Public Comment

Proposed Amendments

1994
VOLUME I

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
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July 26, 1994

MEMORANDUM:

TO: Chairman Wilkins
Commissioners

FROM: Mike Courlander

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

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

COMMENTS BY WMX TECHNOLOGIES, INC.

ON THE

DRAFT GUIDELINES FOR THE

SENTENCING OF ORGANIZATIONS CONVICTED OF ENVIRONMENTAL CRIMES

PRESENTED BY THE UNITED STATES SENTENCING COMMISSION

July 19, 1994

These comments are submitted by WMX Technologies, Inc., the nation's largest environmental services company. WMX Technologies and its subsidiaries (WMX) provide a wide variety of services, including storage, treatment and disposal of solid, hazardous, infectious and radioactive wastes and wastewaters, waste-to-energy plants, remediation projects, and industrial cleaning and other services. As such, WMX operates in an intensely regulated arena and, therefore, has considerable interest in the final Advisory Working Group proposal, which has been submitted for comment by the United States Sentencing Commission. WMX appreciates the opportunity to offer these comments and hopes they will be of assistance to the United States Sentencing Commission as it considers how best to prepare guidelines for sentencing organizations convicted of environmental crimes.

WMX supports establishing sensible and workable guidelines for the sentencing of such organizations. The Advisory Working Group has clearly made a major effort to tackle the extremely difficult and complex task of preparing such guidelines. WMX commends the Working Group for its efforts in this important and difficult area.

However, as discussed below, several portions of the proposed guidelines need significant revision. WMX has particular concerns with those parts of the proposal that limit mitigation of a base offense level penalty to a maximum of 50%, allow potentially unfair and unlawful use of prior settlements and other quasi-enforcement proceedings in determining the appropriate offense level, and provide for an inflexible definition of an adequate compliance monitoring program.

WMX's specific comments, identified by part and section numbers in the draft guidelines, are as follows:

1. Part B, Section 9B2.1. The offense listed in Section 9B2.1(b)(2), "Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification," is too broadly defined; it fails to recognize the wide variation in risk posed to health or the environment by materials that are "hazardous

waste." Some wastes are hazardous because they contain extremely dangerous chemicals (e.g., dioxins, PCBs, etc.). However, other wastes are categorized as hazardous because they were derived from the treatment of other hazardous wastes. This latter category can include hazardous wastes which present virtually no risks at all. The sentencing court should be given greater flexibility in sentencing to reflect the degree of risk posed by a particular hazardous waste.

Moreover, this offense does not distinguish among the many ways hazardous wastes can be "mishandled." Some kinds of mishandling pose serious risks of harm, while others create virtually none. For example, if a load of drummed hazardous wastes is stored for a brief period of time in an on-site parking area, because the facility's storage area is temporarily full, and if the parking area is asphalted and has adequate containment for any spill, such a management practice may result in criminal liability. However, this violation involves virtually no risk; criminal sanctions that start at 15-25% of the statutory maximum would be inordinate.

To address those violations which involve almost risk-free conduct, due to either the innocuous nature of the waste or the minimal impact of the violative conduct, WMX suggests another offense category be created: "Simple Mishandling of a Hazardous Substance," with a base offense level of three. This offense would not include any criminal activity that (1) resulted in any type of discharge, (2) created any "substantial likelihood of death or serious bodily injury," or (3) caused disruption of public utilities or evacuation of a community. (These are aggravators for the existing Mishandling of Hazardous or Toxic Substances or Pesticides category.) The court would impose penalties under this provision for criminal conduct creating extremely low levels of risk.

2. Part E, Sections 9E1.1 and 9E1.2(b). Under the proposed sentencing guidelines, the lowest possible fine is 10% of the maximum statutory fine. In this regard, the guidelines unaccountably are more strict than the existing sentencing guidelines, which allow for penalties to be as little as 5% of the maximum fine. (Indeed, in some cases, U.S. Sentencing Commission guidelines would allow for a judge to impose no fine at all.) There is no justification that would support such a distinction between environmental crimes and other crimes. The guidelines applicable to organizations convicted of environmental crimes should allow a reduction to 0-5% of the maximum statutory fine.

In a similar vein, the draft guidelines unduly limit mitigation to not more than 50% of the offense level, after

application of any aggravating factors.[1] The mitigating conduct set out in the guidelines should be strongly encouraged. It is in everyone's interest that organizations have top quality environmental programs, cooperate with prosecuting authorities, report violations voluntarily, and extend remedial assistance to victims of any criminal activity. To limit the mitigation available for such conduct contradicts sound public policy. Moreover, it is inconsistent with the existing organizational sentencing guidelines, which (as noted above) provide for mitigation of a fine to as little as 5% of the statutory maximum. The draft guidelines should be amended to make them consistent in this regard with the existing sentencing guidelines.

3. Part C, Section 9C1.1(b). The draft guidelines provide for increased penalties because of an organization's prior criminal history. While conceptually such an aggravating factor is appropriate, there are a number of instances when strict applicability of this aggravating factor would cause an unjust result. For example, waste treatment and disposal companies face, from time to time, charges that their transportation units have violated an environmental regulation in transporting solid or hazardous wastes. In many states (e.g., Ohio, Illinois, and Louisiana), such matters are handled as civil administrative cases, with small fines in the two-to-four-figure range. However, in a small minority of states, such matters are handled as criminal cases. For instance, in Michigan, some hazardous waste transporter violations, including strict liability matters, are handled as criminal misdemeanors. The draft guidelines would command the imposition of this aggravator for a five year period following such a conviction, without an examination of its seriousness. This result is unduly harsh.

In addition, the aggravating factor applies even if only one environmental conviction, no matter how minor, has occurred in the preceding five years. The commentary for the prior civil compliance history aggravator wisely notes that, "because of their scale or constant involvement with environmental regulation," some organizations should not be penalized additionally for having a prior record of civil adjudications. A similar recognition is warranted in the case of minor criminal convictions, particularly when they involve strict liability statutes. WMX therefore recommends that this aggravating factor be amended to allow for increases of from 0 to 4 levels and that commentary be added

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[1]The text of §9E1.2(b) says that "in no event shall a fine determined under this Chapter be reduced as the result of mitigating factors to a level below fifty percent (50%) of the Offensive Level calculated in Part B and C." Since the Part C calculations already take into account mitigating factors, this text does not make sense. Presumably, the drafters meant to say "...the Offense Level calculated in Part B and §9C1.1."

explaining that a sentencing court should impose no additional penalty as a result of a criminal history, should it find that the aggravator, in light of the size and nature of the defendant's business and/or the nature of the criminal history, ought not be applied.

4. Part B, Sections 9B2.1(b)(2)(iv) and (3)(iv). The guidelines provide for an increase in the base offense level for an offense involving actions conducted without a required permit or in violation of an existing permit. While there are cases when the application of such an aggravating factor is appropriate, it is unjust to increase a fine on this basis where the underlying crime charges the defendant with acting either without a required permit or in violation of an existing permit. Since the lack of a permit or the disobedience of a permit's requirements forms a key element of the crime, there is no justification for aggravating the penalty on the basis of those same facts. WMX recommends that the text of the guidelines be amended to provide that no increase would be imposed when the underlying offense charges actions were taken without a required permit or in violation of a permit.

5. Part C, Section 9C1.1(d). The guidelines allow an increase in a penalty when the offending conduct was the subject matter of a prior notice of violation for "the same offense conduct." While this aggravating factor may be appropriate in some cases (e.g., a continuous discharge of a hazardous substance into a river), there are other situations where it would not be appropriate. For example, assume a company convicted of improper packaging of hazardous wastes on August 15 had been served with a notice of violation for another alleged incident of improper packaging on August 1. The company may well be innocent of wrongdoing in the earlier incident, while being guilty of a violation on August 15. The mere fact that the illegal conduct on August 15 is of the same type that was said to have occurred on August 1 does not justify increasing the penalty imposed for the August 15 incident. In the cases of continuous conduct, it is not unreasonable to assume that the finding of guilt would constitute in effect a determination that the prior conduct, referenced in the notice of violation, had occurred. However, such a conclusion cannot be drawn for discontinuous acts, even of the same type.

In addition, it bears remembering that a notice of violation is frequently nothing more than a regulatory agency's opinion that a regulated party has violated some legal requirement. In most instances, unless the agency chooses to follow up that notice with some sort of enforcement action, the party has no right to contest the notice, nor any ability to expunge the notice. Depending on the facts, therefore, it could be a deprivation of due process to use a notice of violation as a basis for increasing a penalty. WMX recommends that the text of this aggravating factor be amended to provide that no aggravation be allowed for notices of violation for discontinuous offense conduct. As an alternative, WMX suggests

that this aggravating factor be changed to give the defendant a right to contest any notice of violation which the prosecution proposes to use to aggravate the penalty. This latter solution satisfies due process concerns, although it adds a level of complexity to the sentencing hearing.

6. Part D. Part D commendably attempts to establish stringent standards for a high-quality compliance monitoring program. But it does so in an overly rigid fashion, suggesting that the science of compliance monitoring has been fully developed. This is far from the case. Compliance programs in leading companies continue to evolve and improve. WMX expects its own and other companies' efforts to improve systems for assuring compliance with complex environmental laws will result in new and better ways to accomplish this very complex goal. Part D stifles creative efforts, as companies will be reluctant to explore new compliance assurance mechanisms for fear that those innovations will be grounds for denial of mitigation under these guidelines. WMX therefore urges the Commission to instill greater flexibility in Part D, to allow sentencing courts to award mitigation to companies whose compliance systems meet the spirit of these stringent standards, if not their exact letter.

WMX also has more specific comments on Part D, as follows:

Paragraph (a)(1) requires line managers, including executive and operating officers at all levels, to routinely review environmental monitoring and auditing reports. This would be an excessive and unnecessary burden on the senior officers of a major national or multinational corporation with large numbers of facilities. The guidelines should be flexible enough to allow responsible senior officers to regularly review summary information or exception-based reports regarding the environmental compliance of company operations.

Paragraph (a)(2) could be interpreted as obliging a company to adopt standard operating procedures, based on analysis and design of its work functions, as necessary to achieve, verify, and document environmental compliance in the course of performing the routine work of the company. If so, this requirement would be too prescriptive. Most environmental requirements can be interpreted and met without special interpretation in standard operating procedures. In addition, standard operating procedures may not be the most effective means to assure, document, and verify compliance. Often these procedures end up on the bookshelf collecting dust. Other more effective systems exist and continue to evolve and should be permitted by the guidelines. For example, WMX uses a computer-based system called the Compliance Management System for assigning environmental requirements to its employees and documenting completion of compliance assurance tasks. To reflect the existence of differing, meaningful compliance systems, and the continuing evolution of these systems, WMX believes the

guidelines should establish a performance standard instead of a method for ensuring compliance to allow flexibility and innovation. The guidelines should be clarified to require a system that will identify requirements, define necessary procedures, assign responsibility, provide reminders of when action is required, and document compliance.

Paragraph (a)(3)(i) demands frequent, including random, and when necessary, surprise audits and inspections. The value of such a provision is questionable. While surprise audits can be valuable in some contexts (e.g., when serious, intentional wrongdoing is suspected at the facility being investigated), good quality audits generally require the active participation of the management of the audited location. WMX conducts environmental audits of our major facilities on a regular frequency (every one to three years). For minor facilities we conduct random audits, i.e., we audit a certain number of facilities selected without discrimination every year. In order to prepare for these audits, auditors must receive from facility personnel considerable documentation and information about the facility, its permits, and the regulations that govern its operations. In addition, the participation of facility staff during the course of an audit greatly aids the auditors in identifying and evaluating compliance issues. Because they are not scheduled in advance, surprise audits can occur without key facility personnel being available, which can make the audit much less successful in this regard. Without the assistance and the cooperation of facility staff, an audit would be less able to evaluate the facility's compliance with environmental requirements and its compliance management systems. Therefore, the guidelines should allow either random or frequent audits, depending on the complexity of the regulatory environment in which a facility operates.

Paragraph (a)(3)(i) states that audits of principal operations and all pollution control facilities must be performed to assess, in detail, their compliance with all applicable environmental requirements. An audit where compliance with every requirement is verified (a compliance verification audit) is necessary where there is no formal compliance program in place. However, where there is regular on-site self-auditing and use of a system like the WMX Compliance Management System, a higher level "systems audit" is often a better choice. In a systems audit, the auditors determine whether there are systems in place that will assure continuous compliance with individual requirements. Then they sample compliance to determine if the system is operating effectively. The systems audit finds both the root cause and the symptom. This kind of an audit is both more efficient and effective. It takes less time to do and focuses corrective action on compliance systems that will prevent recurrence of compliance issues. The guidelines should allow for a systems audit.

In Paragraph (a)(3)(ii), the guidelines mandate continuous on-site monitoring by specifically trained compliance personnel and by other means of key operations and pollution control facilities that are either subject to significant environmental regulation, or where the nature or history of such operations or facilities suggests a significant potential for non-compliance. While WMX agrees that some operations require the continuous presence of trained environmental professionals, it is not always necessary. At many of our smaller facilities, where the Compliance Management System mentioned above has been installed, we have found that operations personnel are able to maintain compliance without the need for continuous on-site assistance from environmental professionals. The Compliance Management System is installed and kept up-to-date at these sites by environmental professionals from an office that services several facilities. They also participate in regular self-audits and inspections of these facilities. It is suggested that the guidelines require regular rather than continuous on-site monitoring by specifically trained compliance personnel.

In addition, the guidelines should be clear that the ultimate responsibility for compliance rests with the management of the operation. Trained environmental professionals should be available to provide assistance but should not relieve the operation manager of compliance responsibility.

Finally, Paragraph (a)(4)(iii) says that a company must have systems or programs that are adequate to evaluate employees and agents sufficiently to avoid delegating significant discretionary authority or unsupervised responsibility to persons with a propensity to engage in illegal activities. WMX does not know of any company having a program that satisfies this criterion; indeed, it is doubtful that any testing protocol exists that reliably predicts propensity to act unlawfully. WMX suggests the language be revised to require, at most, that a company avoid delegating significant discretionary authority or unsupervised responsibility to persons it has reason to believe to be unable or unwilling to obey the law.

7. Part C. The guidelines provide no mitigation of penalties for either collateral consequences of a conviction or the defendant's actions following the crime. Companies which do a significant amount of business with state and federal government agencies can be adversely impacted by laws which limit or even prohibit those agencies from doing business with companies convicted of certain kinds of crime. In addition, convicted organizations may be barred from receiving state or federal environmental permits essential to staying in business. At the time of sentencing, such impacts have not yet occurred and may not occur. Nonetheless, the seriousness of these collateral effects of a conviction merits the sentencing judge taking them into consideration in arriving at an appropriate penalty. WMX

recommends an additional factor be established as part of the §9E1.2 general limitations to allow consideration of such collateral impacts when the court finds them more likely than not to occur in the future.

In addition, the guidelines should be amended to provide that mitigation should be afforded a defendant which has spent significant amounts of money correcting the harm that its crime has caused. While there is a proposed mitigating factor in Section 9C1.2(c), concerning remedial assistance to victims of crime, this mitigator is too narrow. Public policy should encourage companies where crimes have caused harm to take prompt action to remediate any damage caused by that violation. WMX recommends a mitigating factor for such expenditures be available; the scope of Section 9C1.2(c) should be expanded accordingly.

8. Part E, Section 9E1.2(c). This portion of the draft guidelines would establish a floor below which a fine could not go, based in part on the "costs directly attributable to the offense." This concept has the potential for "double counting" and is bad public policy.

Double counting results if those costs reflect the expense of environmental remediation and, as will almost always be the case, they are ultimately borne by the party responsible for the damage - the defendant. Under this guideline, then, the defendant will pay this sum twice - once by way of reimbursement and once by way of a fine. Moreover, since it will be EPA or the state equivalent which is paying initially for the remediation, there is no incentive to keep those costs under control.

Secondly, if the remedial activity is undertaken by the defendant, he will minimize the amount of money spent on remediation because of his knowledge that, the greater the costs of remediation, the greater the fine he will pay. This is the wrong message to be sent to the party who is most likely to be held civilly responsible for the remedial activity.

9. Part F. While the Environmental Sentencing Guidelines are in many respects virtually identical to the Organizational Sentencing Guidelines (which set forth in great detail the circumstances under which probation should be or must be imposed for other serious federal crimes), they vary from that framework in a number of meaningful ways. The net result of such departures is to greatly increase the likelihood of the imposition of probation based upon unbounded discretionary standards.

First, the Organizational Guidelines provide at §8D1.1(a)(1) that the Court shall order probation if such sentence is "necessary" to receive payment of restitution, enforce a remedial order, or insure completion of community service; and at

§8D1.1(a)(6) if "necessary" to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct. The Environmental Guidelines counterparts at §§9F1.1(a)(1) and (4) inexplicably substitute "advisable" for "necessary." Necessity is a more typical standard for judicial determinations. Instead, the Environmental Guidelines allow a Court to impose probation even when it is not necessary, but only advisable based on unknown criteria. Such standardless discretion will lead to widely variant treatment of offenders, which strikes at the heart of the purpose of sentencing guidelines.

Second, the Organizational Guidelines, at §8D1.1(a)(4), require probation where similar misconduct occurs within the past 5 years, as determined by a criminal adjudication. The Environmental Guidelines counterpart at §9F1.1.(a)(5) would extend prior misconduct to mere civil or administrative adjudications under federal or state law. This change would not only alter the meaning of prior "misconduct" in a criminal setting, but would create harsh results for companies in the environmental services field where such adjudications are commonplace. This again will lead to widely aberrant results in the imposition of sentencing.

Third, the Organizational Guidelines at §8D1.1(a)(5) provides that a Court shall impose probation if an individual within high level personnel (i.e., individuals who have substantial control or set policy) of the organization or the unit where the offense was committed, participated in the misconduct and within the past 5 years such individual engaged in similar misconduct, as determined by a criminal adjudication.

§9F1.1(a)(6) of the Environmental Guidelines depart from this in two meaningful ways. Not only does it extend to prior misconduct of a civil or administrative nature, but it also abandons any recognized personnel definition ("high level," "substantial authority," etc.) and instead includes any "officer," "manager," or "supervisor," without regard to their level of authority or responsibility, who engaged in similar misconduct. Thus, a Court must impose probation if anyone with any undefined responsibility is previously "involved" in a similar civil or administrative adjudication under either federal or state law.

The end result is that probation for environmental crimes is much more likely than any other crime under the Organizational Guidelines, which, because of its loosely drawn conditions, already provides far more discretionary sentencing than previously established by statute. The potential circumstances under which probation will be considered will be much broader and the discretion to impose it will have far fewer standards. These departures will make challenging probation on appeal nearly impossible, will lead to widely variant results in sentencing and in the end will cause needless and costly expenditures of scarce judicial and company resources. WMX recommends the Commission

consider deleting these departures and revising the draft guidelines, to make them consistent with the existing Organizational Guidelines in this regard.

10. Part C, Section 9C1.1(c). As noted above, WMX has serious reservations on the wisdom of using "prior civil or administrative adjudications" as aggravating factors for criminal matters. Assuming that such matters are retained as aggravators, WMX suggests that they be defined to include only those contested legal proceedings that involved a trial and a finding by a judicial officer or judge of a violation by the defendant. The scope of these adjudications should not incorporate civil consent agreements or decrees, for then the draft guideline would be overly broad, act contrary to public policy and could violate important constitutional rights to due process and equal protection.

First, many companies agree to settle doubtful or even meritless enforcement cases (civil and criminal) because the expense of litigation greatly exceeds the proposed penalty. In addition, some companies settle cases because State agencies, as a matter of policy or law, refuse to issue necessary permits until all outstanding enforcement matters are resolved. For example, 6 NYCRR §621.3(f) empowers the New York State Department of Environmental Conservation (NYSDEC) to refuse to issue a permit or permit renewal to any entity so long as there is an enforcement matter pending against that organization. Any company needing a permit to stay in business in New York will have a powerful incentive to settle cases brought by the NYSDEC, regardless of their merits. In short, civil consent decrees and agreements do not represent reliable indicators of an organization's actual compliance with its legal obligations.

Second, the use of prior consent decrees and agreements to penalize entities later found guilty of a crime creates a strong disincentive against settlements of enforcement cases. Organizations will be less willing to resolve a borderline civil matter if they know that settlement can be used later to aggravate a criminal penalty. This result will mean that enforcement agencies will have to devote more resources to litigate cases which might otherwise be settled.

Third, using consent decrees and agreements (as well as findings of guilt based on nolo contendere pleas) in federal court or federal agency enforcement cases that occurred prior to the effective date of these draft guidelines raises serious questions of fairness, including constitutional due process issues. A company that agrees to a negotiated settlement of a federal enforcement case does so on the basis of knowing precisely what the penalty in that case will be. It is unfair and a denial of due process for the federal government to use that prior settlement as an aggravating factor in a later federal case, when the settling company had no way of knowing such use of the settlement would

occur in the future. The federal government should honor its prior agreements; these guidelines would allow it to breach them.[2]

11. Part C. WMX urges the Commission to add a mitigating factor for cases of environmental crimes committed by "rogue" employees. There have been a number of convictions involving companies where the actual criminal conduct was committed by low-level employees, acting both in violation of explicitly stated company policy and not in the interests of the company. While it may be appropriate in some instances to impose criminal sanctions on corporations for acts committed by such employees, the penalty in such cases should be mitigated. It is virtually impossible for any organization to prevent such "rogue" employees from committing their criminal acts. Some recognition of that fact ought to be taken into account in sentencing.

12. Part C, Section 9C1.2(a). The guidelines establish high thresholds for environmental compliance programs that qualify convicted defendants for the mitigator afforded for such programs. However, under the guidelines, the offense level for eligible companies can be as little as only three levels out of the maximum of eight allowed. In view of these high eligibility standards, a company having a qualifying compliance program should receive at least a substantial majority of the maximum mitigation available. WMX recommends that the range of allowable mitigation be adjusted to provide that the minimum mitigation for eligible companies be at least 6 levels.

13. Other Comments. On February 22, 1994, a number of former officials of the Justice Department's Environmental and Natural Resources Division and the Office of General Counsel of the USEPA commented on these draft guidelines to the United States Sentencing Commission. A major component of their comments concerned the lack of accountability for two central factors in establishing a base offense level: the degree of culpable knowledge and the foreseeability of harm. WMX joins these officials in their concerns about the absence of such factors in setting a base offense level. WMX urges the Commission to consider carefully the comments provided by these former government officials and to work with them and others to establish appropriate factors in the guidelines for culpability and foreseeability.

WMX also supports the draft guidelines rejection of a "simple mechanical counting rule" for prior civil adjudications, as discussed in the commentary to Section 9C1.1(c). Companies operating waste treatment and disposal businesses function under an extremely complex and frequently ambiguous and ever-changing

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[2]In order to use a settlement as an aggravating factor in subsequent criminal sentencing, the government may seek to include clarifying language to that effect in the settlement agreement. In that case, the defendant agreeing to the settlement will be on notice that it may face higher penalties in the future because of the settlement, and can choose to accept such a possibility, or litigate the matter.

regulatory system, which often imposes sanctions on a strict liability, "no fault" basis. (In numerous instances, waste disposal companies have full-time on-site agency environmental inspectors, whose principal task is to monitor compliance by the facilities.) In addition, the size of a company, the number of facilities it runs, the variety of pollutants it manages, etc., can all impact its compliance record. It would be unjust to look solely at some absolute measure of adjudications to determine the quality of a company's compliance record. WMX urges the Sentencing Commission to retain the concepts contained in Comment 1 to Section 9C1.1(c).

WMX values the opportunity to make these comments to the United States Sentencing Commission on this important topic.

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July 18, 1994

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
John Steer
Win Swenson
Peter Hoffman
Marguerite Driessen

FROM: Mike Courlander

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

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

COALITION FOR CLEAN AIR IMPLEMENTATION

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July 13, 1994

United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington DC 20002-8002
Attention: Staff Director

Dear Sir or Madam:

The Coalition for Clean Air Implementation ("CCAI") respectfully submits the enclosed comments in response to the United States Sentencing Commission's December 16, 1993, notice of availability of the final report of the Advisory Working Group on Environmental Offenses and request for public comment. These comments attach and incorporate by reference the comments filed by the CCAI on April 16, 1993, on the Working Group's March 5, 1993, draft.

CCAI is an industry group that focuses on implementation of the Clean Air Act Amendments of 1990. Its members include the American Automobile Manufacturers Association, the American Forest & Paper Association, the American Iron and Steel Institute, the American Mining Congress, the American Petroleum Institute and the Association of International Automobile Manufacturers. CCAI members represent industrial facilities located across the country subject to a broad spectrum of environmental requirements.

CCAI appreciates this opportunity to submit comments. If you have any questions or comments, feel free to contact me at 202/861-2855 or Paul Shorb of Beveridge & Diamond, P.C., at 202/789-6055.

Sincerely,

Quinlan J. Shea, III 105

Quinlan J. Shea, III
AMC Senior Counsel and
Chair, CCAI Legal Subcommittee

Enclosure

COMMENTS OF
THE COALITION FOR CLEAN AIR IMPLEMENTATION
ON THE NOVEMBER DRAFT OF THE
ENVIRONMENTAL SENTENCING GUIDELINES FOR ORGANIZATIONS

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July 13, 1994

TABLE OF CONTENTS

COMMENTS OF
THE COALITION FOR CLEAN AIR IMPLEMENTATION
ON THE NOVEMBER DRAFT OF THE
ENVIRONMENTAL SENTENCING GUIDELINES FOR ORGANIZATIONS

July 13, 1994

INTRODUCTION

The Coalition for Clean Air Implementation (the "Coalition") submits these comments on the November 16, 1993 draft of the Environmental Sentencing Guidelines for Organizations (the "November Draft"), pursuant to the request of the United States Sentencing Commission (the "Commission") for public comment.[1/] The Coalition is an industry association focused on the implementation of the Clean Air Act Amendments of 1990. The members of the Coalition who join in these comments are briefly described below.[2/]

American Automobile Manufacturers Association

The American Automobile Manufacturers Association ("AAMA") is the trade association for U.S. car and light truck manufacturers. Its members, Chrysler Corporation, Ford Motor

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1/ See 58 Fed. Reg. 65,764 (Dec. 16, 1993).

2/ Some of the members of the Coalition and their respective members also are submitting separate comments. The Coalition also wants to express here its endorsement of the comments filed March 31, 1994 with the Commission on behalf of the Coalition for Improved Environmental Audits ("CIEA"), aimed at encouraging effective environmental auditing by creating a right to keep environmental audit reports confidential. The Coalition plans to work with the U.S. Environmental Protection Agency to pursue that end, but believes consistent provisions such as suggested by CIEA also should be included in any environmental sentencing guidelines developed for organizations.

Company and General Motors Corporation, produce approximately 81% of all U.S.-built motor vehicles.

Association of International Automobile Manufacturers

The Association of International Automobile Manufacturers ("AIAM") is a non-profit trade association of manufacturers, manufacturer-authorized importers, and distributors of motor vehicles manufactured both in and outside of the United States for sale in the United States. AIAM's member companies and their affiliates manufacture more than one and one-quarter million vehicles in plants located in five states. AIAM represents American Honda Motor Company, Inc.; American Isuzu Motors Inc.; American Suzuki Motor Corporation; BMW of North America, Inc.; Daihatsu America, Inc.; Fiat Auto U.S.A., Inc.; Hyundai Motor America; Mazda Motor of America, Inc.; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Rolls-Royce Motor Cars Inc.; Rover Group USA, Inc.; Subaru of America, Inc.; Toyota Motor Sales, U.S.A., Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

American Forest & Paper Association

The American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. It represents companies engaged in the growing, harvesting, and processing of wood and wood fiber, and the manufacture of pulp, paper, and paperboard products from both virgin and recycled fiber, as well as solid wood products. The segment of U.S. industry represented by AFPA

accounts for over 7% of the total manufacturing production in the nation.

American Iron & Steel Institute

The American Iron and Steel Institute ("AISI") is a national trade association whose domestic member companies account for approximately 80% of the raw steel production of the United States.

American Mining Congress

The American Mining Congress ("AMC") is a national trade association of mining and mineral processing companies whose membership encompasses: (1) producers of most of the United States' metals, uranium, coal and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining and mineral processing industry.

American Petroleum Institute

The American Petroleum Institute ("API") is a non-profit, nationwide trade association representing approximately 300 companies and over 3,000 individuals engaged in all aspects of the petroleum industry, including exploration, production, refining, distribution and marketing.

SUMMARY OF ARGUMENTS

The November Draft is fatally flawed. It gives little weight to fundamental differences in culpability and seriousness between one environmental offense and another. Therefore it

would mandate outlandishly high criminal fines and other sanctions not only for the relatively few "truly criminal" cases, but also for the many other violations that generally are not (and should not) be prosecuted at all, but in theory could be. Thus removing judicial discretion in sentencing as a check on prosecutorial discretion would be dangerous.

The Commission therefore should not tinker with the November Draft, but reject it and start anew. The Commission should base any further consideration of environmental sentencing of organizations instead on an evaluation of environmental law's special characteristics and on a systematic review of relevant sentencing practice to date. We expect that such a review will indicate no need to ratchet up environmental sentences generally, as the November Draft seems calculated to do, but at most a need for a policy statement addressing the special characteristics of environmental offenses.

DISCUSSION

I. The November Draft is Fundamentally Flawed

A. Problems Carried Over from the March Draft

The Coalition submitted fairly detailed and comprehensive comments on the draft released by the Advisory Working Group on Environmental Sanctions ("Working Group") on March 5, 1993 ("March Draft"). With a few exceptions, the November Draft retains all of the provisions of the March Draft to which the

Coalition (and most other commenters) objected.[3] Therefore, for the sake of brevity, the Coalition hereby incorporates by reference and reaffirms its prior comments (copy attached). In brief summary, the most important problems with the November Draft that carry over from the March Draft include:

- insufficient room to reduce a fine based on lack of scienter or other culpability -- essentially limited to the 3-to-8 point reduction available for a demonstrated "commitment to environmental excellence",[4] and capped at a 50% reduction[5] -- in contrast to the 95% reduction available under Chapter 8 of the existing organizational sentencing guidelines;[6]

- adding "costs directly attributable to the offense" to economic gain, to set a floor for any fine,[7] despite the lack of connection between costs and culpability, the possibilities for double recovery of costs, the difficulty of quantifying certain costs, and the lack of precedent in Chapter 8;[8]

3/ The few instances where the Working Group changed objectionable provisions in the March Draft include dropping several "aggravators" that amounted to double-counting elements of the violations: absence of a permit, threat to human life and safety, and threat to the environment. (Compare Steps II(b), (c), and (j) in the March Draft to §9C1.1 in the November Draft). The November Draft merely bracketed two of its most egregious provisions, reflecting some disagreement as to (1) capping the cumulative effect of mitigators at 50% and (2) including costs resulting from a violation as a component of a base fine. November Draft, §§9E1.2(b), (c).

4/ November Draft, §9C1.2(a).

5/ Id., §9E1.2(b).

6/ See the Coalition's prior comments at pp. 31-32 and 40-41.

7/ November Draft, §9E1.2(c).

8/ See the Coalition's prior comments at pp. 13-24. §8C2.4 of the U.S. Sentencing Guidelines ("U.S.S.G.") uses losses resulting from an offense as a floor only for losses caused "intentionally, knowingly, or recklessly."

- a definition of meritorious compliance programs that is so stringent as to benefit few if any companies, even current leaders in the field, and so inflexible that it will stifle innovation;[9/] and

- probation provisions that, for no articulated reason, go beyond those in Chapter 8 to push a court to impose burdensome and expensive probation conditions, and which seem to invite prosecutorial abuse.[10/]

B. New Problems

A few provisions that are new in the November Draft deserve comment.

1. Use of Offense Categories from Chapter 2, Part Q

The November Draft unfortunately adopts the offense categories from existing Chapter 2, Part Q as a basis for defining the "primary offense level." As a whole, these categories seem awkward, ill-informed, and arbitrary, bearing little relationship to the types of distinctions that civil and criminal prosecutors typically do and should make in seeking different sanctions for different violations. With a few exceptions,[11/] they do not differentiate between truly willful, negligent, and other types of violations, making it all the more important that such distinctions be recognized elsewhere in the

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9/ November Draft, §9C1.2. See the Coalition's prior comments at pp. 35-40.

10/ November Draft, Part F. See the Coalition's prior comments at pp. 42-43.

11/ One exception is the separate category and higher base offense level established for knowing endangerment offenses (at §2Q1.1). However, other truly "knowing" offenses are lumped together with low-culpability offenses. (See, e.g., §2Q1.2, discussed below).

sentencing process (as Chapter 8 does through its "culpability score").[12/]

Further, in many cases these categories make little distinction between (for example) trivial spills and mammoth ones. The great majority of pollution-related environmental violations -- such as under the Clean Air Act ("CAA"), Clean Water Act ("CWA"), Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), Emergency Preparedness and Community Right-to-Know Act ("EPCRA"), Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Oil Pollution Act of 1990 ("OPA"), Resource Conservation and Recovery Act ("RCRA"), and Toxic Substances Control Act ("TSCA") -- will all fall under §2Q1.2. of the existing guidelines and §9B2.1(b)(2)(B) of the November Draft, with a potential primary offense level of 6 to 29.[13/]

2. The Offense Level Fine Table

Using the 2Q categories, even the briefest of emissions violations would seem necessarily to have a primary offense level of at least 12,[14/] which under the offense level fine table established in the November Draft corresponds to 30% to 50% of

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12/ U.S.S.G. §§8C2.5, 8C2.6.

13/ The relatively few violations of these statutes involving materials that are neither hazardous nor toxic substances or pesticides would fall under existing §2Q1.3 and proposed §9B2.1(b)(3), with a potential primary offense level of 6 to 31.

14/ I.e., 8 points from §9B2.1(b)(2)(A) plus 4 points from §9B2.1(b)(2)(B)(i)(b).

the maximum statutory fine.[15/] If the emission or other release is "ongoing, continuous, or repetitive", as often will be the case for typical air or water-related violations, the primary offense level would be at least 14, which corresponds to 40% to 60% of the maximum statutory fine -- even for the most trivial of violations. If violation of a permit was involved, the offense level would increase by 4, which added to 14 would mandate 60% to 80% of the maximum statutory fine -- even without the application of any aggravators.

These high percentages would be applied to statutory maximums that often are set in the environmental statutes at $25,000[16/] or $50,000 per violation.[17/] These provisions can easily authorize multi-million dollar fines, because each day a violation continues generally may be considered a separate violation. Further, fines for organizations of $200,000 and $500,000, for misdemeanors and felonies respectively, are authorized by several environmental statutes.[18/] In fact, it is not clear whether the November Draft's reference to "maximum statutory fine" refers to the $25,000 or $50,000-per-violation

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15/ November Draft, §9E1.1.

16/ E.g., under the CWA for negligent violations (33 U.S.C. § 1319(c)(1)); TSCA (15 U.S.C. § 2615(b)); and EPCRA (42 U.S.C. § 11045(b)(4)).

17/ E.g., under the CWA for "knowing" violations (33 U.S.C. § 1319(c)(2)); RCRA (42 U.S.C. § 6928(d)); and FIFRA (7 U.S.C. § 136l(b)).

18/ E.g., under the CAA (42 U.S.C. § 7413(c)(1)); CERCLA (42 U.S.C. § 9603(b)); and OPA (33 U.S.C. § 1321(b)(5)) -- each by reference to 18 U.S.C. § 3571(c).

authorities in the above-referenced acts, or to the $200,000/$500,000 authority derived from the Alternative Fines Act, codified at 18 U.S.C. § 3571(c).

3. Repetitive Counts

The November Draft does not adequately address the threat of injustice through excessive repetition of counts. The problem is that a prosecutor often can charge a great number of violations, such as by treating each drum stored in violation of permit conditions as a separate violation, or each day of a continuing violation as a separate violation, or both. A guideline-mandated sentence should not be so easily manipulated by the prosecutor without regard to more important factors such as culpability and seriousness of harm.

The November Draft gives the sentencing judge discretion to reduce counts down to a floor set by a mathematical formula,[19/] but only in the case of counts "relating to a course of offense behavior that is ongoing or continuous in nature and does not involve independent volitional acts."[20/] Therefore this count-reducing authority seems unavailable for the multiple-drum scenario and other count proliferation based on contemporaneous events. It also seems potentially unavailable for the run-of-the-mill situation involving a facility experiencing technical

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19/ For example, under the formula the fine for four counts could be reduced to about double the fine for a single count, and the fine for thirteen counts could be reduced to about triple that for a single count.

20/ November Draft, §9E1.2(a).

difficulties in meeting air or water permit limits, in that the choice effectively made each day to continue operating until the fix is installed could be construed as an independent volitional act. Therefore the November Draft leaves judges too little discretion to curb excessive count proliferation.

C. A Routine Example Illustrates the November Draft's Outlandish Outcomes

Suppose, for example, that a company learns that its plant is releasing air emissions slightly in excess of its permitted rate. Continuing to operate the facility despite this known, ongoing emission could be considered a "knowing" violation, subject to criminal penalties of up to $500,000 per day under the Clean Air Act. However, if the only alternative would be to close the facility until new pollution control equipment could be obtained and installed, and if the emissions did not present a significant risk, continuing to operate the facility would generally be considered the preferred course of action, even by environmental regulators.

Nonetheless, under the November Draft, a court would be required to impose a primary offense level of at least 16 and a penalty of between 50 and 70 percent of the maximum statutory fine.[21/] Thus, a court would be required to impose a fine of at

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21/ See November Draft, §9B2.1(b)(2)(A) (providing for a base offense level of 8 for any mishandling of a hazardous substance; §9B2.1(b)(2)(B)(i)(b) (providing for an increase by four levels if the offense involved an actual emission); §9B2.1(b)(2)(B)(v) (providing for an increase by four levels if the offense involved a discharge in violation of a permit); and §9E1.1 (primary offense level of 16 corresponds to a penalty range of 50 to 70 percent of the maximum statutory fine).

least $250,000 per day for each day the plant was in operation. If the count-reduction authority was deemed applicable, two weeks of an ongoing technical difficulty would mandate a fine of over $750,000, putting aside any aggravators or mitigators. If the count-reduction authority was deemed unavailable, then even if the company was able to act very quickly and solve its emission problem within two weeks, the court would be required to impose a base fine of at least $3.5 million; after sixty days, the minimum mandate would be $15 million. Moreover, no matter what mitigation factors might be applicable, under the 50% cap proposed in the November Draft, the actual fine mandated by the Draft would be over $375,000 (after only two weeks) with maximum count reduction, and over $7.5 million (after 60 days) without count reduction. Thus, even though most would agree that the company acted properly in keeping its operations open while solving its environmental problem, and typically a criminal penalty would not even be sought, the November Draft would require a judge to impose severe penalties on the company, if a prosecutor chose to bring such a case.

D. It Is Inappropriate To Rely On Prosecutorial Discretion As The Cure For Such Potential Abuses

Some have argued that the November Draft's potential for exorbitant fines such as those outlined above are of no concern, because prosecutors have rarely if ever sought criminal sanctions

in such situations.[22/] However, this defense of the November Draft is flawed because it fails to consider the effect that broad judicial discretion in sentencing may have had in deterring potential prosecutorial abuse. Presently, federal prosecutors know that if they abuse their discretion and bring actions seeking penalties such as those described above, the judge probably will utilize his or her broad discretion and impose little or no sanctions. But once this restraint is removed, some prosecutors may bring cases that they would not have brought before. This is especially likely given increasing public attention on environmental matters. Such attention may create public pressure for treating corporations as scapegoats, even where they do not intend the violation or the resulting harm.

Even the most ardent prosecutors and environmentalists apparently agree that the sanctions such as described in I.C. above should not be imposed.[23/] This is presumably because the above example does not possess sufficient scienter, foreseeability of harm and other aspects of culpability to warrant the imposition of criminal sanctions. To ensure that no criminal sanctions are imposed in such cases, it is crucial for

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22/ See, e.g., Andrew E. Lauterbach, "Criminal Sanctions Are Supposed To Sting", 11 The Environmental Forum 41 (1994) ("the guidelines should not be gummed up with provisions intended to address hypothetical prosecutions that the government has never brought and does not now plan to bring").

23/ See, e.g., id. ("criminal sanctions are reserved only for the most serious violations").

the guidelines to allow courts to impose no fine when there is no traditional culpability.

II. How the Commission Should Proceed

The Commission faces a situation in which environmental offenses by organizations constitute one of a few categories of offenses not addressed by Chapter 8. The Commission's options for addressing such offenses include (1) somehow adding environmental offenses to the Chapter 8 structure, (2) creating a stand-alone sentencing system parallel to Chapter 8, and (3) not promulgating any binding sentencing guidelines for them, but instead promulgating a policy statement addressing any identified need for guidance in sentencing.

We recommend below a rational process for choosing among these options and deciding how to implement the selected option. We expect that the logical outcome of this process will be to develop a policy statement addressing the special considerations applicable to environmental offenses.

A. The Commission Should Consider the Extent to Which Environmental Offenses Differ from Other Offenses

As a first step, the Commission should examine the ways in which environmental offenses by organizations are like or unlike other offenses. We discuss below some important differences between environmental and other offenses by organizations, and suggest what those differences imply for sentencing.

1. An Environmental Offense May Involve Little Scienter or Culpability

Unlike most of the areas addressed by Chapter 8, criminal liability can be imposed for some environmental violations based on mere negligence rather than a "knowing" violation.[24/] Even statutory provisions that require a "knowing" environmental violation in order to impose a criminal penalty have been interpreted so as to require very little scienter. For example, several courts have held that, to be criminally liable under such provisions, one need only know that the regulated material in question had the potential to be harmful; one need not know the exact identity of the material, that it was subject to regulation, or that one's methods of handling it were illegal.[25/] The example at I.C. above illustrates that even socially desirable behavior in theory can be subject to criminal environmental enforcement.

Therefore it is crucially important that any sentencing guidelines or policy statement for environmental offenses reflect the broad range of culpability that can be associated with

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24/ See, e.g., 42 U.S.C. § 7413(c)(4) (criminal liability under the Clean Air Act for negligent releases of hazardous air pollutants); 33 U.S.C. § 1319(c)(1) (criminal liability for negligent violations of Clean Water Act); 33 U.S.C. § 1321(b)(5) and 42 U.S.C. § 9603(b) (criminal liability, even without negligence, for failure to report certain releases).

25/ E.g., United States v. International Minerals & Chem. Corp., 402 U.S. 558, 563-64 (1971); United States v. Goldsmith, 978 F.2d 643, 645 (11th Cir. 1992); United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992) cert. denied 61 U.S.L.W. 3714 (U.S. 1993); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991).

environmental offenses. Onerous criminal sanctions should not be mandated for environmental violations that technically can be classified as criminal offenses but which do not involve real culpability.

2. Parallel Federal and State Civil Enforcement Schemes Exist for Environmental Offenses

Environmental offenses are unlike any of the other offenses subject to Chapter 8, in that the violation generally is subject to a robust civil enforcement scheme at both the federal and state level.[26/] The civil enforcement authorities generally provide for civil fines calculated to both punish and deter. Authorized maximum fine amounts (e.g., $25,000 per violation per day is typical) are large enough to enable the imposition of very large fines when the enforcing agency deems that appropriate. In addition, the civil remedies available to the federal and state governments and private parties generally include the authority to compel the violator to remediate the effects of, or compensate for the harm caused by, the violation. This extensive and active government enforcement scheme at both the state and federal level, in addition to the private remedies that are available, has no parallel in the other areas addressed by Chapter 8.[27/]

26/ See the Coalition's prior comments at pp. 9-10.

27/ A few of the areas addressed by Chapter 8, such as insider training and tax evasion, are also substantially addressed by federal civil enforcement authorities (i.e., those schemes, administered by the Securities and Exchange Commission and the Internal Revenue Service), but even violations in these areas generally would not be subject simultaneously to potential state-level enforcement, as is true for most pollution-related environmental violations.

One implication of the above is that there is a much greater possibility of double-penalizing an environmental violation than for many other offenses, when both criminal sanctions and civil remedies are pursued. Also, one should not assume that criminal penalties are the sole deterrent opposing any incentive to violate environmental requirements. Instead, the civil enforcement scheme has been and should be relied upon to address most environmental violations; criminal sanctions have been and should be applied only to violations involving real culpability.

B. The Commission Should Define "Heartland" Offenses

The Commission should develop an understanding of what typical environmental criminal cases involve and what distinguishes them from the mass of other environmental violations that generally are not and should not be prosecuted criminally. We suggest that some or all of the following generally are (and should be) part of the decision to seek criminal sanctions:

- actual knowledge that (or reckless indifference as to whether) the law was being violated;
- a violation motivated by a desire to save money (rather than, e.g., the result of an accident);
- an attempt to evade detection (as opposed to, for example, ongoing violations that the party brings to the government's attention while it tries to correct the situation); and
- significant harm or risk of harm.

These types of fact patterns should be recognized as the classic, archetypal, or core examples of what has been and should be prosecuted criminally. These types of situations perhaps are

what certain members of the Working Group had in mind when they pushed for guidelines even more stringent than non-environmental offenses.[28/] Sentencing guidelines should not even apply to situations generally not prosecuted. To the extent low-culpability offenses are subject to sentencing guidelines at all, they should be treated very differently, allowing the judge the discretion to impose little or no penalty.

C. The Commission Should Evaluate Sentencing Practice to Date

The Commission should analyze environmental sentencing practice to date to determine what, if anything, needs to be reformed. Such a review, apparently not yet conducted, is required by 28 U.S.C. § 994(m) prior to developing guidelines.

First, the Commission should systematically examine sentences imposed to date on organizations for environmental offenses. Obvious questions to consider include whether those sentences seem too lenient, too harsh, or too inconsistent. The Working Group has failed to identify any problem with the present sentencing guidelines for organizations warranting the creation of separate environmental guidelines. Mere conclusory statements asserting a generalized need for such guidelines are inadequate.[29/]

28/ See note 23, supra.

29/ See, e.g., Jonathan Turley, "Preserve the Group's Consensus", 11 The Environmental Forum, 43 (1994) ("The treatment of environmental criminals under these generic provision [i.e., without sentencing guidelines] has failed to fully address the sentencing factors that are unique to environmental crime.")

The reason for the Working Group's failure to identify any legitimate reason for additional environmental sentencing guidelines is simple -- there is no such need. The vast majority of environmental cases involve violations of legal or technical requirements with little or no actual harm to the environment.[30/] We know of no evidence that environmental sentences in the absence of guidelines have been too lenient and that sentencing guidelines therefore are necessary to force judges to impose stiffer penalties. If, as the Coalition suspects, no evidence is found that the sentences imposed reflect inappropriate disparities, inadequate deterrence, or other problems requiring separate environmental sentencing guidelines, the Commission should refrain from creating such guidelines.

Second, the Commission should examine non-environmental sentences for organizations to determine if there are lessons to be learned from the application of Chapter 8. This chapter is still relatively new and is not so well-tested that the Commission should reflexively apply it to environmental cases.

Third, the Commission should survey and evaluate federal environmental sentences for individuals under Chapter 2Q. We expect that there are lessons to be learned from evaluating how

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30/ See, e.g., Lloyd S. Guercri and Meredith Hemphill, Jr., Report of Advisory Work Group on Sentencing Guidelines for Organizations Convicted of Environmental Crimes: Dissenting Views (Dec. 8, 1993) at 5 ("governmental representatives on the work group observed that demonstrable harm was present in substantially less than ten percent of the criminal cases").

well or poorly the definitions of offense levels under Chapter 2Q have worked in practice.

The above approach would be consistent with how the Commission originally approached establishing guidelines for individuals.[31/] It also would be consistent with the practice of other working groups convened by the Commission to address special topics such as crack cocaine, computer fraud, public corruption, "substantial assistance", and "departures"; each of these working groups has used a statistical or other detailed historical analysis of prior sentencing practice to develop recommendations.[32/]

The Food and Drug Working Group, established in 1993, has a two-year mission closely analogous to that of the Advisory Working Group in Environmental Sanctions: to assess the feasibility of formulating organizational guidelines for offenses covered (so far only for individuals) by §2N2.1, "Violations of Statutes and Regulations Dealing With Any Food, Drug, Biological Product, Device, Cosmetic or Agricultural Product." The outline of that group's preliminary report reflects exactly the sort of historical and legal review that the Commission should conduct for environmental offenses, namely:

(1) an overview of the most commonly prosecuted crimes sentenced under the guidelines for individuals;

31/ See U.S.S.G. §1.A3 (p. 5) (the Commission took "an empirical approach that used as a starting point data estimating pre-guidelines sentencing practice.").

32/ U.S. Sentencing Commission, Annual Report 1993, at 8-12.

(2) a description and analysis of the cases involving individuals;

(3) a description of the cases involving sentencing (without guidelines) of organizations; and

(4) an analysis of significant issues affecting the application of the existing offense guideline.[33/]

D. The Commission Should Apply Any Guidelines or Policy Statements Developed to Actual and Hypothetical Cases

The Commission should test any guidelines or policy statements under development by applying them to the facts of prior "real life" cases, as well as to hypothetical examples, and determine whether the resulting fines seem appropriate. The Commission tested the Chapter 8 guidelines in this way, by comparing their results to the sentences actually imposed in 774 pre-guidelines cases.[34/] The Coalition's comments and testimony on the March Draft used a few examples to show how it would mandate outlandish penalties in some cases, and the example given at I.C. above shows that the November Draft would also. It would be irresponsible for the Commission even to propose new sentencing guidelines without first systematically assessing what their impact would be.

E. The Commission Should Consider Promulgating a Policy Statement Rather Than Binding Guidelines

The Commission has the authority to develop a non-binding policy statement regarding environmental sentencing, rather than

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33/ Id. at 11.

34/ U.S. Sentencing Commission, Supplementary Report on Sentencing Guidelines for Organizations, at 17-24 (Aug. 30, 1991).

binding sentencing guidelines.[35/] Such a policy statement would be more constructive than binding guidelines. Unlike mechanistic guidelines, policy statements allow judges to adjust for the differences in scienter and other culpability factors which vary among cases. Judges' need for this discretion is particularly great with environmental offenses, in light of the range of scienter and culpability that they embrace.

A policy statement also provides a more flexible format. In preparing such a document, the Commission would not have to address every factor relative to sentencing, but can simply provide principles that judges should consider. For example, a policy statement could emphasize important factors distinguishing large and small penalty situations and point out any problems in prior sentencing practices that should be avoided in the future.

CONCLUSION

The Commission should not tinker with the November Draft, but reject it and start anew. The Commission should base any further consideration of environmental sentencing of organizations instead on an evaluation of environmental law's special characteristics and on a systematic review of relevant sentencing practice to date. We expect that such a review will indicate no need to ratchet up environmental sentences generally, as the November Draft seems calculated to do, but at most a need

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35/ See 28 U.S.C. § 994(a)(2) (providing Commission authority to issue general policy statements regarding any aspect of sentencing).

for a policy statement addressing the special characteristics of environmental offenses.

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COMMENTS OF THE COALITION FOR CLEAN AIR IMPLEMENTATION ON THE WORKING DRAFT RECOMMENDATIONS OF THE ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

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April 16, 1993

TABLE OF CONTENTS

COMMENTS OF THE COALITION FOR CLEAN AIR IMPLEMENTATION ON THE WORKING DRAFT RECOMMENDATIONS OF THE ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

April 16, 1993

INTRODUCTION

The Coalition for Clean Air Implementation (the "Coalition") is an industry association focused on the implementation of the Clean Air Act Amendments of 1990. The members of the Coalition who join in these comments ("Members") on the Working Draft Recommendations dated March 5, 1993 (the "Draft") are briefly described below.[1/]

American Automobile Manufacturers Association

The American Automobile Manufacturers Association ("AAMA") is the trade association for U.S. car and light truck manufacturers. Its members, Chrysler Corporation, Ford Motor Company and General Motors Corporation, produce approximately 81% of all U.S.-built motor vehicles.

Association of International Automobile Manufacturers

The Association of International Automobile Manufacturers ("AIAM") is a non-profit trade association of manufacturers, manufacturer-authorized importers, and distributors of motor vehicles manufactured both in and outside of the United States for sale in the United States. AIAM's member companies and their affiliates manufacture more than one and one-quarter million

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1/ Some of the Members of the Coalition and their members also are submitting separate comments.

vehicles in plants located in five states. AIAM represents American Honda Motor Company, Inc.; American Isuzu Motors Inc.; American Suzuki Motor Corporation; BMW of North America, Inc.; Daihatsu America, Inc.; Fiat Auto U.S.A., Inc.; Hyundai Motor America; Mazda Motor of America, Inc.; Mitsubishi Motor Sales of America, Inc.; Nissan North America, Inc.; Porsche Cars North America, Inc.; Rolls-Royce Motor Cars Inc.; Rover Group USA, Inc.; Subaru of America, Inc.; Toyota Motor Sales, U.S.A., Inc.; Volkswagen of America, Inc.; and Volvo North America Corporation.

American Forest & Paper Association

The American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. It represents companies engaged in the growing, harvesting, and processing of wood and wood fiber, and the manufacture of pulp, paper, and paperboard products from both virgin and recycled fiber, as well as solid wood products. The segment of U.S. industry represented by AFPA accounts for over 7% of the total manufacturing production in the nation.

American Iron & Steel Institute

The American Iron and Steel Institute ("AISI") is a national trade association whose domestic member companies account for approximately 80% of the raw steel production of the United States.

American Mining Congress

The American Mining Congress ("AMC") is a national trade association of mining and mineral processing companies whose membership encompasses: (1) producers of most of the United States' metals, uranium, coal and industrial and agricultural minerals; (2) manufacturers of mining and mineral processing machinery, equipment, and supplies; and (3) engineering and consulting firms and financial institutions that serve the mining and mineral processing industry.

The Coalition's Interest in Commenting

The many companies represented by the Coalition are subject to a broad array of environmental regulations under the federal Clean Air Act and other statutes. It is the policy of each of the companies represented by the Coalition to strive to comply with all applicable environmental laws. Each of those companies has made substantial capital expenditures and has devoted substantial management effort to achieving and maintaining such compliance.

Despite their best efforts, there is a risk that such companies may become the target of a criminal prosecution for a violation of environmental laws. This is true for a number of reasons. First, under a type of vicarious liability known as respondeat superior, corporations can be made legally responsible for the acts of their employees,[2/] even of an employee who acts

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[2/] See, e.g., Apex Oil Co. v. United States, 530 F.2d 1291 (8th Cir.), cert. denied, 429 U.S. 827 (1976) (corporation

(continued...)

contrary to company policy and instruction.[3/] Second, the number and complexity of environmental laws and regulations applicable to a large manufacturing firm makes continuous perfect compliance virtually impossible. Third, and most importantly, violators of these myriad requirements often can be subjected to criminal sanctions even if the violations were accidental and unintentional, due to the elimination or reduction of scienter requirements in many environmental penalty provisions.[4/] Even statutory provisions that require a "knowing" environmental violation in order to impose a criminal penalty have been interpreted so as to require very little scienter. For example, several courts have held that, to be criminally liable under such provisions, one need only know that the regulated material in question had the potential to be harmful; one need not know the exact identity of the material, that it was subject to

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[2/](...continued)
criminally liable for an employee's failure to report oil spills into river, even though no officer or director knew of the spills).

[3/] See, e.g., United States v. Automated Medical Lab., Inc., 770 F.2d 399, 407 (4th Cir. 1985).

[4/] See, e.g., 42 U.S.C. § 7413(c)(4) (criminal liability under the Clean Air Act for negligent releases of hazardous air pollutants); 33 U.S.C. § 1319(c)(1) (criminal liability for negligent violations of Clean Water Act); 33 U.S.C. § 1321(b)(5) and 42 U.S.C. § 9603(b) (criminal liability, even without negligence, for failure to report certain releases).

regulation, or that one's methods of handling it were illegal.[5/]

Even socially desirable behavior in theory can be subject to criminal environmental enforcement. For example, continuing to operate a manufacturing facility despite a known, ongoing, excessive rate of air emissions probably could be considered a "knowing" violation, therefore, subject to criminal penalties of up to $500,000 per day under the Clean Air Act. But if the only alternative would be to shut down the facility until new pollution control equipment could be delivered and installed, and if the additional rate of release did not present a significant risk, continuing to operate the facility generally would be considered to be the preferred course of action, even by environmental regulators.

When confronted with examples of how low-culpability[6/] behavior could in theory be prosecuted criminally, prosecutors often respond: "But of course we use our discretion; we would never prosecute that." In fact, the U.S. Environmental Protection Agency ("EPA") and the U.S. Department of Justice

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5/ E.g., United States v. International Minerals & Chemical Corp, 402 U.S. 558, 563-564 (1971); United States v. Goldsmith, 978 F.2d 643, 645 (11th Cir. 1992); United States v. Dean, 969 F.2d 187, 191 (6th Cir. 1992), petition for cert. filed, (U.S. Nov. 18, 1992) (No. 92-6629); United States v. Dee, 912 F.2d 741, 745 (4th Cir. 1990), cert. denied, 111 S. Ct. 1307 (1991).

6/ By "low-culpability", we refer both to offenses with low degrees of scienter (e.g., an offense for which management is little to blame) and to offenses which, although fully "knowing", otherwise are not highly blameworthy (e.g., the example discussed above).

("DOJ") usually do not seek to prosecute environmental violations that lack traditional culpability. The Coalition, of course, supports such decisions as a matter of fairness and preservation of limited societal resources.

The sentencing discretion currently vested in district court judges presumably helps deter potential overreaching by prosecutors. Even if an overzealous prosecutor proved all of the elements of a low-culpability "criminal" offense, the judge could impose little or no penalty if that seemed appropriate based on the particular circumstances of the case. This rarely happens, in part because prosecutors, judges, and others seem to have a generally shared sense of what is "really criminal", i.e., a small subset of what under federal environmental statutes can be classified as criminal.

If, however, environmental sentencing guidelines remove the discretion that sentencing judges currently enjoy, and do not themselves sufficiently distinguish between different degrees of culpability, prosecutors could threaten or seek large criminal penalties for low-culpability acts, and great injustice could result.

Environmental sentencing guidelines, therefore, must be drafted with the recognition that a corporate offender subject to sentencing may not be a traditional "bad actor", i.e., willfully polluting based on a conscious decision to save money. If the government chooses to prosecute in the absence of traditional

culpability, onerous criminal sanctions should not be imposed as if the "bad actor" stereotype applied.

In our comments below, the Coalition makes a number of specific suggestions to seek fairness in sentencing. The Coalition has focussed on the most fundamental and important issues raised by the Draft's recommendations. We have not attempted here to address every issue in the Draft or that the Draft highlights for comment (some of which could be rendered moot if our core comments were accepted). This silence should not, however, be construed as agreement with those portions of the Draft on which we are not now commenting.

STATUTORY BACKGROUND

The United States Sentencing Commission ("the Commission") is directed by statute to establish sentencing guidelines that will achieve various goals articulated by the Sentencing Reform Act of 1984 (the "Act"). The Commission has identified two fundamental goals of the Act that apply to organizational as well as individual defendants:

(1) reasonable uniformity in sentencing (i.e., provide similar sentences for similar offenses by similar offenders) and

(2) proportionality in sentencing (i.e., impose appropriately different sentences for criminal conduct of differing severity).[7/]

In short, one should treat similar cases similarly and different cases differently. Each of the various goals that a

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7/ United States Sentencing Commission, Guidelines Manual (hereinafter "U.S.S.G."), §1.A3 (p.s.) (Nov. 1992).

sentencing court and the Sentencing Commission are required to consider (i.e., deterrence, which is served by predictability and certainty; fairness; just punishment; reflecting the seriousness of the offense; promoting respect for the law; and protecting the public from further crimes by the defendant)[8/] tie into one or both of these two basic goals. As discussed below, one of our major concerns is that the Draft often fails to give proper weight to the "proportionality" aspect of fairness, in its apparent attempt to ratchet up penalties to assure deterrence.

ISSUANCE OF ENVIRONMENTAL SENTENCING GUIDELINES IS NOT WARRANTED

We have serious doubts as to whether environmental sentencing guidelines should be developed at this time. First, it is not clear that sentencing guidelines are necessary. The expressed goals of the Sentencing Reform Act already guide judicial selection of individual sentences in the absence of applicable sentencing guidelines.[9/] In addition, some environmental statutes contain statute-specific guidance for setting criminal penalties (e.g., 42 U.S.C § 7413(e)). We know of no evidence that sentences imposed on organizations to date under those statutes reflect inappropriate disparities, inadequate deterrence, or other problems calling for additional sentencing guidelines. The Commission should follow the traditional wisdom of "if it ain't broke, don't fix it".

8/ 18 U.S.C. § 3553(a)(2); 28 U.S.C. § 991(b).

9/ 18 U.S.C. § 3553(a).

Assuming that the Advisory Working Group or the Commission develops and releases for public comment an evaluation of whether environmental sentencing guidelines are necessary, such an evaluation should consider the existing civil enforcement system. Virtually every violation of federal environmental law that can be prosecuted criminally also can be prosecuted civilly. In many cases, EPA is empowered to assess substantial civil fines administratively.[10/] In addition, EPA, through DOJ, generally can bring suit in federal district court to seek civil penalties[11/] and other relief. EPA also has broad authority to issue remedial orders administratively,[12/] as well as to seek such orders from a court. To these efforts one must add the enforcement actions of the states, which in many instances are delegated the authority to act as the primary implementer and enforcer of regulatory programs mandated by federal environmental statutes.[13/] In assessing the need for criminal sentences to

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10/ For example, in fiscal year ("FY") 1991, EPA brought 3,925 administrative enforcement actions, and assessed $31.9 million in administrative penalties. EPA, Enforcement Accomplishments Report FY 1991 (hereinafter "Enforcement Accomplishments Report") at 3-3, 3-4 (Apr. 1992).

11/ In FY 1991, EPA referred 393 civil cases to DOJ, and $41.2 million in civil judicial penalties were assessed. Id. at 3-1, 3-4. The total civil penalties (administrative and judicial) assessed in FY 1991 therefore equalled $73.1 million. Id., at 3-4. For comparison, total criminal fines resulting in FY 1991 from EPA enforcement were $14.1 million. Id.

12/ See, e.g., 42 U.S.C. § 6906.

13/ In FY 1991, the states issued 9,607 administrative enforcement actions in the environmental area and referred 544 civil cases to state attorneys general. Enforcement Accomplishments Report at 3-5.

deter environmental violations and what types of violations should be the target of such sentences, one must consider this substantial civil enforcement capability and track record at the federal and state level.

Second, even if sentencing guidelines might be of some value for environmental offenses by organizations, it is not clear that it is feasible to create them, at least at this time. The many factors that need to be properly weighed make this task even more complex than for other types of offenses by organizations. Among other things, there are many unique aspects to evaluating the seriousness of environmental offenses, and there is an unusually wide range of scienter and culpability that may be considered criminal.

Further, it appears that a sufficient body of sentencing decisions does not yet exist regarding environmental violations by organizations to lay a foundation for the construction of guidelines. Such a foundation is necessary[14/] and appropriate.[15/] Abstract rules and formulas that remove

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[14/] 28 U.S.C. § 994(m) requires that "as a starting point in its development of the initial sets of guidelines for particular categories of cases, the Commission ascertain the average sentences imposed in such categories of cases prior to the creation of the Commission . . . ."

[15/] The sentencing guidelines for individuals were based on an analysis of thousands of prior sentences. The Commission chose to look to that precedent in part to benefit from what judges have deemed important in making case-by-case decisions over the years; the Commission chose to deviate from those prior trends only in special cases, such as where required by more recent legislation. U.S.S.G. §1.A3 (p.s.) (Nov. 1992) ("the guidelines represent an approach that begins with, and builds

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