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
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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).

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February 25, 1994

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Mike Courlander

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

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

American Petroleum Institute
1220 L Street, Northwest
Washington, D.C. 20005
(202) 682-8050

G. William Frick
Vice President, General
Counsel and Secretary

February 22, 1994

Chairman William Wilkins
United States Sentencing Commission
One Columbus Circle, N.E.
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Washington D.C. 20002-8002

Dear Chairman Wilkins:

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

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

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

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

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

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

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

I. Culpability is the Overriding Factor

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

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

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

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

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

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

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

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

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

II. Problems with the Penalty Calculations

A. Adoption of Chapter Two, Part Q is Inappropriate

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

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

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

B. The Severity of the Gain Plus Loss Formulation

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

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

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

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

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

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

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

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

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

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

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

III. Aggravating and Mitigating Factors Do Not Properly Reflect Culpability

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

A. The Limit on Mitigation is Unfair

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

IV. Compliance Program and Probation Provisions are Excessive

A. Compliance Program Provisions

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

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

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

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

B. Probation Provisions

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

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

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

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

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

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

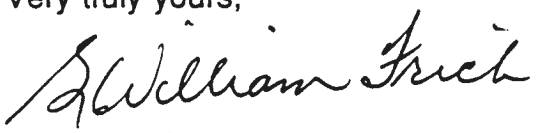
V. Conclusion

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

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

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

Very truly yours,



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

HARRIS

ROBERT E. SULLIVAN
SENIOR VICE PRESIDENT ADMINISTRATION

February 18, 1994

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Attn: Staff Director

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

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

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

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

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

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