

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

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

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

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

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

high and go higher"<sup>4</sup> are unwarranted and ill conceived.<sup>5</sup>

Caterpillar further believes that the comments of several former Justice Department and EPA Enforcement Officials to the Draft Proposal are just as applicable today as they were in May of 1993:

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

Officials' Comment at 20.

#### IV. COMPLIANCE PROGRAMS

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

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<sup>4</sup>Dissent at 2.

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

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

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

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

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

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

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

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

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

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

#### V. CONCLUSIONS

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

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

Nevertheless, Caterpillar also believes that wholesale departure

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

Respectfully submitted,  
Caterpillar Inc.

RECOMMENDED ENVIRONMENTAL SENTENCING GUIDELINES

PREPARED BY: ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

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

~~STEP I+~~

~~BASE FINE~~

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

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

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

~~BASE FINE TABLE~~

~~PERCENTAGE~~

~~OF MAXIMUM~~

~~OFFENSE TYPE STATUTORY FINE~~

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

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

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

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

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

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

~~(f) Wildlife offense \_\_\_\_\_%~~

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

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

#### ~~STEP II+~~

#### ~~PART A - GENERAL APPLICATION PRINCIPLES~~

##### ~~§9A1.1 Applicability of Chapter Nine~~

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

##### ~~§9A1.2 Application Instructions - Organizations~~

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

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

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

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

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



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

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PART B - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

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

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

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2. DETERMINING THE FINE - OTHER ORGANIZATIONS

§9B2.1 Primary Offense Level

- (a) The Primary Offense Level is determined by the type of environmental offense and the specific offense characteristics under subsection (b).
- (b) The Primary Offense Level for each count covered by Chapter Nine is determined under the following categories:
  - (1) Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides for Other Pollutants
    - (A) Base Offense Level: 24
  - (2) Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification
    - (A) Base Offense Level: 8
    - (B) Specific Offense Characteristics
      - (i) (a) If the offense resulted in an ongoing, continuous, or

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

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

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

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

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

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

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

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

(A) Base Offense Level: 6

(B) Specific Offense Characteristics

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

otherwise large, release, pollutant, levels.

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offense was nt action or ease by 6

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

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

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

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

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

#### (4) Tampering with Public Water System

(A) Basic Offense Level: 18

(B) Specific Offense Characteristics

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

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

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

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

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

(a) Cross Reference

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

(5) Wildlife Violations

(A) Base Offense Level: \_\_\_\_\_

(B) Specific Offense Characteristics

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

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

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

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

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

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

(6) Simple Recordkeeping and Reporting

(A) Basic Offense Level: 5

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**PART C - CULPABILITY FACTORS**

**§9C1.1 Aggravating Factors in Sentencing**

**(a) Management Involvement**

If one or more members of the substantial authority personnel of the organization participated in, condoned, solicited, or concealed the criminal conduct, or recklessly tolerated conditions or circumstances that created or perpetuated a significant risk that criminal behavior of the same general type or kind would occur or continue, increase the Base Fine by ~~3~~ to ~~6~~ by 6 levels. If a corporate manager lacking the authority or responsibility to be classified as a member of the organization's substantial authority personnel, but having supervisory responsibility to detect, prevent, or abate the violation, engaged in the criminal conduct, increase the Base Fine by ~~3~~ to ~~4~~ by 1 to 4 levels.

**(b) Threat to the Environment**

~~If the organization (i) caused actual and identifiable harm to the environment that materially degraded a natural resource, or (ii) knowingly created a significant risk of material degradation of a natural resource, increase the Base Fine by 3 to 4.~~

**~~(c) Threat to Human Life or Safety~~**

~~If the organization (i) caused death or serious bodily injury, or (ii) knowingly created a significant risk of such harm, increase the Base Fine by 3 to 4.~~

**~~(d) Scienter~~**

~~If employees or agents of the corporation knowingly engaged in conduct that violated the law under circumstances that evidenced at least a reckless indifference to legal requirements, increase the Base Fine by 3 to 4.~~

**~~(e) Prior Criminal Compliance History~~**

If the organization committed any part of the instant offense less than 5 years after a criminal adjudication of a violation of federal or state environmental law, increase the Base Fine by ~~3~~ to ~~4~~, but by 2 to 4 levels; however if the prior adjudication is for similar misconduct at the same facility, increase the Base Fine by ~~3~~ to ~~4~~ by 5 levels.

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

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

~~(g)~~ Concealment

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

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

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

~~(i)~~ (e) Concealment

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

(f) Absence of Compliance Program or Other Organized Effort

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



such a program, increase the ~~Base Fine by 3 to 3~~  
by 4 levels.

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

~~If the conduct underlying commission of the instant offense  
occurred without a requisite permit, increase the Base Fine by 3  
to 3.~~

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

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

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

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

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

recognition of its responsibility and took all reasonable steps to assess responsibility within the organization and prevent recurrence, reduce the Base Fine by ~~1~~ to ~~1~~ by 3 to 6 levels; provided, however, that no credit shall be given where reporting of the offense was otherwise required by federal law for mere compliance with an applicable federal reporting requirement.

- (2) If the organization pleaded guilty before the government was put to substantial effort or expense in preparing for trial, fully cooperated with the prosecution, and took all reasonable steps to assess responsibility within the organization and prevent recurrence, reduce the Base Fine by ~~1~~ to ~~1~~ by 4 levels.
- (3) If the organization pleaded guilty before the prosecution was put to substantial effort or expense in preparing for trial and cooperated with the prosecution in all relevant respects except by failing to disclose the names and identities of responsible individuals known to it (or names and identities that it could have reasonably ascertained), reduce the Base Fine by ~~1~~ to ~~1~~ by 2 levels.

~~(m) Absence of Scienter~~

~~If the criminal conduct was the result of negligent errors or emissions or was imposed on the basis of strict liability or collective knowledge and no corporate employee or agent acted with a level of intent at least equal to that of reckless indifference, reduce the Base Fine by ~~1~~ to ~~1~~.~~

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

If the organization takes prompt action to provide assistance (in addition to any legally required restitution or remediation) to the victims of its crime to mitigate their losses, reduce the Base Fine by ~~1~~ to ~~1~~ by 2 levels.

~~STEP III: \* \* \* \*~~

## FACTORS FOR PART D - COMMITMENT TO ENVIRONMENTAL COMPLIANCE

### §9D1.1 Factors for Environmental Compliance

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

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

##### (a)(1)

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

##### (a)(2)

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

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

~~(e)~~ (3)

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

- (i) frequent auditing (with appropriate independence from line management) and inspection (including random, and, when necessary, surprise audits and inspections) of its principal operations and all pollution control facilities to assess, in detail, their compliance with all applicable environmental requirements and the organization's internal policies, standards and procedures, as well as internal investigations and implementation of appropriate, follow-up countermeasures with respect to all significant incidents of non-compliance;
- (ii) continuous on-site monitoring, by specifically trained compliance personnel and by other means, of key operations and pollution control facilities that are either subject to significant environmental regulation, or where the nature or history of such operations or facilities suggests a significant potential for non-compliance;
- (iii) internal reporting (e.g. hotlines), without fear of retribution, of potential non-compliance to those responsible for investigating and correcting such incidents;

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

~~(d)~~ (4)

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

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

(e) (5)

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

(f) (6)

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

(g) (7)

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

~~STEP IV~~ (8)

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

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

~~GENERAL LIMITATIONS\* \* \* \*~~

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

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

Offense Level Fine Table<sup>1</sup>

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

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

**§9E1.2 General Limitations**

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

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

(b) Except as provided in subsection (d) below, in no event shall a fine determined under these guidelines this Chapter be reduced as the result of mitigating factors to a level below the greater of (a) fifty percent [50%] of the Base Fine calculated in Step I or (b) the economic gain from the offense, if calculated under Step I(a)(1) in the determination of the Base Fine. fifty percent (50%) of the Offense Level calculated in Parts B and C; provided further that in no event shall a fine for a knowing endangerment violation be reduced below fifty percent (50%) of the final fine calculated in §9E1.1.<sup>2</sup>

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

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



costs directly attributable to the offense].<sup>3</sup>

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

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

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

~~STEP V~~

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

**PART F - PROBATION - ORGANIZATIONS**

**(a) §9F1.1**

**Imposition of Probation for Environmental Crimes - Organizations.**

- (a)** The court shall order a term of probation if the court finds that:
- (1) such sentence is advisable to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3); or
  - (2) the organization is sentenced to pay a monetary penalty (e.g., restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments; or
  - (3) at the time of sentencing, the organization does not have an effective program to prevent and detect violations of law; or
  - (4) such sentence is advisable to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; or
  - (5) the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal, [civil, or administrative adjudication]<sup>4</sup> under federal or state law, and any part of the misconduct underlying the instant offense occurred after that adjudication; or
  - (6) any officer, manager, or supervisor within the organization, or within the unit of the organization within which the instant offense was committed (a) participated in, (b) ordered, directed, or controlled the conduct of others in the commission of, or (c) consented to the misconduct underlying the instant offense and that individual within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal, civil, or administrative

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

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

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

~~(b)~~ §9F1.2

Term of Probation - Organizations

- ~~(1)~~(a) When a sentence of probation is imposed --
  - ~~(i)~~(1) In the case of a felony, the term of probation shall be at least one year but not more than five years.
  - ~~(ii)~~(2) In any other case, the term of probation shall be not more than five years.

~~(c)~~ §9F1.3

Conditions of Probation - Organizations

- ~~(1)~~(a) Pursuant to 18 U.S.C. §3563(a)(1), any sentence of probation shall include the condition that the organization shall not commit another federal, state, or local crime during the term of probation.
- ~~(2)~~(b) Pursuant to 18 U.S.C. §3563(a)(2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: a fine, restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which event the court shall impose one or more other conditions set forth in 18 U.S.C. §3563(b).
- ~~(3)~~(c) The court may impose other conditions that
  - (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and
  - (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

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

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

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

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

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

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

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

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

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

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

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

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

shall be in a form prescribed by the court.

~~(vi)~~ (6)

The organization shall make periodic reports to the court, to the probation officer, or to any person or entity designated by the court, at intervals and in a form specified by the court, regarding the organization's progress in implementing the approved program. Among other things, such reports shall disclose any additional criminal prosecution, civil litigation involving its environmental responsibilities, or environmental administrative proceedings commenced against the organization, or any investigation or formal inquiry by governmental authorities relating to federal, state or local environmental health or safety matters of which the organization learned since its last report. Copies of any such periodic reports shall be furnished to the government.

~~(vii)~~ (7)

In order to monitor the organization's compliance with the approved program, the court may order the organization to submit to such examination of its books and records, inspections of its facilities, testing and monitoring of its operation and regular or unannounced examinations of its employees as the court deems necessary. Compensation to and costs of any experts engaged by the court shall be paid by the organization. Reports on any such monitoring activities shall be filed with the court and copies shall be furnished to the government and the organization.

~~(5)~~ (e)

If probation is imposed under ~~Step V(a)~~ §9F1.1(a), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment.

~~(i)~~ (1)

The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, reporting on the organization's

financial condition and results of business operations, and accounting for the disposition of all funds received.

~~(ii)~~ (2) The organization shall submit to: (a) a reasonable number of regular or unannounced examinations of its financial or appropriate corporate books and records at appropriate business premises by the probation officer or experts engaged by the court; and (b) interrogation of knowledgeable individuals within the organization. Compensation to, and costs of, any experts engaged by the court shall be paid by the organization.

~~(iii)~~ (3) The organization shall be required to notify the court or probation officer immediately upon learning of (a) any material adverse change in its business or financial condition or prospects, or (b) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

~~(iv)~~ (4) The organization shall be required to make periodic payments, as specified by the court, in the following priority: (1) restitution; (2) fine; and (3) any other monetary sanction.

~~(4)~~ ~~§9F1.4~~ Additional Conditions of Probation  
(Policy Statement)

The court may order the organization, at its expense and in the format and media specified by the court, to publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

§9F1.5 Violations of Conditions of Probation - Organizations  
(Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.



ADVISORY GROUP ON ENVIRONMENTAL SANCTIONS

THE UNITED STATES SENTENCING COMMISSION

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

Submitted May 10, 1993

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

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

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

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

environmental sentencing from the existing Guidelines in the first place.

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

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

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<sup>1</sup> The "BRT Comment" and the "NAM Comment", respectively.

<sup>2</sup> The NAM Comment, the BRT Comment and the Officials' Comment are hereinafter referred to collectively as the "Other Comments".

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

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

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

1. The limitation on fine reductions based on mitigation credits, and the lack of limitation on fine enhancements, are unwarranted and unduly harsh.
2. Treatment of gain and loss issues is draconian and fails utterly to address the real problems with the use of these concepts as bases for assessing corporate environmental penalties.
3. Many aggravating factors are worded so that they would apply automatically and almost universally; all mitigating factors are worded so that their availability is largely illusory.
4. The changes to all aggravating and mitigating factors

are uniformly harsher and increasingly inflexible.

5. The changed requirements for effective corporate compliance programs impose impossible management, recordkeeping, monitoring and internal reporting burdens. Many of the requirements are unworkable.
6. The scheme as a whole either fails to take privilege into account or could be applied to render the availability of privilege largely illusory as a practical matter.
7. The practical application of the scheme in the prosecutorial negotiation and plea bargaining context gives unwarranted and virtually unlimited power to prosecutors. The possibility for prosecutorial abuse is significant.
8. The Draft, as written, would operate to chill internal reporting of problems by individuals, would hamper internal investigations and would also impair the ability of counsel to render legal advice concerning the compliance status of the corporation.
9. Any benefit to be derived from the existence of an effective compliance program is largely rendered



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

10. No explanation has been given for the uniformly harsher treatment of corporate environmental crimes as is evidenced throughout the Draft.
11. When the Draft is compared with the bases for inapplicability of the existing Guidelines to environmental criminal penalties (discussed in the following Section), it is clear that those concerns were either ignored, inappropriately dealt with, or actually heightened by the Draft.
12. The Draft appears to be an attempt to "legislate" in the area of both environmental crimes and criminal sentencing. In particular, the Advisory Group appears to have neglected to take into account the limitations imposed upon its activities inherent in the very laws creating the Sentencing Commission.

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

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

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

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

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

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

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

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

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

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

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

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

E. DIFFICULTIES OF APPLICATION WITH RESPECT TO SMALL CORPORATIONS

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

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

The following analysis of the significant departures of the Draft from the provisions of the existing Guidelines demonstrates that:

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

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

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

Id. at 20.

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

1. Increased Detriment for Not Having A Compliance Program<sup>4</sup>

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

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

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

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

2. More Draconian Requirements for An Effective Compliance Program

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

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

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

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

a. Documentation requirements

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

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

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

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



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

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

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