E. DIFFICULTIES OF APPLICATION WITH RESPECT TO SMALL CORPORATIONS

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

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

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

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

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

Id. at 20.

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

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

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

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

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

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

2. More Draconian Requirements for An Effective Compliance Program

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

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

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

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

a. Documentation requirements

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

c. Management Involvement

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

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

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

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

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

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

d. Imposition of Draconian Monitoring and Reporting Requirements

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

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

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

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

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

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

address these concerns in any meaningful way.

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

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

B. AGGRAVATING AND MITIGATING FACTORS

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

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

1. Management Involvement

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

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

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

Again, no reason is given for these changes.

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

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

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

2. Scienter

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

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

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

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

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

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

3. Concealment

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

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

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

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

4. Absence of Permits

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

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

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

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

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

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

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

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

Coordination Concerns.

6. Violation of an Order

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

7. Self Reporting

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

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

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

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

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

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

8. Remedial Assistance

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

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

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

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

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

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

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

IV. SUGGESTED ACTIONS

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

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

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

Respectfully submitted,

Caterpillar Inc.

ATTACHMENT A

DIFFERENCES BETWEEN ORIGINAL AND
DRAFT COMPLIANCE PROGRAMS

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

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

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

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

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

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

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

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

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

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

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

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

c. internal reporting ...;

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

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

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

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

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

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

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

March 30, 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. Please note that the submission from the Washington Legal Foundation contains a few additional comments on guidelines for individuals.

WASHINGTON LEGAL FOUNDATION
2009 MASSACHUSETTS AVENUE, N.W.
WASHINGTON, D. C. 20036
202 588-0302

March 18, 1994

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, D.C. 20002-8002

Dear Commissioners:

The Washington Legal Foundation (WLF) hereby submits these general comments to the Commission in response to the proposed guidelines of the Commission's Advisory Working Group on Environmental Sanctions as well as in response to the Commission's request in its latest proposed amendments of the guidelines that it is seeking "comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment." 58 Fed. Reg. 67522 (Dec. 21, 1993).

As the Commission is well aware, our Foundation has objected to the proposed guidelines issued by the Commission's Advisory Working Group on Environmental Sanctions for organizations, as well as the secret manner in which they were formulated. The final proposal, issued on or about November 16, 1993, is fundamentally flawed as was the first draft issued in March 1993. In some respects, the final proposed guidelines are worse than the original draft because they purport to key the various fine levels with the individual guidelines under Part Q.

The individual guidelines, in effect since 1987 and never revised, have been universally recognized as being arbitrary and fundamentally flawed. Those guidelines impermissibly "double count" several offense conduct factors, and result in draconian prison terms of 21-27 months for a first-time offender found guilty, for example, of placing topsoil and clean building sand on private property which the Environmental Protection Agency deems to contain wetlands. These harsh sentences for minor regulatory infractions are greater than the average sentence imposed under the guidelines for clearly more serious offenses such as arson, car theft, forgery, and many drug offenses. We refer the Commission to our numerous prior submissions on this subject over the last several years for fuller discussion of this subject.

It thus comes as no surprise, that under the proposed

guidelines by the Advisory Working Group, maximum fines would be imposed in almost every environmental case. As I stated in my testimony before the Working Group last May, the original draft (and now the final draft) would require a court to impose a minimum fine of $350,000 on an entity found guilty of placing a load of clean fill on a so-called wetland. Attached hereto for the Commission's information is a WLF Counsel's Advisory "Proposed Environmental Guidelines Would Require Courts To Impose Maximum Fines On Business" by Benjamin S. Sharp, Esq., that also reiterates these critical observations.

The fundamental flaw with the proposed environmental guidelines is that they appear to have been drafted without a proper study of the empirical data to determine whether there is a problem with the current sentencing practice in this area, and if so, whether the proposed sharp departure from the current practice makes any sense under a rational punishment theory, considering the complexity of the subject matter. We are well aware that some members of the Advisory Working Group, such as Professor Jonathan Turley (the Committee's Reporter and a primary author of the proposed guidelines) are so extreme in their views about the proper response to environmental infractions that they seem to believe that infractions of environmental laws and regulations, regardless of the actual harm to the environmental or criminal intent, are "environmental felons" of the first order who deserve to be imprisoned two or three years for a first offense.

Professor Turley and his Environmental Crimes Project at George Washington University Law School have issued reports and provided testimony for Congressmen Charles Schumer and John Dingell concerning the alleged lack of environmental enforcement by the Department of Justice. These and similar Congressional reports by Congressman Dingell have been characterized as "methodologically flawed and replete with factual errors." See William T. Hassler, "Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes," 24 ELR 10074 (Feb. 1994)(copy enclosed). Mr. Hassler states that the investigations that produced these reports "took on the worst aspects of partisan politics, unmitigated by adversarial balance, and replete with simplistic characterizations of complex issues." 24 ELR at 10077. See also U.S. Dep't of Justice, "Internal Review of the Department of Justice Environmental Crimes Program: Report to the Associate Attorney General" (March 10, 1994).

As I noted in my testimony before the Working Group last May, Professor Turley incorrectly stated in his Congressional testimony that our client, John Pozsgai, had created a dump; in fact, he had cleaned up a dumpsite by removing thousands of old tires and rusted automobile parts before allowing clean (non-toxic, non-hazardous) fill to be placed on a small portion of the property to build his garage. Accordingly, the public is justifiably suspect about a

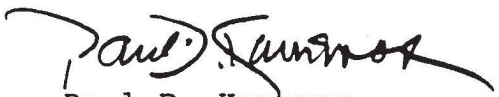
work product of a committee that refuses to release the empirical data it may have relied upon and the methodology of its decisionmaking.

We note that Messrs. Lloyd S. Guerci of Mayer, Brown & Platt, and Meredith Hemphill, Jr. of Bethelem Steel Corporation, two members of the Advisory Working Group, issued a stinging 21-page critique of the committee's proposed guidelines on December 8, 1993. We heartily agree with their conclusion that the proposed guidelines should be rejected.

Before taking any further action with respect to organizational guidelines, we strongly urge the Commission to revise its flawed individual guidelines that produce draconian and disparate sentences. We find it quite remarkable that the Commission is so concerned about sentencing fairness for drug offenders, for example, that it is inviting comment on such issues as whether "male [marijuana] plants should be treated differently or excluded because male plants have a comparatively low THC content. . . or whether a definition of marihuana plant should be adopted that would distinguish among plants at different levels of maturity or would exclude plants below a certain level of maturity." 58 Fed. Reg. 67545. Other proposed amendments also show how the Commission is attempting to sharply refine various offense and offender characteristics. And yet under the environmental guidelines, Sections 2Q1.2 and 2Q1.3, lengthy prison sentences for placing clean building sand on one's own property can be, and have been, imposed, and are greater than prison sentences for dumping harmful and toxic wastes into a public waterway. Where is the Commission's concern with the fairness of that situation?

Accordingly, we again urge the Commission to get on with the sorely needed business of revising the individual environmental guidelines, and to reject, or postpone consideration of, the proposed environmental guidelines for organizations.

Sincerely yours,



Paul D. Kamenar
Executive Legal Director

encls

WASHINGTON LEGAL FOUNDATION

Counsel's Advisory

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Vol. 1 No. 6 December 10, 1993

PROPOSED ENVIRONMENTAL GUIDELINES WOULD REQUIRE COURTS TO IMPOSE MAXIMUM FINES ON BUSINESS

by
Benjamin S. Sharp

On November 16, 1993, the U.S. Sentencing Commission's Advisory Working Group on Environmental Sanctions submitted to the Commission its final proposed guidelines on sentencing corporations and businesses convicted of violating federal environmental laws and regulations. The final draft, like the earlier draft released in March 1993 for public comment, does not provide any explanation or rationale for the proposal. The earlier draft was universally criticized by the corporate community for being unduly complicated in computing the fine to be imposed in a particular case as well as resulting in fines that would be significantly greater than those currently imposed. The final draft, while modified somewhat, will similarly require courts to impose substantial fines that would in many cases be the statutory maximum. The draft guidelines, denominated as a new Chapter 9 in the Guidelines Manual, will also allow courts to impose probation that would include monitoring the company through unannounced visits and audits of the company's financial records. § 9F1.1.

The major difference between the two drafts is the method used to arrive at the base fine. The earlier draft had a range of seven levels of percentages of the maximum fine based upon the nature of the underlying conduct. A typical violation involving a release of any pollutant set the base fine of 60-90 percent of the statutory maximum. The base fine would then be increased based upon aggravating factors such as prior violations, and then adjusted downward based upon mitigating factors such as having an effective environmental compliance program; however, no fine can be reduced below 50 percent of the maximum statutory fine.

The final draft computes the base fine by referencing the base offense levels from the current sentencing guidelines used to impose prison sentences on individuals under Part Q, which already allows for double-counting of aggravating factors. If the company did not have an adequate compliance or audit program, five more points are added to the offense level. The resultant offense level number is then associated with a percentage figure ranging from 10 percent to 100 percent of the statutory maximum fine. In many cases, a level 24 will easily be reached which requires a 100 percent fine. As with the earlier draft, the statutory maximum is *not* the fine listed in the particular environmental statute in question; the statutory maximum references the Alternative Fines Act in 18 U.S.C. § 3571(c), namely, a minimum of $500,000 for any felony. In addition, the proposal requires that no fine shall be lower than the economic gain to the company realized by not complying with the applicable environmental law. § 9E1.2(c).

Because of the Advisory Group's delay in drafting this final proposal, the Commission will be unable to even begin considering it until 1994. The corporate community will thus have ample time to comment on the provisions should the Commission make an announcement that it intends to adopt any of them.

Benjamin S. Sharp is a partner in the Washington, D.C. office of Perkins Coie.

ELR
NEWS & ANALYSIS

Congressional Oversight of Federal Environmental Prosecutions: The Trashing of Environmental Crimes

by William T. Hassler

Editors' Summary: Since late 1992, two congressional committees and an academic group working for a member of a third committee have issued reports severely criticizing the Environmental Crimes Section (ECS) of the U.S. Department of Justice (DOJ). The reports focus on alleged deep divisions among the three units of the federal government responsible for the prosecution of environmental crimes: the ECS, local U.S. Attorneys' Offices, and EPA's Office of Criminal Enforcement. They claim that the ECS lacks prosecutorial zeal and suffers from morale, management, and competency problems.

The author, a former attorney with the ECS and a former Associate Counsel on the staff of Independent Counsel Lawrence Walsh, argues that the reports are methodologically flawed and replete with factual errors. He charges that the congressional investigators conducted unbalanced factual inquiries, adopted unrealistic and inconsistent standards for evaluating prosecutorial decisions, and ignored protections traditionally afforded subjects of criminal investigations and indictments. The author notes that despite the reports' conclusions, DOJ prosecutions of environmental crimes increased dramatically during the 1980s and that DOJ efforts resulted in multimillion dollar criminal fines. He concludes that the reports fail to provide a meaningful basis for addressing important questions about how the government's criminal enforcement powers can best promote environmental protection.

The Environmental Crimes Section (ECS) of the U.S. Department of Justice (DOJ) is a relatively small part of the DOJ's Environment and Natural Resources (ENR) Division,[1] with a modest professional staff of approximately 30 attorneys. Since late 1992, however, the ECS has received a degree of scrutiny disproportionate to its size. Since then, two congressional committees have focused independent investigations on the ECS, and an academic group has prepared a report for a member of still a third congressional committee. No other component of the ENR Division has received such exposure in recent years.

The congressional investigators[2] have reached startlingly negative conclusions. They describe the ECS as suffering from "extreme conservatism and lack of aggressiveness,"[3] a "failure to pursue aggressively a number of significant environmental cases,"[4] and "chronic case mismanagement."[5] By early 1993, *Time* magazine characterized the "cleanup" of the ECS as a "high priority" for the Clinton transition team.[6]

In fact, the ECS' record has been systematically mis-

William T. Hassler is an attorney in private practice in Washington, D.C. He worked at the U.S. Department of Justice's (DOJ's) Environmental Crimes Section (ECS) (which is at least in part the subject of this Dialogue), on the *Rocky Flats* investigation from 1990 to 1991. *See infra* note 19. Prior to working at the ECS, Mr. Hassler worked as an Associate Counsel on the staff of Independent Counsel Lawrence E. Walsh, investigating the Iran/Contra matter.

Although a number of individuals provided information as part of the preparation of this Dialogue, the views stated are solely Mr. Hassler's, and in no way are intended to represent the opinions of current or former officials of the DOJ, or of any private individuals interviewed.

1. The ENR Division's responsibilities include a wide variety of civil and criminal environmental litigation.

2. For purposes of simplicity, the term "congressional investigators" is used in this Dialogue to refer to the members of the Environmental Crimes Project of the National Law Center at George Washington University (whose work was conducted at the request of Rep. Schumer), as well as to investigators for the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, chaired by Rep. John Dingell (D-MI) and the Subcommittee on Oversight and Investigations of the House Committee on Science, Space, and Technology, chaired by Rep. Howard Wolpe (D-MI).

3. Subcomm. on Investigations and Oversight of the House Comm. on Science, Space, and Technology, Report on The Prosecution of Environmental Crimes at the Department of Energy's Rocky Flats Facility, 102d Cong., 2d Sess. 12 (1993) [hereinafter Wolpe Report].

4. Memorandum from Rep. John Dingell to Members of the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, Summary Report on The Department of Justice Undercutting the Environmental Protection Agency's Criminal Enforcement Program, 102d Cong., 2d Sess. (Sept. 9, 1992), [hereinafter Dingell Report], *reprinted in* EPA's Criminal Enforcement Program: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 102d Cong., 2d Sess. 9-55 (Sept. 10, 1992) [hereinafter Dingell Hearing].

5. Letter from Rep. Charles E. Schumer to William P. Barr, U.S. Attorney General (Oct. 29, 1993).

6. Michael S. Serrill, *Law and Disorder: Clinton Urgently Needs a New Attorney General to Handle the Monumental Task of Revamping the Government's Most Troubled Department*, Time, Feb. 15, 1993, at 31.

characterized. The congressional investigators, in their zeal to pressure the DOJ to increase the number of environmental prosecutions across the board, have failed to treat the subjects of their inquiries with the fairness to which any subject of investigation (whether criminal or congressional) is entitled.[7]

This Dialogue is not intended to suggest that the ECS or its attorneys should be above criticism or congressional review. They are, and should be, subject to both. But oversight of the ECS' work should encourage fair and predictable enforcement of the nation's environmental laws, consistent with the standards of prosecution recently announced by Attorney General Janet Reno.[8] Achievement of this goal requires a balanced examination of available evidence, realistic standards for evaluating prosecutorial decisions, and respect for traditional protections afforded individuals subject to criminal investigation or indictment. This Dialogue demonstrates that ECS' critics, to date, have fallen woefully short of this standard.

The Critics and Their Charges

The Dingell Report

As the 1992 presidential race heated up, the House Committee on Energy and Commerce's Subcommittee on Oversight and Investigations (the Dingell Committee), chaired by Rep. John Dingell (D-MI), focused its investigative resources on the ECS and DOJ headquarters. Press reports at the time focused on alleged "sweetheart plea agreements," "secret meetings with defense counsel," and "political favoritism."[9] The report which the Committee ultimately issued in September 1992 (the Dingell Report) does not, however, allege improper political influence.[10] Instead, the Report explores allegedly deep rifts among the three principal bureaucracies charged with enforcing environmental criminal statutes: "local" prosecutors in various U.S. Attorneys' Offices, "main" DOJ prosecutors employed by the ECS (and supervised by political appointees at DOJ headquarters), and the U.S. Environmental Protection Agency's (EPA's) Office of Criminal Enforcement.[11]

The Committee's staff conducted extensive interviews with EPA investigators, and presented selected agents in public hearings. These hearings and the Committee's subsequent Report generated a full-blown controversy over the handling of six cases.[12] Notably, the Committee did not allow testimony at the hearings by witnesses offered by the DOJ.[13]

7. Government prosecutors have not been the only victims of the congressional inquiries' fundamental unfairness. The congressional investigators have generally portrayed the subjects of the underlying criminal investigations as plainly guilty of criminal acts, regardless of whether they have been convicted or, in some cases, even formally charged. As discussed below, these subjects, many of whom are private citizens, have been provided no opportunity to defend their reputations or to present any defenses that they may have. *See infra* notes 20, 128 and accompanying text.

8. *See* Jim McGee, *Justice Department Sets Changes on Discipline: Prosecutors' Conduct Had Led to Complaints*, WASH. POST, Dec. 14, 1993, at A1. *See also A Reno Reform*, WASH. POST, Dec. 20, 1993, at A24; Jim McGee, *War on Crime Expands U.S. Prosecutors' Powers: Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1 (first of six part series).

9. *See* Linda Himmelstein, *DOJ's Environmental Mess*, LEGAL TIMES, July 20, 1992, at 1, 22-23.

10. *See* DINGELL REPORT, *supra* note 4, at 1-3.

11. Primary responsibility for federal criminal prosecution lies with the 94 U.S. Attorneys' Offices nationwide. The U.S. Attorney that heads each office is a presidential appointee. The ECS, which is located in Washington, D.C., has authority to litigate specified criminal offenses generally relating to violations of environmental statutes. The ECS is headed by a Section Chief, who reports to the Assistant Attorney General for the Environment and Natural Resources Division (also a presidential appointee). The U.S. Attorneys' Offices as a whole employ approximately 3,900 attorneys (most of whom work on matters other than environmental criminal matters). The ECS employed 31 attorneys as of 1993. *See* ENVIRONMENTAL CRIME: ISSUES RELATED TO JUSTICE'S CRIMINAL PROSECUTION OF ENVIRONMENTAL OFFENSES; HEARING BEFORE THE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, 102d Cong., 2d Sess. 7 (1993) (statement of L. Nye Stevens, Director, Planning and Reporting General Government Division) [hereinafter GAO STUDY]. The ECS and the U.S. Attorneys' Offices generally share authority to prosecute criminal environmental matters, and frequently prosecute cases jointly. *See id.* at 1, 8-12.

EPA's Office of Criminal Enforcement employs approximately 70 criminal investigators to investigate suspected violations of environmental statutes, and is headed by a Director, who reports to EPA's Assistant Administrator for Enforcement and Compliance Assurance. EPA is currently in the midst of reorganizing its enforcement programs. *See* Memorandum from Steven A. Herman, Ass't Administrator for Enforcement, to Assistant Administrators et al. (Nov. 30, 1993), *reprinted in* DAILY ENV'T REP. (BNA), Dec. 1, 1993, at E-1.

12. These cases or investigations have generally been labeled using the names of the entities that were the subject of investigation, even though in several cases the subjects themselves have not ever formally been charged with wrongdoing. To avoid ambiguity, this Dialogue will refer to the investigations using the terminology found in the congressional reports. This usage should not be construed to suggest that the subjects of investigation were in fact guilty of the allegations discussed.

The Dingell Report focused on:

1. *United States v. PureGro et al.*, CR90-228AAM to -323AAM (E.D. Wash.), in which a corporate defendant (PureGro) and several individual employees were originally indicted for alleged felony violations related to the application of pesticides in Washington State. PureGro eventually pleaded guilty to a misdemeanor, and reportedly paid a fine of $15,000. Charges against individuals were dismissed.

2. *United States v. Weyerhauser*, in which EPA investigated Weyerhauser for violations of the Clean Water Act. Weyerhauser eventually pleaded guilty to five misdemeanor counts, and paid a fine of $125,000.

3. *Thermex Energy Corporation (Thermex)*, in which EPA investigated a company operating in Wyoming concerning alleged mishandling of hazardous waste. No indictment resulted. The company under investigation (Thermex) is now bankrupt.

4. *Chemical Waste Management*, in which the corporation was investigated for alleged mishandling of hazardous wastes in Alabama. A separate case in Louisiana resulted in convictions of individuals. The Dingell Report focused on the Alabama case, which resulted in no indictments.

5. *Hawaiian Western Steel*, in which EPA investigated a corporation for alleged Clean Air Act violations. No indictments resulted. The company under investigation (Hawaiian Western Steel) is now in Chapter 11 bankruptcy proceedings.

6. *Van Leuzen*, in which EPA investigated alleged illegal filling of wetlands by Marius Van Leuzen, an individual. No indictment resulted.

13. According to former DOJ officials, the DOJ offered to allow senior managers, including career prosecutors within ECS management, to address the charges made by EPA agents. The Dingell Committee declined this offer for its September 1992 hearings. *See* DINGELL HEARING, *supra* note 4, at 3 (statement of Rep. Dingell) (stating that the DOJ "is now requesting to be heard and has submitted testimony," that testimony will not be received at September 10, 1992, hearing, but that future opportunity to testify will be provided). The Committee also refused to make part of the hearing record a written statement prepared by the DOJ responding to the Commit-

The GW Report

At roughly the same time that the Dingell Committee conducted its hearings, the Environmental Crimes Project of the National Law Center at George Washington University (the GW Law Center) prepared a separate report (the GW Report) for Rep. Charles Schumer (D-NY)[14], who released a "preliminary" version[15] on October 29, 1992, only days before the national presidential election. The GW Report reaches largely the same conclusions as the Dingell Report.[16] This similarity, however, is not surprising, because the analysis in the GW Report covers largely the same ground as the Dingell Report.[17]

The Wolpe Report

While Reps. Dingell and Schumer were considering the ECS' overall record, another House subcommittee (the Wolpe Committee),[18] chaired by Rep. Howard Wolpe (D-MI), began proceedings focused solely on the recently concluded prosecution of Rockwell International Corporation (Rockwell) for its conduct of operations at the U.S. Department of Energy's (DOE's) Rocky Flats nuclear weapons facility near Denver, Colorado (Rocky Flats).[19] The Committee's investigation was apparently fueled in part by statements from members of a grand jury that heard evidence during the government's investigation of Rocky Flats. Members of the grand jury charged that the government had reached a "sweetheart" deal with Rockwell, and that individuals suspected of serious wrongdoing had gone free.[20] The Committee issued a report[21] (the

tee's inquiries, and removed the written statement from the hearing room when DOJ officials placed it in an area with written statements provided by witnesses at the hearing. Interview with Roger Clegg (Dec. 23, 1993).

In connection with this Dialogue, the author attempted to contact staff counsel for the Dingell Committee to obtain the Committee's position on its choice of witnesses and the restrictions on DOJ participation in its 1992 hearing. The counsel in question did not respond either to repeated telephone calls or a written request for an interview.

14. Rep. Schumer was, at the time the Report was released, Chairman of the Subcommittee on Crime and Criminal Justice of the House Committee on the Judiciary. The letter from Rep. Schumer to Attorney General Barr forwarding the Report does not appear to have been written on behalf of the subcommittee.

15. ENVIRONMENTAL CRIMES PROJECT, NATIONAL LAW CENTER OF GEORGE WASHINGTON UNIVERSITY, PRELIMINARY REPORT ON CRIMINAL ENVIRONMENTAL PROSECUTION BY THE U.S. DEPARTMENT OF JUSTICE (1992) [hereinafter GW REPORT].

The Project Director for the GW Report, Prof. Jonathan Turley, stressed in an interview for this Dialogue that the GW Report is, as its title indicates, "preliminary." Interview with Prof. Jonathan Turley, George Washington University, GW Law Center, Washington, D.C. (Nov. 23, 1993). Although Prof. Turley stated that it is his consistent practice to note the preliminary nature of the GW Report in interviews with reporters, a search of the NEXIS library of the LEXIS database failed to locate any articles in which reporters quoted him as having qualified his criticisms of the ECS or of named ECS attorneys based on the "preliminary" nature of the report. Search of LEXIS-NEXIS Library (Dec. 21, 1993). (In one article, out of dozens quoting or citing Prof. Turley, the Report itself is described as "preliminary"; Prof. Turley himself describes the Report as preliminary in a letter to the editor in a second publication.)

As of November 1993, Prof. Turley stated that the Project's "final" Report remained unfinished, and that it might, but would not necessarily, be released by the end of 1993. *Id.*

16. Both reports found a failure to prosecute environmental crimes aggressively, poor relations between the ECS and U.S. Attorneys' Offices and EPA, mismanagement of the ECS, and barriers to wetlands prosecutions. *See* GW REPORT, *supra* note 15, at 5-6; DINGELL REPORT, *supra* note 4, at 2-3, 38-39.

17. The GW Report itself states that students involved in writing the Report conducted interviews, in addition to "evaluat[ing] [c]ritical testimony given before various congressional committees [presumably during the hearings conducted by the Dingell Committee]." GW REPORT, *supra* note 15, at 4. The amount of independent investigation done in compiling the GW Report is difficult to determine, because the Report does not reveal the identities of its sources. (As discussed below, the GW Report bases its criticism of the ECS on anonymous sources. *See* notes 31 and 65 *infra*, and accompanying text.) The Report's principal author was unwilling, in response to inquiries made in connection with this Dialogue, to disclose any specific information about other sources that the Report may have relied on. He stated that the Report, as released in 1992, included substantial investigation independent of that found in the Dingell Report, although a substantial portion of the GW Report (approximately 130 out of the Report's 162 pages) was intentionally devoted to detailed analyses of the six case studies that were the focus of the Dingell Report. *See* GW REPORT, *supra* note 15, at 34-161. The initial 32 pages of the GW Report criticize, at least in passing, the handling of five additional cases that generally were not the focus of the Dingell Report.

In general, the Dingell Report appears to have been based heavily on testimony by EPA agents and their supervisors. Statements in the GW Report concerning internal ECS personnel matters suggest that its preparers had access to Assistant U.S. Attorneys and ECS attorneys as well. This Dialogue has made no attempt to identify any individual sources who supplied information used in the GW Report.

18. The Subcommittee on Investigations and Oversight of the House Committee on Science, Space, and Technology.

19. The Rocky Flats facility had long been the center of local environmental controversies, as have many other U.S. Department of Energy (DOE) nuclear weapons plants. The *Rocky Flats* investigation gained national prominence when in June 1989, EPA and FBI agents "raided" the plant to search for evidence of criminal wrongdoing. The investigation of the plant concluded in March 1992, when Rockwell agreed to plead guilty and to pay a fine of $18.5 million for admitted violations.

The DOJ hailed the Rockwell plea agreement as a record fine under the Resource Conservation and Recovery Act (RCRA) (in fact, the fine exceeded any other criminal penalty assessed under any environmental statute with the exception of the fine paid by Exxon Corporation in connection with the *Exxon Valdez* spill in Prince William Sound, Alaska).

Readers should be aware that the author of this Dialogue worked on the *Rocky Flats* investigation during 1990 and 1991. The discussion of *Rocky Flats* in this Dialogue is limited to publicly available materials and interviews conducted since the author left the DOJ.

20. *See, e.g.*, Bryan Abbas, *The Secret Story of the Rocky Flats Grand Jury*, DENV. WESTWORD, Sept. 30 - Oct. 6, 1992. The grand jury's unusual public disclosures remain a topic of controversy, and the DOJ's handling of the grand jury received an entire section in the Wolpe Report. WOLPE REPORT, *supra* note 3, at 121-40. As of December 1993, there were no public reports that the grand jurors had provided information to any of the congressional subcommittees at issue.

On January 26, 1993, the U.S. District Court for the District of Colorado released the grand jury report in redacted form, together with a lengthy 124-page response of prosecutors addressing the charges contained in the grand jury report. *In Re Grand Jury Proceedings, Special Grand Jury 89-2 (Rocky Flats Grand Jury)*, Order Regarding Release of Grand Jury Documents (Civ. Action No. 92-Y-180, Jan. 26 1993). The Court reaffirmed prior decisions not to release the report in its entirety because the report

> accused individuals identifiable by name or position . . . ; dealt in rumor and conjecture; engaged in social and even legal argument; dealt with political and social issues outside the province of the special grand jury's duty of investigating crime; contained charges not based upon a preponderance of the evidence; and followed a serious breach of grand jury secrecy.

Id. at 2.

21. *See* note 3, *supra*. The timing of the Wolpe Report, which was issued in January 1993, is a tribute to the Committee staff's perseverance: by the time the Report was issued Bill Clinton was President-elect, and Rep. Wolpe was preparing to leave Congress.

Wolpe Report) containing scathing criticism of the ECS based on the Committee's review of this high-profile case. The Report highlights apparent "cultural" deficiencies at the ECS, which, according to the Committee, led to a lack of aggressiveness.[22]

Dingell II and the GAO Report

Notwithstanding the election of a Democratic President in November 1992, the Dingell Committee remained interested in the controversy over the ECS. In 1993, it renewed its request, previously denied by the Bush Administration, to interview line attorneys about specific prosecutions. In June, the Clinton Administration granted the request,[23] and in November 1993, the Dingell Committee reopened its hearings.

The 1993 hearings continued the attack on the ECS and its top managers, but no longer focused solely on anecdotal evidence relating to the six cases scrutinized in 1992. Instead, the Committee presented a statistical analysis prepared by the General Accounting Office (GAO) comparing the ECS prosecutions to prosecutions by U.S. Attorneys' Offices.[24] As an added twist, three former U.S. Attorneys (all Republican appointees) testified to criticize what they view as a trend toward excessive headquarters (i.e., ECS) oversight of U.S. Attorneys' Offices. The issue of headquarters authority centers largely on an administrative rule issued by Attorney General William Barr in the final days of the Bush Administration, under which the ECS retains an effective veto over certain types of prosecutions.[25] On November 4, 1993, the Clinton Administration announced that it did not intend to repeal the rule in question.[26]

Summary of the Charges

The collective criticisms of the various congressional investigators can be summarized generally as concluding, to use a borrowed phrase, that the ECS was a hotbed of cold feet. More specifically, the congressional investigators concluded that ECS attorneys showed a lack of proper prosecutorial zeal, revealed by:

1. an alleged hostility to wetlands prosecutions developed by EPA and local U.S. Attorneys' Offices;
2. an alleged weakness for "corporate only" pleas, in which (allegedly guilty) corporate employees and managers escaped indictment;
3. a clear tendency to undervalue and "underprosecute" environmental violations relative to prosecutors in U.S. Attorneys' Offices; and
4. serious problems of morale, management, and overall competency.[27]

Evaluating the Critics' Methods

The Dingell, GW, and Wolpe Reports are neither fair nor accurate.[28] Regrettably, the investigations that produced them took on the worst aspects of partisan politics, unmitigated by adversarial balance and replete with simplistic characterizations of complex issues.

Failure to Interview the Reports' Subjects

In the case of the Dingell and GW Reports, the congressional investigators generally did not speak with the attorneys criticized.[29] Instead, these investigators relied almost exclusively on information gathered from law enforcement agents, and, in some cases, other prosecutors.[30] In the case of the GW Report, the witnesses remain entirely anonymous, but clearly did not include the main subjects of the Report's criticisms.[31] In addition, before publishing their

22. *See, e.g.*, WOLPE REPORT, *supra* note 3, at 12, 21-33.

23. *See* Michael Isikoff, *Reno Probes Environmental Crimes Unit*, WASH. POST, June 16, 1993, at A12. The Dingell Committee's request generated its own controversy, in which former Attorney General Benjamin Civiletti emerged as a leading critic of efforts to question line prosecutors. *See* Benjamin R. Civiletti, *Justice Unbalanced: Congress and Prosecutorial Discretion* (address to Heritage Foundation, Washington, DC) (Aug. 19, 1993) (on file with author). The new Clinton DOJ eventually elected to make prosecutors available.

24. *See* GAO STUDY, *supra* note 11.

25. U.S. Attorneys' Manual §5-11.302-303 (revised Jan. 12, 1993), *reprinted in* DAILY ENV'T REP. (BNA), Jan. 19, 1993, at E-1.

26. Statement of Webster L. Hubbell (Associate Attorney General) Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce 14-16 (Nov. 3, 1993) (on file with author).

27. *See* GW REPORT, *supra* note 15, at 5-6; DINGELL REPORT, *supra* note 4, at 1-2; WOLPE REPORT, *supra* note 3, at 12.

28. The same cannot be said, however, of the Dingell Committee's decision to commission the 1993 GAO study cited in note 11 above. There, for the first time, one of the congressional committees sought a serious, objective review of possible differences between the ECS and U.S. Attorneys' Offices prosecutions, without resort to the *ad hominem* and misleading anecdotal evidence relied on in the 1992 congressional studies.

In general, the GAO study showed that the ECS and U.S. Attorneys' Offices prosecutions tended to be statistically indistinguishable in terms of conviction rate, likelihood of indictment, type of disposition (declination, plea, etc.), and type of sentence (fine, probation, imprisonment, etc.). *See* GAO STUDY, *supra* note 11, at 31-34. In fact, 35 percent of all federal criminal environmental cases opened during the period 1988-92 were handled by the ECS and U.S. Attorney's Offices jointly. *Id.* at 15. The GAO reported that U.S. Attorneys' Offices opened 50 percent of all environmental cases in the same time period, and the ECS 14 percent. Performance by various U.S. Attorneys' Offices reportedly varied widely. According to testimony given at the 1993 Hearing (attended by the author), 17 of the 94 U.S. Attorneys' Offices accounted for over 50 percent of prosecutions opened by U.S. Attorneys' Offices.

29. The Wolpe Committee, in contrast to the other investigations, interviewed prosecutors (including prosecutors with whom it disagreed) as well as investigators. The author of this Dialogue was interviewed by the Wolpe staff.

30. The Dingell Committee's task was complicated by the DOJ's refusal in 1992, to allow interviews of line attorneys. Nevertheless, the Committee apparently refused the DOJ's offer to provide testimony by career ECS managers, including those criticized directly by the Committee. *See* DINGELL HEARING, *supra* note 4, at 3 (Sept. 10, 1993). Similarly, the Committee print in which the September 10 proceedings are published does not contain a copy of written comments submitted by the DOJ. (Due to the Committee's refusal to respond to inquiries, it is not possible to determine the reason for this omission.) With the cooperation of the Clinton DOJ, the Committee is now interviewing line attorneys who were publicly criticized 14 months earlier. The DOJ is also reportedly preparing its own study of its attorneys' conduct. Isikoff, *supra* note 23.

31. The GW Project Director explained the failure to provide these subjects an opportunity to defend themselves by noting that some (but not all) victims of the Report's criticism were in (mostly career) management positions. According to the Project Director, he feared that the managers in question would retaliate against his sources if they were allowed to respond to the sources' (anonymous) criticisms. Accordingly, he did not confront these career employees with the charges made against them prior to publication of the Report. Interview with Prof. Jonathan Turley (Nov. 23, 1993); *see also DOJ Disputes Report Alleging Failure to Prosecute Environmental Crimes*, DAILY REP. FOR EXEC. (BNA), Nov. 2, 1992, at 212 (quoting Prof. Turley as stating that "[a]ny effort to scapegoat upper

results,[32] *none* of the congressional investigators contacted defense counsel about substantive matters in any of the cases studied.[33] There does not appear to be any good reason for this failure.[34] For example, counsel for the Wolpe Committee failed to take advantage of an offer by counsel for Rockwell in the *Rocky Flats* case to discuss the case with the Wolpe Committee staff.[35]

With respect to the GW Report, the Project Director stated in an interview for this Dialogue that the initial Report was not designed to include interviews with defense counsel in an effort to provide the Report to then Attorney General Barr as quickly as possible.[36] The 1992 "preliminary" GW Report, however, contains no such qualification in its statement of methodology. (As of December 23, 1993, the GW Law Center has not released a "final" report.[37]) The Report itself states that "staff investigators were instructed to gather information from *every possible avenue* and to interview *every critical party* in federal prosecutions."[38] According to the Project Director, the quoted description of the Report's scope was a mistake that should not have been included in the preliminary Report.[39] In any event, interviews with individuals criticized and representatives of the defendants in cases under study should have been among the highest priorities in any balanced inquiry.

In researching this Dialogue, the author called counsel for the defendants (or subjects of investigation) in five of the six cases considered by the Dingell and GW Reports, as well as lead counsel for the defendant in the *Rocky Flats* investigation.[40] The author reached counsel for at least some defendants in all the cases within one week.[41] Many counsel reported what they considered to be serious factual errors in the Dingell and GW Reports. One reported supplying DOJ attorneys with an affidavit contradicting the charges made in a case studied by the Dingell Committee.[42]

Perhaps because of the GW Law Center's failure to interview defense counsel, the GW Report largely ignores the possibility that the accused might defend themselves in the cases studied. Although the GW Report sets forth in great detail charges for which (in some cases) no defendant had been indicted, it does not analyze any of the corresponding defenses that might be raised.[43] The defense counsel contacted in connection with this Dialogue generally presented coherent theories of potential defenses.[44] The fact

level DOJ officials about interviews (of sources) would have jeopardized the jobs of staff members . . . interviewed").

This explanation seems inadequate. First, several of the career employees criticized are not ECS or DOJ "managers," but were nevertheless not interviewed. Second, the charges made in the Report were obviously not kept secret from the public at large regardless of whether sources would be jeopardized. *See* John H. Cushman Jr., *Justice Department Is Criticized Over Environmental Cases*, N.Y. TIMES, Oct. 30, 1992, at A16; Sharon LaFraniere, *Report Criticizes Justice Department's Pursuit of Environmental Crimes*, WASH. POST, Oct. 30, 1992, at A3. Allowing the subjects of the Report's criticisms—whether or not they worked in "managerial" positions—to address charges that Rep. Schumer was about to make public would not have exposed the Report's sources to a higher risk of retaliation than the direct release of the Report itself.

32. Some counsel contacted or spoke with the GW Project Director after publication of the GW Report. *See, e.g.*, Letter from David V. Marshall, counsel for individual defendant, to Prof. Jonathan Turley (Apr. 11, 1993) (on file with author). In addition, since the release of the Report, the GW Project Director has contacted counsel in some of the six cases studied by the Dingell Committee, although the utility of such interviews seems questionable in light of the fact that the Project has already reported its "preliminary" results.

33. Rep. Wolpe sought documents from Rockwell attorneys. *See infra* note 35.

34. The failure of the congressional investigators to contact defense counsel cannot be explained by any deficiencies in the backgrounds of the defense counsel themselves. Not only were all counsel experienced criminal lawyers, but several had strong backgrounds in environmental criminal defense. One defense counsel, for example, was a former chief of the ECS; a second served as Regional Counsel to an EPA regional office; a third had been part of an environmental enforcement unit in a U.S. Attorney's Office; and still another had experience in successfully defending against federal environmental prosecutions in the past and is now a state judge.

35. Interview with Bryan Morgan, Rockwell defense counsel (Haddon, Morgan & Foreman) (Nov. 1993). The former Staff Counsel of the Wolpe Committee acknowledges that the offer was made after the Committee contacted Rockwell's counsel to obtain documents, but provided several reasons for not accepting. Interview with Edith Holleman (Nov. 11, 1993).

First, the Counsel stated that the Committee did not wish to litigate with Rockwell over attorney-client issues. *Id.* It is unclear why litigation would have been necessary, however, given the company's offer of voluntary cooperation.

Second, the Counsel stated that because the Committee had focused on the conduct of a DOJ investigation, there was no need to obtain information from non-DOJ witnesses such as Rockwell. The Director admitted, however, that the Committee did seek information from other third parties, including the Sierra Club, the Environmental Defense Fund, local environmental activists living near the Rocky Flats plant, the Colorado Department of Health (CDH), and EPA civil agents. *Id.* Rockwell appears to have been one of the few third parties with knowledge of the case that the Committee chose not to interview.

Finally, the Counsel stated that Rockwell had not been interviewed at least in part because it was unlikely to offer information critical of the DOJ's settlement. *Id.*

36. Interview with Prof. Jonathan Turley (Nov. 23, 1993). Prof. Turley also expressed a concern that interviews of defense counsel would have compromised the GW Law Center's on-going interviews. As discussed in note 31, *supra*, it is unclear how interviews with counsel would have compromised the investigation of claims made in a publicly released Report.

37. *See* note 15, *supra*.

38. *See* GW REPORT, *supra* note 15, at 4 (emphasis added).

39. Interview with Prof. Jonathan Turley (Nov. 23, 1993).

40. No attempt was made to contact Mr. Van Leuzen, who did not have counsel.

41. In cases with multiple defendants, contacts were generally limited to counsel for the lead defendant or defendants.

42. Interview with Michael Rosenthal, counsel for Thermex (Dec. 20, 1993). In *Thermex*, EPA agents alleged that an ECS attorney stated that the defendant had offered to plead guilty to charges of improper handling of hazardous waste. According to the agents, the ECS' attorney nevertheless declined to prosecute the case. *See* DINGELL HEARING, *supra* note 4, at 79 (EPA Report of Investigation). Rosenthal states that he provided DOJ attorneys with an affidavit stating that he had never offered any plea on behalf of his client.

43. The Dingell and Wolpe Reports, to their credit, devote some analysis to discussing possible defenses, although the dismissive presentation of the defenses is hardly neutral. *See, e.g.*, DINGELL REPORT, *supra* note 4, at 36-37 (in the *Hawaiian Steel* matter, possible defenses mentioned by prosecutors were "weak at best" or in some cases "absurd[]"); and at 45 (stating that in the *Van Leuzen* case, unspecified prosecutors asked "numerous questions," many of which "made little sense").

44. *See, e.g.*, Letter from James R. Moore, counsel for Weyerhaeuser, to Helen Brunner, Asst. U.S. Attorney, Western Dist. of Washington, (Aug. 31, 1990) (on file with author); letter from David V. Marshall, counsel for individual PureGro employee, to Prof. Jonathan Turley, GW Project Director (Apr. 11, 1993) (on file with author); Statement on Plea, *United States v. PureGro et al.*, CR-90-228-AAM to 232 (E.D. Wash. Sept. 16, 1991) (on file with author).

Several cases at issue involved conduct about which defendants had sought advice of counsel, or had retained independent consultants in an effort to comply with applicable regulations. In one case, defense counsel stated that EPA was specifically informed of, and endorsed, conduct that criminal agents and prosecutors later alleged to be criminal.

that defense counsel allege that defenses exist does not mean, of course, that the defenses are sustainable (just as the fact that an agent alleges that sufficient evidence exists to convict a potential defendant does not mean that the potential defendant is guilty or will be convicted). But attempting to assess any case without a careful review of the concerns of the prosecutors involved, or of potential defenses, is no more valid than trying to pick the winner of the Super Bowl by reviewing one team's highlight films.

The GW Report's "Experience" Test

The GW Report typically describes as "veteran,"[45] "seasoned,"[46] "experienced,"[47] or possessing a "reputation for zealous prosecution"[48] prosecutors who apparently share the GW Law Center's view regarding the ECS' record. In contrast, the GW Report disparagingly refers to the prosecutors it criticizes as "new . . . to the Section,"[49] "disinclin[ed] to prosecute environmental cases,"[50] having "less environmental criminal experience,"[51] or having "limited or controversial records."[52] Such *ad hominem* attacks do nothing to promote an objective evaluation of the cases that the GW Law Center considered. In fact, the GW Law Center's "experience" test systematically disregards prosecutorial experience in nonenvironmental cases.[53]

Consider just one example of the GW Report's characterizations—the *Van Leuzen* case.[54] Floyd Clardy, who supervised *Van Leuzen* for the ECS, is characterized by the GW Law Center simply as a supervisor "new" to the ECS in 1989,[55] as "never having tried an environmental case," and as having exhibited a "noted disinclination" to prosecute environmental crimes.[56] Clardy was not interviewed by the GW Law Center, despite the highly personal nature of these charges.[57]

Clardy's actual experience is much greater than suggested by the GW Law Center. Clardy has been a federal prosecutor for over 15 years, and has tried dozens of cases. He has won awards for his prosecutions. His background includes politically unpopular prosecutions of police officers and prison guards on charges of violating suspects' or inmates' rights, including cases involving racial violence.[58]

Before the GW Law Center released its report, Clardy (now an Assistant U.S. Attorney in Dallas, Texas) and Bonnie LePard of the ECS (dismissed by the GW Law Center as a "less experienced" prosecutor)[59] had obtained an indictment against Robert Brittingham, arguably the most prominent individual ever indicted for an environmental felony.[60] Clardy subsequently received an award for his work in the Brittingham case.[61] The GW Law Center's "investigation" omits any mention of these facts, notwithstanding its reported concern about a claimed lack of indictments of individuals rather than corporations.[62]

Whatever one thinks of the GW Report's "experience" test for evaluating a prosecutor's worth, the Report itself does not apply the test uniformly. At least a partial source for the GW Law Center's criticism of Clardy appears to be EPA agents and supervisors unhappy with a decision (originally made by the Houston, Texas, U.S. Attorney's Office) to decline to prosecute the *Van Leuzen* matter.[63] The Report does not, however, document the number of criminal (or criminal environmental) cases previously taken to trial by EPA agents or EPA attorneys who supported prosecution. Nor does it consider the criminal experience of the members of the prosecution review committee in the Houston U.S. Attorney's Office who, as noted below, unanimously recommended against prosecution of Van Leuzen.[64]

Based on the recommendations of agents with unspecified criminal experience, supported by EPA supervisors with unspecified criminal experience,[65] the GW Law Cen-

45. GW REPORT, *supra* note 15, at 5.
46. *Id.* at 18 ("seasoned prosecutors were overlooked or demoted").
47. *See id.* at 15.
48. *Id.* at 16.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 18.
53. One of the tenets of the GW Report, as well as of other congressional investigations, is that environmental crimes should be treated no differently from any other federal crimes. *See id.* at 6-13 (criticizing "sharp differences in the methods and standards applied in environmental criminal cases as compared to those applied in conventional criminal cases"). *Id.* at 6. Given this tenet, it is ironic that the congressional investigators seem to disregard completely prosecutorial experience of ECS prosecutors fighting "other" federal crimes.
54. *See* note 12 (describing generally the *Van Leuzen* case), *supra*; *see also* notes 77-80 (describing *Van Leuzen* case), *infra* and accompanying text.
55. GW REPORT, *supra* note 15, at 16.
56. *Id.*
57. When asked to describe what measures the GW Project had used to confirm the allegations of its anonymous sources, which characterized Clardy as hostile to environmental prosecution, the Project Director stated that "independent" methods of confirmation had been employed, but declined to elaborate further in order not to "jeopardize" the Report's sources. Interview with Prof. Jonathan Turley (Nov. 23, 1993). Without commenting on the use of such secret methodology, it is apparent that the "independent" means failed to reveal relevant information regarding Clardy's background that would have been readily available if the GW Law Center had simply spoken with Clardy.

At the time the GW Report was released, Clardy was an Assistant U.S. Attorney in Dallas, Texas, and no longer had supervisory authority over any of the GW Project's confidential ECS sources. *See* GW REPORT, *supra* note 15, at 16.

58. Interview with Floyd Clardy, Ass't U.S. Attorney for the Northern District of Texas (Dec. 1993).
59. GW REPORT, *supra* note 15, at 16.
60. *United States v. Brittingham*, No. 3-92-032-R (N.D. Tex.). Brittingham's net worth has been reported to be in excess of $350 million. R.R. Hunt et al., *The Texas 100*, TEX. MONTHLY, Sept. 1993, at 129-30 (reporting Brittingham to be one of the 100 richest men in Texas).

Clardy, working with Peter Martha (another ECS attorney mentioned by the GW Report in an unfavorable context), convicted Brittingham in March 1993 (following the release of the GW Report), after overcoming a well-funded defense team.

Brittingham was fined $4 million and sentenced to community service. His co-defendant (another individual) was fined $2 million and also sentenced to community service. The two individuals were ordered to pay an additional $6 million to fund a lead abatement trust. *$12 Million Penalty for Two in Environmental Case*, MEALEY'S LITIG. REPS./D&O LIABILITY 8-9 (June 2, 1993).

61. Interview with Floyd Clardy (Dec. 1993).
62. *See* GW REPORT, *supra* note 15, at 10 ("[t]here has been a notable paucity of individual indictments in past cases").
63. *See* notes 78-79, *infra* and accompanying text.
64. *Id.*
65. The GW Report also cites unnamed ECS attorneys ("some ECS members") who reportedly "supported prosecution." GW REPORT, *supra* note 15, at 9. Absent further identifying information, it is impossible to evaluate the position taken by the anonymous attorneys with no known official role in the case.

ter concludes that a "new" ECS attorney who had "never" tried an environmental case (but who in fact was a decorated 15-year prosecutor) rejected an "airtight"[66] case for reasons that the GW Law Center cannot fathom, other than his "noted disinclination"[67] to prosecute environmental cases (notwithstanding the *Brittingham* matter and notwithstanding the unanimous recommendation of local prosecutors to decline the case for reasons set forth in the Dingell Report). This example does not promote confidence in the objectivity of the GW Report's other examples of environmental "underprosecution."[68]

Evaluating the Critics' Conclusions

Perhaps as a consequence of their methodology, including the GW Report's extensive reliance on anonymous sources, the three reports contain numerous factual errors.

Wetlands

As regulatory protections for wetlands increased during the 1980s, prosecutions for violations of wetlands regulations increased. The GW Report finds, however, that "internal policies of the Department of Justice . . . severely hamper prosecution in the wetlands area,"[69] and refers to a reported ECS "policy" not to prosecute wetlands cases.[70] Similarly, the Dingell Report states that "[w]etlands enforcement seems to be emerging as an area in which the ECS believes that the best enforcement is no enforcement."[71]

The Dingell and GW Reports support this charge by analyzing two wetlands cases considered for prosecution during the Bush Administration. In the first case, (commonly known as *Tudor Farms*),[72] the local U.S. Attorney's Office in Baltimore, Maryland, supported prosecution (and an eventual plea bargain), and the DOJ concurred. According to the GW Report, however, the Assistant Attorney General for the DOJ's ENR Division, Barry Hartman, "opposed criminal prosecution generally and felony indictments specifically."[73] Hartman, whom the GW Law Center did not interview, states that he in fact approved the prosecution.[74] The former U.S. Attorney for the district in question, whom the GW Law Center did not interview, generally supports this account.[75] According to the U.S. Attorney, all prosecutors involved in the case recommended acceptance of a plea agreement in which the company in question agreed to preserve permanently thousands of acres of wetlands.[76]

In a second wetlands case, *Van Leuzen*, the local U.S. Attorney's Office in Houston, Texas, opposed prosecution, and the DOJ again concurred (although EPA objected). The Dingell and GW Reports, however, claim that the local Assistant U.S. Attorney's "attitude" regarding the *Van Leuzen* prosecution changed after a particular ECS attorney (Floyd Clardy) took responsibility for the case. This suggestion, which the Dingell Committee neatly places in the mouths of EPA agents testifying before it,[77] is contradicted by a letter written by the U.S. Attorney to EPA in 1990. In his letter, the U.S. Attorney stated that after an "exhaustive" review, *local prosecutors* had "unanimously" recommended *declining* prosecution.[78] According to the U.S. Attorney whose office rejected the case, experienced prosecutors in that office cited four "infirmities and problems" that led to rejection of the case:

> (1) the availability of alternative civil remedies to accomplish restoration, (2) a lack of jury appeal, (3) the anticipated inadmissibility of certain evidence, and (4)

66. *Id.* at 7, 30.

67. *Id.* at 16.

68. The Dingell Report resorts to similar distortions. *See, e.g.*, DINGELL REPORT, *supra* note 4, at 45 (describing Clardy as a recent arrival from the Civil Rights Section who had never tried an environmental case).

69. GW REPORT, *supra* note 15, at 6.

70. *Id.* at 22.

71. DINGELL REPORT, *supra* note 4, at 39.

72. *See United States v. Ellen*, 961 F.2d 462, 22 ELR 21282 (4th Cir. 1991) (affirming conviction of individual defendant).

73. GW REPORT, *supra* note 15, at 23.

74. Interview with Barry Hartman, former Ass't Attorney General, ENR Division, Dep't of Justice (Nov. 1993).

75. Interview with Breckinridge Wilcox (Attorney, Arent, Fox, Kintner, Plotkin & Kahn) (Nov. 12, 1993). The former U.S. Attorney stated that prior to acceptance of the plea, Mr. Hartman expressed reservations about the sufficiency of the evidence to sustain felony charges against one individual in the case. These reservations became moot when the plea agreement (which was reportedly supported by the U.S. Attorney and the Assistant U.S. Attorney principally responsible for the case) was reached. The U.S. Attorney agreed that the case against the individual in question was the weakest of the three cases at issue, although the U.S. Attorney himself believed that evidence sufficient to convict was available. *Id.* The individual in question pleaded guilty to a misdemeanor charge as part of the overall settlement.

It should be noted that the U.S. Attorney in question (Breckinridge Wilcox) has not shied away from criticizing the ECS in other instances. For example, Mr. Wilcox testified against greater involvement by main DOJ in environmental cases at the 1993 hearings held by the Dingell Committee. *See* Statement of Breckinridge Wilcox (Arent, Fox, Kintner, Plotkin & Kahn) Before the Subcomm. on Oversight and Investigations, House of Representatives, Comm. on Energy and Commerce (Nov. 3, 1993) (on file with author).

76. Interview with Breckinridge Wilcox (Nov. 12, 1993).

77.

> Q: Did [the Assistant U.S. Attorney] prepare a draft prosecution memo supporting your case?
> A: Yes, she did.
> Q: Did [the Assistant U.S. Attorney] seem initially interested or enthusiastic even on pursuit of this case?
> A: Yes.
> Q: And did that change?
> A: Yes, it did.
> Q: Now, was there any coincidence on this change in [the Assistant U.S. Attorney's] belief that occurred around the same time when the Environmental Crimes Section at the main Justice Department became involved?
> A: Yes, that was general same time [sic].
> Q: It is a remarkable coincidence.

DINGELL HEARING, *supra* note 4, at 187 (testimony of Thomas Kohl, Special Agent-in-Charge, EPA, Dallas, Texas).

78. The letter from the U.S. Attorney states in relevant part:

> I am advised by the Chief of the Criminal Division, [of the U.S. Attorney's Office] . . . that the case review committee, after a rather exhaustive review of the *Van Leuzen* matter, is unanimously recommending a declination for criminal prosecution. Accordingly, and with the benefit of a comprehensive briefing by [the Chief of the Houston Criminal Division], I regretfully inform you that this office will not pursue the *Van Leuzen* referral criminally.

Letter from Henry K. Oncken, U.S. Attorney, to Katherine Savers McGovern, Deputy Regional Counsel, EPA, Region VI (June 1, 1990), *reprinted in* DINGELL HEARING, *supra* note 4, at 192.

problems with sufficiency of proof relating to criminal intent.[79]

What the Dingell and GW Reports uncover in this case is an event commonplace in prosecutors' offices—a prosecutor's rejection of a case referred for prosecution by enthusiastic investigating agents. What is out of the ordinary is not the ultimate disposition of the case, but that congressional investigators would fault DOJ headquarters for concurring in the rejection of a case that a review committee convened by the local U.S. Attorney's Office had previously rejected unanimously.[80]

The fact that the U.S. Attorney's Office believed that the case had problems does not, of course, necessarily mean that EPA's more bullish views on the case, expressed at the September 1992 Dingell hearing, were wrong.[81] Clearly, however, facts do not support the congressional investigators' claims that the ECS, rather than the U.S. Attorney's Office, was the source of the case's rejection, or that this case illustrates a schism between main DOJ and a U.S. Attorney's Office.

ChemWaste

The Dingell and GW Reports express concern over the handling of an investigation involving Chemical Waste Management in Louisiana and Alabama (*ChemWaste*). In that matter, prosecutions were successfully pursued in Louisiana but declined in Alabama.

The Dingell Report criticized the decision, allegedly made by the ECS Section Chief, to decline prosecution of the Alabama case.[82] But the ECS' Section Chief was not alone in opposing prosecution. According to the testimony of the EPA attorney who supervised the case (and who favored prosecution), the local U.S. Attorney independently concluded that the case was unwinnable.[83] Although line attorneys from both the ECS and the U.S. Attorney's Office reportedly disagreed, the senior attorneys from both the ECS and the U.S. Attorney's Office appear to have agreed to decline the case.[84]

In the GW Report, however, the GW Law Center claims to have "discovered" activity relevant to the ECS' decision not to prosecute. The GW Report stated:

> *The [GW Law Center] project discovered that Mr. Cartusciello [chief of the ECS] met with Joan Z. (Jodie) [Bernstein,]*[85] a Waste Management Inc. Vice President and former General Counsel for EPA who was accompanied by Judson W. Starr, the first chief of the Environmental Crimes Unit [ECS' forerunner]. After a long meeting, Mr. Cartusciello decided the case should be re-examined. Shortly thereafter, Mr. Cartusciello told the U.S. Attorney that ChemWaste was a meritless case . . . .[86]

It is unclear what, if anything, would be improper about a senior prosecutor meeting with defense counsel as part of a decision whether to prosecute a case. In any event, according to Mr. Starr (whom the GW Law Center did not interview prior to the GW Report's publication)[87] and a spokesperson for Ms. Bernstein (whom the GW Law Center also did not interview) no such meeting ever took place.[88] (The GW Law Center also did not interview Cartusciello, who was one of the principal targets of the Report's criticism.)

79. *Id.*
Notwithstanding the quoted letter, the GW Report repeatedly characterizes the case against Mr. Van Leuzen as "airtight." GW REPORT at 7, 30. According to the GW Report, "the Project . . . attempted to find some basis for the decision not to prosecute Van Leuzen." *Id.* at 8. The Report does not, however, even mention the letter quoted or local prosecutors' concerns about the adequacy of the case presented by investigators.

80. *Cf.* GW REPORT, *supra* note 15, at 15 ("The tension between the Environmental Crimes Section and the AUSAs [Assistant U.S. Attorneys] is most apparent in cases like . . . *Van Leuzen*").
The Dingell Report concluded that *Van Leuzen* provided an example of

> the inappropriate centralization and micromanagement in Washington of even fairly minor environmental cases, with the prosecutorial decision on a small and straightforward one-defendant case being made at the Assistant Attorney General level.

DINGELL REPORT, *supra* note 4, at 38. The involvement of the Assistant Attorney General (Barry Hartman) appears, however, to have resulted from EPA's request that the ECS reconsider the Houston prosecutors' decision to decline the case, rather than an attempt by the DOJ to interfere in a small, local matter. The record from the Committee hearings lacks any statement regarding who requested the meeting with Hartman. *See* DINGELL HEARING, *supra* note 4, at 188-89, 193-95.

81. *See* DINGELL HEARING, *supra* note 4, at 183-91 (testimony of Kathleen A. Hughes, Fred L. Burnside, and Thomas Kohl).

82. DINGELL REPORT, *supra* note 4, at 5-6, 24-31.

83. The EPA attorney testified as follows:

> Mr. Dingell: In the meetings or discussions which occurred, the only fellow that you are aware of that wanted the case dismissed was again [the ECS Section Chief]; is that right?
>
> Ms. Hughes: In the final prosecution meeting in Alabama, the U.S. Attorney reacted to [the Section Chief's] statement that he didn't think that it ought to be prosecuted by saying that he didn't think that we could win it in front of a jury, but that he didn't agree with [the Section Chief]'s statement that all these people were innocent.
>
> Mr. Dingell: He said that you could win it before a jury?
>
> Ms. Hughes: No. The U.S. Attorney said he didn't think we could win it before a jury. *That was his position after listening to everything.*

DINGELL HEARING, *supra* note 4, at 167 (testimony of Kathleen A. Hughes, emphasis added).

84. *Id.* at 167.

85. The GW Report, apparently as the result of a typographical error, omitted Ms. Bernstein's last name. Given the other particulars provided (Jodie Bernstein, for example, is a former General Counsel of EPA and current officer of Chemical Waste Management's parent company), there can be no question that the reference is to her.

86. GW REPORT, *supra* note 15, at 114 (emphasis added).

87. In an interview conducted in connection with this Dialogue, Mr. Starr stated that he was interviewed by a representative of the GW Project following the public release of the GW Report.

88. According to witnesses who testified before the Dingell Committee, a meeting took place that was attended by Mr. Cartusciello, three other ECS attorneys (including at least one who favored prosecution of the case), an attorney from the Birmingham U.S. Attorney's Office, an EPA attorney, and an EPA agent. Mr. Starr and two other lawyers for Chemical Waste Management (*not* including Ms. Bernstein) were reportedly present at this meeting. *See* DINGELL HEARING, *supra* note 4, at 162 (testimony of Thomas Kohl, Special Agent-in-Charge, Environmental Protection Agency, Dallas, Texas EPA).
There is nothing in the record to suggest that this meeting was anything other than routine. It is unclear whether the GW Report's "discovery" inaccurately identifies the participants in this meeting, or refers to some other meeting that did not take place.

Rocky Flats

☐ *The* Rocky Flats *Fine.* The Wolpe Committee closely analyzed the plea negotiations in the *Rocky Flats* case, in part through analysis of memoranda written by prosecutors. From the materials released by the Committee, it is clear that the prosecutors in question disagreed frequently over a variety of issues, including the strength of the charges and merits of the case. Prosecution, of course, is a subjective art, and such disagreements normally would not excite much comment. The Committee, however, makes the disagreements into the subject of one of its central findings: that main DOJ and ECS prosecutors, who placed "little value on environmental crimes," undercut attempts by attorneys from the Office of the U.S. Attorney for the District of Colorado (based in Denver) to gain an even larger fine from Rockwell.[89] The Committee states, for example:

> Main Justice attorneys were willing to settle for $1-$6 million. One actually said that the government should pay Rockwell .... [T]he lead attorney in Denver [was] pushing for a larger settlement—on the order of $20 million to $30 million ....[90]

Although this account of the "facts" suggests that ECS attorneys valued the case less than the Denver-based attorneys did, it is based on what is either a critical distortion or a sloppy error: *the Committee misidentifies a Denver-based Assistant U.S. Attorney as an ECS employee.*[91] Once this misstatement is corrected, the Committee's conclusion collapses.

For a significant part of the investigation, the *Rocky Flats* case was assigned to four line prosecutors, two each from the ECS and the U.S. Attorney's Office. Although each individual attorney's opinions of the case's strength varied from time to time, the Committee was fair in stating that one of the Denver-based attorneys was consistently the most optimistic about the case. What the Committee overlooks is that the other Denver-based attorney was generally the most *pessimistic* about the case. The Committee's conclusion that ECS attorneys were most bearish about the case is simply wrong: the opinions of ECS attorneys (who frequently disagreed with each other) generally fell between those of the two Denver-based attorneys.

A corrected version of the facts would have stated that the line attorneys from the ECS sought fines in the range of $4-6 million,[92] while the line attorneys from the Denver office split sharply, one favoring a settlement (as of January 1991) of $20 million, and one favoring a settlement (as of January 1991) of $1 million.[93] Moreover, the latter attorney, from the U.S. Attorney's Office in Denver, is specifically identified (by, among others, the U.S. Attorney for the District of Colorado)[94] as the attorney whom the Wolpe Committee reports as remarking that a fairer settlement would pay Rockwell money.[95]

Even aside from the error noted above, the Wolpe Committee greatly overestimates the significance of a disagreement between prosecutors over the appropriate size of a fine. Selection of fines is not a science, and reasonable prosecutors may differ reasonably over a case's strengths and weaknesses. Moreover, for all of the Committee time spent on the genesis of the $18.5 million fine,[96] the Wolpe Report never even attempts to evaluate the fine according to standards of fairness.

The congressional investigators suggest that the success of a prosecution is directly proportional to the size of the fine obtained, regardless of the underlying case's merits. Under this theory of prosecution, government attorneys should act as advocates without any broader sense of fairness. According to the logic of the Wolpe Committee, if the government had the leverage to force Rockwell to pay a larger settlement, no lesser settlement was adequate.[97]

The Committee's view differs markedly from traditional views of the principles that should guide a prosecutor, under which a prosecutor remains an advocate, but is guided by

89. *See* WOLPE REPORT at 12, 102-07.

90. *Id.* at 22. *See also id.* at 105 (identifying specific attorneys and amounts proposed by each at the settlement conference).

91. In its table of key participants, the Report contradictorily lists the attorney in question as an employee of "Justice Department (Headquarters)" while giving his title as "Assistant U.S. Attorney, Colorado." WOLPE REPORT, *supra* note 3, at 6. The text of the Report, however, clearly assumes that the attorney in question was an ECS, rather that U.S. Attorney's Office, attorney. *See id.* at 21-22, 103.

The Denver-based U.S. Attorney clearly identified the prosecutor in question as being a member of the U.S. Attorney's Office. *See Environmental Crimes at the Rocky Flats Nuclear Weapons Facility,* STAFF INTERVIEWS CONDUCTED BY THE SUBCOMM. ON INVESTIGATIONS AND OVERSIGHT, Transmitted to the Comm. on Science, Space, and Technology, 103d Cong., 1st Sess., Serial F at 320 (Sept. 1993) [hereinafter WOLPE TESTIMONY] ("[the attorney in question] ...—an assistant in my office— ... had an extremely low value of the case").

The Staff Counsel of the Wolpe Committee stated in an interview conducted in connection with this Dialogue that she had not written the section of the Report in question and had no knowledge of the source of the mistake. Interview with Edith Holleman (Nov. 11, 1993). The Wolpe Committee staff member responsible for writing the section of the Wolpe Report in which the misidentification occurs declined to comment regarding the error.

92. Their boss, the Section Chief of the ECS, reportedly sought a higher fine. *See* WOLPE REPORT, *supra* note 3, at 103.

93. The following table summarizes settlement positions of various attorneys involved, as reported by the Wolpe Committee ("AUSA" stands for Assistant U.S. Attorney):

Attorney	Proposed Final Settlement Goal
Denver-based AUSA 1	$21 - $28 million
ECS Line Attorney 1	$6 million
ECS Line Attorney 2	$4 million
Denver-based AUSA 2	$1 million

See WOLPE REPORT, *supra* note 3, at 102-07.

The Denver-based U.S. Attorney and the Section Chief of the ECS in 1990-91 are generally reported to have taken negotiating positions between Denver-based AUSA 1 and ECS Line Attorney 1. *Id.* at 103. As the Report notes, the Denver-based U.S. Attorney (and not the ECS) initially agreed to settle the matter for $15.5 million, which would have roughly split the difference between the proposals of Denver-based AUSA 1 and ECS Line Attorney 1. The final settlement of $18.5 million provided $16.5 million to the federal government and an additional $2 million to the state of Colorado. Plaintiff's Sentencing Memorandum at 112, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed Mar. 26, 1992).

94. *See* WOLPE TESTIMONY, *supra* note 91, at 320.

95. WOLPE TESTIMONY, *supra* note 91, at 206. The Wolpe Report also omits to note that the statement in question, in the words of the prosecutor who reported it, was probably made "somewhat jokingly."

96. *See* WOLPE REPORT, *supra* note 3, at 12-13, 20-27, and 102-07.

97. *See, e.g., id.* at 35 ("millions of dollars in potential additional criminal and civil penalties on the listed—and easily provable—violations were given away"); and at 107 ("we may never know how much more the government could have won if they had pushed Rockwell harder").

a sense of fairness that would not necessarily bind a private attorney. As the U.S. Supreme Court has long held,

> [s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts."[98]

It is beyond the scope of this Dialogue to address whether the amount prosecutors obtained in this case was in fact fair to the government, to the public, or to Rockwell. But it is worth remembering that in addition to the size of any fine, the "success" of a prosecution should also be judged by its overall fairness in light of the charges in question. The Wolpe Committee, however, fails to acknowledge that fairness is a goal that may legitimately influence prosecutors' recommendations.

The Committee magnifies and distorts the disagreements among line prosecutors over particular issues. In fact, Denver-based attorneys in the U.S. Attorney's Office did not report the alleged ECS interference in their investigation that the Committee claimed to find.[99] There was no testimony, for example, that any senior ECS or main DOJ official attempted to discourage the U.S. Attorney's Office from seeking a fine it considered appropriate.[100] The U.S. Attorney for the District of Colorado, whose office directed the case, testified as follows:

> Q: Did you ever have any differences of opinion or disagree with anyone in main Justice regarding positions on major issues in this case?
>
> A: Not that I recall. . . . [A]s to litigative direction, I can't recall any major disagreements where we didn't prevail. And I can't even recall any major disagreements.[101]

The wide range of opinions among different prosecutors might suggest that the case was controversial and legitimately difficult to value.[102] While such a conclusion does not lend itself to spectacular committee reports, it may be closer to the truth than the Committee's actual conclusions.[103]

☐ *Accomplishments at Rocky Flats.* The Wolpe Committee's evaluation of the prosecutors' performance in the *Rocky Flats* case overlooks many accomplishments achieved by the Denver-based U.S. Attorney's Office and the ECS jointly. The execution of a federal search warrant in June 1989, which *both* the Denver-based U.S. Attorney and the ECS approved, was one of the most aggressive acts in the entire prosecution. The Wolpe Committee, however, ignores the ECS' cooperative role in preparation of the warrant and the approvals received from all levels of the DOJ prior to its execution. Similarly, the Wolpe Committee hardly notes the significant prosecutorial and investigative resources that *both* the ECS and the Denver-based U.S. Attorney's Office expended on the case for over three years. At the most basic level, such expenditures seem to evidence an intent to prosecute the investigation aggressively, not to block it.

The Wolpe Report also ignores the relative lack of prior enforcement history at the Rocky Flats plant in particular, and DOE facilities in general. The Rocky Flats plant, for example, had not previously been the focus of any significant civil enforcement action by state or federal environmental regulators.[104] Similarly, no other U.S. Attorney's Office has ever initiated comparable enforcement activity against another DOE facility that engaged in conduct similar to the conduct that allegedly occurred at Rocky Flats. As one prosecutor told the Wolpe Committee,

> There are 16 other DOE facilities around this country, at least two of which in my personal opinion are worse than Rocky Flats. . . . And there are attorneys in those districts—and I don't want to get into trouble for criticizing a colleague in the Department, but all I know is that Mike Norton [the Denver-based U.S. Attorney who supported the Rocky Flats prosecution] is the only one who had the intestinal fortitude to stand up and say, "We'll take this on."[105]

Even if prosecutors had settled for one of the allegedly low-ball DOJ fines (of approximately $5 million), they would have exceeded any previous fine at Rocky Flats or

98. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *see also Berger v. United States*, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.")

99. *See* WOLPE REPORT, *supra* note 3, at 12.

100. The lead Denver-based prosecutor stated:

> [M]y sense is . . . that Mr. Hartman [Assistant Attorney General, DOJ] largely gave Mr. Norton [the Denver-based U.S. Attorney] a free rein. And in terms of these numbers . . . he kind of said what his bottom line was and pretty much gave Mr. Norton free rein to do better than that if he could.

WOLPE TESTIMONY, *supra* note 91, at 212.

101. *Id.* at 320.

102. The Denver-based head of the prosecution team (who generally was the most bullish member of the team) testified as follows:

> From our perspective, one of the problems I have personally with some of the judgments that have been made about the case—and I'm not just talking about the subcommittee—you know, the media and the press, the other constituents—is that there seems to be an impression that this was absolutely a hands-down killer case, and why would we give up such a great case that ultimately, clearly a lot of people would have been convicted and a lot of people would have gone to jail. How could you give that up? This is just a fundamental misconception. This was an extremely difficult, very problematic case.

Id. at 196. *Compare* WOLPE REPORT, *supra* note 3, at 36 (violations were "easily provable").

103. For an excellent discussion on the general difficulties in applying EPA regulations to criminal cases, *see* Judson W. Starr et al., *Prosecuting Pollution*, LEGAL TIMES (SUPP.), May 31, 1993.

104. Prior to execution of the 1989 federal warrant, Rockwell reportedly paid EPA $47,500 in civil penalties in 1987, for improper handling of transformers containing PCBs. *See Rockwell Agrees to Pay EPA*, ASSOCIATED PRESS, Dec. 21, 1988; *see also* Plaintiff's Sentencing Memorandum at 118, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed Mar. 26, 1992); Plaintiff's Supplemental Sentencing Memorandum at 18, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed May 28, 1992).

In addition, Rockwell paid the state of Colorado approximately $100,000 in 1989, in response to civil charges brought by the state *after* execution of the federal search warrant. *See* Plaintiff's Sentencing Memorandum at 118, *supra* note 104. Two citizen enforcement actions, brought by the Sierra Club, were underway at the time the search warrant was executed. *See Sierra Club v. U.S. Dept. of Energy [DOE]*, 770 F. Supp. 578, 22 ELR 20072 (D. Colo. 1991); *Sierra Club v. DOE*, 22 ELR 20076 (D. Colo. 1991); *Sierra Club v. DOE*, 734 F. Supp. 946, 20 ELR 21044 (D. Colo. 1990).

105. WOLPE TESTIMONY, *supra* note 91, at 216.