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. . . .**"

MAYER, BROWN & PLATT

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LLOYD S. GUERCI
202-778-0637

February 23, 1994

The Honorable William H. Wilkins, Jr., Chairman
Julie E. Carnes, Michael S. Gelacak,
A. David Mazzone, and Ilene H. Nagel,
Commissioners
United States Sentencing Commission
Federal Judiciary Building, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Simulations of Fines Under Work Group's Proposed Sentencing Guidelines for Environmental Crimes

Dear Chairman and Commissioners:

This letter addresses the simulations transmitted by the government to Commissioners Nagel and Gelacak on January 24, 1994. I believe that the preparation of fines simulations is a valuable and important exercise. However, because of the numerous problems with these simulations, I believe that they do not support the proposition that the work group proposal is sound.

First, the data set is too small. The simulations addressed only ten cases. Based upon the Environmental Protection Agency's printout sent to me on June 30, 1993, and thereafter circulated to the work group, there are far more cases. These should have been evaluated.

Second, the factual circumstances of the cases are not stated. It is not possible to determine whether the fine fit the crime. Also, the complete story is not presented. For example, the presence or absence of fines imposed on individuals is not stated. This may be part of an overall plea.

Third, nine of the ten cases involved pleas. In these pleas, it is reasonable to assume that an agreement was reached on the number of counts to be charged. Therefore, these simulations do not support the author's conclusion that the multiple violations provisions of the work group's proposal is reasonable. In fact, the ninth example (Ocean Spray), demonstrates that through multiple counts, very large fines are generated under the proposal.

Fourth, these simulations do not support the view of some members of the work group that the fine should be at least as large as the clean up costs or natural resources damages. In one case, Ashland Oil, oil cleanup costs exceeded the fine. In another case, Bristol-Myers Squibb, there is no basis for equating the restitution to natural resources damages.

Sincerely,

Lloyd S. Guerci

LSG:mcr

cc: Raymond Mushal, Esq.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

February 14, 1994

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Mike Courlander

SUBJECT: Public Comment on Proposed Guidelines for Organizations Convicted of Environmental Crimes

Attached for your information is public comment regarding the Advisory Working Group's proposed environmental sentencing guidelines for organizations.

MAYER, BROWN & PLATT

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January 31, 1994

The Honorable William H. Wilkins, Jr., Chairman,
Julie E. Carnes, Michael S. Gelacak,
A. David Mazzone, and Ilene H. Nagel,
Commissioners
United States Sentencing Commission
Federal Judiciary Building, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Guidelines for Organizations
Convicted of Environmental Crimes

Dear Chairman and Commissioners:

In my dissent of December 8, 1993, I noted the factors considered by the Government in deciding whether to bring a criminal action (p. 3, fn. 3).

On January 12, 1994, EPA issued a memorandum that sets out factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil authorities. A copy is enclosed.

Sincerely,

Lloyd S. Guerci

Enclosure

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

OFFICE OF
ENFORCEMENT

January 12, 1994

MEMORANDUM

SUBJECT: The Exercise of Investigative Discretion

FROM: Earl E. Devaney, Director
Office of Criminal Enforcement

TO: All EPA Employees Working in or in Support of the Criminal Enforcement Program

I. Introduction

As EPA's criminal enforcement program enters its second decade and embarks on a period of unprecedented growth, this guidance establishes the principles that will guide the exercise of investigative discretion by EPA Special Agents. This guidance combines articulations of Congressional intent underlying the environmental criminal provisions with the Office of Criminal Enforcement's (OCE) experience operating under EPA's existing criminal case-screening criteria.[1]

In an effort to maximize our limited criminal resources, this guidance sets out the specific factors that distinguish cases meriting criminal investigation from those more appropriately pursued under administrative or civil judicial authorities.[2]

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[1] This guidance incorporates by reference the policy document entitled Regional Enforcement Management: Enhanced Regional Case Screening (December 3, 1990).

[2] This memorandum is intended only as internal guidance to EPA. It is not intended to, does not, and may not be relied upon to, create a right or benefit, substantive or procedural, enforceable at law by a party to litigation with the United States, nor does this guidance in any way limit the lawful enforcement prerogatives, including administrative or civil enforcement actions, of the Department of Justice and the Environmental Protection Agency.

Indeed, the Office of Criminal Enforcement has an obligation to the American public, to our colleagues throughout EPA, the regulated community, Congress, and the media to instill confidence that EPA's criminal program has the proper mechanisms in place to ensure the discriminate use of the powerful law enforcement authority entrusted to us.

II. Legislative Intent Regarding Case Selection

The criminal provisions of the environmental laws are the most powerful enforcement tools available to EPA. Congressional intent underlying the environmental criminal provisions is unequivocal: criminal enforcement authority should target the most significant and egregious violators.

The Pollution Prosecution Act of 1990 recognized the importance of a strong national environmental criminal enforcement program and mandates additional resources necessary for the criminal program to fulfill its statutory mission. The sponsors of the Act recognized that EPA had long been in the posture of reacting to serious violations only after harm was done, primarily due to limited resources. Senator Joseph I. Lieberman (Conn.), one of the co-sponsors of the Act, explained that as a result of limited resources, "... few cases are the product of reasoned or targeted focus on suspected wrongdoing." He also expressed his hope that with the Act's provision of additional Special Agents, "... EPA would be able to bring cases that would have greater deterrent value than those currently being brought."

Further illustrative of Congressional intent that the most serious of violations should be addressed by criminal enforcement authority is the legislative history concerning the enhanced criminal provisions of RCRA:

> [The criminal provisions were] intended to prevent abuses of the permit system by those who obtain and then knowingly disregard them. It [RCRA sec. 3008(d)] is not aimed at punishing minor or technical variations from permit regulations or conditions if the facility operator is acting responsibly. The Department of Justice has exercised its prosecutorial discretion responsibly under similar provisions in other statutes and the conferees assume that, in light of the upgrading of the penalties from misdemeanor to felony, similar care will be used in deciding when a particular permit violation may warrant criminal prosecution under this Act. H.R. Conf. Rep. No. 1444, 96th Cong., 2d Sess. 37, reprinted in 1980 U.S. Code Cong. & Admin. News 5036.

While EPA has doubled its Special Agent corps since passage of the Pollution Prosecution Act, and has achieved a presence in nearly all federal judicial districts, it is unlikely that OCE will ever be large enough in size to fully defeat the ever-expanding universe of environmental crime. Rather, OCE must maximize its presence and impact through discerning case-selection, and then proceed with investigations that advance EPA's overall goal of regulatory compliance and punishing criminal wrongdoing.

III. Case Selection Process[3]

The case selection process is designed to identify misconduct worthy of criminal investigation. The case selection process is not an effort to establish legal sufficiency for prosecution. Rather, the process by which potential cases are analyzed under the case selection criteria will serve as an affirmative indication that OCE has purposefully directed its investigative resources toward deserving cases.

This is not to suggest that all cases meeting the case selection criteria will proceed to prosecution. Indeed, the exercise of investigative discretion must be clearly distinguished from the exercise of prosecutorial discretion. The employment of OCE's investigative discretion to dedicate its investigative authority is, however, a critical precursor to the prosecutorial discretion later exercised by the Department of Justice.[4]

At the conclusion of the case selection process, OCE should be able to articulate the basis of its decision to pursue a criminal investigation, based on the case selection criteria. Conversely, cases that do not ultimately meet the criteria to proceed criminally, should be systematically referred back to the Agency's civil enforcement office for appropriate administrative or civil judicial action, or to a state or local prosecutor.

IV. Case Selection Criteria

The criminal case selection process will be guided by two general measures - significant environmental harm and culpable conduct.

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[3] The case selection process must not be confused with the Regional Case Screening Process. The relationship between the Regional Case Screening Process and case selection are discussed further at "VI.", below.

[4] Exercise of this prosecutorial discretion in all criminal cases is governed by the principles set forth in the Department of Justice's Principles of Federal Prosecution.

A. Significant Environmental Harm

The measure of significant environmental harm should be broadly construed to include the presence of actual harm, as well as the threat of significant harm, to the environment or human health. The following factors serve as indicators that a potential case will meet the measure of significant environmental harm.

Factor 1. Actual harm will be demonstrated by an illegal discharge, release or emission that has an identifiable and significant harmful impact on human health or the environment. This measure will generally be self-evident at the time of case selection.[5]

Factor 2. The threat of significant harm to the environment or human health may be demonstrated by an actual or threatened discharge, release or emission. This factor may not be as readily evident, and must be assessed in light of all the facts available at the time of case selection.

Factor 3. Failure to report an actual discharge, release or emission within the context of Factors 1 or 2 will serve as an additional factor favoring criminal investigation. While the failure to report, alone, may be a criminal violation, our investigative resources should generally be targeted toward those cases in which the failure to report is coupled with actual or threatened environmental harm.

Factor 4. When certain illegal conduct appears to represent a trend or common attitude within the regulated community, criminal investigation may provide a significant deterrent effect incommensurate with its singular environmental impact. While the single violation being considered may have a relatively insignificant impact on human health or the environment, such violations, if multiplied by the numbers in a cross-section of the regulated community, would result in significant environmental harm.

B. Culpable Conduct

The measure of culpable conduct is not necessarily an assessment of criminal intent, particularly since criminal intent will not always be readily evident at the time of case selection. Culpable conduct, however, may be indicated at the time of case selection by several factors.

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[5] When this factor involves a fact situation in which the risk of harm is so great, so immediate and/or irremediable, OCE will always cooperate and coordinate with EPA's civil enforcement authorities to seek appropriate injunctive or remedial action.

Factor 1. History of repeated violations.

While a history of repeated violations is not a prerequisite to a criminal investigation, a potential target's compliance record should always be carefully examined. When repeated enforcement activities or actions, whether by EPA, or other federal, state and local enforcement authorities, have failed to bring a violator into compliance, criminal investigation may be warranted. Clearly, a history of repeated violations will enhance the government's capacity to prove that a violator was aware of environmental regulatory requirements, had actual notice of violations and then acted in deliberate disregard of those requirements.

Factor 2. Deliberate misconduct resulting in violation.

Although the environmental statutes do not require proof of specific intent, evidence, either direct or circumstantial, that a violation was deliberate will be a major factor indicating that criminal investigation is warranted.

Factor 3. Concealment of misconduct or falsification of required records.

In the arena of self-reporting, EPA must be able to rely on data received from the regulated community. If submitted data are false, EPA is prevented from effectively carrying out its mandate. Accordingly, conduct indicating the falsification of data will always serve as the basis for serious consideration to proceed with a criminal investigation.

Factor 4. Tampering with monitoring or control equipment.

The overt act of tampering with monitoring or control equipment leads to the certain production of false data that appears to be otherwise accurate. The consequent submission of false data threatens the basic integrity of EPA's data and, in turn, the scientific validity of EPA's regulatory decisions. Such an assault on the regulatory infrastructure calls for the enforcement leverage of criminal investigation.

Factor 5. Business operation of pollution-related activities without a permit, license, manifest or other required documentation.

Many of the laws and regulations within EPA's jurisdiction focus on inherently dangerous and strictly regulated business operations. EPA's criminal enforcement resources should clearly pursue those violators who choose to ignore environmental regulatory requirements altogether and operate completely outside of EPA's regulatory scheme.

V. Additional Considerations when Investigating Corporations

While the factors under measures IV. A and B, above, apply equally to both individual and corporate targets, several additional considerations should be taken into account when the potential target is a corporation.

In a criminal environmental investigation, OCE should always investigate individual employees and their corporate[6] employers who may be culpable. A corporation is, by law, responsible for the criminal act of its officers and employees who act within the scope of their employment and in furtherance of the purposes of the corporation. Whether the corporate officer or employee personally commits the act, or directs, aids, or counsels other employees to do so is inconsequential to the issue of corporate culpability.

Corporate culpability may also be indicated when a company performs an environmental compliance or management audit, and then knowingly fails to promptly remedy the noncompliance and correct any harm done.[7] On the other hand, EPA policy strongly encourages self-monitoring, self-disclosure, and self-correction.[8] When self-auditing has been conducted (followed up by prompt remediation of the noncompliance and any resulting harm) and full, complete disclosure has occurred, the company's constructive activities should be considered as mitigating factors in EPA's exercise of investigative discretion. Therefore, a violation that is voluntarily revealed and fully and promptly remedied as part of a corporation's systematic and comprehensive self-evaluation program generally will not be a candidate for the expenditure of scarce criminal investigative resources.

VI. Other Case Selection Considerations

EPA has a full range of enforcement tools available - administrative, civil-judicial, and criminal. There is universal consensus that less flagrant violations with lesser environmental consequences should be addressed through administrative or civil monetary penalties and remedial orders, while the most serious environmental violations ought to be investigated criminally. The challenge in practice is to correctly distinguish the latter cases from the former.

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[6] The term "corporate" or "corporation", as used in this guidance, describes any business entity, whether legally incorporated or not.

[7] In cases of self-auditing and/or voluntary disclosure, the exercise of prosecutorial discretion is addressed in the Department of Justice policy document entitled "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

[8] See EPA's policy on environmental audits, published at 51 Fed. Reg. 25004 (July 9, 1986)

The case-selection factors described in this guidance should provide the foundation for the communication process that necessarily follows in the Regional Case Screening Process. This guidance envisions application of the case-selection factors first, to be followed by the recurring scrutiny of cases during the Regional Case Screening process.

The fundamental purpose of Regional Case Screening is to consider criminal enforcement in the greater context of all available EPA enforcement and environmental response options, to do so early (at the time of each case opening) before extensive resources have been expended, and to identify, prioritize, and target the most egregious cases. Regional Case Screening is designed to be an ongoing process in which enforcement cases are periodically reviewed to assess not only the evidentiary developments, but should also evaluate the clarity of the legal and regulatory authorities upon which a given case is being developed.[9]

In order to achieve the objectives of case screening, all cases originating within the OCE must be presented fully and fairly to the appropriate Regional program managers. Thorough analysis of a case using the case-selection factors will prepare OCE for a well-reasoned presentation in the Regional Case Screening process. Faithful adherence to the OCE case-selection process and active participation in the Regional Case Screening Process will serve to eliminate potential disparities between Agency program goals and priorities and OCE's undertaking of criminal investigations.

Full and effective implementation of these processes will achieve two important results: it will ensure that OCE's investigative resources are being directed properly and expended efficiently, and it will foreclose assertions that EPA's criminal program is imposing its powerful sanctions indiscriminately.

VII. Conclusion

The manner in which we govern ourselves in the use of EPA's most powerful enforcement tool is critical to the effective and reliable performance of our responsibilities, and will shape the reputation of this program for years to come. We must conduct ourselves in keeping with these principles which ensure the prudent and proper execution of the powerful law enforcement authorities entrusted to us.

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[9] The legal structure upon which a criminal case is built - e.g., statutory, regulatory, case law, preamble language and interpretative letters - must also be analyzed in terms of Agency enforcement practice under these authorities. Thorough discussion of this issue is beyond the scope of this document, but generally, when the clarity of the underlying legal authority is in dispute, the more appropriate vehicle for resolution lies, most often, in a civil or administrative setting.

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December 8, 1993

LLOYD S. GUERCI
202-778-0637

The Honorable William H. Wilkins, Jr., Chairman,
Julie E. Carnes, Michael S. Gelacak, A. David Mazzone,
and Ilene H. Nagel, Commissioners
United States Sentencing Commission
Federal Judiciary Building, Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Proposed Guidelines for Organizations Convicted of Environmental Crimes

Dear Chairman and Commissioners:

On November 16, 1993, Frederick Anderson transmitted to you an advisory work group's proposed environmental sentencing guidelines for organizations. Meredith Hemphill, Jr. and I were members of that work group.

As I noted in my letter to you of November 18, 1993, I intended to file a dissent to the work group proposal. Enclosed is the dissent by Meredith Hemphill, Jr. and Lloyd Guerci.

In the dissent, we urge the Commission to reject the work group proposal. First, we explain that there is no foundation for the proposal. The proposal was not accompanied by any explanation or supporting document, and the work group did not otherwise support most of its assumptions and conclusions. Second, the proposal is dramatically different from Chapter 8 of the Sentencing Guidelines. We identify major unjustified differences between Chapter 8 and the work group proposal. Third, we explain that the fines generated by the proposal are greater than those under Chapter 8 and excessive. If you have any questions regarding our dissent, we would be pleased to answer them.

We appreciated the opportunity to participate on the work group. In particular, we would like to thank Commissioners Nagel and Gelacak and Commission staff for the time they generously devoted to the process.

Sincerely,

Lloyd S. Guerci

Enclosure

Report of Advisory Work Group
on
Sentencing Guidelines for Organizations
Convicted of Environmental Crimes

Dissenting Views
by
Lloyd S. Guerci
and
Meredith Hemphill, Jr.1/

December 8, 1993

I. Introduction

On November 16, 1993, an advisory work group submitted final proposed guidelines for the sentencing of organizations convicted of environmental crimes to the United States Sentencing Commission. We did not support that proposal, which varies dramatically from U.S.S.G. Chapter 8. This summarizes the general basis for our dissent.

Before turning to the discussion of the deficiencies of the proposal, we note that the final proposed guidelines are in most respects similar to the work group's draft proposal of March 5, 1993. Interested parties addressed the March 1993 draft in written comments and at a public hearing. It was roundly criticized. As Roger Pauley of the Justice Department stated: "Quite simply, the approach taken in this draft is fatally flawed."2/ Several former Assistant and Deputy Assistant Attorneys General from the Department of Justice's Environment

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1/ The views expressed by the dissenters are their personal views. The views of Meredith Hemphill, Jr. do not necessarily reflect the views of Bethlehem Steel Corporation or its management.

2/ Comments of April 16, 1993.

Division and former EPA General Counsel recommended wholesale changes to the draft proposal. Similarly, a former Chief of the Justice Department's Environmental Crimes Section analyzed the draft against his experience, concluded that it was based upon the wrong considerations and summarized the fines generated as starting high and going higher. In addition, a former Deputy Solicitor General who was responsible for criminal matters explained that the draft was fundamentally flawed both from an economic/deterrence approach and would cause massive over-deterrence, and from a fairness perspective as it would result in similar treatment of differently situated defendants and different treatment of similarly situated defendants. At the public meeting, most commenters suggested a return to Chapter 8.

Unfortunately, most of the deficiencies in the March 5, 1993 draft proposal were not corrected.

II. Background

There are about a dozen major federal environmental statutes and most states have enacted their own counterparts to the federal legislation. Pursuant to these laws, hundreds of thousands of environmental regulations have been adopted. These laws and regulations provide a full slate of remedies, including environmental restoration and penalties, which are designed to ensure that violators compensate for any harm done and pay appropriate penalties above and beyond restoration as punishment.

As explained by a consultant invited to appear before the work group, perfect compliance with the complex environmental

requirements is impossible, notwithstanding considerable efforts properly made by many organizations to achieve compliance. The nature, degree, and duration of the violations varies widely, as does the potential, if any, for harm. Fortunately, most violations are not particularly serious.

Under most of the major environmental statutes, EPA is authorized to seek administrative penalties and civil penalties for a broad range of violations. In addition, criminal fines may be imposed for many of the same violations. Administrative and civil penalties may be imposed without any showing of intent, i.e, they are strict liability offenses. Most criminal offenses require a showing of general intent; some may be established on a showing of simple negligence; one (33 U.S.C. § 407) is a strict liability offense. According to the Government, none of the criminal offenses requires a showing of specific intent. Some environmental offenses are felonies and some are misdemeanors. Administrative and civil penalties generally range to $25,000 per day/per violation for a first offense. Compared to administrative or civil penalties, criminal fines may be much higher. See 18 U.S.C. § 3571(c). 3/

3/ The Government has the prosecutorial discretion to proceed against organizations administratively, civilly or criminally. The Government appears to consider a number of factors in determining whether to proceed with a bring a criminal action. As explained to the work group, the factors that are frequently considered are: (1) jury appeal [a. not purely a technical violation; b. environmental factors - harm to the environment - real or potential; c. human health factors - harm to the public - real or potential; d. egregiousness of the violation (e.g., amount above allowable emission standards); e. nature of the pollutant discharged; f. willfulness], (2) culpability of the

In addition to penalties and fines, the corporate violator is subject to other expensive sanctions. If a chemical is spilled and the spill is not contained, it is likely that the company will have to expend a substantial sum for remediation. Corporations that are convicted are subject to suspension and debarment of contracts with the Government. Also, when a criminal action is brought, if possible, the Government indicts the responsible corporate employees, and upon conviction seeks fines and imprisonment.

We now turn to the proposal and issues raised by the proposal. In urging the Commission to reject the work group draft, we first address the lack of a foundation for the proposal. Second, we identify major unjustified differences between Chapter 8 and the work group proposal. Third, we submit that the fines generated by the proposal are excessive.

THE COMMISSION SHOULD REJECT THE WORK GROUP DRAFT

I. There Is No Foundation Or Justification For The Work Group Draft

A. The Adoption of a Separate Sentencing Structure for Environmental Crimes Is Ill Advised Because There are No Compelling Grounds for It

The threshold question is whether separate and different guidelines should be adopted for environmental crimes. We

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violator [a. past violations; b. ongoing violations; c. actual knowledge; d. institutional indifference; e. evidence of falsification], (3) motive, e.g., economic savings, and/or (4) quality of the evidence.

believe that the Commission should adopt separate and different guidelines for particular areas of the law only where supported by compelling grounds. Such grounds have not been established for environmental crimes. In fact, there is no explanation for the work group proposal.

As the Commission is well aware, sentencing is a complex, time-consuming matter. Sentencing courts should not be required to apply vastly different rules for different areas of the law unless there are compelling reasons. The work group has done just what it should not have done: it has suggested a separate and significantly different chapter in the Guidelines for environmental offenses, without a demonstrated need.

The work group members who supported the proposal did not justify their positions based upon the real needs in environmental practice. At the outset, some members thought that criminal actions for environmental crimes should involve environmental harm. However, governmental representatives on the work group observed that demonstrable harm was present in substantially less than ten percent of the criminal cases. It follows that most criminal cases involve violations of legal and technical requirements, without any demonstrable harm. In general, the Commission has considered regulatory offenses as manageable within the existing structure and warranting a modest offense level. See U.S.S.G. Chapter 1, Part A4(f).

When asked for justifications for different guidelines for environmental crimes, work group members often merely stated that

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

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

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

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

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

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

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

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

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

Seriousness of the offense

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

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

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

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

Culpability of the Organization

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Consideration of Culpability is Improperly Limited

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

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

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

C. The Provisions for Multiple Counts are Unjustified

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

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

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

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

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

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

pollution control systems were added or perhaps to close permanently.

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

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

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

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

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

D. The Compliance Program is Excessive

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

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

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

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

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

E. The Proposal Does Not Dovetail with the Existing Guidelines

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

The Commission should reject the work group proposal.

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J. BRYAN WHITWORTH
Senior Vice President
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January 28, 1994

The Honorable William W. Wilkins, Jr., Chairman
Julie E. Carnes, Michael S. Gelacek, A. David Mazzone, and
Ilene H. Nagle, Commissioners
United States Sentencing Commission
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Re: Comments on the Proposal of the Advisory Working Group on Environmental Offenses

Dear Commissioners:

I was honored to serve on the Commission's Advisory Working Group on sentencing guidelines for organizations convicted of environmental crimes. Because of the various submissions presently before the Commission, as well as the request for public comment which the Commission published on December 16, I would like to present a brief statement regarding the proposed guidelines.

I appreciate the Commission's decision to invite the public to provide comments as well as alternatives to the Advisory Group's proposal. Partly as a result of the diverse backgrounds and interests represented in the members of the Advisory Group, the proposal is a product of consensus and not unanimity. While it represents the members' best efforts under the circumstances, it did not answer all of the questions that should be asked by the Commission in its efforts to determine whether sentencing guidelines for environmental crimes are appropriate, and, if so, to develop fair and workable guidelines.

I am familiar with the dissent expressed to the Commissioners by Messrs. Guerci and Hemphill. Although the issues they raise were for the most part considered by the Group, it is an indication of the importance of the Commission's deliberations regarding the Group's proposal that members should feel it advisable to express their individual concerns. The following are my comments regarding the substance of the proposal.

First, in my estimation there is a question whether the proposal adequately accounts for differences in the scienter attributable to the organization responsible for the commission of an offense. While many of the environmental statutes prescribe lower maximum fines for offenses not involving "knowing" conduct, some do not, and it is important that the sentencing judge be allowed in every case to consider the state of mind of those responsible for the offense. It is also true that even within the category of "negligent" offenses, fines may range from between $2,500

and $25,000 per day of violation. With the minimum and maximum fines varying by a factor of ten, the court in setting the sentence should be able to evaluate the degree of negligence or knowledge of those involved in setting the sentence. The Group's original proposal, which was made available for public comment last March, included lack of scienter as a mitigating factor. It seems to me that the Commission should review this issue and determine how it should be treated under the guidelines.

Second, because the environmental statutes provide the prosecutor with opportunities to bring multiple counts for offenses which may involve essentially one course of offensive conduct, there is a question whether the guidelines adequately deal with the problem of "count stacking". This matter of count stacking, as much as any other issue considered by the Group, was considered during the course of our deliberations, and many different solutions and approaches were discussed. It would have been impossible to have incorporated all of the various ideas brought before the Group regarding this issue, and I would encourage the Commissioners to view this part of the proposal as only one of many possible approaches that could be considered.

Third, the proposal may not adequately account for the situation in which the offender has already paid for cleanup costs and perhaps has also paid a civil penalty based on the calculated economic gain realized from the offense. The proposal may yet require the payment of an additional amount, which is also based on economic gain or loss, as a criminal fine. This might lead to the assessment by the government of a total penalty which could be out of proportion to the offensive conduct exhibited in a given case. The Commission should give further consideration to this issue and its possible consequences as it reviews the Group's proposal.

Fourth, I share the concern expressed by many regarding the utilization of "economic gain plus costs directly attributable to the offense" to prescribe the minimum fine in most circumstances. I fear that this standard for fine calculation, coupled with the deletion of the mitigator for "lack of scienter", will cause the courts to have to mete out enormous sentences in cases where no truly culpable offender exists. Such an event could serve to lessen public respect for the judicial decision-making process, a result which is completely opposite to the result sought by the Group and, I am sure, to the result sought by both the Commission and Congress.

Perhaps the major weakness in the Advisory Working Group's proposal involves the manner by which the Group established minimum fines for each category of environmental offense. The Group did not empirically test the results that would be obtained by the application of its proposed schedule of fines as suggested by, among others, a committee of the American Bar Association. I would recommend that the Commission ask its staff to provide it with an analysis of the Advisory Group's proposal as it would apply to actual cases of environmental offenses reported by the federal courts, and also to hypothetical cases which could arise from the application of the proposed guidelines. I believe that the Commission would greatly benefit by testing the proposal in a real-world context, an exercise which the Advisory Working Group touched upon but did not pursue to completion.

In fact, it may be that a close analysis of the reported cases would indicate that there have been insignificant differences among sentences for similar classes of environmental offenses by organizations. Since this was neither examined nor reported by the Advisory Working Group, perhaps the Commission itself should consider whether the available data would demonstrate a need for sentencing guidelines in this area of law.

These are what I consider to be the most significant points of concern regarding the proposal submitted by the Advisory Group. Knowing that the Commission's invitation to comment will draw numerous comments addressing the specific provisions of the guidelines, I have tried to limit my comments to those matters which I believe may have the greatest potential effect upon the sentencing process.

I very much appreciate the Commission's invitation to participate in the meeting of February 24. Unfortunately, I will be unable to attend. I hope that the thoughts I have expressed in the form of this letter will be useful to the Commission, and I again want to thank the Commission and each of its members for the opportunity to be of service.

Very truly yours,

J. Bryan Whitworth

JBW:MCW:klk/jr550

pc: Advisory Working Group