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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

company may have an effective compliance system that puts responsibility elsewhere.

The point is a critical one. The Advisory Group's compliance program is not unsound, but it is not the only way to assure compliance. Organizations differ markedly in size, culture and the environmental compliance issues they must address. There will be different sound methods to assure compliance depending on the different facts and circumstances that organizations face. The Advisory Group should not attempt to prescribe a single method for compliance; it would not fit many situations and it would result in detrimental constraints for organizations attempting to reach compliance by the route best suited to their needs. Moreover, if a company makes the "wrong" decision on one factor out of seven or ten, it should not be treated as having made taken the wrong course throughout. Mitigation or aggravation of the sentence should be proportional to the degree and seriousness of a company's effort to achieve compliance.[1]

The provisions of the existing guidelines have been a powerful incentive to corporate managers to institute programs to

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[1] In any event, there should not be a 50% floor on the reduction in sentence available for the company with a sound compliance program. First, if the level of corporate culpability is low, the criminal sentence should be low. This principle is followed for criminal offenses outside the environmental statutes and we know of no reason to treat environmental violations differently. Second, environmental law has been particularly creative in permitting environmentally beneficial actions to be undertaken in lieu of penalty payments. Those possibilities should not be foreclosed by imposing threshold requirements for the payment of fines.

prevent and detect violations of law because they express sound principles which can be tailored to particular circumstances. They should not be abandoned in the environmental context both because the principles are sound and because the myriad of real life situations that the corporate environmental manager must address demand that he or she be given the discretion to tailor the response. The real test of a compliance program is the thoughtfulness in design and the energy in execution which a company achieves. Quality flows from the mental state of management, not from following a detailed checklist.

2. Economic Benefit and Remedial Costs Are Not a Sound Foundation for the Base Fine.

The base fine provisions should capture the central elements in environmental crimes that should be deterred and punished. We do not believe the Advisory Group's emphasis on the defendant's economic benefit and on remedial costs does this. First, there is an insufficient weight given here to the mens rea of the organization. The first thing a judge does and should look at in a criminal sentence is mens rea. The evil frame of mind is what distinguishes criminal offenses from civil cases. The distinction between civil and criminal violations is blurred in environmental law but the principle that lies behind the distinction should be focused on: we sanction people and organizations criminally because they have done something morally wrong. The taxpayer who deprives the government of $100,000 through a transcription or mathematical error is different and is

treated differently from one that consciously lies or falsifies its income. The degree of effort to comply with law; the degree of purposeful violation of the law should be given greater when weight than the present proposal allows through its mitigating and aggravating factors.

Next, with regard to the "objective" results of the criminal act, one should look at harm foreseeable to a reasonable person not to a proxy for harm such as economic gain or remedial costs. The acts that are to be condemned morally are those that the public and the defendant know to be harmful. In the environmental field, it does not follow that economic gain or remedial costs are reasonable measures of harm. As a generality, it is cheaper to reduce gross risks and more expensive to reduce highly improbable risks. Thus, generally, economic benefit is likely to be smaller when obvious harm is not being protected against and greater small risks are not addressed. Consequently, a company would be fined less for failing to address big risks rather than small risks. Such a result does not make sense.

Next, a number of environmental regulations are driven by technological standards rather than risk or harm-based standards. In those situations there is no obvious relationship between costs to a defendant and injury or risk of injury.

Remedial costs are likely to vary with a host of factors which are driven by the length of time before discovery of the

criminal act and the particular circumstances of the receiving environment. Drums of solvent which are illegally disposed of may cost very little to clean up if promptly discovered, but can lead to substantial expense if they leach into groundwater for a year or two. Sentences should not vary materially on the basis of such factors which are largely unrelated to the defendant's acts.

Equally fundamentally, remedial costs are likely to vary widely between statutes. Remedial action is routinely required under RCRA, sometimes under the Clean Water Act, and rarely under the Clean Air Act. A defendant with the same mental state causing the same harm or risk of harm is likely to face very different remedial costs if he releases a contaminant to the groundwater, surface water, or air. This is not a sensible result.

Under the strict liability civil provisions of the environmental laws, there is basis for ignoring the culpability of the defendant and focusing on its economic benefit. In the criminal context, there should be a different standard. Culpability and foreseeable harm or risk of harm should be the factors given dominant weight. Those factors are not measured by economic benefit and remedial costs. There is no ready monetary benchmark to substitute for a judgment as to the degree of culpability and the foreseeable harm or risk of harm which the offense reflects and on the basis of which the defendant should be sentenced.

3. Guidelines Should Take Account of the "Listing" Provisions of the Clean Air and Water Acts.

The Clean Air and Water Acts contain so-called "listing" provisions which result in the defendant's facility at which a criminal offense occurred being barred from being used for government contracts for a period of time. The company that manufactures nails and sells them to the government may find its business severely disrupted by listing; its neighbor who makes the same nails and sells them privately will be untouched by listing. These provisions produce dramatically different results in the true sanctions imposed on defendants who are similarly situated except for the fact that one is engaged in government contracts. This is obviously contradictory to the central thrust of the Commission's work: similar defendants should be treated similarly. The most obvious beneficial result of listing - providing a goad to a company to correct violations - can now be achieved through other sentencing mechanisms such as probation. In these circumstances, there is no basis for increasing a party's effective sanction simply because it sells to the government. The Advisory Group needs to address this problem by straightforwardly instructing judges to reduce the sentence they impose so that the government contractor is treated even-handedly after the effect of listing is taken into account.

NAM National Association of Manufacturers

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

February 23, 1994

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

Dear Chairman Wilkins:

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

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

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

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

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

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

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

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

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

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

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

Thank you for the opportunity to comment.

Sincerely,

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

cc: Commissioner Carnes
Commissioner Gelacak
Commissioner Mazzone
Commissioner Nagel

ELECTRONIC INDUSTRIES ASSOCIATION

February 23, 1994

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

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

Dear Chairman Wilkins:

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

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

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

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

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

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

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

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

Respectfully submitted,

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

Kevin C. Richardson
Vice President
Government Relations

JTY/ms
Attachments

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

ELECTRONIC INDUSTRIES ASSOCIATION

April 16, 1993

BY HAND

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

Ladies and Gentlemen:

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

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

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

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

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

THE DRAFT DOES NOT COMPORT WITH EXISTING GUIDELINES

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

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

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

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

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

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

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

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

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

THE GAIN PLUS COSTS BASE FINE DETERMINATION IS IMPROPER

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

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

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

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

THE ENVIRONMENTAL COMPLIANCE PROGRAM REQUIREMENTS ARE UNDULY BURDENSOME

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

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

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

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

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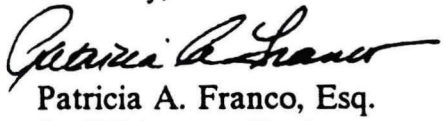
EIA cannot support environmental sentencing guidelines that: are inconsistent with present Sentencing Guidelines; will not achieve the intent of the Sentencing Reform Act of 1984; will burden already strapped judicial resources; are predicated on complex and unquantifiable proof burdens for economic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

Sincerely,



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

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

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

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

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

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

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

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

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

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

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

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G. William Frick
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February 22, 1994

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Washington D.C. 20002-8002

Dear Chairman Wilkins:

On November 16, 1993, an advisory working group submitted proposed guidelines for the sentencing of organizations convicted of environmental crimes (November draft) to the United States Sentencing Commission (Commission). We strongly recommend that the Commission reject the proposal in its entirety and begin anew. We believe that the advisory group has failed in its task of identifying and assisting the Commission in understanding the distinct aspects of environmental regulation. This letter responds to the Commission's call for comment on the advisory group's November draft, 58 Fed. Reg. 65764 (December 16, 1993), and articulates API's concerns that this draft, as well as the March 5, 1993 draft, are fatally flawed.

We believe the advisory group has developed a relentlessly punitive scheme that (1) fails to properly account for the extensive array of civil remedies, including environmental restoration and punitive penalties, which can obviate criminal presentation for the same conduct underlying the civil action; (2) fails to properly account for the lack of culpability and proof of harm in a vast majority of cases; and (3) represents an exhaustive revision of pre-Guidelines practice and existing Chapter 8 guidelines for organizations, without any explanation of the need for such drastic measures.

It is doubtful that the advisory group or the Commission at this time could demonstrate consistency with the fundamental goals of the Sentencing Reform Act (Act), 28 U.S.C. § 991-998, i.e., that corporate environmental sentencing lacks "reasonable uniformity in sentencing" or "proportionality in sentencing," § 1.A3 of the Guidelines Manual, since there has been no attempt to review current sentencing practice as the Act requires.[1] In fact, application of the proposed guidelines in some cases will result in

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[1] The Act requires that "...as a starting point in the development of its initial set of guidelines for a particular set of cases, the Commission ascertain the average sentences (continued...)

disparate sentences among similarly situated defendants and thus will be directly contrary to the purposes of the Act.

Despite the outcry of reasoned opposition in response to the advisory group's March, 1993 draft proposal (March draft), the November draft has changed little, and primarily in ways which would result in more stringent fines not related to greater culpability, environmental harm or corporate profit. The ability of sentencing guidelines to effectuate a strong relationship between the mens rea of the defendant and the sentence meted out is critical if the proper deterrent effect is to be realized. On this ground alone, the November draft is fatally flawed and should be repudiated.

In API's comments of May 7, 1993 (API's Comments) submitted to the Commission, hereby incorporated by reference, we focused on the countless ways in which the advisory group's March draft deviated from the Chapter 8 guidelines applicable to organizations, the lack of foundation for such departures, and the apparent goal of the advisory group to impose harsher sentencing for criminal violations of environmental law than for any other type of violation. These same concerns apply equally to the November draft and as described below, this draft would result in stricter penalties than the earlier draft. Additionally, the November draft further downgrades consideration of culpability instead of giving it the prominence it deserves in an environmental sentencing scheme.

I. Culpability is the Overriding Factor

As discussed in API's Comments and pointed out by numerous other commentors, environmental regulations are more extensive than any other regulatory scheme, overlap at both the federal and state levels and are so detailed and complex that continuous perfect compliance is not obtainable at any price. The nature, duration of the violations, and potential for harm, if any, varies widely. According to advisory group members Lloyd S. Guerci and Meredith Hemphill, the authors of Dissenting Views, a governmental representative on the advisory group "...observed that demonstrable harm was present

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[1](...continued)
imposed in such categories of cases prior to the creation of the Commission..." 28 U.S.C. § 994(m) (1993). The Commission has complied with this mandate in developing the individual guidelines (having statistically analyzed 40,000 convictions) and the organizational guidelines, including seeking advice from judges, attorneys, probation officers, academics and federal agencies. Here, there are barely 250 environmental cases involving corporate defendants over the last decade. To further diminish a solid base for promulgating environmental guidelines, the group operated in a closed process, holding private meetings and placing prohibitions on its members right to discuss the issues outside the meetings. See, Benedict S. Cohen, Corporations and the Sentencing Guidelines for Environmental Crimes, National Legal Center White Paper, Vol. 5, No. 5, at 7, 8 (1993).

in substantially less than 10 percent of the criminal cases." Dissenting Views at 5. This means that the majority of criminal environmental cases involve violations of technical requirements, without any demonstrable injury.

While minimizing the historical emphasis on culpability as the distinguishing attribute of criminal prosecutions, the advisory group also ignores the availability of civil sanctions. As stated by an expert in the field of criminal prosecution in his incisive critique of the March draft,[2] "the environmental statutes have created a comprehensive civil enforcement system that authorizes a full panoply of remedies including environmental restoration and civil penalties designed to recoup economic gain from noncompliance, require remediation or compensation for environmental harm and require payment of punitive penalties above disgorgement and remediation." Benedict S. Cohen, Corporations and the Sentencing Guidelines for Environmental Crimes, The National Legal Center White Paper, Vol. 5, No. 5, at 12 (1993) (White Paper). Corporations that are convicted are also subject to other expensive remedies such as suspension and debarment of contracts with the government. These sanctions are vigorously enforced by EPA and the states and there is much political and societal pressure to escalate the current levels of enforcement activity. See API's Comments, at 5 and White Paper, at 42-49. Thus, criminal enforcement is not needed to ensure that defendants do not profit from their violations, bear the cost of environmental remediation and pay punitive penalties.

Nevertheless, criminal prosecution can be brought for many of the same underlying actions which trigger a civil enforcement action. This is true even though administrative and civil penalties can be imposed without any showing of intent on a strict liability basis. In addition, criminal sanctions can be imposed for conduct that is accidental or otherwise unintentional because many environmental statutes have been construed to relax or eliminate the scienter requirement found in most criminal statutes. Moreover, an organization may be held criminally responsible for the acts of its employees, even employees acting contrary to company policy and instruction. These are key distinctions of criminal environmental law not reflected in the advisory group's March or November drafts.

These considerations should be recognized and weighed heavily by the Commission in evaluating, in the first instance, the need for environmental guidelines. Secondly, if it is determined after proper research that guidelines, rather than general policy statements, are necessary, such guidelines should be formulated to fairly reflect

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[2] The author of this critique of the March draft is Benedict S. Cohen, now in private practice, who has served as Deputy Assistant Attorney General in the Justice Department's Environment and Natural Resources Division, as Senior Counsel in the Department's Office of Legal Counsel and as Associate Counsel to President Reagan.

the wide ranges of scienter and harm characteristic of environmental offenses, as well as prior civil remediation, restitution and penalties paid. The advisory group has not served the Commission well in neglecting to address these critical issues. Despite overwhelming comment to the March draft that culpability should be taken into consideration in the base fine calculation, the advisory group took the opposite tact, without any empirical basis, of "...dramatically curtailing the assessment of organizational culpability and adopted in its place a series of aggravators and mitigators without a culpability multiplier." Dissenting Views, at 7. Simply put, the advisory group "...totally misses the mark on the issue of culpability." Id.

Criminal prosecution should be reserved for violations reflecting the most culpability and historically this has been the emphasis. However, the advisory group has systematically and drastically increased the severity of Chapter 8 at almost every point, despite the complexities of environmental offenses, e.g., the criminalization of strict liability and negligent offenses. These factors suggest that environmental offenses may demonstrate less rather than more culpability than other corporate offenses. Yet the advisory group has singled out environmental offenses for outlandishly harsh treatment.

II. Problems with the Penalty Calculations

A. Adoption of Chapter Two, Part Q is Inappropriate

Unlike the March draft, the November draft begins the process for calculating a fine by using the base offense levels defined in the Sentencing Guidelines for individuals. Sentencing Guidelines, Chapter Two, Part Q. Part Q identifies seven major categories of environmental offenses that are each assigned a certain number of points. The points are then adjusted upwards in light of specific characteristics of the particular offense. Aggravating and mitigating factors are applied to this number to determine the Offense Level. Each Offense Level is designated a corresponding percentage of the maximum statutory fine, so that the higher the Offense Levels, the higher the designated percentage of the maximum statutory fine. For example, mishandling of a nonhazardous pollutant is 6 points. However, if the offense constitutes a continuing violation, 6 points are added, for violation of a permit, 4 points are added, for management involvement, 2 points are added, for prior civil violations, 2 points and for failed compliance, 5 points. The total score of 25 requires imposition of 100 percent of the statutory fine. § 9E1.1 Offense Level Fine Table.

This system ensures that penalties calculated will be at or close to the maximum statutory fine since the vast majority of offenses necessarily have multiple "offense characteristics" which will result in a high Offense Level. Moreover, the seven major subdivisions are a crude and arbitrary way to categorize environmental offenses, particularly since the degree of scienter is not built into the category of the offense. In fact, it is common understanding that the Commission deferred adopting environmental sentencing guidelines for corporations, in part, out of recognition that the base offense

levels defined in Chapter Two would be a weak foundation. Consequently, the advisory group, in adopting Chapter Two in its November draft, has contributed nothing to the debate.

B. The Severity of the Gain Plus Loss Formulation

Step 1(a) of the March draft requires the calculation of the base fine to be the greater of the "economic gain plus costs directly attributable to the offense" or a percentage of the maximum statutory fine derived from a Base Fine Table. Although the November draft no longer includes a "gain plus costs" factor in the base fine formulation, this deletion is misleading. The November draft brings about a similar effect as the March draft by requiring that "in no event shall a fine determined under this chapter be less than the economic gain [plus costs directly attributable to the offense]." March draft, at 25, § 9E1.2(c). In a footnote, the draft indicates that the advisory group is divided as to whether costs directly attributable to the offense should be added.

API strongly opposes the penalty floor measured by economic gain plus costs for the following reasons. First, this formulation is a substantial deviation from Chapter 8 guidelines for non-environmental crimes which use either the offender's gain or the victim's loss, whichever is greater, but not the sum of the two. Secondly, in those guidelines, loss is a component of the base fine calculation only to the extent that the loss was caused intentionally, knowingly, or recklessly, while there is no such limitation in the November draft. Thirdly, as stated in our previous comments, the legislative history behind 18 U.S.C. § 3571(d) defining loss as used in the Chapter 8 guidelines, indicates that this provision was enacted to disgorge gains from economic crimes that were the direct and intended result of a defendant's action. This rationale has absolutely no application to environmental offenses which can involve large losses that were unintended and bear no relationship to the culpability and economic gain of the offender. API's Comments at 9.

Moreover, costs are defined under Application Note 2(b), § 9.A1.2 to include actual environmental harm including natural resource damages, harms incurred and remediation or other costs borne by others. This approach is a serious departure from the existing guidelines which utilize restitution as a mitigating factor, not as a means to increase the base fine. Most civil environmental laws hold the party strictly liable for remediation or cleanup costs, a form of restitution. The proposal to make them also a criminal fine would require the company to make double payment and may violate prohibitions against double jeopardy. U.S. v. Halper, 490 U.S. 433 (1989); U.S. v. Walker, 940 F.2d 442 (9th Cir. 1991). Cleanup costs should be a basis for decreasing the fine, not increasing it.

Likewise, determining "harm" to the environment and harm to humans are enormously complex and heavily debated issues. Issues such as the calculation of natural resource damages are highly controversial and are extremely difficult even for civil courts that normally handle such cases. These issues are not well suited for resolution

in the sentencing context and would raise a host of issues not directly relevant to criminal sentencing. See API Comments at 11-14, for further detail.

For all of the above noted reasons, neither economic gain nor "costs" as defined in the November draft should be used to calculate penalties in the context of environmental sentencing.

C. The Approach to Multiple Counts Curbs the Court's Discretion

Another unique aspect of environmental regulation not addressed satisfactorily by the advisory group is that many if not most environmental violations involve multiple counts. Moreover, most environmental statutes impose $25,000 per day penalties. Thus, the maximum statutory fine could quickly become outrageous and disproportionate to the actual effect of the offense, the culpability of the offender or the economic gain. A major concern is the potential for "count stacking" by prosecutors and guidelines that do not give the court the discretion to curb abuse of prosecutorial discretion by deleting excessive counts.

The March draft included a provision, Step 1(b), that would have given the court the discretion to delete counts in such circumstances, but placed serious constraints on the court's discretion to use the provision, i.e., the counts must not involve independent volitional acts, counts should be reduced to a representative number and the base fine must adequately reflect the distinct types of criminal behavior involved.

The November draft is even more restrictive and requires the court to count all charges of conviction, and sets a rigid scheme whereby the court can only reduce multiple counts by a specified percentage of the statutory maximum. § 9E1.2(a). The November draft also double counts repetitive violations since under § 9B2.1 regarding calculation of the primary offense levels, repetitive violations are considered an offense characteristic which increases the base offense by six (6) levels. Consequently, repetitive violations are given a greater offense level than non-repetitive violations. This makes it all the more important that the court have a broad range of discretion to handle multiple counts in a way that reflects the seriousness of the violation.

The November draft's handling of multiple counts makes no sense unless the goal is to produce inflated penalties regardless of the degree of culpability or harm. Furthermore, it severely limits the discretion of the court to impose a penalty that is appropriate given the facts of the individual case. The advisory group has failed to heed the advice provided it by visiting judges that "...given the broad range of facts in environmental cases, there should be more discretion in sentencing for environmental criminal offense than other crimes." Dissenting Views, at 13. For some misinformed reason, the advisory group has chosen to deviate from the existing guidelines which provide for grouping of similar offenses in order to avoid the unjust result of inflated counts.

III. Aggravating and Mitigating Factors Do Not Properly Reflect Culpability

The November draft makes some improvements to the earlier draft by eliminating aggravating factors that were also elements of the base fine and would have resulted in double counting, i.e., threat to human life and safety, threat to the environment, scienter, and absence of a permit. However, the advisory group continues to overlook the important fact that prior compliance history can be totally irrelevant to the culpability of the defendant. For example, it is not unusual for EPA to issue a judicial or administrative order on a violation involving no scienter or harm to the environment, or in some cases, merely to announce that no enforcement action will be taken. In such instances, enhancement of the base fine because of the mere issuance of the order would be inappropriate. Courts should be given maximum discretion to examine the compliance event to determine whether it has any bearing on culpability and to provide zero enhancement where no culpability is involved.

A. The Limit on Mitigation is Unfair

The advisory group received repeated comments that the 50% cap on mitigation made no sense, especially when compared to the 95% mitigation allowed for non-environmental offenses. Despite these comments, the advisory group retained the 50% cap and provided no analysis as to why there should be such vastly different treatment of environmental offenses.

IV. Compliance Program and Probation Provisions are Excessive

A. Compliance Program Provisions

One of the most draconian aspects of the March draft remains unaltered in any significant sense in the November draft. The guidelines in Chapter 8 set forth broad, guiding principles and permit an organization to develop the best means of achieving compliance with those principles. Without any showing that the elements set forth in Chapter 8 were inadequate, the advisory group replaced them with seven (7) restrictive and detailed criteria which must all be met, i.e., "substantial satisfaction" with each subpart must be shown, before any mitigation is received. Step III, March draft; § 9C1.2 and Part D, November draft. Moreover, an organization without such a program, or with a program that does not meet all criteria, will be penalized by an **increase** in the base offense level. § 9C1.1(f). This is in marked contrast to the to the guidelines for "non-environmental" violations. This approach also places more emphasis on compliance with the elements of the guidelines than it does on compliance with environmental law.

It is important that an organization have flexibility to tailor a compliance program that best takes into consideration its size, activity and internal structure. The advisory group incorrectly assumes that one compliance program will satisfy all organizations. In reality, what is indispensable for one organization may be superfluous for another.

Furthermore, the criteria are so onerous and costly that it is unlikely that they will be followed. The criteria could discourage organizations from developing environmental compliance programs by making it impossible to receive mitigation unless perfection, as measured by standards out of touch with reality, is achieved. Some mitigation should be given for good faith compliance efforts that represent a lack of culpability, even if all seven criteria are not met.

The new element added to the November draft which purports to create some degree of flexibility for "additional innovative approaches" is a sham. § 9.1.1(8). An organization may demonstrate that additional mitigation is due only if it "substantially satisfies" the seven primary factors and sustains a heavy burden in demonstrating to the court that its additional programs "contribute substantially" to achieving compliance. Such unrealistic requirements provide little incentive for an organization to develop "additional programs" that would enhance its compliance efforts.

B. Probation Provisions

The probation provisions in the November draft are the same as in the March draft. This is a significant flaw of the advisory group's work. API is at a loss to understand why environmental law should be the one area where the courts' discretion to devise appropriate terms of probation should be so limited. Additionally, under this proposal it would be the only area of the law where the sentencing guidelines would require imposition of probation in essentially every case. The terms of probation in both documents are far-reaching, including, among others, mandatory disclosure, examination of books and records, inspection of facilities, development of a compliance program and use of a court selected expert at the organization's expense. These post-offense conditions are particularly onerous and the advisory group has articulated no rationale as to why these provisions are necessary for environmental offenses, but not, for example malum in se criminal offenses partially subsumed in Chapter 8.

V. Advisory Group's Late "Analysis" is Meaningless

A final point must be made regarding the lack of analysis of the need for guidelines by the advisory group. API has received a copy of the January 24 letter from Raymond Mushal to Commissioners Nagel and Gelacak. Therein, advisory group members Mushal and Lauterback purport to analyze ten actual cases to prove the point that the group's proposal is neither draconian nor out of line with the application of Chapter 8. About the only thing that can be said of this effort is that it is an unsuccessful attempt to save the advisory group from criticism that it did not analyze actual cases.

In fact, the letter is a clear demonstration of the continued lack of scholarship and proper analysis of this area of law by the majority of the members of the advisory group. First, and most importantly, only ten cases were chosen for analysis, with no indication that they were fairly or randomly chosen. Analysis of such a small group out of the

universe of possible case scenarios adds nothing to the group's understanding of the fairness of the results. Second, it is curious why this "analysis", such as it is, was completed after the group finished its work. We suspect that the reason is clear: just as many, or more, cases could be analyzed showing that disparate and harsh sentences would be obtained under the proposal, and the use of these ten cases as examples could not bear even the most rudimentary scrutiny by other members of the group. Third, the writer of the letter concedes that the analysis did not focus properly on the use of aggravators and mitigators, and did not include a large enough universe of data to allow analysis of the problem of count-stacking. Fourth, there is no information presented which would indicate that current sentencing approaches lead to results which call for the adoption of guidelines at all. Fifth, the analyses do not account for what results would obtain by application of the "economic gain plus cost" minimum fine, which is likely to be most onerous.

The one thing the letter does do is this: it indicates a need, recognized but not acted upon by the advisory group, to gather information on the actual application of the proposal to actual and hypothetical cases. To the extent that the Mushal letter attempts to deflect or eliminate the need for that sort of critical analysis, it does the Commission and the public a great disservice. Anecdotal "analysis" of ten cases, chosen by who knows what method, is going to produce misleading information no mater what the "results" are. In the final analysis, the Commission should view the Mushal letter as a charge to conduct a real analysis of the draft guidelines, using the universe of reported cases as well as hypothetical, before even considering the matter further.

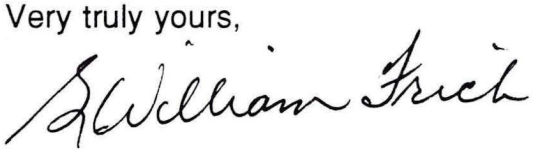
V. Conclusion

The advisory group has failed to evaluate the need for guidelines for environmental offenses by reviewing the limited data on the sentencing of corporations for criminal violations of environmental law. Thus, there is no demonstrated empirical basis for guidelines. In fact, the pervasiveness and complexity of environmental regulation suggests that broad policy statements are more appropriate than a separate set of rigid guidelines.

Secondly, the advisory group has proposed a scheme that will result in harsher penalties for environmental offenses than for non-environmental offenses. This is troubling in that most criminal environmental offenses do not involve the culpability which should be the main concern of judges in setting criminal sentences.

The Commission is under no obligation to promulgate guidelines for environmental offenses and would be prudent in reserving such action until and unless disparity in current sentencing for environmental crimes is demonstrated. At that time, the Commission would be well advised to draw on a wider range of environmental law expertise than is represented by the advisory group. At the present time, the Commission should squarely reject the work of the advisory group because its proposed guidelines are unnecessary, unsupported and unjust.

Very truly yours,



cc: Commissioner Ilene H. Nagel
Commissioner Michael S. Gelacak
Commissioner Julie S. Carnes
Commissioner A. David Mazzone

February 22, 1994

United States Sentencing Commission
One Columbus Circle, NE
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Washington, D.C. 20002-8002

Re: Comments Concerning the Development of Organizational Sentencing Guidelines for Environmental Offenses

Dear Commissioners:

We write in response to your December 16, 1993 solicitation of comments as well as alternatives to the recommendations of the Advisory Working Group on Environmental Sanctions. The undersigned are former officials of the Justice Department's Environment and Natural Resources Division and the Office of General Counsel of the United States Environmental Protection Agency. Our service with the government spans the years from 1977 to 1993. During that time we oversaw the growth of criminal prosecutions for environmental offenses to the point that they have become a vital, indispensable element in environmental enforcement. Last Spring, we provided both written comments and testimony to the Advisory Group. Here, we provide a few general comments concerning the Advisory Group's most recent product, suggest an alternative model, and offer our views as to how the Commission might wish to proceed next.

The Advisory Group is to be commended for the substantial effort it has made in addressing the difficult and complex sentencing issues presented by environmental crimes. However, most of the fundamental concerns raised in our submission to the Advisory Group last Spring appear still to be germane to the Advisory Group proposal now under consideration by the Commission. (A copy of our prior submission accompanies this letter.) Most importantly, the proposal still does not adequately account for what, in our experience and judgment, should be the central factors in setting a base offense level: 1) the degree of culpable knowledge and 2) the foreseeability of harm to people or the environment, taking

into account the social utility or disutility of the defendant's conduct.[1] The inadequacy of the proposal in this respect is mainly attributable to two problematic features.

First, the proposal suffers as a result of the otherwise sensible decision of the Advisory Group to return to the existing organizational sentencing format which derives the base offense level for an organization from the overall offense level established under the individual guidelines. The problem is that the Chapter 2Q guidelines for sentencing individual environmental offenders are themselves flawed, in part, for inadequately addressing culpable knowledge and foreseeability of harm. Our understanding is that the Commission was sufficiently concerned with the individual guidelines three years ago that it initiated an effort to revise them. Until the individual guidelines are corrected, an appropriate baseline for organizational sentencing will be lacking.

Second, the proposal abandons the existing organizational guidelines approach for crediting crime prevention programs and inexplicably limits available credit for organizational behavior that strongly evinces a lack of culpable knowledge attributable to the corporate entity. In particular, making any credit depend on satisfaction of all of the stringent factors enumerated by the Advisory Group is disproportionately severe. We remain of the view that the existing guideline scheme for imputing corporate culpability applies equally well to the environmental context as it does to other organizational sentencing. (The same is true of the existing scheme for probation). The Advisory Group has provided no explanation for its strikingly different treatment of the issue, which hinders our ability to provide more specific additional commentary.

Also of significant concern to us is the Advisory Group's inadequate treatment or failure to address the areas which we identified as requiring special consideration in the sentencing of environmental crimes: 1) collateral consequences, including civil obligations; 2) remedial costs that greatly exceed gain; 3) prior enforcement history. Our prior submission discussed these issues in detail. Further, the Advisory Group attempted to address our concerns (and those of many others) that the quantification of gain and loss central to the prior version would prove highly problematic, time consuming, and tend to increase sentencing disparity. However, while appearing to delete those contentious and somewhat speculative elements from the setting of the base fine itself, the Advisory Group has clearly left the door open for counterproductive disputes simply by relocating those

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[1] The predominance and currency of these factors is reflected both in DOJ's July 1, 1991 policy statement, "Factors in Decisions on Criminal Prosecutions for Environmental Violations," and most recently in EPA's January 12, 1994 policy statement concerning how it will select cases meriting criminal investigation.

elements elsewhere. It is important to ensure that these distortive factors in the sentencing calculus are minimized, not just repositioned or rendered less transparent.

Regarding alternatives, the Appendix to our comments to the Advisory Group contains a "mock up" of a structure for setting a base fine level based on the concepts of culpable knowledge and foreseeable harm. While it is certainly open to refinement, we believe that our model provides a reasonable estimate of how to address these core concerns in a guideline format. If the Commission wishes, we would be happy further to develop the language, commentary, and explanatory rationale for the model. We then propose three modifications to existing Chapter 8 adjustment factors to guide the court in addressing specific considerations relevant to organizational sentencing in the environmental context. Beyond this, we believe that Chapter 8 is generally sound. Organizational sentencing for environmental offenses does not warrant a completely separate chapter in the guidelines.

While the Advisory Group has provided a useful forum for initially debating and focusing on some of the difficult issues in sentencing environmental offenders, we urge the Commission and its staff to undertake the critical conceptual and empirical work that remains to be done in this area:

- Commission staff should be charged with examining the relationship between the Advisory Group proposal and the substance, structure and objectives underlying the existing organizational sentencing provisions. We would encourage the staff to do the same with our model. The staff should then produce an explanation of its analysis and identify specific questions for public comment.

- Commission staff should also conduct, to the extent possible, an empirical study of judicial sentencing practice for organizational sentencing in the environmental context. (It is not clear that the Advisory Group ever identified heartland cases upon which to base its ultimate determinations). Because the number of judicially determined sentences is likely to be small, and the number of reported decisions still smaller, it may be that caselaw will provide an insufficient understanding of "heartland" scenarios and commonly encountered sentencing considerations. If that is the case, then we would recommend the approach advanced by numerous commenters that the Commission give courts guidance in the form of policy statements as a means of developing more structured guidelines after sufficient actual experience has been recorded. For obvious reasons we would caution strongly against reliance on plea agreements as providing a reliable basis for what a sentence should be.

Finally, in both our former official capacities, and in our positions in academia and the private sector, we have amassed considerable experience in the area of criminal environmental enforcement policy and practice. We would welcome the

opportunity to meet with the Commission and staff at a convenient time to share our views and more fully discuss the complex environmental sentencing issues now under consideration.

Thank you for your consideration of our views.

Joan Z. Bernstein	General Counsel, U.S. EPA; Acting Assistant Administrator for Enforcement, U.S. EPA (1977-1979)
Francis S. Blake	General Counsel, U.S. EPA (1985-1988)
Donald A. Carr	Acting Assistant Attorney General, Land and Natural Resources Division (1989)
Michele B. Corash	General Counsel, U.S. EPA (1979-1981)
Carol A. Dinkins	Assistant Attorney General, Land and Natural Resources Division (1981-1983) Deputy Attorney General (1984-1985)
Angus Macbeth	Deputy Assistant Attorney General, Land and Natural Resources Division (1979-1981)
Roger J. Marzulla	Special Litigation Counsel, Land and Natural Resources Division (1983-1984) Deputy Assistant Attorney General, Land and Natural Resources Division (1984-1987) Assistant Attorney General, Land and Natural Resources Division (1987-1989)

James W. Moorman	Assistant Attorney General, Land and Natural Resources Division (1977-1981)
Vicki A. O'Meara	Deputy General Counsel, U.S. EPA (1987) Acting Assistant Attorney General, Environment and Natural Resources Division (1992-1993)
Richard B. Stewart	Assistant Attorney General, Environment and Natural Resources Division (1989-1991)
George Van Cleve	Deputy Assistant Attorney General, Environment and Natural Resources Division (1989-1991)

HARRIS

ROBERT E. SULLIVAN
SENIOR VICE PRESIDENT ADMINISTRATION

February 18, 1994

United States Sentencing Commission
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Washington, DC 20002-8002

Attn: Staff Director

SUBJECT: COMMENTS ON THE FINAL REPORT OF THE ADVISORY WORKING GROUP ON SENTENCING GUIDELINES FOR ENVIRONMENTAL OFFENSES

Pursuant to the Sentencing Commission's Notice dated December 16, 1993, Harris Corporation is pleased to submit comments on the Advisory Working Group's draft of sentencing guidelines for organizations convicted of environmental offenses. Harris Corporation, with worldwide sales of more than $3 billion dollars, is focused on four major businesses: electronics systems, communications, semiconductors, and Lanier Worldwide office equipment.

Harris Corporation has previously submitted comments to the Commission relating to sentencing guidelines for organizations and, on April 16, 1993, submitted comments to the Advisory Working Group on environmental guidelines for organizations. Also, a representative of Harris testified at the May 12, 1993 hearing of the Advisory Working Group (hereafter referred to as "AWG").

Harris Corporation fully supports the national environmental protection program and the efforts of responsible individuals and environmental groups to protect our nation's environment. We are aware of the extensive efforts of the members of the AWG, and we appreciate the dedication of those individuals to the AWG project. Nevertheless, we cannot support its proposals. We respectfully submit to the Commission that these proposals are not worthy of further consideration by the Commission and, further, that the entire process in which the Group has been engaged is seriously flawed.

We have found it to be extremely difficult to comment about the substance of the AWG proposals because they are presented without explanation of the basic concepts upon which they are based and the reasons for many specific provisions. This is particularly true as regards several significant changes from the existing guidelines or anything previously adopted by the Commission. It can be presumed that, if this draft were to be issued as final guidelines, an explanatory preamble or opening section would be prepared. Unfortunately,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Respectfully submitted,

Robert E. Sullivan

Robert E. Sullivan

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

NOV 30 1994

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

The Honorable Richard P. Conaboy, Chairman
U.S. Sentencing Commission
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Conaboy:

The U.S. Environmental Protection Agency (EPA) submits the enclosed comments concerning the proposed Chapter 9 sentencing guidelines for organizations convicted of environmental crimes, which the Advisory Group submitted to the Sentencing Commission in November of 1993.

The Agency spent considerable effort in 1992 and 1993 reviewing the Advisory Group's initial draft and submitting its own proposed guidelines for organizations. EPA personnel have spent additional time reviewing the final proposal of the Advisory Group, and have prepared the attached comments for the benefit of the Commission. These comments reflect the high priority EPA continues to assign to the sentencing of organizations convicted of environmental offenses.

EPA appreciates the significant expenditure of time and effort members of the Advisory Group expended in developing the proposed Chapter 9. EPA endorses the Advisory Group's decision to develop proposed guidelines which generally incorporate the individual sentencing guidelines found in Guidelines Part Q - Offenses Involving the Environment, and the decision to follow the basic format of Chapter 8, the current general organizational sentencing guidelines.

I know you and your staff will review EPA's comments carefully. With this in mind, I would like to take this opportunity to highlight specific areas of concern EPA has regarding the Advisory Group's November, 1993, proposal.

* The proposed Chapter 9 does not adequately take the extent of management involvement and the size of the organization into account.

* The proposal purports to restrict courts from applying some provisions of 18 U.S.C. § 3571 in calculating fine amounts, an action that could prevent courts from assessing appropriate fines in certain cases. Additionally, the Advisory Group's proposal uses different terminology from that used in 18 U.S.C. § 3571 and in Chapter 8 in terms of calculating loss and gain. This will be confusing, and EPA encourages the Commission to adopt the terms "pecuniary loss" and "pecuniary gain", which are already in place in Title 18 of the United States Code and Chapter 8 of the Guidelines.

* The Advisory Group failed to incorporate all offenses which are subject to Part 2Q Guidelines into the proposed Chapter 9. The Agency strongly believes individual and organizational guidelines should result in the most consistent treatment of both types of defendants as possible; thus all offenses covered by Part Q should be covered by Chapter 9. Organizations should not receive more lenient treatment than individuals convicted of environmental offenses.

* The proposal does not provide for a role for environmental regulatory agencies in determining conditions of probation as Chapter 8 does.

* We support the Advisory Group's emphasis that organizations should develop effective programs to detect and prevent violations of law. However, we oppose the proposed eight-level reduction for such programs as excessive. The reward for having such a program should equal the penalty for not having one, in this case a four-level adjustment.

* EPA suggests increasing the proposed reduction for cooperation to eight levels in order to encourage voluntary disclosure and cooperation with regulatory and law enforcement agencies.

* EPA is trying to incorporate waste minimization and pollution prevention into the national consciousness. To this end, we propose a two-level reduction for organizations which develop and implement substantial pollution prevention projects as part of their sentence.

EPA representatives will be happy to discuss the Agency's views on the Advisory Group's proposal at any time. In addition to our detailed comments, we are enclosing the Agency's proposed

Chapter 9 Guidelines submitted to the Advisory Group in May of 1993. The proposal contains substantial explanation of our views on a variety of sentencing issues which EPA believes would be useful to the Sentencing Commission.

Sincerely,

Steven E. Chester
Deputy Director
Office of Criminal Enforcement

Enclosures

COMMENTS BY THE U.S. ENVIRONMENTAL PROTECTION AGENCY ON THE FINAL PROPOSAL OF THE ADVISORY GROUP ON ENVIRONMENTAL SANCTIONS OF THE U.S. SENTENCING COMMISSION

PART A - GENERAL APPLICATION PRINCIPLES

Application Note 2(a) - Definition of "Counts": This term is defined vaguely, and should be deleted. EPA assumes that what was intended was that a fine should be calculated for each count of the charging document. A sentencing court is explicitly directed to do so as part of Guideline § 9E1.1 - Fine Calculation. Therefore defining the concept of what a count is does not help the fine calculation process and it would be advisable to delete this "count" definition.

Application Note 2(b) - Definition of "Costs": The Agency strongly recommends that the term "costs" be replaced with the term "pecuniary loss." As more fully explained in EPA's April 17, 1993, detailed comments on the Advisory Group's initial draft (pp. 1-4) and the Agency's May 7, 1993, own guidelines proposal (pp. 2-3), EPA prefers the term "pecuniary loss" because that term is a necessary part of any sentence imposed under 18 U.S.C. § 3571(d). Using the differently defined term "costs" in this Guideline introduces unnecessary complexity and confusion.

"Pecuniary loss" should be defined by reference to Section 8A1.2 of the Guidelines. The definition should also include all damages caused by the offense, including:

1) environmental harm, including natural resource damages, property damage, anticipated and actual clean-up expenses (including oversight expenses), and expenses of abating any threat to the environment, and

2) harm to human health, including death, bodily injury, medical expenses and expenses to abate any threat to human health. The term includes expenses borne by a defendant. The term "bodily injury" is defined at Section 1B1.1, Application Note 1(b), and includes future harm from exposure to substances.

The term pecuniary loss, as used in 18 U.S.C. § 3571(d), permits a court to set a fine at a level which reflects the severity of the harm. The Advisory Group's draft entirely excludes reference to the term, and has thus "written out" this method of determining the statutory maximum. EPA does not believe the

Sentencing Commission has the authority to eliminate a statutory provision enacted by Congress. The Advisory Group's action could prevent courts, in cases of catastrophic damages (e.g. the Exxon Valdez case), from having the authority to impose an appropriate fine. Use of pecuniary loss, as well as its counterpart, "pecuniary gain", is available under Chapter 8 to determine the statutory maximum in other types of crime, and EPA sees no reason why environmental crimes should be treated differently.

If the Commission adopts the "costs" concept, EPA believes that the term at present is too narrowly defined. As drafted, the term is limited to harm proximately caused by the offense conduct. This requirement will introduce unnecessary litigation over causation, and should be deleted. The definition of costs, if this term is retained, should seek to capture all costs associated with the offense.

Also, the phrase "material degradation" is defined such that no costs are appropriately considered unless an entire natural resource, such as the air or water, has been virtually destroyed. This requirement would limit the court in considering harm except in the most egregious cases, and should be deleted.

Finally, EPA recommends that expenses borne by the defendant be included as pecuniary losses. The purpose of the "cost" or "pecuniary loss" provision is to define the scope of damage. This can be measured by placing a value on the harm to the environment or by using clean-up costs. Excluding clean-up expenses borne by the defendant results in an inaccurate picture of the scope of harm. Use of a defendant's remedial expenses to determine harm simply substitutes the most readily determined measure of harm - clean-up costs - for the much more difficult task of assigning "value" to environmental damage. Finally, it is unclear whether one defendant's penalty can be reduced even if another defendant paid for a clean-up.

Some object to including costs borne by the defendant on the basis that such action constitutes "double-counting". That view is simply incorrect. A defendant's remedial expenses are restitution, not a fine. Using clean-up expenses in determining the harm (whether borne by the defendant or anyone else) does nothing more than accurately reflect the scope of the harm caused.

The Chapter 8 guidelines support the Agency's position. They define pecuniary loss by referring to Section 2B1.1, Comment 2. That comment specifically adopts the idea of using repair costs as a substitute for direct measurement of a loss.

Application Note 2(c) - Definition of "Economic gain": This term should be replaced by the term "pecuniary gain," which is already used in sentencing determinations. See 18 U.S.C. § 3571. The definition in the Advisory Group's draft should be retained to

explain the application of the term in the environmental context. However, the definition should be amended to include interest from deferred compliance expenditures.

Also, pecuniary gain should include "all pecuniary gains attributable to the offense". The Advisory Group's draft limits the gains to those attributable to the "offense conduct which is described in the criminal charges". This language would exclude gains related to relevant conduct. This language thus places unwarranted importance on which counts are selected for charging, plea agreement or trial. The Guidelines seek to de-emphasize the selection of counts as the driving force behind sentencing as reflected by the definition of relevant conduct at Section 1B1.3. Thus, the Work Group's concept is at odds with a fundamental concept of the overall Sentencing Guidelines.

Application Note 2(e) - Definition of "High-level personnel of the organization": The definition of this term refers to individuals in charge of major business or functional units such as sales, administration or finance. A reference should be added to encompass individuals in charge of production, operations, maintenance or environmental compliance.

Application Note 2(g) - Definition of "Material degradation": This term should be deleted in accordance with our comment on Note 2(b)'s definition of "costs." As defined, the phrase would eliminate any harm measurement unless an entire natural resource was destroyed.

Application Note 2(h) - Definition of "Natural resource": A reference to groundwater is necessary to complete this concept.

Application Note 2(i) - Definition of "Organization" - It is unnecessary to define this term insofar as it is defined by statute.

Application Note 2(k) - Definition of "Substantial authority personnel": Reference should be added to environmental managers.

PART B - FINES

Section 9B1.1 - Determining the Fine - Criminal Purpose Organizations: An application note should be added to provide examples in this context, such as 1) a transporter who primarily dumps waste at unpermitted sites, and 2) an asbestos removal company that routinely fails to follow required procedures for removal and disposal of asbestos waste.

Section 9B2.1(b)(4) - Tampering with Public Water Systems: EPA recommends that this section be rewritten to contain § 2Q1.4 and

2Q1.5 As a general principle, EPA believes that Chapter 9 should incorporate and build upon Section 2Q to ensure that the sentencing of organizations is as consistent as possible with the sentencing of individuals.

EPA is also concerned that, as drafted, § 9B2.1(b)(4) would narrow the application of the guidelines for attempted or threatened tampering with public water systems. In particular, § 9B2.1(b)(4) would not apply to attempted or threatened tampering unless the attempt or threat resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure. Under the Section 2Q guidelines, attempted and threatened tampering have base offense levels of 18 and 10, respectively; disruption, evacuation, and substantial expenditure are specific offense characteristics. EPA does believe individuals and organizations should be treated differently for these offenses, and sees no justification for not applying the guidelines to all cases of attempted or threatened tampering.

Section 9B2.1(b)(5) - Wildlife Violations: Again, to maintain consistency between individuals and organizations, EPA recommends that the language of § 2Q2.1 be substituted for the Advisory Group's wildlife guideline. Moreover, EPA is reluctant to change the existing § 2Q guideline without the benefit of input from the U.S. Fish and Wildlife Service or other affected agencies.

Omitted § 2Q1.6 - The Advisory Group's proposal does not include § 2Q1.6, Hazardous or Injurious Devices on Federal Lands. This guideline should be incorporated into Chapter 9.

Section 9B2.1(b)(6) - Simple Recordkeeping and Reporting: EPA strongly recommends that this section be deleted. Together with the definition language at Application Note 4 on page 10, this section unjustifiably creates a lower fine for reporting offenses where a defendant did not anticipate environmental harm. The almost universal reason for criminally prosecuting reporting violations in lieu of treating them as civil or administrative matters is because the defendant intentionally misled the government. The EPA heavily relies on self-reporting by the regulated industry to monitor environmental compliance. The motive for this crime is the desire to escape costs of environmental compliance, rather than any desire to contaminate the environment. Therefore, providing a substantial decrease in the fine based on consideration of the defendant's intent to cause environmental harm is inappropriate. It is also inappropriate to tie the use of this provision to a corporate defendant's subjective expectations.

Further, this provision would allow a reduction in Base Offense level for any defendant who believed that the lie would only "insignificantly" increase "non-substantive" environmental harm. These undefined terms would reduce the fine even though the defendant knew a fraudulent report would cause some degree of harm.

For these reasons, the Agency urges that this section be deleted.

Application Note 1 - The sections incorporated by reference in this Application Note do not include Guideline § 1B1.3, Relevant Conduct, which should be included to avoid confusion, insofar as relevant conduct is used in other sections which have been incorporated by reference. Also, the reference to "...(application notes b and j)..." should refer to notes 1(b) and 1(j).

Application Note 2 - This note needs some clarification. It is apparently intended to say that such crimes as conspiracy and mail fraud should be grouped with environmental counts; in such cases the court should use the guideline which provides the higher fine. Also, the Advisory Group's draft refers to "closely interrelated" counts, while Section 3D1.2 refers to "closely-related" counts.

Application Note 3 - This note explains the phrase "material threat of release", but since this should be deleted because the term is not used anywhere in the proposed Chapter 9.

Application Note 4 - This note discusses "simple recordkeeping..." and should be deleted consistent with EPA's recommendation above concerning Guideline § 9B2.1(b)(6).

PART C - CULPABILITY FACTORS

EPA's recommendations on this section are provided in highlighted additions and deletions to the text of the Advisory Group's Part C, followed by the Agency's explanation of the changes. The Agency believes these changes would better capture the extent of management involvement warranting an increase in the fine and more precisely tailor the punishment to the size of the organization. EPA has repeatedly expressed its concern that the Advisory Group's proposal fails to take size of the organization sufficiently into account.

Section 9C1.1 - Aggravating Factors in Sentencing

(a) Management Involvement

An organization's specific offense level shall be increased based upon the number of employees in the organization and the level of participation of its substantial authority personnel or managers. For purposes of this provision, the number of employees shall include all employees of the convicted organization.

Substantial Authority Personnel
The increase specified in the table below for the participation of the substantial authority personnel applies only if: one or more