the lack of such an explanatory statement accompanying the specific proposals may indicate that there is no real consensus within the Group, or stated differently some, if not many, members of the Group may not have completely accepted some of the more drastic changes of approach which this draft represents. This omission of an explanatory statement cannot be remedied later.

To be specific on this point, no reason is given for shifting terminology from that adopted previously by the Commission, such as the change from "pecuniary gain" to "economic gain". Similarly, there is no explanation for the substantially different and more extensive definition of terms relating to gain, loss and material degradation. Finally, there is no explanation for the AWG's departure from the Commission's practice of using dollar amounts in the fine tables and substituting fine tables expressed in percentages of the maximum statutory fine. This substitution could lead to a conclusion that the objective was to increase fine levels drastically, but in a way which is not likely to be understood from a cursory reading of the document. Indeed, although it seems quite clear that this change does in fact raise fine levels significantly, it is almost impossible for even environmental experts to calculate the extent of the increase as applied to all the varied circumstances which the guidelines attempt to address.

In this context, Harris Corporation's comments are brief, and perhaps necessarily incomplete. We may not yet understand what was the intention of the Advisory Working Group. Nevertheless, the following specific comments are offered:

1. The Commission elected to exclude environmental crimes as set forth in Chapter 2, Part Q from full application of the provisions of Chapter 8 relating to sentencing of organizations. Presumably this was done because of difficulty in determining whether application of those guidelines would produce reasonable, fair and uniform results in environmental sentencing. Whatever the reason for that exclusion, the AWG draft does not reflect any evidence that those concerns of the Commission have been answered, or even that they were discussed by the Group. In the absence of either explanations or supporting evidence, the AWG proposals should be rejected in their entirety.

2. The failure of the AWG to submit an agreed-upon statement of its policies and assumptions, and the lack of any supporting documentary, anecdotal, or testimonial evidence is also a sufficient ground in and of itself to completely dismiss the proposals.

3. Even ignoring the question of their legality, the secret processes adopted by the AWG cast serious doubt upon the resulting recommendations. While the Group appeared initially to be moderately representative, it decided to work in meetings closed to the public and, more importantly, to purposely avoid communication to, and consultation with, any outsiders, even the constituencies they purported to represent. By that action, it established itself as a group of individuals acting solely on the basis of their own individual beliefs and personal viewpoints and is thereby wholly unrepresentative of the broad panoply of organizations with interest in and experience concerning environmental protection and compliance with law. As such, the report is merely a statement of the viewpoints of individual members acting on their own, with no indication as to how many of them are in agreement with any specific portions of the report.

4. A first reading of the draft proposals may give the impression that they are moderate and do not constitute a significant departure from previously adopted concepts of the Commission or the public generally. Unfortunately, in spite of the apparent reasonableness of many sections, the final result from applying all of these guidelines would, in our opinion, produce unfair and even bizarre results. The most notable provision which does this is the Offense Level Fine Table of Section 9E1.1. It calls for fines for each offense level using percentages of the maximum statutory fine, as compared with the dollar amounts employed by the existing guidelines. In effect, this is an indirect means for applying the provisions of the Alternative Fines Act, 18 U.S.C. Section 3571 (d) in almost every sentencing proceeding. That law makes the maximum fine for each offense "twice the gross gain or twice the gross loss resulting from the violation unless this would unduly complicate or prolong the sentencing process." However, nothing in that statute specifies that such maximum should affect sentencing in any way other than to increase the maximum. It should not be the basis for ratcheting up all fines just because there is a higher maximum. The AWG draft achieves that result and thereby constitutes an attempt at pure legislative action which is unjustified and is arguably beyond the power of the Commission itself.

5. This percentages approach to fine levels would introduce a virtual "wild card" into sentencing, with almost certain loss of uniformity and certainty. Note particularly that the Act's provision about "unduly complicating or prolonging the sentencing process" in itself introduces doubt as to what the fine for each offense should be, even where it would not otherwise be necessary to determine the maximum. Since every fine would be a percentage of the maximum, that maximum would be a necessary part of every sentencing process. In each such case, it would be necessary to determine if calculation of gross gain or gross loss would unduly complicate or prolong the proceedings. For this reason alone, the AWG fine level table is impracticable. Certainly, the need to make this determination in every proceeding would prolong each sentencing hearing.

6. The minimum fine as set by the draft in Section 9E1.2 (c) is also unprecedented. Its effect would be to completely nullify the provisions of most other sections of the guidelines in a significant number of cases. If any significant loss has resulted, even if fortuitus an unforeseeable, no effect would be given to important mitigating factors, such as those indicating little culpability; voluntary clean-up; compensation for any resulting injury; effective compliance and environmental protection programs; cooperation with administrative agencies; administrative penalties already imposed; or the absence of prior offenses. In any case where the loss was significant, however fortuitous and unforeseeable it may have been, the minimum fine provision would usurp all of these mitigating factors, and in many instances would produce a grossly excessive penalty.

7. The compliance requirements set forth in the draft break new ground. Although perhaps not clearly specified, realizing any benefit from the proposals would require a company, regardless of its size, to maintain two separate and distinct compliance programs. A general legal compliance program (referred to by many companies as an "ethics program") is already called for by the organizational guidelines of Chapter 8. A complete and fully separate environmental program for Chapter 9 would be required by the AWG. For large companies such as Harris Corporation, this would not be a problem if the AWG

mandated program were a reasonable one, since Harris already has both programs which operate separately and in tandem. In companies such as Harris, the ethics program includes law compliance, but also calls for ethical conduct over and above compliance with the law. Similarly, the company's environmental protection program is designed to do just that, not just to comply with all the administrative rules. However, the AWG requirement applies to all companies, large and small. It calls for all to have both programs. That seems to be overkill, particularly when most small companies probably do not handle a significant number or amount of pollutants.

8. No detailed comments about the super-comprehensive AWG compliance provisions seem necessary except to say that they create detailed inflexible specifications for what should be adopted by all American companies, in all industries, of all sizes, with all types of management, when some companies may have practically no contact with detrimental substances. A simple statement calling for compliance and an appropriate educational program should suffice for the majority of American companies, and could reasonably be prescribed by the Commission, but the AWG all-encompassing proposals go far beyond what is reasonable and practicable. In this regard, three comments seem in order:

a) Most companies which deal with hazardous or toxic substances employ individuals who are competent to devise compliance programs and means for protecting the environment.

b) The problem of procedures prescribed centrally is well illustrated here. Law enforcement and agency personnel become familiar with the uncommon and extreme cases, and in hindsight determine how an incident could have been prevented. Also, necessarily, they prefer policies and programs which they think will simplify law enforcement and thereby make their jobs easier. Clear rules for measuring compliance, preferably quantifiable, become the preference. Uniformity over all industries adds immeasurably to ease of enforcement. In contrast, companies which wish to protect the environment effectively start with the situation they face, look for potential risks, and then shape a program to fit. That is a far more effective way and, we submit, the Commission should encourage that approach.

c) Proper organizational procedures call for flexibility and judgement. Overly complex procedures imposed upon simple operations involving negligible environmental risk would inevitably result in almost complete disregard of those procedures. The level of detail and complexity in a procedure must be tailored to bear some rational relationship to the risks and complexity of the operations. Excessive warnings and overly detailed regulations make them so incomprehensible to the employee so as to be irrelevant. The risk that the rules will be disregarded is thereby increased, and prevention of incidents is thereby impaired.

9. The compliance procedures called for in the AWG draft are potentially disastrous for small business operators. Individual members of the AWG may have had some

understanding of small business operations, and some definition reflecting size and number of employees. However, the draft reflects little appreciation of the reality that the rules will be applicable to a variety of retail, distribution, personal service and other diverse operations having very few employees and a single owner/manager. Such operations will probably never even hear of compliance regulations included within complex criminal sentencing guidelines, let alone have the resources to comply with them. If these rules are ever imposed upon such organizations, they will fall upon an unwitting and unsuspecting offender. In such situations, recognizing that ignorance of the law is no excuse, criminal prosecution and conviction can result. At the same time, the penalties ought to reflect true culpability. The extent of the penalty should not depend upon the presence or absence of compliance with a set of rules which none of the defendants can reasonably be expected to understand or know about.

10. In contrast with crimes committed by individuals, organizational offenses most frequently are covered by regulatory commissions and administrative rules and procedures. The organization's liability is vicarious, the offensive acts or failures to act always being committed by individuals. In such circumstances, coordination of civil, administrative and criminal procedures and remedies is essential if any rational results are to be expected. This need applies to all organizational offenses, but it is particularly applicable to environmental offenses, since there will be few instances in which an organization subjected to criminal prosecution will not already have been subjected to administrative proceedings, perhaps under both state and federal laws. Very frequently the organization will have completed remedial action, often voluntarily, and will have had an administrative penalty assessed against it. Resolution of the administrative process may have involved some payment by the company as "civil damages" for alleged damage to the environment, natural resources or wildlife. The AWG draft reflects little recognition of this entire subject: it is not even apparent that the issue was considered.

From our reading of the draft, if it were to be adopted, we can readily conceive of the following scenario:

- the organization at its own expense conducts a cleanup of a substance discharge
- the organization compensates, often voluntarily, or otherwise through civil actions, individuals and organizations which suffered injury
- an administrative agency will have required a payment of restitution or civil damages for alleged injuries to the environment or natural resources
- the administrative proceedings result in an administrative fine or penalty
- individuals in the organization, management or non-management, may be subjected to imprisonment or fines
- the company, as a result of criminal proceedings, will pay a fine or negotiate a fine through plea bargaining, which will be greatly influenced by the sentencing guidelines

In these circumstances, under the AWG proposals, the minimum fine would be economic loss, as defined, plus all "costs," which by the AWG definition would include all the amounts paid by the company and others for clean-up, all payments made to compensate injured parties, and all amounts paid for alleged injury to the environment and natural resources, which as a minimum would be the amount paid as a result of the administrative proceedings. In short, the more the company does to clean up the environment, offer remedies to injured parties, and settle administrative proceedings voluntarily, the higher the minimum fine would be in the criminal proceedings. Not only does this make no sense, the result could only be to deter the very kind of voluntary action which the guidelines ought to encourage.

11. We renew our comments previously given to the Commission concerning probation as applied to organizations. Chapter 8 includes provisions for probation which we believe already go too far in encouraging courts to impose probation. It does not seem appropriate for the AWG to address this issue, which has already been addressed by the Commission itself. If the Commission does again review the issue of probation, applying any recognized form of probation to publicly held corporations is neither required to achieve any legitimate objectives, nor likely to produce sensible results. It is important to note that probation appears in the guidelines for organizational sentencing as an additional penalty for recalcitrant management, superimposed upon other penalties. Conversely, for offenses of individuals, probation is an ameliorating and mitigating device to be applied in less severe cases in lieu of, or to hold off, penalties which otherwise would be applied. Neither the concepts upon which probation is based, nor the procedures utilized in the courts, fit the sentencing of organizations. Additional comments concerning probation are contained in the many comments on this subject submitted to the Commission in connection with its consideration of Chapter 8.

12. The AWG seeks to establish an entirely new Chapter of the Guidelines relating to environmental offenses of organizations. The basis for this approach is unclear and does not appear to be required. It would seem more appropriate for whatever action is appropriate for environmental sentencing, to avoid re-inventing everything, but rather to fit it into the existing chapters of the guidelines.

The AWG proposals demonstrate the lack of any comprehensive investigation of penalties for environmental offenses or the application of the many laws and regulations dealing with environmental protection. In contrast to these present circumstances, and lack of evidentiary basis for the AWG proposals, we urge the Commission to redirect its attention to its previous investigations and considerations in adopting the individual guidelines ultimately issued in 1987. Chapter 1, Part A of those quidelines illustrates the real concerns the Commission then had, and should now have, in breaking new ground and maximizing the penalties for offenses, often without regard to anything resembling real culpability and with almost no knowledge or appreciation as to potential effects.

In the then-new guidelines, the Commission enunciated its concerns, and stated specifically that, as a continuing organization, it could monitor the application of the initial guidelines and make appropriate modifications as necessary. Harris Corporation submits that it is now time for the Commission to re-examine the application of Part Q of Chapter 2 to individual sentencing, both to eliminate the double counting and other deficiencies now known to exist, and also to determine what problems may exist as to sentencing of organizations for environmental offenses. Consideration could then be given to those problems found to exist, rather than to develop a new document as the Advisory Working Group apparently seeks to do.

In conclusion, Harris Corporation respectfully reiterates its opposition to the AWG proposals and any further consideration of them by the Commission. We urge the Commission to reconsider the entire issue of environmental sanctions once all the Commission vacancies are filled. Further, the Commission staff should undertake a comprehensive investigation of the issue. Then the Commission should allow appropriate opportunity for public consideration and comments of any proposed guidelines. We appreciate the opportunity to submit these comments on the AWG proposals.

Respectfully submitted,

Robert E. Sullivan

Robert E. Sullivan

National Association of Manufacturers

James P. Carty

Vice President

Government Regulation, Competition & Small Manufacturing

February 23, 1994

The Honorable William Wilkins
Chairman
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2500, South Lobby
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

The Commission has invited comment on the final report of the Advisory Working Group on Environmental Offenses. On behalf of the 12,000 members of the National Association of Manufacturers (NAM), I am pleased to submit the following comments.

We have closely followed the Working Group's nearly two years of deliberations and have studied in detail its draft and final recommendations to the Sentencing Commission. We have concluded that the Working Group has largely squandered its time and efforts. Conceived for the purpose of advancing the state of knowledge regarding organizational sentencing generally and environmental crime and sentencing in particular, the Working Group has failed its mission.

The Working Group ignored its original mandate to undertake a meaningful study of the issues presented by organizational sentencing for environmental offenses that would assist the Commission in drafting guidelines, and sought instead to act as a surrogate sentencing commission. Functioning as a "junior varsity" commission, the Working Group concentrated on drafting actual sentencing guidelines, and undertook to educate *themselves* (curious for so-called "experts") rather than members of the Commission. Instead of a document that would further enlighten the Commission, the final recommendation is a cold and lifeless set of guidelines that largely fails to answer the over-arching issues that face policy-makers and, regarding those it purports to answer, fails to provide any explanation or rationale. The reader is put in the position of guessing the reasons for the Working Group's choices and is left uninformed as to guiding principles or other conceptual framework that may have animated the project. Further, there is no treatment of empirical and anecdotal information that may support the recommended guidelines. The recommendation of the Working Group is thus of little use in providing guidance to the Commission on how to proceed in developing environmental sentencing guidelines.

Beyond the manner in which the document was developed (and whether it is at all useful), we believe it represents a deeply flawed set of guidelines that evidences limited

understanding of the subject matter. Despite a wealth of comment provided the Working Group that laid out both the practical and philosophical pitfalls of the draft document, the final recommendation shows at best modest improvement.

The list of problems is long. Because we believe, however, that it is entirely premature to engage the Commission over specific guidelines proposals, given the absence of a foundation, framework and timetable for the development of an actual Commission recommendation, we give only summary treatment to the document's many problems.

Thus, the NAM believes the recommendation would unnecessarily create a separate chapter for environmental sentencing. It fails to adequately differentiate offenses based on the state of mind of the defendant. It would require an excessively detailed and complex compliance program, and would limit mitigation credit to instances where all seven factors are "substantially satisfied."

The recommendation would also make the absence of a compliance program an aggravating factor, and would place the burden on the defendant to prove its existence. It inadequately addresses count proliferation and incorporates deeply flawed Chapter 2Q offense levels. Its definition of "substantial authority personnel" is too broad; it would limit mitigation to 50 percent of the base offense level adjusted for aggravating factors, and would require calculation of "economic gain" in every case by placing a floor on the amount of fine.

Ultimately, the Commission will have to get serious about developing a body of empirical, quantitative and anecdotal information that can serve as a *starting point* for understanding the relevance and limits of environmental criminal enforcement and sanctions. (It is regrettable that the Working Group failed to aid in that endeavor.) Only after doing so can the Commission intelligently make the threshold determination whether sentencing guidelines of any kind are appropriate and necessary for environmental offenses.

Our suggestion to the Commission, therefore, is to suspend any activity on the development of specific organizational sentencing guidelines for environmental offenses until a) a serious effort is made to establish a factual foundation on which to base a guidelines

recommendation and, b) a new chairman and a full complement of commissioners are nominated and confirmed.

Thank you for the opportunity to comment.

Sincerely,

James P. Carty
Vice President
Government Regulation
Competition & Small Manufacturing

cc: Commissioner Carnes
Commissioner Gelacak
Commissioner Mazzone
Commissioner Nagel

ELECTRONIC INDUSTRIES ASSOCIATION

February 23, 1994

The Honorable William H. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Subject: Comment on the Final Recommendations of the Advisory Working Group on Environmental Sanctions

Dear Chairman Wilkins:

The Electronic Industries Association (EIA) submits this letter as comment to the sentencing guidelines proposed by the Advisory Working Group (AWG) on November 16, 1993 (hereinafter referred to as "Revised Draft Environmental Guidelines"). This document sets forth recommended criminal sanctions for organizations convicted of federal environmental crimes. For reasons provided below, EIA urges the Commission to reject the Revised Draft Environmental Guidelines.

EIA is the oldest and largest trade association for the U.S. electronic industries, with more than 1,000 member companies that design, manufacture, distribute and sell electronic parts, components, equipment and systems for use in consumer, commercial, industrial, military, and space applications. Our industry was responsible for more than $310 billion in factory sales in 1993. As an association representing the industry that employs the largest number of U.S. workers, EIA has a substantial interest in the development of fair and reasonable sanctions for violations of federal environmental statutes.

EIA member companies have traditionally been at the forefront of environmental compliance and innovation. The electronics industry has comprehensive compliance programs in current operation to prevent violations of environmental requirements. Accordingly, EIA supports appropriate sentencing and effective sanctions for corporations that knowingly and intentionally violate federal environmental requirements in a way that poses a significant threat of harm to people or the environment.

EIA actively participated in the public phases of the AWG's proceedings. In April 1993, EIA presented both written comments and oral testimony (*see* attachments) recommending that the Commission and the AWG withdraw the initial draft guidelines for three principal reasons: (1) the failure to incorporate existing federal sentencing guidelines in the initial

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draft would have resulted in sentencing disparities; (2) the process for determining fines was predicated upon complex and unquantifiable proof burdens for economic gain and loss; and (3) the initial draft would have put in place unduly burdensome and ineffective environmental compliance programs.

EIA is deeply concerned that the AWG failed to correct the fundamental flaws and patent inequities contained in the earlier draft. Specifically, the Revised Draft Environmental Guidelines still fail to comport with existing Federal Sentencing Guidelines and the Sentencing Reform Act of 1984. This inconsistency would cause unacceptable disparities in sentencing on environmental offenses and therefore result in imposition of inequitable penalties.

In addition, when the AWG decided to revise its initial guidelines, EIA had hoped the AWG would develop a body of empirical, quantitative and anecdotal information that could serve as a useful starting point for understanding the relevance and limits of environmental criminal enforcement and sanctions. However, neither the AWG nor the Commission has attempted to tabulate what courts actually consider when sentencing organizations for violations of environmental requirements. The collection of such empirical data is not only an essential step for establishing a foundation for developing sentencing guidelines, it is also necessary step to avoid disparate sentencing. EIA believes that this is a task for the Commission and its staff; EIA feels that it is inappropriate for the Commission to delegate this critical task to an *ad hoc* working group as it has up to this point.

Therefore, EIA recommends that the Commission reject the AWG's recommendations and initiate a *de novo* consideration of this issue once the current vacancies on the Commission have been properly filled. EIA encourages the Commission to afford adequate opportunity for public notice and comment on any future decision regarding environmental sentencing guidelines.

Respectfully submitted,

Barbara N. McLennan, Ph.D., J.D.
Staff Vice President
Government and Legal Affairs
Consumer Electronics Group

Kevin C. Richardson
Vice President
Government Relations

JTY/ms
Attachments

cc: Julie E. Carnes, Commissioner
Michael S. Gelacek, Commissioner
A. David Mazzone, Commissioner
Irene H. Nagel, Commissioner

ELECTRONIC INDUSTRIES ASSOCIATION

April 16, 1993

BY HAND

Advisory Working Group on Environmental Sanctions
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002-8002

Ladies and Gentlemen:

The Electronic Industries Association (EIA) submits this letter as comment to the working draft of recommended sentencing guidelines setting forth criminal penalties for organizations convicted of federal environmental crimes issued for public comment on March 5, 1993 (Draft Environmental Guidelines). EIA believes that the Draft Environmental Guidelines should not be adopted by the Sentencing Commission because they do not comport with existing Sentencing Guidelines, will impose enormous burdens on defendants and overall on judicial resources, and will result in environmental compliance obligations that are inequitable at best and may impede environmental compliance. EIA respectfully requests two minutes to testify at the May 10, 1993 hearing to state briefly our concerns with the Draft.

EIA is the oldest and largest trade association for the U.S. electronics industry, comprised of more than 1,000 member companies that design, manufacture, distribute and sell electronic parts, components, equipment and systems for use in consumer, commercial, industrial, military and space use. The electronics industry was responsible for more than $285 billion in electronics factory sales in 1992. As an association that represents a major manufacturing industry that employs more workers in the U.S. than any other, EIA is concerned with the development of requirements that ensure that public health and the environment are protected without unnecessarily burdening limited industry resources.

EIA member companies traditionally have been at the forefront of environmental compliance and innovation. Our companies have strong environmental programs in place and endeavor to prevent all violations. Our members also are proactive environmentally. Many are implementing programs so that their products will be chloroflourocarbon free before the mandated phase-out dates. Members also are involved with EPA's Green Lights program, the Industry Cooperative for Ozone Layer Protection,

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and EPA's 33/50 voluntary waste reduction program. Within EIA, our member companies have been promoting waste minimization plans in areas such as Design for the Environment, pollution prevention, rechargeable battery recycling, and cathode ray tube recycling. As such, we fully support appropriate sentencing and effective sanctions for corporations that are found guilty of federal environmental crimes. Because this Draft does not reflect such appropriate sentencing and effective sanctions, however, we cannot support its adoption by the Sentencing Commission.

As detailed below, EIA sets forth in three sections our concerns with the present Draft Environmental Guidelines. First, we set forth our general concerns with the extent to which the Draft Environmental Guidelines depart from the existing Sentencing Guidelines and will result in sentencing disparities. Second, we describe our objections to fines based upon economic gain plus costs, as set forth in Step I(a)(1). Finally, we specify the flaws that we see with the Draft's treatment of environmental compliance as an aggravating and/or mitigating factor in Steps II and III.

THE DRAFT DOES NOT COMPORT WITH EXISTING GUIDELINES

One of EIA's primary concerns with the Draft Environmental Guidelines is that they do not comport with the existing federal Sentencing Guidelines nor the Sentencing Reform Act of 1984. Indeed, these Draft Guidelines, if adopted, will result in: substantially harsher sentences for environmental crimes than would be imposed under the existing federal Sentencing Guidelines; sentencing disparities; and longer sentencing hearings that will burden severely limited judicial resources.

There are several examples where the Draft departs from the existing Sentencing Guidelines in terms of punishment severity. For instance, the Draft Environmental Guidelines impose probationary obligations in Step V that are substantially harsher than provided for under the existing guidelines. Probation under the Draft would include corporate audits by third parties as well as mandatory disclosure of all financial records. Such probationary conditions would allow a court to take complete control of a corporation convicted of a single environmental offense. Such a result is not the purpose of probation generally, which contemplates corporate supervision, not complete control.

Similarly, fines under the Draft Environmental Guidelines would be substantially higher than under the existing guidelines. One reason for such large fines is the fact that the Draft sets minimum fine ranges at a very high percentage of the statutory maximum. Given that there is limited opportunity for a company that proves that mitigating facts exist to have its fine reduced, even companies that can make a showing that they are

committed to environmental compliance, and have cooperated and self reported, have far less fine reduction potential than do companies sentenced under the existing guidelines. Again, such a result is inequitable.

Another of the most significant disparities between the existing Sentencing Guidelines and the Draft Environmental Guidelines is in Step IV, which limits the cumulative effect of mitigating factors under the guidelines to fifty percent of the base fine. A base fine reduction may exceed fifty percent only if it is necessary to prevent the company from going out of business. The analogous mitigating factor limitation in the existing Sentencing Guidelines is five percent of the base fine. No justification exists to treat environmental crimes in such an onerous fashion compared to other categories of crimes. This deviation from the existing Sentencing Guidelines will result in substantial sentencing disparities. The Working Group should revise the mitigating factors limitation in Step IV to be consistent with the existing Sentencing Guidelines.

These large fines also point to another flaw in the Draft. There is no correlation between fine levels and mens rea, or intent to commit a crime or to do harm. Sanctions keyed to culpability and intent are fair, appropriate and effective. The Draft therefore should be revised to impose higher fines on those companies with proven intent to violate the law, and lesser fines on those whose violation is not a result of criminal intent.

Moreover, under the existing Sentencing Guidelines, the Draft Environmental Guidelines base fine table is not premised on the harm or toxicity or hazardousness of the release. Thus, releases due to mishandling of dredge material or encapsulated hazardous debris will be subject to the same base fine as is an unlawful discharge of a carcinogen. Such a result comports neither with justice nor common sense.

The complexity of the sentencing scheme that the Draft Environmental Guidelines proposes also will cause sentencing disparities. Given the myriad of fine combinations possible under this proposed system, it is quite possible that separate corporate defendants in truly parallel situations will receive vastly different sentences. This is just the result that the Sentencing Reform Act intended to avoid.

Finally, EIA is concerned that the Draft Environmental Guidelines, if instituted, will result in longer sentencing hearings and that proof of mitigating or aggravating factors will be exceedingly complex such that judicial resources (not to mention defendants') will be burdened substantially. Again, such a result is the exact opposite of what was intended by Congress, and EIA urges both the Working Group and the Sentencing Commission not to adopt this Draft with these patent inequities and deviations from statutory intent.

THE GAIN PLUS COSTS BASE FINE DETERMINATION IS IMPROPER

EIA also takes issue with the Draft Environmental Guidelines' establishment of the "economic gain plus costs directly attributable to the offense" in Step I(a)(1) as a fine basis for three reasons. Each reason demonstrates why this base fine method should be withdrawn.

First, the addition of gain plus costs as a base fine is yet another example of where the Draft departs from the existing Sentencing Guidelines in a way that will result in harsher fines than would be issued under the existing standards. In the existing Guidelines, the provisions applicable to organizations define the base fine as the greater of the gain or the loss realized. Thus, the base fine imposed in the Draft Environmental Guidelines likely would exceed vastly a similar fine issued under the general Guidelines. Such an anomalous result is not just.

Second, the quantification of economic gain and costs in an environmental context that would be required pursuant to Step I(a)(1) seldom will be easy to determine. It assumes that the cost of the violation will be ascertainable at the time of sentencing, which is highly unlikely given the quantification difficulties we see with environmental damages in other contexts, such as in Superfund cleanups. Further, it assumes that economic gain will be ascertainable, when such a determination, at best, will rest on faulty and highly speculative financial assumptions. In short, such factors as economic gain and costs in the environmental context seldom will be solid facts but will be widely divergent estimates that may represent little more than projections into the future. They are very shaky evidence upon which to allow a judge to impose a sentence.

Finally, these determinations of gain/loss, given the illusory qualities of gain/loss proof, will be labrynthine tasks that will be time consuming in a sentencing hearing and thus will impose enormous burdens on judicial resources. Such a burden will "unduly complicate and prolong the sentencing process" in direct contravention to statutory intent.

THE ENVIRONMENTAL COMPLIANCE PROGRAM REQUIREMENTS ARE UNDULY BURDENSOME

There are several problems with the way that the proof and factors of an environmental compliance program are required and assessed under the Draft Environmental Guidelines that make its treatment unjust and ill-advised. EIA urges the Working Group and the Sentencing Commission to eliminate these inequities.

First, the absence of an environmental compliance program can form the basis for an upward fine adjustment under Step II(i). Such an upward adjustment has no counterpart in the Sentencing Guidelines. Such a disparity with the Sentencing Guidelines is not fair and ignores the myriad of reasons that a corporation may have for not having a formal program in place.

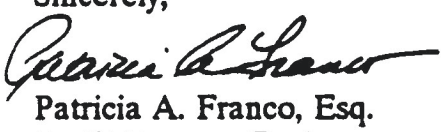
Second, the complex "factors for environmental compliance" set forth in Step III, on which use of a compliance program as a mitigating factor must be based, is complex, will unfairly burden small corporations, and edicts a specified list of functions and objectives that may or may not further responsible environmental management. In addition to being expensive and not amenable to being tailored to suit individual industry-specific operating parameters, it is premised on a very poor management model. In short, it would require micromanagement by senior personnel, and calls for a system of employee monitoring and discipline with no concern as to fairness or due process for an accused employee. In the end, such a system may boomerang and result in increased noncompliance, because employees may perceive no incentive for innovative and proactive solutions to environmental challenges, only a system that targets those who are too visibly involved in environmental management.

EIA urges the Commission and the Working Group to refrain from top-down imposition of compliance programs, as is done by the treatment of compliance programs in these Draft Environmental Guidelines. Instead, programs that encourage cooperation and innovation should be rewarded in order to ensure environmental health and safety.

* * * * *

EIA cannot support environmental sentencing guidelines that: are inconsistent with present Sentencing Guidelines; will not achieve the intent of the Sentencing Reform Act of 1984; will burden already strapped judicial resources; are predicated on complex and unquantifiable proof burdens for economic gain and loss; and would put in place inequitable and ineffectual environmental compliance programs. EIA respectfully request two minutes to testify at the May 10, 1993 hearing to state briefly our concerns with the Draft. In these comments and in our testimony, EIA urges the Working Group and the Sentencing Commission to withdraw this Draft because it does not represent an equitable method by which to assess culpability, deter bad acts, or advance public health and environmental protection.

Sincerely,



Patricia A. Franco, Esq.
Staff Director, Environmental Affairs

STATEMENT OF MARK V. STANGA BEFORE THE UNITED STATES SENTENCING COMMISSION

Good Afternoon. My name is Mark Stanga, and I am Environmental Affairs Counsel for Litton Industries. I am here today representing Litton and the Electronic Industries Association. Litton is a technology-based company providing advanced electronic defense systems, industrial automation systems and resource exploration services. The EIA is the oldest and largest trade association for the U.S. electronics industry, with more than 1000 members that design, manufacture, distribute and sell electronic parts, components, equipment and systems.

Both the EIA and Litton filed written comments with the Commission on the recommended organizational sentencing guidelines for environmental crimes. I will summarize these comments briefly.

The EIA and Litton strongly urge the Commission *not* to adopt the recommended guidelines in their current form. We believe that the recommended guidelines would impede rather than advance the Sentencing Reform Act's goal of consistent sentencing. The recommended guidelines would impose enormous and unjustified burdens on defendants and overall on judicial resources, and would result in inequitable environmental compliance burdens.

One of our major concerns is that the recommended guidelines would result in substantially harsher sentences than would be provided for other categories of crimes under the existing organizational guidelines. Numerous aspects of the recommended guidelines would contribute to harsher sentences for environmental crimes. I will mention a few.

The recommended guidelines would result in much higher base fines than before because overall they place the fine ranges at a very high percentage of the maximum. Another factor that would contribute to higher base fines is *combining* economic gain with environmental loss, instead of using the greater of gain *or* loss.

Another serious defect in the recommended guidelines is that they limit the cumulative effect of mitigating factors to fifty per cent of the base fine except where necessary to keep the defendant from going out of business. The analogous mitigating factor limit in the existing guidelines is five per cent. No justification exists to treat environmental crimes so harshly compared to other crimes.

The recommended guidelines would require extremely complicated sentencing hearings, involving numerous factual and judgmental determinations.

The recommended guidelines expand the concept of probation far beyond its traditional bounds. Probation would include third party compliance audits and mandatory disclosure of all financial records, allowing a court to take complete control of a convicted corporation.

We urge the Commission to withdraw the recommended guidelines because they do not represent an equitable method to assess culpability, deter environmental crime, or advance pubic health and environmental protection. Thank you.

General Electric Company
1331 Pennsylvania Ave. N.W.
Washington, DC 20004-1703

February 23, 1994

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

Re: Preliminary Comments of the General Electric Company Concerning Further Development of Organizational Sentencing Guidelines for Environmental Offenses

Dear Commissioners:

I am writing in response to your December 16, 1993 notice indicating the availability of the final recommendations of the Advisory Working Group on Environmental Sanctions.

Last Spring, GE, along with Johnson Controls, Inc. and IMCERA Group provided written comments to the Advisory Group concerning its preliminary draft. I subsequently testified at the public hearing held by the Advisory Group and, at the Group's request, provided supplemental comments relating to that testimony. My commentary was based upon my experience over the last four years as GE's vice-president in charge of environmental matters company-wide and, before that, my experience both in the federal government and in private law practice with the enforcement of the federal civil and criminal laws. Having learned that the Commission will be meeting with the Advisory Group later this week, I offer the following brief remarks concerning the Group's final work product.

The Advisory Group still has not provided advice on the fundamental threshold question whether such guidelines are necessary and whether the Group's final recommendations truly reflect empirical reality. The Group has likewise failed to discuss the conceptual underpinnings and provide reasoned justification for its choices. This is unfortunate, as the continued lack of supporting analysis makes rigorous assessment of the Group's work quite difficult.

Generally, however, while the final recommendations have moved in a positive direction, the movement is fairly incremental. Significant structural and substantive problems remain. GE's principal concerns are reflected in the attached article which should be published soon in the Environmental Law Institute's policy journal, The Environmental Forum. These views are more fully explained in my supplemental comments (also attached) concerning the Advisory Group's draft which, unfortunately, remain equally relevant to the final proposal.

GE would be happy to provide more extensive comments at a later date. Before the Commission takes further action on the Advisory Group proposal, we would urge the Commission to have staff explore the proposal's conceptual underpinnings and provide the results of its analysis to the public. In addition, it is our hope that the Commission will undertake an empirical analysis of existing sentencing practice and make that information publicly available as well. These analyses are critical to producing a principled approach to sentencing organizational offenders that is realistic, workable, and fair.

Thank you for your consideration of our views.

Very truly yours,

Stephen D. Ramsey

Stephen D. Ramsey

SUBMISSION TO THE ENVIRONMENTAL FORUM

BY STEPHEN D. RAMSEY
VICE PRESIDENT FOR CORPORATE ENVIRONMENTAL PROGRAMS

FEBRUARY 14, 1994

I've contemplated the issue of criminal enforcement from many sides, none of them theoretical. This is not an encomium against criminal enforcement of environmental laws. Criminal sanctions are appropriate for willful violations of the environmental laws that will lead to demonstrable harm. Guidelines that assure that similarly situated defendants are sentenced similarly and in proportion to the offense are appropriate. This is, rather, the view of a potential end user of the advisory group's product and a plea (no pun intended) for a moment of perspective in which we ask: what should the criminal sentencing guidelines accomplish and are we there yet? Hopefully guidelines will encourage corporate self-policing, differentiate between technical and more egregious acts and be creative and flexible in encouraging good behavior and deterring bad behavior. Despite a lot of hard work over a long period of time, the sentencing guidelines proposed by the Advisory Group on organizational environmental crimes do not, in my view, accomplish that goal. In short, we are not "there" yet.

The first step is to focus on what the criminal laws and criminal sentence are supposed to achieve. It's pretty simple: bad behavior should be punished and deterred and good behavior should be encouraged. Bad behavior is doing what reasonable people know will harm or injure people or the environment and taking that action willfully and knowingly. It should not be criminal bad behavior to store your hazardous waste more than 90 days when it presents no serious or realistic risk to anyone. It is not criminal behavior to discharge oil to a lake as the result of an accident rather than a deliberate act. Foreseeable harm and culpability should be the benchmarks for criminal charges and criminal sentencing.

Good behavior for a corporation in this context is integrating into the company's culture lawful behavior and self-policing mechanisms that assure that active compliance with the law is part of the corporation's automatic response to every situation. The quality of the effort as well as the end result should be important factors in evaluating corporate behavior and considering punishment for it.

These basic propositions do not set environmental crime apart from other crimes. At bottom the environmental criminal system is an integral part of the criminal law generally.

The point at which environmental crime most differs from the general criminal law is the indistinct border between civil and criminal offenses. In particular it is difficult to articulate by reference to jury instructions the difference in knowledge and willfulness that turns a civil offense into a crime.

The Advisory Group failed to exploit the opportunity to help clarify the structure and content of environmental criminal law. That is a misfortune for everyone in the environmental profession. Neither culpability nor foreseeable harm is illuminated as the central focus of charging or sentencing environmental crimes. Most importantly, there is virtually no effort at capturing the varying mental states that should be the basis of much of the variation in environmental criminal sentencing. There are degrees of bad behavior. Sentencing guidelines should reflect that clearly and effectively and make use of them.

The Advisory Group's encouragement of good behavior is also flawed. The blue print for corporate compliance is a straitjacket. It should be obvious to those with experience in environmental enforcement or environmental management that techniques and standards for compliance programs have evolved rapidly over many years responding to new ideas ranging from TQM to waste minimization. That change has been for the good. Creativity and change need flexibility to flourish. It should be encouraged by guidelines which emphasize principles but allow them to be expressed in new and better ways. The last word on how to structure corporate environmental compliance will not be spoken in 1993.

There was another opportunity to encourage good behavior that was missed. For a long time environmental enforcement has included remedies which benefit the environment generally. The concept of restitution through environmentally beneficial projects has a long history of success and both

community and judicial acceptance. The Advisory Group's limitation on mitigation to 50% of the fine is neither explained nor warranted.

The Advisory Group has not clearly articulated the basis and explanation for their proposals. The instructions on corporate compliance are provided in rigid detail and designed to make sure they are followed without question or dissent. The bases for determining the fine amount appears designed to assure that fines are high -- very high. This rips environmental sentencing for organizations out of the context of organizational sentencing generally. It is a hallmark of the Sentencing Commission's guidelines for organizations that they recognize the vicarious nature of organizational crime and accordingly allow for a wide range of fine results depending on how the organization has measured up to broad principles of internal governance. Not only is that system sound for environmental offenses, it is particularly appropriate in the environmental context when the distinction between civil and criminal misconduct is so difficult to articulate and define.

I hope the Sentencing Commission rejects the Advisory Group's work product. We should not be dealing with basics after fifteen years of federal environmental criminal enforcement nor legislating in the guise of sentencing guidelines. To get beyond basics the Sentencing Commission has to construct a sentencing system that fully and persuasively explicates the range of culpability and foreseeable harm that make up the bad behavior the sentences should deter; firmly places environmental offenses in the context of general criminal law principles; and explicates the good behavior that is to be encouraged while leaving the room for flexibility and creativity which will provide the opportunities for companies to devise systems which make sense for their situation and, yes, actually work. There is still a lot of work for the Commission to do.

Stephen D. Ramsey, GE Co.
2/14/94
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Stephen D. Ramsey
Vice President Corporate Environmental Programs

General Electric Company
[illegible]

July 7, 1993

Advisory Working Group on
Environmental Sanctions
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Members of the Advisory Working Group:

At the public hearing on May 10, 1993, I spoke on behalf of the General Electric concerning the Advisory Group's draft of proposed sentencing guidelines for organizational offenses. In response to the Advisory Group's request at that hearing, I enclose supplemental comments which address questions raised at the hearing and incorporate the major points of my testimony.

If you have any questions or would like additional information, I would be to pleased to respond further. Thank you for your consideration.

Very truly yours,

Stephen D. Ramsey

Enclosure

Supplemental Comments of the
General Electric Company
to the United States Sentencing Commission's
Advisory Group on Environmental Sanctions

1. The Advisory Group Should not Depart from the Existing Guidelines "Effective Programs to Prevent And Detect Violations of Law."

In the Commission's existing guidelines, one of the most innovative and thoughtful elements is the linkage between the deterrent function of the criminal sanction and the imputed criminal liability of organizations or corporations. The existing guidelines for organizational offenses put substantial weight at sentencing on whether the organization had an "effective program to prevent and detect violations of law." This provision is sound for two reasons: it both promotes sound management principles within organizations aimed at assuring compliance with the law and deters organizations from violation of the law.

The provisions of the guidelines addressed to the prevention and detection of violations of law work as an incentive to corporate managers; they serve as a positive framework setting out what a corporation should do to pursue the ends of crime control. In addition, the guidelines recognize that it is individuals that actually commit crimes; criminal liability is imputed to an organization on the basis of the acts and mental state of those who work for it. To the degree that an organization has established and enforced internal standards to assure that its

officers and employees do not commit criminal acts, the sanction for crimes imputed to the organization should be reduced because the mental state of the organization is not conducive to criminal behavior.

The existing guidelines provide a sound and reasonable basis both for sentencing and for guiding the corporate manager because they are expressed as general standards which support the goal of an "effective program to prevent and detect violations" of law and thus recognize the diversity of organizational structure and management approaches that can result in an effective program. Given general standards, corporate managers can and do design programs tailored to their corporate circumstances. General standards recognize the most important element in programs aimed at preventing and detecting violations of law: the quality of the program is derived from the care, thoughtfulness and vigor of those running the program. In a complex regulatory system, the hallmark of a good compliance record will be the attentiveness and energy of those with responsibility; it will rarely be the ability to execute a checklist, cookbook approach to compliance.

The Advisory Group makes two fundamental errors in departing from the present Guidelines: it departs from broad standards to excessive and often ambiguous detail; and it treats the program to prevent and detect violations of law as an all-or-nothing matter.

The benchmark standards for a sound compliance program should be assuring compliance in an efficient manner that is not wasteful; providing an effective disciplinary mechanism to enforce the system; and training and educating employees so that they know what is expected of them and have the knowledge and judgment to perform their job competently. Given these goals it is equally important to recognize that different organizations can achieve the goals in different ways and that there is not a single path or pattern that must be followed.

To illustrate the departure from appropriately broad standards, we will address the existing guidelines' fifth standard: "The organization must have taken reasonable steps to achieve compliance with its standards." This standard covers monitoring and auditing. In the Advisory Group proposal this standard becomes a requirement for (1) frequent auditing; (2) inspection; (3) continuous on-site monitoring; and (4) redundant, independent checks on the status of compliance. Step III(c). First, it is impossible to determine what the difference between auditing, inspecting, monitoring, and independently checking something is. Aren't auditing and independently checking the same? Regardless of the lack of clarity, this list ignores the importance of efficiency in corporate compliance systems and conveys the sense that there can never be enough compliance police.

Take a simple but practical and important example of corporate environmental compliance. We take an example from

compliance with the RCRA regulations for listed solvents since the improper management of such solvents has been a frequent subject of civil and criminal enforcement. Assume that a company's only present RCRA obligations arise from the use of a listed solvent. It decides to assure compliance with RCRA by substituting a non-RCRA solvent. It instructs its purchasing agent as to which solvents to buy and which not to buy and requires that all solvent purchase be approved in advance by the purchasing agent's superior. It is important to assure that this system is complied with. But does it require frequent auditing, inspection, continuous on-site monitoring, and redundant, independent checks to achieve that goal?

Corporate managers are very much aware that some manufacturing systems are much more prone to human error or improper manipulation than others. It makes sense to have more thorough and careful control over such systems than over, say, the purchasing system we have described or a proven and reliable mechanical system with built in safeguards against failure. In short, the effort in checking compliance ought to be proportional to the likelihood that the system will fail or be abused, taking into account the risks which failure or abuse would present. It makes sense to encourage appropriate use of reliable systems to comply with the law. Part of such encouragement is recognizing that the effort needed for compliance verification will vary with the system employed. The general standard of the existing guidelines rightly allows the corporate manager to make the central judgments about what controls are appropriate to the chosen system,

the Advisory Group proposal does not put sufficient weight on the nature of the system being checked. Put another way, the measure of a sound compliance effort is different from requiring that operations be checked out by four or five overlapping and duplicative methods. Achieving good compliance involves using intelligence in setting up the system and in operating it. The standard of the existing guidelines is sound, the organization must have taken reasonable steps to achieve compliance; the appropriate nature of those steps will depend on facts and circumstances that can not realistically be foreseen and described in guidelines or requirements.

Next, the Advisory Group makes an error by requiring that a court find that all of the factors in Step III were substantially satisfied, before granting any mitigation based on efforts to achieve compliance with environmental requirements.

The programs to prevent or detect violations of law or to assure compliance are measures of the corporate mental state. A corporation that has nine-tenths of the appropriate mental state should be treated differently from a corporation with one-tenth of the appropriate mental state. Treating Step III in the Advisory Group proposal as an all-or-nothing matter assumes that Step III accurately reflects the only system by which environmental compliance should be achieved. We have already provided an example of why we do not believe that is the case. We will add another here. Step III requires that the organization have "implemented

a system of incentives ... to provide rewards ... and recognition to employees and agents for their contributions to environmental excellence." Step III(e). At the outset, it is unclear whether "environmental excellence" is the same as "environmental compliance," but since all of Step III is directed to determining whether the organization has made a commitment to environmental compliance and this section is entitled "Incentives for Compliance," it is fair to assume they are the same. A company could very well take the position that compliance with the environmental laws is a threshold expectation of its employees. Those who violate environmental laws will be disciplined, but those who comply will not receive rewards and recognition because everyone is expected to comply; it is just as inappropriate to reward the waste water treatment plant operator for doing the job expected of him as it is to reward the CEO for not fixing prices or rigging bids.

Another company may believe that the corporate environmental staff, rather than the line manager, should "direct the resolution of identified compliance issues." Step III(a). This may be so for a number of reasons. If the line manager allowed that "compliance issue" to arise, it may be prudent to have someone else assure that it is resolved. A specialized corporate staff may bring much greater knowledge of the array of possible solutions to bear. While having line managers direct the resolution of compliance issues may be hallmark of a commitment to environmental compliance in one corporate organization, another