the existence and contents of permits. For example, the Clean Air Act's permitting provisions encourage the states to incorporate the requirements of that Act into the provisions of all permits. 42 U.S.C. § 7661c(f)(1). It does not require a great stretch of the imagination to envision a situation in which an overly zealous prosecutor takes the position that violation of permit conditions are the equivalent under the Draft to an activity that "occurred without a requisite permit". This possibility, coupled with the suggestion in the comment to Step II(j) of the Draft that the aggravator would also apply "to situations covered by a federal, state of local permit, but where the permitting authority would never issue a permit for the type of conduct in question," would render this aggravator applicable in virtually every situation which involves violations of environmental laws.

In short, this is another aggravator whose application would be automatic and universal and which does not address <u>any</u> of the Bases for Exclusion. It should be eliminated.

5. <u>Prior Civil/Criminal Compliance History</u>

The provisions of the existing Guidelines took into account the fact that crimes of "separately managed businesses" should not be

a part of prior civil or criminal compliance history. (§ 8C2.5(c)). That requirement is eliminated in the Draft with respect to civil compliance issues. (See Steps II(e), II(f)). Further, the provisions of the existing Guidelines apply in the Civil context only if the prior adjudication involved "similar misconduct", while those provisions in the Draft would also apply to any "prior civil or administrative adjudication." In the criminal context (and again, unlike the existing Guidelines), the prior adjudications would apply with respect to violations of any "federal or state environmental law", regardless of whether such violation involved similar misconduct.

As an example of the potentially harsh effect of these changes, if a wholly owned, but separately managed, subsidiary of a corporation located in Maine executes a consent decree involving a civil fine for recordkeeping violations, and if, four years later, a separately managed division of the parent corporation is found guilty of a wholly unrelated permit violation, the Draft would require an automatic enhancement. Such result would not occur under the original Guidelines.

Further, these changes do not address the concerns that led to the inapplicability of the existing Guidelines to environmental penalties, in that it does not adequately address issues of intent, and fails completely to address Reporting Concerns, issues concerning cooperation, Gain or Loss Difficulties or

Coordination Concerns.

## 6. Violation of an Order

While this section is not substantively different from the provisions of the existing Guidelines, it is nevertheless problematic in that it fails to take into account the existing practice of environmental officials of utilizing civil or administrative Consent Decrees as a settlement device. Those Consent Decrees typically contain provisions to the effect that a corporation will not again violate the particular statute in question. These provisions could arguably last forever. Accordingly, it could create a difficult and, it is believed, unanticipated situation wherein an aggravating factor would automatically be applied if a separate subsidiary or division in a different state was involved, however inadvertently, in a violation of that law five, ten or even fifteen years down the line. Such application would be unduly harsh, and the possibility of such application should be guarded against by appropriate drafting.

## 7. Self Reporting

One of the bases for making the existing Guidelines inapplicable to corporate environmental penalties concerned questions about

reporting requirements. During the development of Chapter Eight of the original Guidelines, the Commission concluded that because "self reporting of criminal conduct may open the door to a criminal sanction, civil liability and adverse effects to reputation," it is "important to provide a clear and definite incentive for firms to self-report offenses." Methodology Used to Develop Offense Level Table and Assign Weights to Mitigating Factors in Draft Chapter Eight, U.S. Sentencing Commission Memorandum 29, n. 38 and at 26, n.7 (Nov. 16, 1990). Nevertheless, the Draft renders the mitigation credit unavailable in situations wherein "reporting of the offense [is] otherwise required by law." Step II(1)(1). Thus, in the context of environmental laws, which frequently impose mandatory reporting obligations, availability of this mitigating credit is rendered largely illusory. Accordingly, the incentive to self report is also rendered nonexistent.

Another problem stems from the availability of credit for "fully cooperating". In particular, the problem stems from how regulatory officials may interpret the term "fully cooperate".

In the previous example of XYZ corporation, it is possible that government officials would routinely refuse to agree that mitigation credits for an environmental corporate compliance program are available unless XYZ waives privilege and produces the contents of all audits and internal investigations. Further,

it is possible that such government officials would inform XYZ that if the privilege is not waived, XYZ will be deemed not to have cooperated with the government and will lose the "cooperation" credit as well. XYZ is thus in the "Catch-22" situation of either waiving both the attorney-client and the self-evaluative privilege or losing this mitigation credit.

These potential problems have existed with respect to the existing Guidelines, and were one of the bases for making the existing Guidelines inapplicable to corporate environmental penalties. These problems, however, have not been addressed and should be addressed.

8. Remedial Assistance

Inclusion of this provision is a laudable attempt to encourage responsible behavior on the part of organizations. Unfortunately, the availability of a restitution credit is limited to restitution "in addition to any legally required restitution or remediation." (Step II(n)). Due to the availability of injunctive, administrative and third party remedial and restitutionary relief, this limitation will likely render the availability of this mitigation credit largely illusory.

## C. OTHER ASPECTS OF THE DRAFT'S SCHEME (SPECIFICALLY, ITS INTRUSIVE AND UNWARRANTED "PROBATION" REQUIREMENTS.)

There are three other aspects of the Draft's sentencing scheme which would ordinarily merit additional comment. Those aspects are the limitations on fine reductions without corresponding limitations on enhancements, count stacking, and the probationary aspects of the Draft. By virtue of the discussion of these issues in the Other Comments,[12] discussion here will be limited to a brief discussion of the unwarranted effect of the "probation" recommendations on organizations.

Specifically, the intrusive nature of the Draft's probation provisions is evidenced by the language of the probation provision calling for an effective compliance program. If, at the time of sentencing, the corporation is found not to have an effective compliance program, the provision expressly calls for government review and court approval of any compliance program proposed by the corporation, as well as court retention (at the Company's expense) of experts to design it if the organization's program is not "satisfactory". Further, the Draft provides for court orders requiring: (a) thorough review of the defendants

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[12] With reference to probation, see BRT Comment at 15-17; NAM Comment at 20-21; Officials' Comment at 18. With reference to count stacking, see NAM Comment at 15-17; Officials' Comment at 15; BRT Comment at 17. With reference to the lack of limits on enhancements, see BRT Comment at 12; NAM Comment at 4.

books and records; (b) periodic reports to "any person or entity designated by the court"; (c) inspections of its facilities; and (d) "testing and monitoring" of its operations. (Step V(c)(4)).

These provisions amount to an egregious attempt to impose external controls upon corporations, where the sole basis is lack of an effective compliance program (presumably measured by the impossible standards set forth in Step III of the Draft).

## IV. SUGGESTED ACTIONS

The Officials' Comment generally suggests that reference to the existing Guidelines, with modifications as indicated, would be sufficient. Caterpillar is on the whole in agreement with those suggestions. However, Caterpillar would go further to suggest that unless future efforts provide realistic resolutions to problems such as problems with privilege, unworkable requirements for compliance programs, problems with whether Consent Decrees should be counted as prior civil or criminal adjudications, whether provisions of Consent Decrees should constitute "Orders" which might give rise to fine increases in the event of future "violations", aggravating factors whose applicability could be universal, mitigating factors which are largely illusory,

problems with corporate "knowledge", realistic and flexible coordination between individual conduct and corporate culpability and problems with reporting and cooperation requirements, the result will remain unworkable.

If these concerns cannot be adequately addressed, Caterpillar would suggest that Guidelines along the lines envisioned are not the answer, and that the area of corporate environmental crimes may be an area which is so complex, and which is so manifestly not susceptible to resolution by use of Sentencing Guidelines, that the Advisory Group should consider the possibility of utilizing policy statements that can act as guides to the federal Courts, rather than utilizing inflexible and otherwise unworkable Sentencing Guidelines.

Respectfully submitted,

Caterpillar Inc.

ATTACHMENT A

DIFFERENCES BETWEEN ORIGINAL AND
DRAFT COMPLIANCE PROGRAMS

1. The original Guidelines require adoption of standards and procedures which are "reasonably capable" of reducing the prospect of criminal conduct. The original Guidelines also contemplate that criminal actions by employees will not automatically result in a program's being deemed ineffective. On the other hand, the Draft requires that the policies and procedures must be "necessary to achieve environmental compliance."

2. The original Guidelines provide that a corporation should "hav[e] in place and publiciz[e] a reporting system whereby employees and other agents could report criminal conduct to others within the organization without fear of retribution." The Draft makes it a "requirement that employees report any suspected violation to appropriate officials ... and that a record will be kept by the organization of such reports."

3. The Draft requires that "to the maximum extent possible ... the organization has analyzed and designed the work functions . . . so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization." The original Guidelines impose no such requirement.

4. The Draft, in its section on Disciplinary Procedures, includes the gratuitous requirement that the organization, as a part of its disciplinary activities, may be required to report "individuals' conduct to law enforcement authorities." This requirement is not contained in the original Guidelines.

5. Evaluation and Improvement requirements under the Draft include implementation of "a process for measuring the status and trends of its effort to achieve environmental excellence, and for making improvements or adjust, as appropriate in response to those measures." This requirement includes "a periodic, external evaluation of the organization's overall programmatic compliance effort." In other words, each organization would be required to hire an outside management consultant and to have measurement and improvement mechanisms. The original Guidelines contain no such explicit requirement.

6. The training and publication portion of the original Guidelines calls for taking "steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical matter what is required." The requirements in the Draft are much more specific. For example, all organizations must develop and implement "systems or programs that are adequate to:

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

b. train, evaluate, and document the training and evaluation, of all employees and agents of the organization, both upon entry into the organization and on a refresher basis, as to the applicable environmental requirements, policies, standards (including ethical standards) and procedures necessary to carry out their responsibilities in compliance with those requirements, policies and standards."

7. The Draft requires implementation of "a system of incentives, appropriate to [the organization's] size and the nature of its business, to provide rewards (including as appropriate, financial rewards) and recognition to employees and agents for their contribution to environmental excellence. In designing and implementing sales or production programs, the organization has insured that these programs are not inconsistent with environmental programs." This requirement does not appear anywhere in the original Guidelines.

8. The requirements for monitoring and reporting programs are also much more detailed. The Draft would require organizations to design and implement, "with sufficient authority, personnel and other resources, the systems and programs that are necessary for:

a. frequent auditing ... and inspection (including random, and, when necessary, surprise audits and inspections) ... to assess, in detail, their compliance with all applicable environmental compliance requirements . . . as well as internal investigations and implementation of appropriate follow-up countermeasures with respect to all significant incidents of noncompliance;

b. continuous on-site monitoring, by specifically trained compliance personnel and by other means, of key operations ... that are either subject to significant environmental regulation, or where the nature or history of such operations suggests a significant potential for noncompliance;

c. internal reporting ...;

d. tracking the status of responses to identified compliance issues, to enable ... documented resolution of environmental compliance issues by line management; and

e. redundant, independent checks on the status of compliance.

Again, these specifics are not found in the original Guidelines.

9. The Draft requires "line managers, including the executive and operating officers at all levels" to "direct their attention" in the "day-to-day operation of the organization" to "measuring,

maintaining and improving the organization's compliance with environmental laws. This must be done through "routine management mechanisms utilized throughout the organization (e.g., objective setting, progress reports, operating performance reviews, departmental meetings). The original Guidelines set no such requirements, but merely require the organization to adopt "standards and procedures reasonably capable of reducing the prospect" of noncompliance.

10. The Draft requires line managers to "routinely review environmental monitoring and auditing reports, direct the resolution of identified compliance issues, and ensure application of the resources and mechanisms to carry out a substantial commitment." The original Guidelines set no such requirements, but merely require the organization to adopt "standards and procedures reasonably capable of reducing the prospect" of noncompliance.

# COMMENTS OF FORMER JUSTICE DEPARTMENT AND EPA OFFICIALS ON DRAFT ENVIRONMENTAL GUIDELINES PREPARED BY ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

April 16, 1993

The undersigned are former officials of the Justice Department's Environment and Natural Resources Division (formerly the Land and Natural Resources Division) and the Office of General Counsel of the United States Environmental Protection Agency. Our service with the government spans the years from 1977 to 1993. During this period, we oversaw the growth of criminal prosecutions to the point that they have become a vital, indispensable element in environmental enforcement. A number of us also worked with the Sentencing Commission on the development of sentencing guidelines for environmental crimes. Because of this experience, we have reviewed the draft organizational guidelines for environmental crimes submitted by the Advisory Working Group on Environmental Sanctions with particular interest.

It is undisputed that the environmental criminal laws should be vigorously, fairly and effectively enforced. We attempt in these comments to address more difficult questions regarding the bases on which criminal sentences should be determined, particularly those culpable states of mind and types of conduct that are the appropriate targets of deterrence and punishment.

## Summary

The Advisory Group is to be commended for the substantial effort it has made in addressing difficult and complex sentencing issues. We urge the Advisory Group to amend its proposal to incorporate the following principles:

- In determining the base offense level, pecuniary gain and pecuniary loss should not be used, save in exceptional circumstances. The factors to be used in setting the base offense level should be 1) the degree of culpable knowledge of the defendant and 2) the foreseeability of harm to people or the environment, taking into account the social utility or disutility of the defendant's overall conduct;

- The issue of charging defendants for offenses on a per day basis should be addressed by following the general principles of Chapter 3.D of the existing guidelines;

- The existing guidelines' system of adjusting the base fine should also be followed, especially the more flexible approach for crediting compliance programs. Three factors merit particular explication as they relate to environmental offenses: the prior enforcement history of the defendant; the remedial costs incurred by the defendant; and authorization for a broader downward departure from the fine amount where the defendant will suffer substantial, collateral economic loss as a result of being barred from government contracts.

- Probation with respect to environmental organizational offenses should continue to be governed by the probation provisions in the existing organizational guidelines.

## I. Special Characteristics of Environmental Regulatory Violations

The Advisory Group has made an impressive effort to grapple with an extremely complex problem. The difficulty in formulating the base fine for environmental crimes committed by organizations arises from a number of factors that distinguish environmental crimes, to a greater or lesser degree, from other organizational crimes. These differences arise from the fact that criminal enforcement of environmental laws is part of a comprehensive regulatory system that seeks to control, but not prohibit, pollution and other forms of natural resource use.

First, EPA and DOJ administer an extensive and well-developed system of civil remedies for regulatory violations, which typically recoups from corporate offenders the economic gain from failing to comply with environmental laws and regulations, and also civilly penalizes such offenders for the gravity of the offense.

Second, in many areas of environmental law, the government obtains extensive remedial relief so that harm to the environment is largely corrected. Remedial costs are usually greater than the cost of initially complying and therefore work as a deterrent to future violations. In addition, the government can recover money damages for injury to natural resources, and private damage actions are also available.

Third, the issues raised by determining economic gain, environmental harm, and appropriate remedial measures in the environmental context are typically very complex, time consuming, and poorly suited to resolution in the criminal process.

Fourth, the core of most organizational crimes outside of the environmental area is to obtain money or things of value from others; and the economic gain to the defendant and loss to the victim are typically in rough balance. The core of environmental crime is to dispose of waste materials to avoid the costs of legally required treatment or disposal, or to avoid other regulatory burdens, and there is no correlation between gain to the defendant and any loss, in the form of environmental harm that a given violation may cause.

Fifth, the environmental laws generally do not prohibit any and all discharges or emissions of pollutants. Pollutant discharges or emissions are accepted as the consequence of fully legitimate economic activity; their levels and nature are controlled by statute and regulation. There is a balance struck in the laws between the social utility of the economic activity and the harm of polluting discharges. Even when regulatory requirements are violated, the government usually does not insist on immediate compliance where it would be difficult or costly to achieve and the harm threatened by the violation is small. Annually, in large numbers of civil cases, the government does not seek to enjoin the violating discharge but allows it to continue if the defendant has agreed to bring its operation into compliance with the law promptly.

Finally, the government has been successful in obtaining jury instructions in many environmental criminal cases which do not require the government to show that the defendant knew it was violating a particular statute or regulation in order to obtain a conviction. This results in a greater range of possible mental states among convicted defendants than is the case in many other areas of white collar crime.

These differences from other organizational crimes pose major problems in identifying the core elements that should be considered in determining the base fine for environmental offenses.

Equally important, most of the aggravating and mitigating factors in the Commission's existing guidelines for organizations which operate to increase or reduce the base fine are relevant and require no special application in the environmental context. For example, the provisions in the existing guidelines directed to the question of imputed organizational liability, which focus on whether the organizational defendant has an effective program to prevent and detect violations of law are as important to environmental crimes as they are to other organizational crimes. These principles are generally sound; in our experience, there has been a substantial, beneficial response on the part of the regulated community to the incentives in the existing guidelines for adoption of compliance programs which appropriately recognize the need for flexibility in such programs to prevent and detect violations. These principles should be reaffirmed in the environmental context, rather than revisited and revised.

Other mitigation elements such as self-reporting, cooperation, acceptance of responsibility, and assistance to the government are likewise as applicable to environmental offenses as to other crimes. A few of the aggravating or mitigating factors deserve special or different emphasis in environmental sentencing; for instance, the possibly serious collateral civil consequences of being barred from government contracts. But, as a general matter, the adjustment factors identified by the Commission in the existing organizational guidelines are sound and can be consistently applied to environmental cases.

## II. Factors to be Considered in Setting the Base Fine for Organizational Environmental Regulatory Violations.[1]

For other organizational crimes, the Commission has set the base fine level as the greater of 1) pecuniary gain to the defendant; 2) pecuniary loss to the victim(s); or 3) the offense level set in the sentencing guidelines for individuals. None of these provides an effective means of establishing a base fine in the environmental context.

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[1] The Advisory Group did not provide any recommendations with respect to wildlife offenses. We believe that it is appropriate for the Commission to go forward with consideration of proposals for so-called traditional environmental offenses, and subsequently make separate provision for the sentencing of wildlife crimes, which are distinguishable in at least two fundamental ways. First, wildlife offenses frequently involve prohibitions of certain conduct affecting protected species, rather than the relative limitations and conditions placed on pollutant wastestreams. Second, in many wildlife offenses the degree of culpability is clearer. While there are exceptions to this proposition (for instance, some cases arising under the strict liability provisions of the Migratory Bird Treaty Act), we believe that separating the traditional environmental offenses from wildlife offenses will result in greater clarity and consistency in each area. Accordingly, we urge the Commission to consider convening an appropriate panel of experts in wildlife law.