The lack of a permit or the absence of governmental authorization may also reflect the foreseeability of harm. CMA suggests that to the extent the foreseeability of harm is already included as an aggravator, a permit-related aggravator also "double-counts" the offense.

C. The Draft Recommendations Constitute a Radical Departure from Current Practice on Mitigating Factors.

CMA also believes that the mitigating factors identified by the Working Group are too restrictive. First, the available mitigating factors should more closely track the recommended aggravating factors. For example, if the absence of a permit is an aggravator, the defendant's compliance with its permit should be considered a mitigating factor.

Second, the available mitigating factors should more closely follow those applicable to other organizational sentences. Credit should be given for efforts to remediate or mitigate damage, similar to the credit available for other organizational crimes. In particular, mitigation credit does not provide an undue benefit to defendants, but rather provides an incentive to minimize all possible damage to human health or an affected environmental resource. Step II(n).

CMA is concerned that the mitigating factor outlined in Step II(1)(2) may have an unintended consequence. Under this factor, an organization can see its base fine reduced if it pleads guilty before the government is put to substantial effort and expense in preparing for trial. However, it is not clear what effect the assertion of a good faith defense by the organization will have in implementing this provision.

A defendant frequently will not know with particularity the government's charges until indictments are issued, and consequently it may not be possible to discuss a valid defense until well into a case. Certainly a company should not be penalized for asserting a defense in such circumstances, or taking other steps that ultimately affect whether the charge is continued or a solution negotiated. Moreover, it is not clear what standard will be applied by sentencing courts in determining when the government has incurred "substantial effort and expense." The uncertainty surrounding the availability of this mitigating factor could unfairly penalize organizations investigating, or defending an investigation, of an environmental violation. CMA recommends that this aggravating factor only apply to circumstances that arise after the defendant has entered its plea and has an opportunity to consider its defense.

D. The Draft Recommendation Does Not Encourage the Development of Effective Internal Compliance Programs.

CMA is particularly concerned about the compliance program factors identified by the Working Group. We question the need for separate factors that overlay the existing compliance program elements. U.S.S.G. § 8A1.2 (Application Note 3(k). Indeed, CMA suggests that the draft recommendations will necessarily dictate artificial organizational structures, when the focus should be on promoting compliance with environmental regulations.

The requirement that substantially all the elements of the internal compliance provisions must be satisfied before mitigating credit is given is simply unrealistic and unfair. Significant resources have been expended to develop compliance programs under

internal company policies and industry-wide voluntary initiatives such as Responsible Care®. As example of the breadth and depth of compliance programs typical in the U.S. chemical industry are outlined in the Appendix to CMA's comments on the Commission's original sentencing proposal.~ Comments of the Chemical Manufacturers Association dated January 10, 1991 to the U.S. Sentencing Commission on Sentencing of Convicted Organizations, 55 Fed. Reg 46600 (Nov. 5, 1990). Those expenditures should not be lightly disregarded in a sentencing approach that mandates absolute compliance with all the program elements.

One of the goals behind the Sentencing Commission's general organizational guidelines, and indeed the Sentencing Reform Act, was to provide strong incentives to implement internal compliance programs. The Working Group recommendations can further encourage compliance program development by allowing substantial credit for each element attained.

The Group could adopt a scaling system to provide mitigating credit for each program element implemented. A scaling approach will provide an important incentive, as more comprehensive programs will qualify for more credit. The Working Group could also do more to foster effective internal compliance programs by removing the overall limitation on mitigating factors, as is more fully set out below.

E. It is not Appropriate to Establish a Minimum Fine Threshold of 50% of the Base Fine Calculated.

Step IV(a) of the recommended guidelines limit the effect of allowable mitigating factors to no more than 50% of the base fine

determined under Step I. CMA can think of no logical reason for this limit.

If an organization has a demonstrated commitment to and an effective internal program, and qualifies for a significant downward adjustment of a proposed fine, logic and fairness demand credit. In the existing guidelines applicable to organizational fines, mitigating factors may reduce the ultimate fine to 5% of the base fine. An arbitrary limit of a 50% downward adjustment appears to confirm that punishment for environmental violations is the controlling policy goal when compared to the general guidelines.

A limit of 50% on downward adjustments will wreak havoc with factoring culpability into these sentences, and will undermine the important policies affording credit for internal compliance programs and cooperation. For example, the 50% limitation will remove any incentive to report an offense and cooperate in an investigation, particularly when the organization can reasonably rely on other mitigating factors to get down to the 50% level.

CMA also suggests that to the extent a limitation on downward adjustments is considered necessary, a reciprocal limitation on upward adjustments should also be applied.

F. Probation for Convicted Organizations Should be a Matter of Discretion for Sentencing Judges.

As noted earlier, Congress afforded sentencing judges considerable discretion in formulating appropriate sanctions for convicted defendants. The Working Group recommendation, however, completely removes a sentencing court's discretion to impose probation as part of the sentence. Step V. Probation is to be ordered whether or not a

fine is imposed. Compare Step V(a)(2) and (a)(7). It appears that regardless of a court's objectives in sentencing an organization, those objectives are secondary to the requirement that probation be imposed.

CMA strongly recommends that the Working Group revisit the extensive conditions of probation set out in Step V. Under the recommended conditions, prosecutors and the courts will have continuing jurisdiction to review the implementation of internal compliance programs. This oversight function may well be impractical and does not reasonably serve as a deterrent.

The draft recommendations would permit, as a condition of probation, a requirement that the defendant publicize the nature of the offense, the fact of conviction, the punishment imposed, and any preventive measures taken to avoid similar offenses. Step V(d). An earlier report to the Sentencing Commission succinctly summarized why the "publicity" option has been generally rejected as a sentencing tool:

> The "publicity" sanction ... was rejected ... "as inappropriate with respect either to organizations or individuals, despite its possible deterrent effect, since it comes too close to the adoption of a policy approving social ridicule as a sanction." J. Parker, Criminal Sentencing Policy for Organizations, 27, Fn. 118 (May 1988). (quoting National Commission on Reform of Federal Criminal Laws, Final Report § 3007 and Comment (1971)).

CMA suggests that, insofar as notice to employees of violations and preventive measures could help promote worker health and safety and environmental compliance, publication of the violation (as a condition of probation) should be limited to affected employees.

IV. CONCLUSION

CMA is concerned that the Working Group recommendations establish an excessively punitive approach to sentencing organizations convicted of environmental violations. Such an approach is simply not warranted in sentencing for the vast majority of cases. Indeed, the Working Group should consider minimal adjustments in the existing sentencing guidelines which can serve the needs of the courts in sanctioning environmental crimes.

CMA recommends that the Working Group substantially revise its recommended sentencing approach and provide a detailed statement of the rationale behind the Group's ultimate recommendations to the Sentencing Commission and to the public. The statement will permit more meaningful consideration of the Working Group's effort in the future.

Feb 1994

BEFORE THE UNITED STATES SENTENCING COMMISSION

COMMENTS OF UNION PACIFIC RESOURCES CO. ON ORGANIZATIONAL SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES PROPOSED BY THE SENTENCING COMMISSION'S ADVISORY WORKING GROUP

Andrew L. Frey
Lawrence S. Robbins
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Thomas M. Durkin
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for
UNION PACIFIC RESOURCES CO.

COMMENTS OF UNION PACIFIC RESOURCES CO. ON ORGANIZATIONAL SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES PROPOSED BY THE SENTENCING COMMISSION'S ADVISORY WORKING GROUP

Union Pacific Resources Co. ("UPRC"), a subsidiary of Union Pacific Corporation, is one of the largest independent oil and gas exploration and production companies in the United States. UPRC is headquartered in Fort Worth, Texas, and has over 1400 employees. With 42 operated and non-operated rigs currently drilling for oil and gas in the United States, UPRC has been the most active driller in this country for the past two years. UPRC also operates several natural gas processing plants, has interests in coal and trona mines, and owns or leases the minerals in over 8 million acres of land in the United States, 806,000 of which have been developed for oil and gas production.

UPRC respectfully submits the following comments on the organizational sentencing guidelines for environmental crimes proposed by the Advisory Working Group of the United States Sentencing Commission.

INTRODUCTION

Broadly speaking, punishment schemes -- whether criminal fines, civil penalties, imprisonment, or other -- may be evaluated from two distinct and important perspectives. The first of these is utilitarian: it views punishment as a means of achieving a desired end, typically, inducing actors to take the appropriate level of precautions to avoid certain societal harms; this perspec-

tive accordingly focuses primarily on issues of deterrence.[1] The second perspective is retributive and is grounded in traditional moral notions of just deserts: it assesses a proposed punishment scheme in terms of its capacity to treat individual offenders according to the nature of the offense committed, to distinguish appropriately among differently situated offenders, and to impose penalties that are reasonably proportioned to the underlying offense.[2]

The discussion that follows applies these two distinct perspectives in analyzing the Working Group's Proposed Guidelines for Environmental Sanctions for Organizations. In Section I (pages 3-20, infra), we examine the Proposed Guidelines from an economic/deterrence approach to sentencing, concluding that the structure of the proposal is very poorly designed to achieve rational deterrence. In Section II (pages 20-30, infra), we discuss what we believe are certain serious deficiencies in the proposal from a fairness standpoint.

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[1] The "'utilitarian' position" asserts that "what justifies the practice of punishment is its propensity to protect society from harm." H.L.A. Hart, Punishment and Responsibility: Essays In The Philosophy of Law 72 (1973).

[2] For descriptions and applications of "utilitarian" arguments, see generally J. Bentham, An Introduction to the Principles of Morals and Legislation (1970); J.S. Mill, Utilitarianism (13th ed. 1906); H. Sidgwick, Methods of Ethics 411-95 (7th ed. 1962); J. Smart & B. Williams, Utilitarianism: For and Against (1973). For comparable descriptions and applications of "non-utilitarian" arguments, see generally R. Dworkin, Taking Rights Seriously 184-205 (1977); C. Fried, An Anatomy of Values 207-36 (1970); Anscombe, Modern Moral Philosophy, 33 Philosophy 1 (1958).

Overall, it is our submission that the current framework is too flawed in concept to provide a suitable basis for organizational sentencing for environmental crimes. We therefore believe that the Commission should reject the current proposal and remand the matter to the Working Group for further study.

I. THE PROPOSED GUIDELINES ARE FUNDAMENTALLY FLAWED FROM AN ECONOMIC/DETERRENCE APPROACH, AND WOULD CAUSE MASSIVE OVERDETERRENCE AND CHILL SOCIALLY USEFUL ACTIVITY.

A. The Utilitarian Perspective

1. By its nature, utilitarian analysis -- the economist's stock in trade -- focuses on the costs and benefits of punishment. The utilitarian asks: How much punishment is necessary to provide sufficient incentives to avoid commission of a particular offense? How much punishment is "too much"? And what form should any punishment take? For several reasons, sentencing of corporations, particularly for environmental offenses, is especially well suited to such utilitarian inquiries.

First, deterrence -- a quintessentially utilitarian objective -- should be the primary objective of organizational sentencing in general. To be sure, general penal philosophy, developed in the context of sentencing of individuals, recognizes a variety of objectives in sentencing -- principally, retribution, or punishment; deterrence; and incapacitation. But incapacitation is essentially inapplicable to organizations other than those that exist solely for unlawful ends. Moreover, retribution should be at most a very subordinate ingredient of organizational sentencing. When a fine is imposed on an individual defendant, he must pay the

fine. By contrast, when a fine is imposed on an organizational defendant, the onus of the fine falls directly upon the shareholders and indirectly upon the employees and customers of the defendant, virtually all of whom, in the case of most publicly-held corporations, will be personally innocent of wrongdoing.[3] Because it is rarely appropriate to measure a fine upon a corporation by its advancement of the goals of retribution or incapacitation, effective deterrence should provide the fundamental measure of criminal fines directed at organizational defendants.

Further, utilitarian analysis makes particularly good sense in the context of environmental offenses. Environmental laws are unusually complex and pervasive, and thus potentially apply to a wide array of conduct that is not manifestly or inherently anti-social. Unlike more traditional, non-regulatory offenses -- such as robbery, extortion, or embezzlement -- environmental offenses, of one degree or another, may often be an unavoidable incident to the lawful course of business for many companies. This is especially true because firms are charged with the responsibility for monitoring and controlling the activities of large numbers of individuals in their employ -- a difficult task for the best-intentioned.

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[3] The Supreme Court has recognized this precise point in the course of holding municipalities immune from punitive damages: "Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. * * * Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

As a result, companies "must engage in legitimate professional activities that are regulated in significant part by criminal sanctions; to this extent, they become unavoidably 'entangled' with the criminal law."[4] Moreover, at the end of the day, what we can most appropriately demand of companies -- and what is most socially useful -- is that they take reasonable measures to avoid infractions of the law. Reasonable measures, presumably, are those that are neither so few as to be ineffectual in preventing environmental harms, nor so many as to squander, past the point of diminishing return, resources that could more beneficially be applied elsewhere (for example, to job creation). A utilitarian approach recognizes these factors by requiring firms to internalize the costs of environmental offenses.

2. From an economic perspective, an optimal punishment scheme must take account of three fundamental principles:

First, the amount of a fine should generally be based on the costs or harms associated with an offense. By ensuring that the company internalizes the full social costs generated by its conduct, a punishment scheme creates appropriate incentives to alter corporate behavior and thereby reduce the incidence of environmental damage.[5] But a fine based on costs alone will often under-deter environmental harms because companies will discount

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[4] J. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 219-220 (1991).

[5] See, e.g., Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U.L. Rev. 395 (1991).

costs by the percentage likelihood of escaping liability altogether due to non-detection. Accordingly, in calculating the fine it is also necessary to adjust upward to reflect the probability of escaping detection. In general, the resulting calculation will yield the proper level of deterrence of the offense.[6]

Second, and crucially important to a rational scheme of deterrence, the determination of the fine must take into account all of the monetary consequences to the company resulting from the offense. As one commentator has noted, "[a] million dollar fine affects firms in the same way as a million dollar private settlement or a comparable loss in reputational capital."[7] Accordingly, "sentencing guidelines should allow the judge to consider other direct monetary costs incurred by the firm, including private settlements, cleanup costs, and remedial action taken to ensure future compliance."[8] It is in this respect that the current proposal is perhaps most gravely deficient.

Third, care must be taken, in setting fines for criminal conduct, to avoid overdeterrence -- which results from the failure to credit against a criminal fine the monetary exactions imposed as a result of civil and administrative actions, as well as moneys voluntarily expended to remediate the harms. As one former member

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[6] Id. at 397.

[7] Cohen, Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990, 71 B.U.L. Rev. 247, 279 (1991).

[8] Ibid. Accord, Alschuler, Comment: Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U.L. Rev. 307, 308 (1991).

of the Sentencing Commission has noted, "any penalty structure that exceeds the expected losses generated by a prohibited activity will impose costs exceeding its benefits."[9] "Because firms will generally respond to penalties by adjusting their prevention activities so as to minimize their combined prevention and expected penalty costs, supraoptimal penalties will produce supraoptimal levels of control and suboptimal levels of consumption."[10]

Overdeterrence has important practical consequences, particularly in the context of environmental offenses committed by business organizations. Many criminal prosecutions of organizations for environmental crimes arise from either accidents that have serious societal consequences (e.g., a discharge of waste that imperils the safety of drinking water, or an oil spill that causes extensive damage to wildlife, beaches, etc.) or from the wrongful actions of relatively low-level employees -- actions that may stem from inadequate training or supervision but that do not reflect deliberate corporate policy to disobey the law. These offenses may occur despite the fact that the firm has taken reasonable measures to avoid their occurrence. Even where it has not, the purpose of any monetary sanction is to create appropriate incentives for the offender and others like it to take reasonable precautions to prevent future similar occurrences.[11] The imposition of fines

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[9] Block supra note 5, at 408.

[10] Id. at 408-09.

[11] We put to one side, for purposes of this discussion, the case in which company policy-makers deliberately opt to disobey the law. To begin with, we believe that such cases are relatively rare

greatly in excess of the relevant societal costs arising from the infraction will overdeter the offense conduct -- i.e., cause firms to overinvest in precautions to avoid the infraction.

Such overinvestment will, at a minimum, raise the costs of the products produced by the firm, without reaping any commensurate benefit in environmental protection. At worst, it will cause firms to withdraw from activities that carry excessive risk of liability, depriving the public both of useful products (such as child vaccines) and of jobs. As Professor Coffee has cautioned, "if the fine is severe enough to threaten the solvency of the corporation, the predictable response will be a cost-cutting campaign involving reductions in the work force through layoffs of lower echelon employees who received no benefit from the earlier crime."[12] See also Huber & Litan, The Liability Maze: The Impact of Liability Law on Safety and Innovation (Brookings 1991); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (O'Connor, J., concurring in part and dissenting in part).

As we show below, the Working Group's proposal violates these elemental principles of rational deterrence. It neither credits non-fine costs incurred by an offender (causing overdeterrence in

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(leaving aside criminal-purpose organizations). In any event, because deliberate environmental crimes by organizations would almost always be economically motivated, a system that sets punishments at a level sufficient to deprive the organization of any prospect of illicit gain should suffice to remove fully the incentive to commit a contemplated offense.

[12] Coffee, "No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 401 (1981).

virtually all cases) nor adjusts the fine on the basis of the likelihood of escaping detection (producing underdeterrence in some cases). It therefore is bound to fail any test based on the accomplishment of rational deterrence.

B. The Charged-Offense Scheme Set Forth In Section 9B2.1 of the Proposed Guidelines Is Indefensible On Deterrence Grounds.

Under the Working Group's proposal, a court must begin by determining the "primary offense level," derived from the table set forth in Section 9B2.1. After adjusting for various aggravating and mitigating factors (see pages 26-30, infra), the offense level is then converted to a prescribed percentage of the maximum statutory fine.[13]

From the outset, however, this "charged-offense" approach is fatally flawed -- since it makes the criminal sanction imposed on the organizational defendant largely a function of the prosecutor's charging practices. Moreover, this regime makes no adjustments for collateral sources of deterrence, including private civil actions, penalties, and remediation costs. In short, there is little reason to anticipate that the Working Group's proposal will produce penalties that appropriately deter environmental offenses.

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[13] Moreover, at that point, the fine may be increased to equal the sum of the economic gain plus costs associated with the offense. See pages 18-20, infra.

1. A Charged-Offense Regime Likely Will Result In Either Overdeterrence or Underdeterrence.

Viewed from an economic perspective, Section 9B2.1 is, at best, an arbitrary method of determining appropriate penalties for environmental wrongdoing. As noted above, appropriate levels of deterrence can usually be achieved by imposing penalties equal to the social costs engendered by the offense, adjusted to reflect the risk of non-detection (with credits for non-fine economic losses incurred by the offender). There is no reason to believe that the maximum statutory fine -- on which Section 9B2.1 is predicated -- bears a particularly close relation to the social costs generated by any specific infraction.[14] Moreover, the proposal does not differentiate between violations based upon the amount of pollutants discharged or the likelihood of significant harm. As a general matter, therefore, fines based on charged-offenses will not result in optimal deterrence levels. Indeed, any appropriate fit between fine levels and desirable levels of deterrence would be pure happenstance.

2. By Placing Excessive Discretion In The Hands Of Federal Prosecutors, A Charged-Offense Regime Creates The Potential For Extreme Overdeterrence.

Under Section 9B2.1, a convicted organizational defendant would be fined within a narrowly-bounded percentage of the maximum statutory fine that could be imposed for each offense of which the

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[14] True, the congressional choice of a maximum fine would, in theory, reflect its judgment as to the gravity of the most serious form of a given offense. In practice, however, the available criminal fines are not meaningfully calibrated to achieve this end.

defendant is convicted. Under a percentage of the maximum system, however, it is essential that significant judicial sentencing discretion be retained. Otherwise, the penalty inflicted on an organization convicted of violating the environmental laws would be too directly linked to the prosecutor's charging decisions.

While a prosecutor retains power under any charged-offense sentencing regime to influence the penalty imposed on a defendant, the particular features of the environmental law increase the prosecutor's power significantly. As the Working Group has acknowledged, environmental law provides a great potential for "count proliferation." Section 9E1.2, Comment 1. Such count proliferation is likely to take one of two forms in the environmental context. First, a single criminal act may simultaneously violate a number of different environmental laws: For example, a corporation that illegally discharges hazardous wastes into a stream and fails to report that release may be found guilty of violating simultaneously the Clean Water Act, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-87, CERCLA, and the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-50. Second, commission of environmental offenses that are continuing in nature arguably would enable the prosecutor to split the offense and "stack" the charges: For example, assuming that a defendant has released pollutants into its treatment system and from the system into navigable waters and has exceeded its permitted allowances for a period of one year, a prosecutor may arguably charge the defendant with 365 separate

violations of the Clean Water Act, 33 U.S.C. § 1319(c)(1), as well as 365 violations of RCRA. 42 U.S.C. § 6928(a). Prosecutorial charging practices in the environmental field thus could force absolutely staggering fines if, as in the proposed guidelines, the penalty is directly linked to the offenses charged.[15]

Either of these forms of count proliferation will typically yield criminal fines that are indefensible on economic grounds. First, where a particular act results in simultaneous violations of CERCLA, the Clean Water Act, and RCRA, and in the consequent imposition of three separate criminal fines, the result will more likely than not be overdeterrence, especially when one adds the civil remedial costs also borne by on the environmental wrongdoer. Second, while it is true that cumulative fines for ongoing environmental violations may be appropriate from an economic perspective where each continuing day of violation creates additional social costs, many criminal offenses under the environmental laws, even if ongoing, do not give rise to increasing costs -- e.g., the recordkeeping offenses under CERCLA, 42 U.S.C. § 9603(b). And even where ongoing criminal conduct entails social costs, those costs are often accounted for through civil or administrative remediation.

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[15] Because of the extensive media and public attention given environmental issues in recent years, it is likely that prosecutorial discretion to charge multiple offenses under the environmental laws will be exercised frequently. Just as "the determination [to prosecute] seems based more on the media attention given a particular environmental accident than on the conduct of the company involved," so may the decision as to what or how many offenses to charge be a function of external political forces. Locke, supra, 16 Colum. J. Env. L. at 326.

Because application of Section 9B2.1 will generally expose defendants to the risk of massive fines bearing little or no rational relationship to appropriate levels of deterrence, it is essential that the Guidelines contain an effective mechanism for cabining the effects of inappropriate count proliferation. The grouping rules contained in the individual guidelines, U.S.S.G. § 3D1.2(d), would provide such a mechanism.

Nevertheless, the Working Group expressly rejects the grouping rules applicable to the individual guidelines, concluding -- without explanation -- that "[a]pplied to environmental offenses, this approach could understate the harms that environmental crimes can cause." Section 9E1.2, Comment 1.[16] Instead, the Working Group proposes a pale substitute, allowing for a modest downward adjustment where a court concludes, "in the interest of justice," that "the total fine calculated under this Chapter would be unjust as a result of excessive repetition of counts relating to a course of offense behavior that is ongoing or continuous in nature and does not involve independent volitional acts." Section 9E1.2. And even "in the interest of justice," a court may not truly "group" the excessive counts, but must instead increase the total fine by

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[16] It should also be noted that the Working Group has chosen to apply grouping rules to situations in which a defendant is simultaneously charged with both environmental and non-environmental crimes. Section 9B2.1, Application Note 2. There is no discernible reason why these rules would be any less appropriate in the context of multiple environmental counts alone. Indeed, because a prosecutor could evade the grouping rules by simply declining to charge an organizational defendant with non-environmental crimes, the application of the grouping rules itself becomes a function of prosecutorial charging practices under the scheme contemplated by the Working Group.

at least some fractional percentage of the maximum fine for each additional count. In short, Section 9E1.2 does not materially ameliorate the power of the prosecutor to stack charges -- and thus it does not ameliorate the likelihood of substantial overdeterrence.

By contrast, in the draft it submitted for public comment last spring, the Working Group included, as "Step I(b)," a provision that would have enabled trial courts simply to "delet[e] the unnecessary or repetitious counts from its computation of the Base Fine." Assuming that the Commission is otherwise inclined to adopt Guidelines in this area at all (see pages 30-31, infra), we believe that a such as "Step I(b)" should be included. While that measure would not solve the overall problems with the current proposal -- the fines will still result in overdeterrence, even when grouping principles are taken into account -- such limitations would provide essential protections against the imposition of fines that result simply and solely from the exercise (or abuse) of prosecutorial discretion.[17]

3. A Charged-Offense Regime Also Fails To Account For Civil And Administrative Remedies And Penalties, And Other Internalized Costs, That Accompany Environmental Infractions

Where an environmental offense that is the subject of a criminal prosecution has also caused actual harms, the offender

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[17] In light of the Proposed Guidelines' general failure to guard against fines that are grossly excessive, and that bear no relation to appropriate deterrence levels, the Working Group's suggestion that Section 9E1.2(a) -- as weak as it already is -- should be "used sparingly" (Section 9E1.2, Comment 3) is wholly unwarranted.

will be exposed not only to criminal sanctions but also to substantial civil liability such as clean up costs.[18] The costs thus borne by the corporate actor operate -- for deterrence purposes -- just like criminal fines, requiring the defendant to bear the costs imposed on society by its actions. Therefore, to the extent that the social costs of environmental offenses are reflected in the non criminal liabilities borne by the offender, sound sentencing policy -- viewed from the perspective of rational deterrence -- must credit these costs against any fine that is imposed. Otherwise, the net costs imposed on an organizational for environmental offenses would far exceed the harms caused by such conduct, resulting in significant overdeterrence.[19]

The same is true with respect to moneys voluntarily expended to remediate the harms caused by a violation of environmental laws. The vast majority of publicly-held corporations in this country do

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[18] In addition, civil penalties may be assessed against an environmental defendant as the result of citizen suits under the Clean Water Act, 33 U.S.C. §§ 1251-1376, and the Clean Air Act, 42 U.S.C. §§ 7401-7671q, governmental suits under any number of environmental statutes, and private recovery actions under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). 42 U.S.C. §§ 9601-75. Further, private and public actors may also proceed under state and local law to redress environmental infractions.

[19] This does not mean that the criminal fine has no role to play in the deterrence calculus with respect to environmental offenses. Most obviously, it may be needed to supplement civil liabilities when the offense behavior is of a kind likely to escape detection, since it is insufficient deterrence to make an offender who expects to escape detection pay only if he is caught. In addition, there may, at least in theory, be instances in which the civil remedies are for some reason unavailable or do not capture all the societal costs of an offense. In cases of these sorts, civil and administrative liabilities may require supplementation by criminal fines in order to achieve proper deterrence.

voluntarily respond when their conduct has caused a significant environmental harm, often spending very substantial sums in the effort to remediate those harms long before any damages actions or penal proceedings have been instituted. These efforts cost money, and the prospect of having to spend corporate resources in this fashion necessarily adds to the deterrence of conduct that risks creation of environmental harms.

The Proposed Guidelines, however, simply do not take account of these additional sources of deterrence; and by virtue of that omission, they are bound to give rise to massive overdeterrence in many circumstances. A company faced with a fine measured by costs directly attributable to the offense -- where costs are doubled and tripled by virtue of parallel civil and administrative actions and sums voluntarily expended on remediation -- will internalize more than simply the environmental harms associated with its actions: It will be forced to choose between spending wasteful amounts to monitor and prevent future mishaps, thereby raising the costs of its products, or discontinuing activities with excessive liability risks altogether, often at great social cost to employees and the general public.

But these are not the only respects in which the Working Group's proposal overlooks the monetary consequences suffered by the environmental offender. The Proposed Guidelines also fail to account for various indirect costs incurred as a result of a criminal charge or conviction: "noncompliance [with the environmental laws] costs far more in terms of its direct impact on the

bottom line, the prospect of severe penalties for the company and its management, and in indirect costs from adverse public and government relations."[20] Such costs also include the loss of trade or stock value that may well result from an organization's conviction for environmental offenses,[21] and possibly severe handicaps or disqualifications -- including suspension and debarment -- in government contracting activities.

Because the prospect of such costs is internalized by the organization, and therefore operates as a deterrent to wrongdoing, rational deterrence policy requires that non-fine economic consequences be taken into account in setting a criminal fine. The regime embodied in the current proposal does not do so.[22] Because the level of the fine is so substantially detached from the need for deterrence, the current proposal is indefensible from the primary perspective that matters in corporate sentencing.

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[20] Locke, Environmental Crimes: The Absence Of "Intent" And The Complexities Of Compliance, 16 Colum. J. Env. L. 311, 330 (1991) (emphasis added).

[21] See Cohen, Corporate Crime And Punishment: An Update On Sentencing Practice In The Federal Courts, 1988-1990, 71 B.U. L. Rev. 247, 266-67 and accompanying notes (1991) (discussing marketplace sanctions against organizations convicted of criminal activity).

[22] Indeed, as we have shown, the current proposal does just the opposite, increasing the fine even though the level of non-fine monetary liability from the offense (and therefore the level of deterrence) is independently rising.

C. The Gains Plus Costs Formula Suggested In Section 9E1.2(c) Of The Proposed Guidelines Is Indefensible From A Deterrence Perspective.

Section 9E1.2(c) of the Proposed Guidelines provides that criminal fines imposed for an environmental offense shall "in no event * * * be less than the economic gain [plus costs directly attributable to the offense]."[23] Under this provision, a court -- having already selected a percentage of the maximum statutory fine pursuant to Section 9E1.1 -- must then select a possibly even larger fine based on the sum of the economic gain plus costs.

For several reasons, this approach will generally result in significant overdeterrence. First and foremost, like the charged-offense regime discussed above, the "gain plus costs" formula completely fails to account for the deterrent force of either the moneys expended in voluntary remediation of harms caused by an offense or as a result of civil liability reinforced by restitution and remediation ordered by the sentencing judge. By failing to reduce the criminal fine by these amounts -- indeed, by increasing the fine by the amount of remediation costs -- the "gain plus costs" provision would engender massive over-deterrence, with the greatest penalties being imposed in the cases wherein they are least needed.

What is more, assessing criminal fines based on gain plus costs is almost certainly irrational. As a general proposition,

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[23] The Working Group acknowledges that it "was divided over whether the bracketed language should be included as part of the general limitations." Section 9E1.2(c) n.* * *. Nevertheless, the Working Group elected to forward this provision to the Commission.

gain-based penalties for environmental offenses are often likely to correlate poorly with rational deterrence. In designing the underlying substantive rules, the lawmaking authority normally engages in a utilitarian cost-benefit analysis; thus, most such rules are based on the conclusion that the harms avoided by a proposed standard are greater than the costs of compliance. The case in which there is a violation but gains exceed harms will accordingly be the exception and will in all likelihood be a less injurious offense.

An example will illustrate the point. Suppose two cases in which runoffs of wastes into a stream cause $1,000 of damage. In one of those cases, the harm could have been avoided by precautions that would have cost the offender $100; in the other situation, $2,000 of precautions would have been required to avert the $1,000 harm. The first offender has a "gain" of $100, the second of $2,000; but plainly it makes no sense to say that the offender that failed to spend $2,000 to avert a $1,000 harm deserves greater punishment than the one who could have averted the same harm by expending a mere $100.

To the extent gain is to be used as a basis for setting a penalty, the justification would be that a properly calibrated penalty based on expected gain provides the optimal level of deterrence of the offense conduct by removing any incentive to engage in the offense. By definition, then, a penalty calculation based on more than anticipated gain from the offense (or from the

failure to take adequate precautions to avoid the offense) inherently produces greater than needed deterrence.

Accordingly, whether one determines that the proper level of deterrence is best achieved by a costs-based or a gain-based approach, it will invariably be irrational to add the two together. Indeed, no justification has been provided by the Working Group for the proposal to add gains to harms in calculating the fine. Significantly, the Working Group's proposal alters radically the approach taken in the alternative fine statute, 18 U.S.C. § 3571(d), which treats pecuniary gains or losses as alternative, not cumulative, bases for calculation of criminal fines.

II. THE PROPOSED GUIDELINES ARE FUNDAMENTALLY FLAWED FROM A FAIRNESS PERSPECTIVE, RESULTING IN THE SIMILAR TREATMENT OF DIFFERENTLY SITUATED DEFENDANTS, AND THE DIFFERENT TREATMENT OF SIMILARLY SITUATED DEFENDANTS.

While we consider it essential to devise a system that achieves appropriate deterrence of environmental crimes -- neither too much nor too little -- it is not unreasonable or inappropriate to examine any proposed sentencing structure from a non-utilitarian or fairness perspective as well. In this respect too, however, the current proposal is so gravely flawed that it should not be accepted by the Commission without substantial rethinking and revision.

A. The Fairness Approach.

A sentencing scheme may offend our moral intuitions about fairness in two distinct respects. First, sentencing may be relatively unfair -- that is, it may result in the dissimilar

treatment of equally culpable conduct, or in the similar treatment of dissimilar conduct. The individual sentencing guidelines focused primarily on the unequal treatment of similarly situated defendants. See, e.g., S. Rep. 98-225, 98th Cong., 1st Sess. 52 (1983) ("[a] primary goal of sentencing reform is the elimination of unwarranted sentencing disparity); id. at 78 ("the major premise of the [individual] sentencing guidelines [is] the need to avoid unwarranted sentencing disparity"). Nevertheless, the similar treatment of differently situated offenders poses essentially the same problem.

Second, unfairness may be absolute -- that is, a particular sentence may be disproportionate not to the sentence received by others for the same conduct, but to the culpability of the defendant measured on an absolute, rather than relative, scale. As the Supreme Court has often recognized, "[t]he principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." Solem v. Helm, 463 U.S. 277, 284 (1983). See also Robinson v. California, 370 U.S. 660 (1962); Weems v. United States, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for the crime should be graduated and proportioned to [the] offense * * * * ").

As we explain below, the proposed guidelines suffer from both infirmities. On the one hand, the Working Group proposes to treat dissimilar defendants similarly, and, conversely, to treat similar defendants dissimilarly. On the other hand, in many circumstances, the fine levels established by the Working Group would punish

organizations well out of proportion to the "wrong" they have committed. In short, the Working Group's proposal results in manifest inequity and, considered from a fairness perspective, proves too blunt and undiscriminating an instrument to use as a basis for imposing criminal fines.

B. The Proposed Guidelines Do Not, As Presently Drafted, Clearly Take Account of Culpability Distinctions That Bear On Fair Sentencing of Different Defendants.

From a fairness perspective alone, punishment of a corporation should be less severe where the offense in question (1) was committed by a low-level employee, and/or (2) was done without knowledge or specific intent.[24] Under the Proposed Guidelines, however, the primary offense level takes only limited account of these distinctions. Under the charged-offense regime contained in Section 9B2.1 -- and likewise under the "gain plus costs" approach of Section 9E1.2(c) -- the sentencing court is generally not required to differentiate between a corporate offender that is liable because a low-level employee acted unwittingly and a company whose liability derives from the willful conduct of its board of directors.

Such distinctions have special force in the context of environmental offenses, where criminal liability may attach without a showing of knowledge or specific intent. As one commentator has noted, to proceed criminally, "[t]here is no requirement of proof that the defendant knew: (1) that the material was 'hazardous

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[24] See generally, Coffee, supra note 5; Hart, supra note 1.

waste' under RCRA, a 'pollutant' under the Clean Water Act, or otherwise a regulated material; (2) the permit requirements of applicable environmental statutes; (3) whether the facility had a permit; or (4) any other proscription of the statute at issue." Locke, supra, 16 Colum. J. Env. L. at 325. Differentiating among offenders is also critical because, due to the complexity of the environmental laws, criminal sanctions may extend to a wide range of offenders, some that act willfully but many, perhaps most, that do not. See, e.g., American Mining Congress v. U.S. E.P.A., 824 F.2d 1177, 1189 (D.C. Cir. 1987) (describing the "mind-numbing journey through RCRA" required to define hazardous waste under the statute).[25]

The failure of the primary offense level to make such distinctions is not troubling, so long as the aggravating and mitigating factors adequately adjust for those special characteristics. But the Working Group has not accomplished that task. First and foremost, in contrast to the version it submitted for public comment last spring, the Working Group's current proposal contains no mitigating allowance for the absence of scienter. Similarly, although the proposal includes an "aggravator" for the involvement of "substantial authority personnel" (Section 9C1.1-(a)), the latter category is sweepingly defined to include any individual

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[25] It is also important to note in this connection that under the criminal law in general, companies may be held criminally liable even if the relevant conduct was committed by a low-level employee acting in disregard of express company policy. See Miller & Levine, Recent Developments in Corporate Criminal Liability, 24 Santa Clara L. Rev. 41, 41 (1984) (footnotes omitted); 1 K. Brickey, Corporate Criminal Liability, §3:01 at 40 (1984).

"who, although not a part of an organization's management, nevertheless exercise[s] substantial discretion when acting within the scope of [his] authority" (Section 9A1.2, Application Note 2(k)).

C. In Addition, The Charged-Offense Regime Under Section 9B2.1 Creates The Potential For Manifest Unfairness By Placing Excessive Power In The Hands Of Federal Prosecutors.

Under Section 9B2.1 prosecutors could enjoy nearly unfettered discretion in affecting, through their charging decisions, the fines ultimately paid by corporate defendants. Such discretion is not only an irrational means of achieving deterrence (as we noted above); it is also unjust. Similarly situated defendants may receive wildly different fines based solely on the prosecutor's choice of charges. Likewise, absolutely staggering fines can result from conduct that evidences little real culpability.[26]

Most fundamentally, Section 9B2.1 simply vests too much power in prosecutors. By giving prosecutors so much control over the ultimate determination of penalties -- a power traditionally vested in the judicial branch because of its greater independence and neutrality -- Section 9B2.1 affords prosecutors the opportunity to "pile up" charges vindictively, coerce lopsided dispositions, and even, at the extreme, extort settlements from innocent defendants.

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[26] If, for example, a lower-level employee, acting contrary to company policy, allowed waste he did not know to be hazardous -- and which would not be hazardous if it came from another source -- to run off into a river for a period of 30 days, the company could be charged with, and convicted on, 30 counts of violating the Clean Water Act, as well as 30 counts of violating RCRA. The fines that would result from this conduct under a charge offense regime would bear absolutely no relation to the culpability of the defendant.

Accordingly, just as Grouping Rules are important from a utilitarian perspective, so too are such rules important -- indeed, critical -- from a fairness perspective. While the Working Group suggests that grouping rules may be inappropriate in the environmental context, it has not justified that assertion. It has not explained why grouping rules are appropriate in the context of individual violations of the environmental laws, but not in the context of organizational violations. Indeed, it is clear that grouping rules are more, not less, appropriate in the context of organizational criminal defendants in general, and organizational defendants in environmental cases in particular, since a particular charge against an organizational defendant says far less about the nature and gravity of the offense than does a charge against an individual. At a minimum, the Working Group should re-incorporate "Step I(b)" from its earlier draft, so as to allow judges to restore the balance between fine levels and levels of culpability. Where, as here, the underlying system of criminal liability does not take into account the varying degrees of culpability that can give rise to organizational criminal liability, fundamental fairness demands that the sentencing regime do so.[27]

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[27] We share the concerns articulated by the Department of Justice in its Comments on the prior draft circulated by the Working Group:

> Unless the provision of Step I(b) are applied, the number of counts charged, unlike the situation elsewhere, will be of great importance in calculating the Base Fine level. As stated above, however, the number of counts is often poorly related to the seriousness of the conduct charged * * *.

D. The Aggravating And Mitigating Factors Proposed By The Working Group Generally Fail To Advance The Objective Of Fairness In Sentencing.

Adjusting fines to reflect aggravating or mitigating factors is, as a general proposition, an entirely sensible means of ameliorating potential unfairness in a guidelines regime for imposing fines. For example, as we have noted, fairness suggests mitigating a fine to reflect an organization's relative or absolute lack of culpable intent. Fairness also requires that the proposal take into account the seriousness of the violation, either in the initial steps or in the aggravators and mitigators.[28] While aggravating and mitigating factors can theoretically help achieve fairer sentencing outcomes, the approach taken by the Working Group fails sufficiently to advance those objectives. Indeed, the aggravating and mitigating factors proposed by the Working Group suffer from the same infirmities as the primary offense level provisions of the Proposed Guidelines.

Department of Justice, "Comments On Working Draft Of Recommended Sentencing Guidelines For Organizations Convicted Of Federal Environmental Crimes," April 16, 1993, at 4.

[28] The proposal does not do this. For example, the proposal sets the fines for the large group of offenses involving releases (routinely, offense level 14) in the high and narrow range of 40-60 per cent of the statutory maximum. The proposal incorrectly assumes that all releases are inherently very dangerous, and it does not provide for mitigation when the releases are not dangerous. The proposal should provide for lower fines where the discharges are unlikely to cause significant harm or where the substances involved are not particularly toxic as released.

1. Aggravating Factors

As a general matter, the system of aggravating factors chosen by the Working Group carries the potential for injustice because it fails to account for the abnormally high base fine levels established in Section 9B2.1 of the Proposed Guidelines.

Several of the primary base fine amounts listed in the Primary Offense Level Table already approach statutory maxima. For example, any offense involving "knowing endangerment" -- including an offense imputed to an organization as a result of the actions of a low-level employee acting contrary to company directives -- carries with it a fine amounting to 100% of the statutory maximum fine. Similarly, any offense involving unlawful handling of a hazardous substance resulting in an ongoing release, discharge, or emission into the environment routinely (at offense level 14) carries with it a fine amounting to 40-60% of the maximum.

Despite the very high base fine levels chosen by the Working Group, the proposed amendments treat the presence of certain aggravating factors as grounds for increasing the fines still further -- rather than treating the absence of such factors as grounds for <u>reducing</u> the base fine below the statutory ceiling. Thus, for example, while environmental crimes accompanied by managerial involvement in the offense, concealment of wrongdoing, or a poor history of civil or criminal compliance with the environmental laws may well, in certain cases, justify fines near to or at the statutory maxima, environmental offenses that do not involve these features most assuredly do not. Nevertheless, the

effect of Section 9C1.1 is to impose fines approaching the statutory maxima on those defendants that acted with limited culpability. Although these fine levels may be somewhat lower than the fines imposed on more culpable defendants, the effect of the Working Group's inflated fine structure is to impose significant liability on relatively innocent organizational actors. As a matter of basic fairness, that is improper. In light of the sizeable primary offense levels, the proposed guidelines should treat the absence of aggravating factors as a ground for downward departure from the primary offense levels listed in Section 9B2.1, rather than treating the presence of those factors as grounds for increasing base fine levels that already approach statutory maxima.

2. Mitigating Factors

The Working Group's treatment of mitigating factors also presents the potential for unfair sentencing of organizational offenders. In particular, Section 9C1.2 treats environmental compliance as an all-or-nothing proposition, allowing for reductions in the primary offense level only where there is "substantial" satisfaction of the requirements of Section 9D1.1, and refusing to credit partial or good-faith efforts at compliance. While we agree that environmental compliance should be grounds for mitigation, some mitigation (albeit at a reduced level) should be available for good faith compliance efforts, even if the strict and all-encompassing requirements listed in Section 9D1.1 are not fully satisfied. Good-faith efforts at compliance reflect a lack of culpability that should be recognized and rewarded. Indeed, both

the environmental laws themselves, and the government officials charged with enforcing those laws, have recognized that good faith efforts at compliance should be rewarded. See Clean Water Act, 33 U.S.C. § 1319(d) (authorizing consideration of good faith efforts in determining civil enforcement decisions); Locke, supra, 16 Colum. J. Env. L. at 330 and n. 116 (noting Justice Department comments regarding good faith efforts at compliance); U.S.S.G. § 8A1.2, application note (k).[29]

The 50% floor on fine reductions resulting from mitigating factors (Proposed Guidelines, Section 9E1.2(b)) also violates principles of fairness.[30] First, mitigating factors are a reflection of diminished criminal culpability, and such activity should be appropriately recognized. That mitigation should not be withheld simply because some arbitrary cut-off has been reached. There are also questions of relative fairness: a defendant that deserves a 90% reduction because of its low level of culpability

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[29] Viewed from a pure economic/deterrence perspective, it might at first blush appear that, because successful compliance efforts reduce the occurrence of infractions and therefore the risk of incurring costs or penalties from environmental mishaps (i.e., virtue is its own reward), some double counting would inhere in credit for compliance programs. In fact, however, such compliance programs not only reduce the costs of environmental mishaps to the offender but also materially reduce enforcement costs to the government. A credit for an effective compliance program gives effect to this benefit.

[30] The Working Group acknowledged that it "was divided over the precise percentage limitation on mitigation credit for violations other than knowing endangerment violations." Section 9E1.2(b) n.* *.

should not be fined at the same level as a defendant that deserved only a reduction to the 50% threshold.[31]

III. THE COMMISSION SHOULD NOT PROMULGATE BINDING GUIDELINES IN THIS AREA

We have argued above that, as drafted, the Working Group's Proposed Guidelines are fundamentally -- we would say irretrievably -- flawed on both deterrence and fairness grounds. At the same time, the Working Group has identified many issues that are undoubtedly relevant to the sentencing of organizations convicted of environmental crimes -- issues that should be considered by judges in imposing corporate sentences under the environmental laws.

We respectfully suggest that it is imperative that the Working Group "go back to the drawing board" to restructure its proposals so that they better achieve fairness and rational deterrence. Should it then arrive at a structure that appears more satisfactory, we nevertheless suggest that any action initially taken on this subject by the Commission take the form of non-binding policy statements rather than binding guidelines. Such policy statements, which could be transformed into guidelines if experience reveals the appropriateness of such action, would serve to guide judicial sentencing decisions without depriving judges of the discretion to achieve rational deterrence and reasonably fair

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[31] Under Section 9C1.2(b), organizations may receive mitigation credit by entering a guilty plea "before the government was put to substantial effort or expense in preparing for trial." In our view, this provision creates an undue incentive for organizations to forego their right to raise bona fide challenges to the charges levied against them.

sentences.[32] During the period when the policy statements are in place, a comprehensive base of empirical information regarding environmental violations and associated fines, which currently does not exist, should be developed.

CONCLUSION

For the above stated reasons, we urge the Commission to reject the Proposed Guidelines.

Andrew L. Frey
Lawrence S. Robbins
MAYER, BROWN & PLATT
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Thomas M. Durkin
MAYER, BROWN & PLATT
190 S. LaSalle Street
Chicago, Illinois 60603

Attorneys for
UNION PACIFIC RESOURCES CO.

February 1994

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[32] As Professor Kathleen Sullivan has observed in another context:

> If fairness consists of treating like cases alike, then there is an argument that standards are fairer than rules. Rule-based decisionmaking suppresses relevant similarities and differences; standards allow decision-makers to treat [a]like cases that are substantively alike. Standards are thus less arbitrary than rules. They spare individuals from being sacrificed on the altar of rules, notwithstanding the good that rule-boundedness brings to all.

Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 66 (1992). See also Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1687-1713 (1976).

MAYER, BROWN & PLATT

CHICAGO
LONDON
NEW YORK
HOUSTON
LOS ANGELES
TOKYO
BRUSSELS

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

202-463-2000
TELEX 892603
FACSIMILE:
202-861-0473

LLOYD S. GUERCI
202-778-0637

January 31, 1994

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

Re: Proposed Guidelines for Organizations
Convicted of Environmental Crimes

Dear Chairman and Commissioners:

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

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

Sincerely,

Lloyd S. Guerci

Enclosure

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

OFFICE OF
ENFORCEMENT

January 12, 1994

MEMORANDUM

SUBJECT: The Exercise of Investigative Discretion

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

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

I. Introduction

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

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

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

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

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

II. Legislative Intent Regarding Case Selection

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

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

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

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

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

III. Case Selection Process[3]

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

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

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

IV. Case Selection Criteria

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

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

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

A. Significant Environmental Harm

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

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

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

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

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

B. Culpable Conduct

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

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

Factor 1. History of repeated violations.

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

Factor 2. Deliberate misconduct resulting in violation.

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

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

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

Factor 4. Tampering with monitoring or control equipment.

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

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

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

V. Additional Considerations when Investigating Corporations

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

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

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

VI. Other Case Selection Considerations

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

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

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

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

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

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

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

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

VII. Conclusion

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

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

PHILLIPS PETROLEUM COMPANY

BARTLESVILLE, OKLAHOMA 74004
918 661-5634

J. BRYAN WHITWORTH
Senior Vice President
Corporate Relations and Services

January 28, 1994

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

Re: Comments on the Proposal of the Advisory Working Group on Environmental Offenses

Dear Commissioners:

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

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

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

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

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

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

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

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

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

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

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

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

Very truly yours,

J. Bryan Whitworth

JBW:MCW:klk/jr550

pc: Advisory Working Group

MAYER, BROWN & PLATT

CHICAGO
LONDON
NEW YORK
HOUSTON
LOS ANGELES
TOKYO
BRUSSELS

2000 PENNSYLVANIA AVENUE, N.W.

WASHINGTON, D.C. 20006-1882

202-463-2000
TELEX 892603
FACSIMILE:
202-861-0473

December 8, 1993

LLOYD S. GUERCI
202-778-0637

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

Re: Proposed Guidelines for Organizations Convicted of Environmental Crimes

Dear Chairman and Commissioners:

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

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

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

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

Sincerely,

Lloyd S. Guerci

Enclosure

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

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

December 8, 1993

I. Introduction

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

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

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

2/ Comments of April 16, 1993.

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

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

II. Background

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

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

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

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

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

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

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

THE COMMISSION SHOULD REJECT THE WORK GROUP DRAFT

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

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

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

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

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

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

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

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