

First, absent extraordinary circumstances, the use of pecuniary gain or loss in environmental criminal sentencing is inappropriate for a number of reasons. There is an extensive system of civil remedies for regulatory violations directed to determining gain to the organizational defendant and recovering that gain through civil penalties. Pecuniary loss to the victim is not a concept that fits easily with environmental offenses, but insofar as it suggests recoupment for harm to the environment or people, the civil system addresses those issues through a well established array of remedial requirements and tort judgments.

Further, the issues involved in precisely determining gain and loss issues in the environmental context are complex and frequently cannot be resolved quickly. Thus, they are not well suited to resolution in the sentencing context and would raise at sentencing a host of issues that are usually not directly relevant to the criminal trial. For example, assessing the short and long term environmental effects of a significant pollution episode and determining the cost of remediating and restoring natural resources is a process which, as the civil system demonstrates in case after case, can take years of study, analysis, and debate to complete. It requires substantial technical expertise that far exceeds both the capabilities and resources of probation offices. Evidentiary presentation of this material can take weeks. Most of this evidence would involve issues that have little or nothing to do either with the proof adduced at trial or with the central sentencing focus on the defendant's culpable knowledge and awareness of the foreseeable consequences of its conduct. Moreover, the novelty and malleability of many of the methods for quantifying environmental harm can lead to widely varying assessments, which in turn would promote, rather than diminish, sentencing disparity. For example, the attempt to quantify natural

resource injury through the use of contingent valuation methodology has been shown to result in highly variable and unreliable values for such resources.

Gain and loss are frequently not good measures of the seriousness of environmental crimes. Violations that produce small pecuniary gains to the defendant may result in large risks or harm to people and to the environment; conversely, large expenditures by the defendant may be necessary to abate small risks. Pecuniary losses are particularly difficult to measure and will frequently vary with the time of discovery of the offense and other extraneous factors. Gain and loss are reasonable measures of financial crimes, but environmental crimes differ from the vast majority of financial crimes.

Second, we agree with the position implicitly taken by the Advisory Group that the present individual guidelines for environmental crimes are not appropriate for organizational sentencing. They are not based on the core factors that should be weighed in organizational sentencing for environmental crimes: (a) culpable knowledge, and (b) the extent of foreseeable harm, taking into account the balancing of social utility and harm that is inherent in the environmental laws. These are the right elements to focus on because they are the elements which, in our opinion, distinguish environmental criminal cases from environmental civil cases and are therefore the elements which the criminal sentence should seek to deter or punish. The more deliberately and consciously a defendant acts to violate a regulatory requirement without making an effort to comply with the law, the greater the criminal sanction should be. The more the balance between social utility and harm tips so

that it was foreseeable that the potential harm flowing from the defendant's action would clearly outweigh any social utility, the greater the criminal sanction should be.

A. Culpable knowledge

We have identified seven levels of culpable knowledge that environmental defendants may typically possess and have ranked them in order of increasing seriousness:

- strict liability offense;
- offense committed negligently;
- offense committed with or without knowledge of the legal requirement violated, combined with effort to comply with the legal requirement including informing the government (where the legal requirement becomes known after the event, effort to comply and informing the government should occur promptly after obtaining knowledge);
- offense committed with lack of knowledge of the legal requirement violated;
- offense committed with knowledge of the legal requirement violated and combined with effort to comply with the legal requirement but not informing the government;

- offense committed with willful blindness to the legal requirement and no effort to comply with the legal requirement;
- offense committed with knowledge of the legal requirement violated and no effort to comply with the legal requirement.

We have developed these differing degrees of culpable knowledge by thinking through our experience with charging environmental crimes and identifying those elements of mens rea that are not already given weight in the general aggravating and mitigating provisions of the existing guidelines. For instance, active concealment of an offense could be an additional level of culpable behavior, but appears to be addressed in the general provisions of the guidelines. We believe that these elements are important in determining the seriousness of an environmental criminal offense.

At the lower end of the culpability scale, one would find corporations which are trying to comply with a complex legal regime and not concealing their conduct. At the upper end, one would find those deliberately violating the law. Increasing base offense level weights should be assigned to each of these mental states and the judge should sentence on the basis of which mental state he or she concludes most accurately reflects the organization's culpable knowledge.²

² We do not see a reason for abandoning the "offense level" method that the Commission has so far used exclusively in the guidelines, in favor of a percentage approach. We

(continued...)

A subsidiary point should be made here. It is generally agreed that where the individuals directly involved in the crime are in higher positions of managerial responsibility, the organizational sanction should be greater. This principle is appropriately reflected in some of the aggravating and mitigating factors in the existing organizational guidelines (see § 8C2.5), so that while that principle should be applied in the environmental context, we believe this can be achieved through the existing guidelines.

B. Foreseeable Harm

Substantive Regulatory Violations. In formulating how the harm flowing from the defendant's acts should be weighed, one must recognize that, in practical terms, the law does not prohibit polluting releases or waste disposal per se, but subjects releases and waste management practices to quantitative limitations and other forms of control, and that releases and waste types per se are not accurate proxies for harm to people or the environment. One must also emphasize that the government routinely permits violating releases to continue, if the defendant is acting to bring itself into compliance and no serious imminent harm is threatened.

² (...continued)

suppose that the Advisory Group saw the same problem that we did with importing offense levels from the individual guidelines. Among other matters, the offense levels that they would generate for a "basic" environmental crime would result in a base fine range for an organizational offense that far exceeds the statutory maximum. However, we believe that a distinct set of base offense levels could be developed for offenses imputed to organizations.

Accordingly, the harm that should be given weight at sentencing is fairly limited to those emissions or discharges of pollutants, or waste management practices, which would have been enjoined if they were known to the government before they took place and which would have resulted in demonstrable harm to people or the environment.

This formulation is aimed at addressing a number of concerns. First, it is unfair to weigh against a party, in the criminal context, releases that the government would not have sought to enjoin or a court was not likely to enjoin in the civil context. These are the typical releases in which the social utility of the defendant's conduct outweighs the harm of the conduct. Second, the focus should be on harm that foreseeably would flow from the conduct, not an arbitrary proxy for harm such as the volume or duration of a release, or the cost of remedying a release. In this connection, it is appropriate to weigh the harm that would have resulted if the defendant's conduct were not detected; the defendant should not benefit at sentence from the fact that the public or the government was able to mitigate promptly the consequences of its acts. Third, the foreseeable harm threatened by the defendant's conduct must be demonstrable in order to keep the sentencing inquiry from turning into a speculative exercise. In selecting an offense level range based on foreseeable harm, it would be appropriate to give added weight to the fact that the harm actually transpired and was serious.

Next, to properly link harm to the defendant, a further distinction should be made on the basis of foreseeability. The defendant should be held fully responsible for harm foreseeable to its officers and employees. Where the responsible employee lacked

requisite skill or knowledge suitable to his or her position, it is reasonable to judge the organizational defendant by reference to the harm foreseeable to a reasonably competent person in that position. But it is not reasonable to increase or reduce the weight for unforeseeable results or for results foreseeable only to the specialized expert.

The range of possible harm to people and the environment from environmental offenses is extensive. It is unrealistic to assign fixed weight to general categories of harm (releases of acute toxics, releases of "hazardous substances," releases of other pollutants, etc.) because such categories cannot capture all the relevant facts and circumstances. For example, a release to biologically rich breeding grounds results in harm different from the same release quickly diluted into the ocean. Judges should be directed to sentence within a range of offense levels based on foreseeable harm as we have defined it.

The range of offense levels based on foreseeable harm must inevitably be reasonably broad to accommodate at one end substantial injury to people or the environment, and at the other end the numerous episodes in which foreseeable harm may be quite minor. For example, at the low end of the spectrum, one could postulate a situation involving a permit violation under the Clean Water Act, in which pollutants were discharged into a POTW and the operation of the POTW treatment system mitigated or eliminated any harm from the discharge. At the high end, a Clean Water Act permit violation could involve the knowing discharge of a pollutant known to be poisonous, leading to at least short term elimination of a drinking water supply. An example of unforeseeable harm would be a violative air emission in an area normally complying with ambient air quality standards and

which took place at the same time as an accidental failure of equipment at an unrelated factory such that the two releases together violated the ambient air quality standard. An example of a release in which the harm does not outweigh the social utility can be found where ambient air or water standards are not violated, although a technology-based requirement applicable to a release was violated.

In order to arrive at an overall base fine for substantive regulatory violations, one would combine the appropriate offense level based on culpable knowledge with the appropriate offense level based on foreseeable harm. Recordkeeping and reporting crimes can be assimilated into the proposed base offense system by a) determining the defendant's level of culpable knowledge with respect to the legal requirements and b) determining the foreseeable harm on the basis of likely results to people or the environment if the recordkeeping or reporting violation had gone undetected. A recordkeeping/reporting violation that was related to the perpetuation of violations giving rise to foreseeable harm would be regarded the same as a substantive offense. Other recordkeeping/reporting violations would be assigned a lesser offense level where demonstrable foreseeable harm is lacking; in such cases, the integrity of the regulatory system is the central concern. Special mitigating consideration should continue to be given to the organization in the circumstance where an employee committed a recordkeeping or reporting violation in order to deceive the company. See U.S.S.G. §8C2.5 (n.9).

C. Other Issues in Setting the Base Fine

Knowing endangerment. The knowing endangerment crimes defined by the Clean Air Act, the Clean Water Act, and RCRA vary from the mass of environmental offenses by virtue of their more specific scienter requirement and the very serious potential for harm against which they protect. Also, these crimes are not tied to specific regulatory requirements that may be overbroad or not readily attainable in particular instances. Because knowing endangerments involve the highest degrees of culpable knowledge and foreseeable harm, they are good candidates for setting a high base offense level range. It would make sense to define that range in such a way that the base fine would reach the \$1,000,000 maximum where there is a substantial "culpability score" derived from the existing organizational guidelines.

Multiple/Ongoing offenses. Numerous environmental criminal statutes allow for charging on a per day basis. This raises the specter that a defendant might face 30, 60, or hundreds of counts and fines that are in reality disproportionate to the offense committed. We agree with the Advisory Group that this issue must be addressed. We believe that the principles adopted by the Commission in Chapter 3D of the existing guidelines are basically correct: judges should group offenses charged on a per day basis, provide some diminishing increase in sentence for the first five or so additional counts, but cap the increases at that point. Of course, as already noted in Chapter 3D, a situation in which there will be inadequate scope for ensuring appropriate additional punishment for additional crimes can be handled by departure from the guidelines. §3D1.4, comment. (backg'd). In the

environmental context, such a situation might arise in a case of exceptionally deliberate, ongoing violations which are creating serious foreseeable harm on a daily basis. The grouping principles of Chapter 3D also are applicable in the environmental context where issues other than per-day charges arise, such as where the government charges multiple offenses based on one course of conduct. An example is when an offense of failure to obtain a permit is charged in addition to an offense of discharging illegally in violation of applicable limitations.

III. Relating the aggravating and mitigating factors of the existing organizational guidelines to environmental offenses

The existing guideline scheme for determining the scope of imputed corporate liability and for making departures is generally sound and applies equally well to the environmental context as it does to other organizational sentencing. Apart from obvious issues of double counting that may arise in applying some of these provisions to environmental offenses,³ three areas deserve special consideration or particular emphasis in sentencing environmental crimes.

Collateral consequences--including civil obligations. The potential for debarment or prohibition from government contracting can be a significant sanction in and

³ The most significant of these are the departures authorizing upward adjustment for "Risk of Death or Bodily Injury" (§ 8C4.2) and "Threat to the Environment" (§ 8C4.4). The grounds for both departures are inherent elements of a substantive environmental offense and therefore are already dealt with as core considerations in setting the base fine in the manner that we have suggested.

of itself in an environmental conviction under the Clean Air and Clean Water Acts.

Economic losses far greater than fines may fall on a defendant that is dependant on sales to the government, while the collateral consequence of debarment will have no effect on a company selling entirely to the private market. Accordingly, a judge should be allowed to adjust the amount of an organizational fine where debarment is likely to have significant consequences so as to avoid this disparity. This would require more than the fine range adjustment provided by the present guidelines.

Remedial costs that greatly exceed gain. In a great many cases the cost of remedying an environmental violation is far greater than the economic benefit derived from committing the violation. This means that the remedial sanction has a sting and a deterrent impact which is much greater than in the case of other economic crimes. Where this disparity between economic gain and remedial loss exists, its deterrent effect should be recognized through fine reduction. The existing guidelines already provide for reduction on these grounds. See §8C4.9.

Prior history of enforcement actions against company. In the environmental context, this factor requires careful judgment that limits its application to indicators of culpability. A number of civil and administrative actions are based on a standard of strict liability and should not be regarded as "misconduct." The same is true in cases of civil liability based on the doctrine of respondeat superior.

IV. Probation

The existing guideline provisions for probation are already directly applicable to companies convicted of environmental crimes. We have seen no evidence of any problem in their application to such cases. Nor do we see any issues unique to environmental organizational sentencing that would warrant probation provisions that are different or more stringent than those applicable to the majority of other organizational offenses.

V. Problems with the Draft Proposal in Light of the Foregoing Principles

We believe that the Advisory Group draft should be modified in accordance with the principles set forth above. With respect to the base offense level, the Advisory Group draft substitutes a ranked series of offense categories--actual release of a hazardous substance, threatened release of a hazardous substance, etc.--for the structure of the present individual environmental guidelines. In a general sense, this is a step in the right direction insofar as the draft's categories can be understood as proxies for foreseeable harm--one of the two key variables that should guide sentencing. These categories, however, fail adequately to reflect real world variations in foreseeable harm, which depend on the facts and circumstances of particular cases. For example, a violation that foreseeably threatens release of substantial amounts of toxic substances to groundwater in an area supplied by residential drinking water wells should be treated more severely than where the same release would not contaminate any groundwater. Although the percentage ranges given by the Advisory Group for each category provide some flexibility, they are insufficient to deal with

the range of foreseeable harm and ultimately rest on categorical proxies for harm which have limited accuracy. Accordingly, the categories proposed by the draft should be replaced by a scale based on the relative degree of foreseeable harm associated with a violation, taking into account the social utility of a defendant's conduct.

The other key variable in determining the base offense level is the degree of defendant's culpable knowledge. The draft addresses culpable knowledge in a narrow and piecemeal fashion after the base fine is established, through some of the aggravating and mitigating factors. Culpable knowledge is such a fundamental consideration in sentencing that it should be an explicit variable in establishing the base fine. The various degrees of culpable knowledge should be ranked on a scale. The score generated by applying this scale to a particular case should be combined with the score for foreseeable harm and net social disutility in order to determine the base fine.⁴ For reasons set forth above, we believe that the special features of environmental regulation and enforcement make it unnecessary and counterproductive to use the alternative calculation of economic gain and cost. Such gain/cost calculations should be reserved only for the exceptional case, such as the Valdez oil spill.

With respect to the other basic elements in sentencing decisions, including the problem of multiple violations, aggravating and mitigating factors, and probation, we believe

⁴ Because knowing endangerment violations by definition involve high social disutility and a high degree of culpable knowledge, they can, as already noted, appropriately be dealt with as a distinct category with a higher base fine range tailored to the higher penalties provided by statute.

that the basic structure already adopted for other organizational violations should be followed for environmental violations as well.

The draft, however, proposes a number of fundamental changes and special features in sentencing for environmental violations that are either at odds with or have no counterpart in the organizational guidelines for other violations. For example, the draft departs substantially from § 3D1.4 of the existing organizational guidelines by proposing novel provisions to deal with multiple offenses involving repeated days of violation.

The draft limits the reduction in the base fine based on mitigating factors to no more than 50% of the base fine, or the economic gain from the offense, in contrast to the existing organizational guidelines which allow a reduction in the base fine of as much as 80-95% in cases where the organization has a sound compliance program and has been fully forthcoming and cooperative. The incentive for such programs created by the mitigation afforded under the existing scheme has already begun to produce greater corporate consciousness, improved compliance, and more open dealings with the government. Such an incentive should be maintained. It should not be undercut by imposing unduly rigid specifications on the content of an effective program to prevent and detect violations of the law or by requiring that organizations waive the attorney/client privilege before they will be treated as being cooperative.

The draft also departs from the existing organizational guides in precluding consideration in sentencing of the collateral consequences of conviction, such as contract debarment or "listing"; precluding consideration of defendant's obligation to pay remedial costs; making failure to have an organizational compliance program an aggravating factor rather than simply making the presence of such a program a mitigating factor; imposing new, detailed sentencing requirements and powers with respect to imposition of compliance program obligations; and mandating probation and specifying additional probation conditions. Although many of the draft's probation provisions are substantively similar to those already found in the existing guidelines, the draft interposes several novel features which unduly restrict a judge's discretion.

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. Moreover, most environmental regulation permits some pollution and other releases to occur because of the social utility of the activity in question. Disproportionately

severe criminal sanctions for environmental violations may inhibit companies from entering or continuing certain lines of business, unjustifiably depriving society of economic benefit. Just as there may be harm to the environment and society from choosing too low a level of deterrence, so too it may be counterproductive to overdeter productive economic activity.

SUBMITTED BY

Joan Z. Bernstein	General Counsel, U.S. EPA; Acting Assistant Administrator for Enforcement, U.S. EPA (1977-1979)
Francis S. Blake	General Counsel, U.S. EPA (1985-1988)
Donald A. Carr	Acting Assistant Attorney General, Land and Natural Resources Division (1989)
Michele B. Corash	General Counsel, U.S. EPA (1979-1981)
Carol A. Dinkins	Assistant Attorney General, Land and Natural Resources Division (1981-1983) Deputy Attorney General (1984-1985)
Raymond Ludwiszewski	Deputy General Counsel, U.S. EPA (1990-1991) Acting Assistant Administrator for Enforcement, U.S. EPA (1991) Acting General Counsel, U.S. EPA (1992-1993)
Angus Macbeth	Deputy Assistant Attorney General, Land and Natural Resources Division (1979-1981)

Roger J. Marzulla

Special Litigation Counsel, Land and Natural Resources
Division (1983-1984)

Deputy Assistant Attorney General, Land and Natural Resources
Division (1984-1987)

Assistant Attorney General, Land and Natural Resources
Division (1987-1989)

James W. Moorman

Assistant Attorney General, Land and Natural Resources
Division (1977-1981)

Vicki A. O'Meara

Deputy General Counsel, U.S. EPA (1987)

Acting Assistant Attorney General, Environment and Natural
Resources Division (1992-1993)

Richard B. Stewart

Assistant Attorney General, Environment and Natural Resources
Division (1989-1991)

George Van Cleve

Deputy Assistant Attorney General, Environment and Natural
Resources Division (1989-1991)

Appendix

BRIEF EXPLANATION AND MOCKUP OF STRUCTURE FOR SETTING A BASE FINE FOR ENVIRONMENTAL ORGANIZATIONAL OFFENDERS

We provide the following in order to show with some specificity how a sentencing scheme based on the concepts we have articulated might look. Given the relatively limited period of time that we were given to analyze and prepare comments to the Advisory Group, we believe this to be a reasonable estimate of how to address the offenses at issue. It is certainly open to refinement. If the Advisory Group wishes, we would be happy further to develop the language, commentary, and explanatory rationale.

The base fine scenario reflects offense levels tied to specific gradations of culpability and a general range of offense levels to be applied to foreseeable harm. Ultimately, suitable offense levels for each gradation of foreseeable harm could be designated as experience develops. The remainder of the existing organizational sentencing scheme should generally be applied as written, except for those few aspects identified above which require specific comment or amendment addressing areas of particular significance in environmental cases.

A. Knowing Endangerment Offenses

A knowing endangerment is an offense committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury. As we indicated in our comments, knowing endangerments represent a fairly discrete and more specifically defined category of environmental criminal offenses. The statutory maximum is \$1,000,000.

To maintain consistency with the general organizational sentencing scheme, the base fine range must be selected so as to ensure that the statutory maximum will be assessed in the most egregious instances of organizational culpability, but nevertheless allow for substantial mitigation where the organization is virtually free from blame for the act of its employee. The calculus for achieving such a result is relatively straightforward.

Under the existing organizational guidelines, the fine is determined by first deriving a base fine from a table that corresponds to the offense level for the underlying individual violation. §8C2.4(d). The base fine figure is then multiplied by a factor that corresponds to an organizational "culpability score"--essentially a measure of the severity of imputed corporate liability. Section 8C2.6 establishes a multiplier range of 2 to 4 for instances of maximum corporate culpability, based on a culpability score of 10 or more

"points."⁵ Working backward from those multipliers, in order to arrive at a figure of \$1,000,000 in cases where organizational culpability for a knowing endangerment is at its apex, the base fine should be set at no more than \$250,000. The corresponding offense level would therefore be 17. This would result in an overall guideline fine range of \$500,000 to \$1,000,000 for a relatively significant organizational role in the offense.⁶ In determining the fine within the range, the court would follow the policy statement provisions in §8C2.8. The court would then proceed to consider any other appropriate provisions from Chapter 8.

B. Major Statutory Environmental Offenses

As noted in our comments, setting the base fine for the major statutory environmental offenses requires consideration of a broad array of culpability and foreseeable harm scenarios, but the same basic principle used for calculating knowing endangerments can be employed here as well.

The maximum statutory fine for most environmental organizational felonies is \$500,000 (under the Alternative Fines Act). With that as a benchmark, the maximum base fine for an environmental felony amount should be \$125,000. This would produce a substantial overall guideline fine range of \$250,000 to \$500,000 for the most serious environmental offenses.⁷ Consistent with the existing scheme, the minimum base fine should remain at \$5,000 for the least serious felony circumstances. Judges should be asked to work within this \$5,000 to \$125,000 range when weighing the combination of factors listed below. Where a negligence or strict liability misdemeanor count is involved, the range should be reduced to \$2,500 to \$62,500.

⁵ Because the highest culpability score that could be assessed in aggravation is 17 points, the 10 point threshold for receiving the maximum multiplier range allows for a number of differing scenarios that could result in the maximum fine.

⁶ Full organizational mitigation would still result in a fine range of \$12,500 to \$50,000.

⁷ Full organizational mitigation would still result in a fine range of \$6,250 to \$25,000.

Base Fine for Environmental Offenses

For environmental offenses, the factors to be used in setting the base offense level should be 1) the degree of culpable knowledge of the defendant combined with 2) the harm foreseeable to the defendant as described below.

In exceptional cases involving egregious organizational misconduct and massive harm, the court may determine the base fine in accordance with §8C2.4(a)(1), (a)(2), and (c).

Culpable Knowledge

The degrees of culpable knowledge attributable to the organization committing the underlying offense are as follows:

- **Strict Liability**
Offense level: 0
- **Negligence/Collective knowledge**
Offense level: 1
- **Knowing offense committed with or without knowledge of legal requirement with reasonable effort to comply including informing the government**
Offense level: 2
- **Knowing offense committed with lack of knowledge of legal requirement**
Offense level: 3
- **Knowing offense committed with knowledge of legal requirement with reasonable effort to comply but not informing the government**
Offense level: 4
- **Knowing offense committed with willful blindness to legal requirement**
Offense level: 5
- **Knowing offense committed with knowledge of particular legal requirement without reasonable effort to comply**
Offense level: 6

Background: For the third level of culpable knowledge (the one that warrants an offense level of 2) to be applicable, one would expect that for an offense committed with knowledge of the legal requirements the organizational defendant would immediately inform the government. For an offense committed without knowledge of applicable legal requirements, one would expect the organizational defendant to have informed the government promptly upon discovery of the violations.

Harm Foreseeable at Time Offense was Committed

The foreseeable harm given weight at sentencing should be limited to those emissions or discharges of pollutants or hazardous waste management practices which would have been enjoined if they were known to the government before they took place and which would have resulted in demonstrable harm to people or the environment.

Offense level: 0-9

In assessing the nature and scope of foreseeable harm, the court should consider the following:

- **Extent of Harm to People**

The nature of demonstrable harm to people could include: permanent or life-threatening bodily injury, serious bodily injury, bodily injury, adverse health effects. The court should also consider the number of persons actually affected or at demonstrable risk of being affected. An increase in the base fine may be warranted where the threatened harm actually transpired and was serious.

- **Extent of Harm to the Environment**

There are a great variety of potential scenarios of potential environmental harm, ranging from relatively minor, temporary losses of biota to massive, permanent ecological despoliation.

- **Harm foreseeable to reasonably competent person**

If the harm foreseeable to a reasonably competent person in the position of the employee(s) who committed the violation is significantly greater than the harm foreseeable to the employee(s), an increase in the base fine amount may be warranted.

Background: The threshold definition of "harm" for the purposes of sentencing accounts for the fact that organizations are allowed, pursuant to permit, regulation, or without regulation, to emit or discharge pollutants and dispose of waste as a necessary part of otherwise acceptable economic activity. The government's or the court's decision not to enjoin otherwise violative emissions should be viewed as a reliable indicator that, on balance, the social utility to allowing a violation to occur or continue outweighs the incremental "environmental loading" that might happen prior to correction of the violation. If the event would not have been enjoined or, in the case of an ongoing emission, was not enjoined, then no additional weight should be added to the base fine culpable knowledge determination.

Under the structure, recordkeeping and reporting offenses do not require special treatment per se. Those recordkeeping or reporting offenses that are related to the perpetuation of violations giving rise to foreseeable harm would be regarded the same as any other offense that leads to or exacerbates foreseeable harm. Those that lead to no foreseeable harm should be treated like any other "purely regulatory" situations.

C. Modifications to Existing Adjustment Factors

1. **Collateral Consequences of a Conviction:** The following should be added to application note 3 to Section 8C2.8: "In an environmental case in which the conviction will result in an organization being barred from government contracting, a downward departure may be warranted."

2. **Prior Enforcement History:** The following should be added to application note 7 to Section 8C2.5: "In an environmental case, civil or administrative adjudications based on principles of strict liability or based purely on the doctrine of respondeat superior should not be counted as 'similar misconduct'".

3. **Remedial Costs:** Section 8C4.9 should be amended as follows: "If the organization has paid or, has agreed to pay, or can show that it will be liable for remedial costs In such a case, a substantial fine may not be necessary in order to achieve adequate punishment and deterrence. This frequently may be an element of environmental cases. . . ."

RECOMMENDED ENVIRONMENTAL SENTENCING GUIDELINES

PREPARED BY: ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

(Comparison of the draft dated November 16, 1993
to the draft dated March 5, 1993)

~~STEP I:~~

~~BASE FINE~~

~~(a) The base fine is the greater of:~~

~~(1) the economic gain plus costs directly attributable to the offense; or~~

~~(2) a percentage, derived from the Base Fine Table below, of the maximum statutory fine that could be imposed for the offenses of conviction.~~

~~BASE FINE TABLE~~

~~PERCENTAGE~~

~~OF MAXIMUM~~

~~OFFENSE TYPE STATUTORY FINE~~

~~(a) An offense involving knowing 90-100%
endangerment (under the Resource
Conservation and Recovery Act,
Clean Water Act, or Clean Air Act)~~

~~(b) An offense involving unlawful 60-90%
handling of a hazardous substance
or other environmental pollutant
resulting in an actual release,
discharge, disposal or emission
into the environment~~

~~(c) An offense involving unlawful 40-70%
handling of a hazardous substance
or other environmental pollutant
creating a material threat of actual
release, discharge, disposal or
emission into the environment~~

~~(d) An offense involving knowing 30-50%
falsification; knowing concealment
or destruction; knowing omission or
tampering~~

~~(e) Other offenses involving unlawful 15-30%
handling of a hazardous substance or
other environmental pollutant not~~

~~resulting in an actual or threatened
release, discharge, disposal or
emission into the environment~~

~~(f) Wildlife offense _____%~~

~~(g) An offense involving simple 10-20%
recordkeeping and reporting~~

~~(b) [Where the court finds that the Base Fine calculated pursuant
to Step I(a) would be unjust as a result of the unnecessary or
excessive repetition of counts relating to a course of offense
behavior that is ongoing or continuous in nature and does not
involve independent volitional acts, the court may, in the
interest of justice, reduce the Base Fine by deleting the
unnecessary or repetitious counts from its computation of the
Base Fine. In so doing, the court should insure that the Base
Fine adequately reflects the seriousness of the offense, the
culpability of the defendant and each of the distinct types of
criminal violations involved.]~~

STEP II:

PART A - GENERAL APPLICATION PRINCIPLES

§9A1.1 Applicability of Chapter Nine

This Chapter applies to the sentencing of all
organizations for environmental criminal violations.

§9A1.2 Application Instructions - Organizations

(a) Determine from Part B (Fines) the sentencing
requirements and options relating to fines:

(1) If the organization operated primarily for a
criminal purpose or primarily by criminal
means, apply §9B1.1 (Determining the Fine -
Criminal Purpose Organizations).

(2) Otherwise, apply §9B2.1 (Primary Offense
Level) to determine the primary offense level
for the violation.

(b) Determine from Part C (Culpability Factors) the
aggravating and mitigating factors applicable to
the violation:

(1) Apply §9C.1 (Aggravating Factors in
Sentencing) to determine whether any
aggravating factors apply to the violation.

- (2) Apply §9C1.2 (Mitigating Factors in Sentencing) to determine whether any mitigating factors apply to the violation.
 - (3) To determine the basis for mitigation due to an organization's prior commitment to environmental compliance, refer to Part D (Commitment to Environmental Compliance).
- (c) Determine the final organizational fine under Part E (Fine Calculation and General Limitations):
- (1) Apply §9E1.1 (Fine Calculation) to determine the percentage of the maximum statutory fine corresponding to the offense level from Parts A through D.
 - (2) Apply §9E1.2 (General Limitations) to determine that the organizational fine satisfies minimum sentencing standards while guaranteeing that the organization is able to satisfy the fine imposed.
- (d) Determine from Part F (Probation - Organizations) the sentencing requirements and options relating to probation.

* * * *

PART B - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

§9B1.1 Determining the Fine - Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose or primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.

* * * *

2. DETERMINING THE FINE - OTHER ORGANIZATIONS

§9B2.1 Primary Offense Level

- (a) The Primary Offense Level is determined by the type of environmental offense and the specific offense characteristics under subsection (b).
- (b) The Primary Offense Level for each count covered by Chapter Nine is determined under the following categories:

(1) Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides for Other Pollutants

(A) Base Offense Level: 24

(2) Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification

(A) Base Offense Level: 8

(B) Specific Offense Characteristics

- (i) (a) If the offense resulted in an ongoing, continuous, or

repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(b) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(ii) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(iii) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(iv) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(v) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(vi) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

(3) Mishandling of Other Environmental Pollutants: Recordkeeping, Tampering, and Falsification

(A) Base Offense Level: 6

(B) Specific Offense Characteristics

(i) (a) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

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(b) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(ii) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(iii) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(iv) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(v) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(4) Tampering with Public Water System

(A) Basic Offense Level: 18

(B) Specific Offense Characteristics

(i) If a risk of death or serious bodily injury was created, increase by 6 levels.

(ii) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(iii) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by 2 levels.

(iv) If the purpose of the offense was to influence government action or to extort money, increase by 6 levels.

(v) If the offense involved a threatened tampering or attempted tampering that resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, use the offense level for the substantive offense.

(a) Cross Reference

(1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

(5) Wildlife Violations

(A) Base Offense Level: _____

(B) Specific Offense Characteristics

(i) If the offense (a) was committed for pecuniary gain or otherwise involved a commercial purpose; or (b) involved a pattern of similar violations, increase by 2 levels.

(ii) If the offense (a) involved fish, wildlife, or plants that were not quarantined as required by law; or (b) involved a pattern of similar violations, increase by 2 levels.

(iii) If more than one applies, use the greater:

(a) If the market value of the fish, wildlife, or plants exceeds \$2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

(b) If the offense involved (i) marine mammals that are listed as depleted under the Marine Mammal Protection Act (as set forth in 50 C.F.R. §216.15); (ii) fish, wildlife,

or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increase by 4 levels.

(6) Simple Recordkeeping and Reporting

(A) Basic Offense Level: 5

* * * *

PART C - CULPABILITY FACTORS

§9C1.1 Aggravating Factors in Sentencing

(a) Management Involvement

If one or more members of the substantial authority personnel of the organization participated in, condoned, solicited, or concealed the criminal conduct, or recklessly tolerated conditions or circumstances that created or perpetuated a significant risk that criminal behavior of the same general type or kind would occur or continue, increase the Base Fine by $\%$ to $\%$ by 6 levels. If a corporate manager lacking the authority or responsibility to be classified as a member of the organization's substantial authority personnel, but having supervisory responsibility to detect, prevent, or abate the violation, engaged in the criminal conduct, increase the Base Fine by $\%$ to $\%$ by 1 to 4 levels.

(b) Threat to the Environment

~~If the organization (i) caused actual and identifiable harm to the environment that materially degraded a natural resource, or (ii) knowingly created a significant risk of material degradation of a natural resource, increase the Base Fine by $\%$ to $\%$.~~

(c) Threat to Human Life or Safety

~~If the organization (i) caused death or serious bodily injury, or (ii) knowingly created a significant risk of such harm, increase the Base Fine by $\%$ to $\%$.~~

(d) Scierter

~~If employees or agents of the corporation knowingly engaged in conduct that violated the law under circumstances that evidenced at least a reckless indifference to legal requirements, increase the Base Fine by $\%$ to $\%$.~~

(e) Prior Criminal Compliance History

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

~~(f)~~ (c) Prior Civil Compliance History

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

~~(g)~~ (c) Concealment

~~If any employee or agent of the organization sought to conceal the violation or to obstruct administrative, civil, or criminal investigation of the violation by knowingly furnishing inaccurate material information or by knowingly omitting material information, increase the Base Fine by % to %.~~

~~(h)~~ (d) Violation of an Order

If the commission of the instant offense violated a judicial order or injunction (other than a condition of probation), an administrative order, a condition of probation, a cease and desist order, or occurs following a notice of violation for the same offense conduct, increase the Base Fine by % to % by 1 to 3 levels.

~~(i)~~ (e) Concealment

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

(f) Absence of Compliance Program or Other Organized Effort

If, prior to the offense, the organization either had no program or other organized effort to achieve and maintain compliance with environmental requirements, or it had such a program in form only and had substantially failed to implement

such a program, increase the Base Fine by % to % by 4 levels.

~~(j) Absence of a Permit* * * *~~

~~If the conduct underlying commission of the instant offense occurred without a requisite permit, increase the Base Fine by % to %.~~

~~MITIGATING FACTORS IN SENTENCING §9C1.2 Mitigating Factors in Sentencing~~

~~(k)(a) Commitment to Environmental Compliance~~

If the organization demonstrates that, prior to the offense, it had committed the resources and the management processes that were reasonably determined to be sufficient, given its size and the nature of its business, to achieve and maintain compliance with environmental requirements, including detection and deterrence of criminal conduct by its employees or agents, reduce the Base Fine by % to % by 3 to 8 levels. If an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense, there shall be a rebuttable presumption that the organization had not made a commitment sufficient to achieve and maintain compliance with environmental requirements as described in Step III Part D. In order to grant any mitigation under this provision, the court must conclude that all of the factors described in Step III Part D were substantially satisfied. If this threshold test is met, the degree of mitigation shall be based on the court's evaluation of the organization's commitment to implementing each of these factors. The discussion accompanying each factor should provide a framework for the court's analysis.

~~(b)(1) Cooperation and Self-Reporting~~

- (1) If the organization (a) prior to an imminent threat of disclosure or government investigation, and (b) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation and clearly demonstrated

recognition of its responsibility and took all reasonable steps to assess responsibility within the organization and prevent recurrence, reduce the Base Fine by ~~3 to 6~~ by 3 to 6 levels; provided, however, that no credit shall be given where reporting of the offense was otherwise required by federal law for mere compliance with an applicable federal reporting requirement.

- (2) If the organization pleaded guilty before the government was put to substantial effort or expense in preparing for trial, fully cooperated with the prosecution, and took all reasonable steps to assess responsibility within the organization and prevent recurrence, reduce the Base Fine by ~~3 to 6~~ by 4 levels.
- (3) If the organization pleaded guilty before the prosecution was put to substantial effort or expense in preparing for trial and cooperated with the prosecution in all relevant respects except by failing to disclose the names and identities of responsible individuals known to it (or names and identities that it could have reasonably ascertained), reduce the Base Fine by ~~3 to 6~~ by 2 levels.

~~(m) Absence of Scienter~~

~~If the criminal conduct was the result of negligent errors or omissions or was imposed on the basis of strict liability or collective knowledge and no corporate employee or agent acted with a level of intent at least equal to that of reckless indifference, reduce the Base Fine by 3 to 6.~~

~~(n) (c)~~ Remedial Assistance

If the organization takes prompt action to provide assistance (in addition to any legally required restitution or remediation) to the victims of its crime to mitigate their losses, reduce the Base Fine by ~~3 to 6~~ by 2 levels.

~~STEP III: * * *~~

FACTORS FOR PART D - COMMITMENT TO ENVIRONMENTAL COMPLIANCE

§9D1.1 Factors for Environmental Compliance

In determining whether to grant mitigation under §9C1.2(a) the court must first conclude that each of the following seven factors were substantially satisfied, at a minimum, in determining that the organization has made a commitment to environmental compliance. In evaluating the extent of the organization's commitment, and thereby determining the degree of mitigation, if any, that may be justified, the court should examine, for each of the factors described below, 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 applied.

(a) Minimum Factors Demonstrating a Commitment to Environmental Compliance.

(a)(1)

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

(b)(2)

Integration of Environmental Policies, Standards and Procedures. The organization has adopted, and communicated to its employees and agents, policies, standards and procedures necessary to achieve environmental compliance, including a requirement that employees report any suspected violation to appropriate

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

~~(e)~~(3)

Auditing, Monitoring, Reporting and Tracking Systems. The organization has designed and implemented, with sufficient authority, personnel and other resources, the systems and programs that are necessary for:

- (i) frequent auditing (with appropriate independence from line management) and inspection (including random, and, when necessary, surprise audits and inspections) of its principal operations and all pollution control facilities to assess, in detail, their compliance with all applicable environmental requirements and the organization's internal policies, standards and procedures, as well as internal investigations and implementation of appropriate, follow-up countermeasures with respect to all significant incidents of non-compliance;
- (ii) 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;
- (iii) internal reporting (e.g. hotlines), without fear of retribution, of potential non-compliance to those responsible for investigating and correcting such incidents;

- (iv) tracking the status of responses to identified compliance issues to enable expeditious, effective and documented resolution of environmental compliance issues by line management; and
- (v) redundant, independent checks on the status of compliance, particularly in those operations, facilities or processes where the organization knows, or has reason to believe, that employees or agents may have, in the past, concealed non-compliance through falsification or other means, and in those operations, facilities or processes where the organization reasonably believes such potential exists.

~~(d)~~ (4)

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

- (i) maintain up-to-date, sufficiently detailed understanding of all applicable environmental requirements by those employees and agents whose responsibilities require such knowledge;
- (ii) train, evaluate, and document the training and evaluation, of all employees and agents of the organization, both upon entry into a new position in the organization and on a refresher basis, as to the applicable environmental requirements, policies, standards (including ethical standards) and procedures necessary to carry out their responsibilities in compliance with those requirements, policies and standards; and
- (iii) evaluate employees and agents sufficiently to avoid delegating significant discretionary authority or unsupervised responsibility to persons with a propensity to engage in illegal activities.

(e)(5)

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

(f)(6)

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

(g)(7)

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

~~STEP IV~~, (8)

Additional Innovative Approaches. An organization that substantially satisfies each of the factors listed in (a)(1) through (7), above, may also endeavor to demonstrate that additional mitigation, up to the allowable ___ levels, is justified due to its implementation of additional programs or components that it can show are effective and important to carrying out its overall commitment to

environmental compliance. The organization shall have a very heavy burden of persuading the court that its additional program or component contributes substantially to achieving the fundamental objectives of environmental compliance represented by the pertinent factor(s) identified in Part D.

~~GENERAL LIMITATIONS* * * *~~

~~(a) Limitation on Cumulative Effect of Mitigating Factors §9E1.1
Fine Calculation~~

~~In no event may The organizational fine for each count under this Chapter is determined by applying the offense level from Parts A through D to the Offense Level Fine Table below.~~

Offense Level Fine Table¹

<u>Offense Level</u>	<u>Percentage Max. Stat. Fine</u>
0-6	10
7	10-20
8	15-25
9	20-30
10	25-35
11	30-40
12	30-50
13	35-55
14	40-60
15	45-65
16	50-70
17	55-75
18	60-80
19	65-85
20	70-90
21	75-95
22	80-100
23	85-100
24 or more	100

¹ The Advisory Group was divided over the precise percentages of the statutory maximum fine to correspond to particular offense levels.

§9E1.2 General Limitations

(a) If the court finds that the total fine calculated under this Chapter would be unjust as a result of excessive repetition of counts relating to a course of offense behavior that is ongoing or continuous in nature and does not involve independent volitional acts, the court may, in the interest of justice, reduce the fine imposed on such counts, provided that the total fine imposed shall not be less than required under the table below. In so doing, the court should insure that the total fine adequately reflects the seriousness of the offense, the culpability of the defendant and each of the distinct types of criminal violations involved. When the court deems a reduction appropriate under this subsection, the minimum fine to be imposed shall be the sum of the related counts with the applicable fine for each count weighted as follows:

<u>Count</u>	<u>Fraction of Applicable Fine</u>
1	1
2	1/2
3	1/3
...	...
...	...
n	1/n

(b) Except as provided in subsection (d) below, in no event shall a fine determined under these guidelines this Chapter be reduced as the result of mitigating factors to a level below the greater of ~~(a) fifty percent [50%] of the Base Fine calculated in Step I or (b) the economic gain from the offense, if calculated under Step I(a)(1) in the determination of the Base Fine.~~ fifty percent (50%) of the Offense Level calculated in Parts B and C; provided further that in no event shall a fine for a knowing endangerment violation be reduced below fifty percent (50%) of the final fine calculated in §9E1.1.²

~~(b) Inability to Pay~~ (c) Except as provided in subsection (d) below, in no event shall a fine determined under this Chapter be less than the economic gain [plus

² The Advisory Group was divided over the precise percentage limitation on mitigation credit for violations other than knowing endangerment violations.

costs directly attributable to the offense].³

(d) The court shall reduce the fine below that otherwise required under §9E1.1 or §9E1.2(b or (c) to the extent that imposition of such fine would impair the defendant's ability to make restitution to the victim. The court may impose a fine below that otherwise required by this chapter Chapter if the court finds that:

- (1) imposition of the required fine would result in the liquidation or cessation of all or a significant part of the business operations of the defendant due to the defendant's inability to pay the fine even with the use of a reasonable installment schedule;
- (2) the defendant is not a "Criminal Purpose Organization," as described in ~~§-8C1.1~~ §8C1.1 of the Guidelines; and
- (3) the defendant has not engaged in a sustained pattern of serious environmental violations.

The reduction allowed under ~~Step IV(b)~~ subsection (d) shall not be more than necessary to avert the threatened liquidation or cessation of business operations.

STEP V

³ The Advisory Group was divided over whether the bracketed language should be included as part of the general limitations.

PART F - PROBATION - ORGANIZATIONS

(a) §9F1.1

Imposition of Probation for Environmental Crimes - Organizations.

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

- (1) such sentence is advisable to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3); or
- (2) the organization is sentenced to pay a monetary penalty (e.g., restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments; or
- (3) at the time of sentencing, the organization does not have an effective program to prevent and detect violations of law; or
- (4) such sentence is advisable to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; or
- (5) the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal, [civil, or administrative adjudication]⁴ under federal or state law, and any part of the misconduct underlying the instant offense occurred after that adjudication; or
- (6) any officer, manager, or supervisor within the 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

⁴ The Advisory Group was divided over the mandatory use of probation for organizations with prior civil or administrative adjudications.

adjudication under federal or state law, and any part of the misconduct underlying the instant offense occurred after that adjudication; or

- (7) the sentence imposed upon the organization does not include a fine; or
- (8) such sentence is advisable to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. §3553(a)(2).

~~(b)~~ §9F1.2

Term of Probation - Organizations

~~(1)~~(a) When a sentence of probation is imposed --

~~(i)~~(1) In the case of a felony, the term of probation shall be at least one year but not more than five years.

~~(ii)~~(2) In any other case, the term of probation shall be not more than five years.

~~(c)~~ §9F1.3

Conditions of Probation - Organizations

~~(1)~~(a) Pursuant to 18 U.S.C. §3563(a)(1), any sentence of probation shall include the condition that the organization shall not commit another federal, state, or local crime during the term of probation.

~~(2)~~(b) Pursuant to 18 U.S.C. §3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: a fine, restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. §3563(b).

~~(3)~~(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

~~(4)~~(d) If probation is ordered under ~~Step V(a)(3)~~ ~~§9F1.1(a)(3)~~ or (4), the court shall impose the conditions set forth in this paragraph. If probation is ordered under ~~Step V(a)(5)~~ ~~§9F1.1(a)(5)~~ or (6), the court shall impose any of the following conditions it deems necessary in order to achieve and maintain compliance with applicable environmental law. ~~That~~ ~~The~~ determination of necessity shall be made in writing after the parties have had the opportunity to present relevant information to the court.

~~(i)~~(1) The organization shall develop and submit to the court a program to identify and correct any conditions that gave rise to the conviction and to prevent and detect any future violations, including (i) an effective program to detect and prevent future violations of law and (ii) a schedule of implementation of any such program.

~~(ii)~~(2) Any such proposed program shall be made available for review by the government.

~~(iii)~~(3) If the organization fails to submit a satisfactory program, the court shall engage such experts as it finds necessary to prepare such a program, and the cost of such experts shall be paid by the organization. Any experts engaged by the court shall be given access to such information in the possession of the organization as the court deems necessary to the effective accomplishment of the experts' task.

~~(iv)~~(4) No program shall be approved that is less stringent than any applicable statutory or regulatory requirement.

~~(v)~~(5) Upon approval by the court of a program to identify and correct any conditions that gave rise to the conviction and to prevent and detect violations of law, the organization shall notify its employees as the court deems appropriate and shall notify shareholders and the public of its criminal behavior and of the terms of the approved program. Such notice

~~(4)~~ (d) If probation is ordered under ~~Step V(a)(3)~~ §9F1.1(a)(3) or (4), the court shall impose the conditions set forth in this paragraph. If probation is ordered under ~~Step V(a)(5)~~ §9F1.1(a)(5) or (6), the court shall impose any of the following conditions it deems necessary in order to achieve and maintain compliance with applicable environmental law. ~~That~~ The determination of necessity shall be made in writing after the parties have had the opportunity to present relevant information to the court.

~~(i)~~ (1) The organization shall develop and submit to the court a program to identify and correct any conditions that gave rise to the conviction and to prevent and detect any future violations, including (i) an effective program to detect and prevent future violations of law and (ii) a schedule of implementation of any such program.

~~(ii)~~ (2) Any such proposed program shall be made available for review by the government.

~~(iii)~~ (3) If the organization fails to submit a satisfactory program, the court shall engage such experts as it finds necessary to prepare such a program, and the cost of such experts shall be paid by the organization. Any experts engaged by the court shall be given access to such information in the possession of the organization as the court deems necessary to the effective accomplishment of the experts' task.

~~(iv)~~ (4) No program shall be approved that is less stringent than any applicable statutory or regulatory requirement.

~~(v)~~ (5) Upon approval by the court of a program to identify and correct any conditions that gave rise to the conviction and to prevent and detect violations of law, the organization shall notify its employees as the court deems appropriate and shall notify shareholders and the public of its criminal behavior and of the terms of the approved program. Such notice