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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

February 22, 1994

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

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

Dear Commissioners:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Thank you for your consideration of our views.

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Francis S. Blake	General Counsel, U.S. EPA (1985-1988)
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COMMENTS OF FORMER JUSTICE DEPARTMENT AND EPA OFFICIALS ON DRAFT ENVIRONMENTAL GUIDELINES PREPARED BY ADVISORY WORKING GROUP ON ENVIRONMENTAL SANCTIONS

April 16, 1993

The undersigned are former officials of the Justice Department's Environment and Natural Resources Division (formerly the Land and Natural Resources Division) and the Office of General Counsel of the United States Environmental Protection Agency. Our service with the government spans the years from 1977 to 1993. During this period, we oversaw the growth of criminal prosecutions to the point that they have become a vital, indispensable element in environmental enforcement. A number of us also worked with the Sentencing Commission on the development of sentencing guidelines for environmental crimes. Because of this experience, we have reviewed the draft organizational guidelines for environmental crimes submitted by the Advisory Working Group on Environmental Sanctions with particular interest.

It is undisputed that the environmental criminal laws should be vigorously, fairly and effectively enforced. We attempt in these comments to address more difficult questions regarding the bases on which criminal sentences should be determined, particularly those culpable states of mind and types of conduct that are the appropriate targets of deterrence and punishment.

Summary

The Advisory Group is to be commended for the substantial effort it has made in addressing difficult and complex sentencing issues. We urge the Advisory Group to amend its proposal to incorporate the following principles:

- In determining the base offense level, pecuniary gain and pecuniary loss should not be used, save in exceptional circumstances. The factors to be used in setting the base offense level should be 1) the degree of culpable knowledge of the defendant and 2) the foreseeability of harm to people or the environment, taking into account the social utility or disutility of the defendant's overall conduct;

- The issue of charging defendants for offenses on a per day basis should be addressed by following the general principles of Chapter 3.D of the existing guidelines;

- The existing guidelines' system of adjusting the base fine should also be followed, especially the more flexible approach for crediting compliance programs. Three factors merit particular explication as they relate to environmental offenses: the prior enforcement history of the defendant; the remedial costs incurred by the defendant; and authorization for a broader downward departure from the fine amount where the defendant will suffer substantial, collateral economic loss as a result of being barred from government contracts.

- Probation with respect to environmental organizational offenses should continue to be governed by the probation provisions in the existing organizational guidelines.

I. Special Characteristics of Environmental Regulatory Violations

The Advisory Group has made an impressive effort to grapple with an extremely complex problem. The difficulty in formulating the base fine for environmental crimes committed by organizations arises from a number of factors that distinguish environmental crimes, to a greater or lesser degree, from other organizational crimes. These differences arise from the fact that criminal enforcement of environmental laws is part of a comprehensive regulatory system that seeks to control, but not prohibit, pollution and other forms of natural resource use.

First, EPA and DOJ administer an extensive and well-developed system of civil remedies for regulatory violations, which typically recoups from corporate offenders the economic gain from failing to comply with environmental laws and regulations, and also civilly penalizes such offenders for the gravity of the offense.

Second, in many areas of environmental law, the government obtains extensive remedial relief so that harm to the environment is largely corrected. Remedial costs are usually greater than the cost of initially complying and therefore work as a deterrent to future violations. In addition, the government can recover money damages for injury to natural resources, and private damage actions are also available.

Third, the issues raised by determining economic gain, environmental harm, and appropriate remedial measures in the environmental context are typically very complex, time consuming, and poorly suited to resolution in the criminal process.

Fourth, the core of most organizational crimes outside of the environmental area is to obtain money or things of value from others; and the economic gain to the defendant and loss to the victim are typically in rough balance. The core of environmental crime is to dispose of waste materials to avoid the costs of legally required treatment or disposal, or to avoid other regulatory burdens, and there is no correlation between gain to the defendant and any loss, in the form of environmental harm that a given violation may cause.

Fifth, the environmental laws generally do not prohibit any and all discharges or emissions of pollutants. Pollutant discharges or emissions are accepted as the consequence of fully legitimate economic activity; their levels and nature are controlled by statute and regulation. There is a balance struck in the laws between the social utility of the economic activity and the harm of polluting discharges. Even when regulatory requirements are violated, the government usually does not insist on immediate compliance where it would be difficult or costly to achieve and the harm threatened by the violation is small. Annually, in large numbers of civil cases, the government does not seek to enjoin the violating discharge but allows it to continue if the defendant has agreed to bring its operation into compliance with the law promptly.

Finally, the government has been successful in obtaining jury instructions in many environmental criminal cases which do not require the government to show that the defendant knew it was violating a particular statute or regulation in order to obtain a conviction. This results in a greater range of possible mental states among convicted defendants than is the case in many other areas of white collar crime.

These differences from other organizational crimes pose major problems in identifying the core elements that should be considered in determining the base fine for environmental offenses.

Equally important, most of the aggravating and mitigating factors in the Commission's existing guidelines for organizations which operate to increase or reduce the base fine are relevant and require no special application in the environmental context. For example, the provisions in the existing guidelines directed to the question of imputed organizational liability, which focus on whether the organizational defendant has an effective program to prevent and detect violations of law are as important to environmental crimes as they are to other organizational crimes. These principles are generally sound; in our experience, there has been a substantial, beneficial response on the part of the regulated community to the incentives in the existing guidelines for adoption of compliance programs which appropriately recognize the need for flexibility in such programs to prevent and detect violations. These principles should be reaffirmed in the environmental context, rather than revisited and revised.

Other mitigation elements such as self-reporting, cooperation, acceptance of responsibility, and assistance to the government are likewise as applicable to environmental offenses as to other crimes. A few of the aggravating or mitigating factors deserve special or different emphasis in environmental sentencing; for instance, the possibly serious collateral civil consequences of being barred from government contracts. But, as a general matter, the adjustment factors identified by the Commission in the existing organizational guidelines are sound and can be consistently applied to environmental cases.

II. Factors to be Considered in Setting the Base Fine for Organizational Environmental Regulatory Violations.[1]

For other organizational crimes, the Commission has set the base fine level as the greater of 1) pecuniary gain to the defendant; 2) pecuniary loss to the victim(s); or 3) the offense level set in the sentencing guidelines for individuals. None of these provides an effective means of establishing a base fine in the environmental context.

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[1] The Advisory Group did not provide any recommendations with respect to wildlife offenses. We believe that it is appropriate for the Commission to go forward with consideration of proposals for so-called traditional environmental offenses, and subsequently make separate provision for the sentencing of wildlife crimes, which are distinguishable in at least two fundamental ways. First, wildlife offenses frequently involve prohibitions of certain conduct affecting protected species, rather than the relative limitations and conditions placed on pollutant wastestreams. Second, in many wildlife offenses the degree of culpability is clearer. While there are exceptions to this proposition (for instance, some cases arising under the strict liability provisions of the Migratory Bird Treaty Act), we believe that separating the traditional environmental offenses from wildlife offenses will result in greater clarity and consistency in each area. Accordingly, we urge the Commission to consider convening an appropriate panel of experts in wildlife law.

First, absent extraordinary circumstances, the use of pecuniary gain or loss in environmental criminal sentencing is inappropriate for a number of reasons. There is an extensive system of civil remedies for regulatory violations directed to determining gain to the organizational defendant and recovering that gain through civil penalties. Pecuniary loss to the victim is not a concept that fits easily with environmental offenses, but insofar as it suggests recoupment for harm to the environment or people, the civil system addresses those issues through a well established array of remedial requirements and tort judgments.

Further, the issues involved in precisely determining gain and loss issues in the environmental context are complex and frequently cannot be resolved quickly. Thus, they are not well suited to resolution in the sentencing context and would raise at sentencing a host of issues that are usually not directly relevant to the criminal trial. For example, assessing the short and long term environmental effects of a significant pollution episode and determining the cost of remediating and restoring natural resources is a process which, as the civil system demonstrates in case after case, can take years of study, analysis, and debate to complete. It requires substantial technical expertise that far exceeds both the capabilities and resources of probation offices. Evidentiary presentation of this material can take weeks. Most of this evidence would involve issues that have little or nothing to do either with the proof adduced at trial or with the central sentencing focus on the defendant's culpable knowledge and awareness of the foreseeable consequences of its conduct. Moreover, the novelty and malleability of many of the methods for quantifying environmental harm can lead to widely varying assessments, which in turn would promote, rather than diminish, sentencing disparity. For example, the attempt to quantify natural

resource injury through the use of contingent valuation methodology has been shown to result in highly variable and unreliable values for such resources.

Gain and loss are frequently not good measures of the seriousness of environmental crimes. Violations that produce small pecuniary gains to the defendant may result in large risks or harm to people and to the environment; conversely, large expenditures by the defendant may be necessary to abate small risks. Pecuniary losses are particularly difficult to measure and will frequently vary with the time of discovery of the offense and other extraneous factors. Gain and loss are reasonable measures of financial crimes, but environmental crimes differ from the vast majority of financial crimes.

Second, we agree with the position implicitly taken by the Advisory Group that the present individual guidelines for environmental crimes are not appropriate for organizational sentencing. They are not based on the core factors that should be weighed in organizational sentencing for environmental crimes: (a) culpable knowledge, and (b) the extent of foreseeable harm, taking into account the balancing of social utility and harm that is inherent in the environmental laws. These are the right elements to focus on because they are the elements which, in our opinion, distinguish environmental criminal cases from environmental civil cases and are therefore the elements which the criminal sentence should seek to deter or punish. The more deliberately and consciously a defendant acts to violate a regulatory requirement without making an effort to comply with the law, the greater the criminal sanction should be. The more the balance between social utility and harm tips so

that it was foreseeable that the potential harm flowing from the defendant's action would clearly outweigh any social utility, the greater the criminal sanction should be.

A. Culpable knowledge

We have identified seven levels of culpable knowledge that environmental defendants may typically possess and have ranked them in order of increasing seriousness:

- strict liability offense;

- offense committed negligently;

- offense committed with or without knowledge of the legal requirement violated, combined with effort to comply with the legal requirement including informing the government (where the legal requirement becomes known after the event, effort to comply and informing the government should occur promptly after obtaining knowledge);

- offense committed with lack of knowledge of the legal requirement violated;

- offense committed with knowledge of the legal requirement violated and combined with effort to comply with the legal requirement but not informing the government;

- offense committed with willful blindness to the legal requirement and no effort to comply with the legal requirement;

- offense committed with knowledge of the legal requirement violated and no effort to comply with the legal requirement.

We have developed these differing degrees of culpable knowledge by thinking through our experience with charging environmental crimes and identifying those elements of mens rea that are not already given weight in the general aggravating and mitigating provisions of the existing guidelines. For instance, active concealment of an offense could be an additional level of culpable behavior, but appears to be addressed in the general provisions of the guidelines. We believe that these elements are important in determining the seriousness of an environmental criminal offense.

At the lower end of the culpability scale, one would find corporations which are trying to comply with a complex legal regime and not concealing their conduct. At the upper end, one would find those deliberately violating the law. Increasing base offense level weights should be assigned to each of these mental states and the judge should sentence on the basis of which mental state he or she concludes most accurately reflects the organization's culpable knowledge.[2]

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[2] We do not see a reason for abandoning the "offense level" method that the Commission has so far used exclusively in the guidelines, in favor of a percentage approach. We

(continued...)

A subsidiary point should be made here. It is generally agreed that where the individuals directly involved in the crime are in higher positions of managerial responsibility, the organizational sanction should be greater. This principle is appropriately reflected in some of the aggravating and mitigating factors in the existing organizational guidelines (see § 8C2.5), so that while that principle should be applied in the environmental context, we believe this can be achieved through the existing guidelines.

B. Foreseeable Harm

Substantive Regulatory Violations. In formulating how the harm flowing from the defendant's acts should be weighed, one must recognize that, in practical terms, the law does not prohibit polluting releases or waste disposal per se, but subjects releases and waste management practices to quantitative limitations and other forms of control, and that releases and waste types per se are not accurate proxies for harm to people or the environment. One must also emphasize that the government routinely permits violating releases to continue, if the defendant is acting to bring itself into compliance and no serious imminent harm is threatened.

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[2] (...continued)
suppose that the Advisory Group saw the same problem that we did with importing offense levels from the individual guidelines. Among other matters, the offense levels that they would generate for a "basic" environmental crime would result in a base fine range for an organizational offense that far exceeds the statutory maximum. However, we believe that a distinct set of base offense levels could be developed for offenses imputed to organizations.

Accordingly, the harm that should be given weight at sentencing is fairly limited to those emissions or discharges of pollutants, or waste management practices, which would have been enjoined if they were known to the government before they took place and which would have resulted in demonstrable harm to people or the environment.

This formulation is aimed at addressing a number of concerns. First, it is unfair to weigh against a party, in the criminal context, releases that the government would not have sought to enjoin or a court was not likely to enjoin in the civil context. These are the typical releases in which the social utility of the defendant's conduct outweighs the harm of the conduct. Second, the focus should be on harm that foreseeably would flow from the conduct, not an arbitrary proxy for harm such as the volume or duration of a release, or the cost of remedying a release. In this connection, it is appropriate to weigh the harm that would have resulted if the defendant's conduct were not detected; the defendant should not benefit at sentence from the fact that the public or the government was able to mitigate promptly the consequences of its acts. Third, the foreseeable harm threatened by the defendant's conduct must be demonstrable in order to keep the sentencing inquiry from turning into a speculative exercise. In selecting an offense level range based on foreseeable harm, it would be appropriate to give added weight to the fact that the harm actually transpired and was serious.

Next, to properly link harm to the defendant, a further distinction should be made on the basis of foreseeability. The defendant should be held fully responsible for harm foreseeable to its officers and employees. Where the responsible employee lacked

requisite skill or knowledge suitable to his or her position, it is reasonable to judge the organizational defendant by reference to the harm foreseeable to a reasonably competent person in that position. But it is not reasonable to increase or reduce the weight for unforeseeable results or for results foreseeable only to the specialized expert.

The range of possible harm to people and the environment from environmental offenses is extensive. It is unrealistic to assign fixed weight to general categories of harm (releases of acute toxics, releases of "hazardous substances," releases of other pollutants, etc.) because such categories cannot capture all the relevant facts and circumstances. For example, a release to biologically rich breeding grounds results in harm different from the same release quickly diluted into the ocean. Judges should be directed to sentence within a range of offense levels based on foreseeable harm as we have defined it.

The range of offense levels based on foreseeable harm must inevitably be reasonably broad to accommodate at one end substantial injury to people or the environment, and at the other end the numerous episodes in which foreseeable harm may be quite minor. For example, at the low end of the spectrum, one could postulate a situation involving a permit violation under the Clean Water Act, in which pollutants were discharged into a POTW and the operation of the POTW treatment system mitigated or eliminated any harm from the discharge. At the high end, a Clean Water Act permit violation could involve the knowing discharge of a pollutant known to be poisonous, leading to at least short term elimination of a drinking water supply. An example of unforeseeable harm would be a violative air emission in an area normally complying with ambient air quality standards and

which took place at the same time as an accidental failure of equipment at an unrelated factory such that the two releases together violated the ambient air quality standard. An example of a release in which the harm does not outweigh the social utility can be found where ambient air or water standards are not violated, although a technology-based requirement applicable to a release was violated.

In order to arrive at an overall base fine for substantive regulatory violations, one would combine the appropriate offense level based on culpable knowledge with the appropriate offense level based on foreseeable harm. Recordkeeping and reporting crimes can be assimilated into the proposed base offense system by a) determining the defendant's level of culpable knowledge with respect to the legal requirements and b) determining the foreseeable harm on the basis of likely results to people or the environment if the recordkeeping or reporting violation had gone undetected. A recordkeeping/reporting violation that was related to the perpetuation of violations giving rise to foreseeable harm would be regarded the same as a substantive offense. Other recordkeeping/reporting violations would be assigned a lesser offense level where demonstrable foreseeable harm is lacking; in such cases, the integrity of the regulatory system is the central concern. Special mitigating consideration should continue to be given to the organization in the circumstance where an employee committed a recordkeeping or reporting violation in order to deceive the company. See U.S.S.G. §8C2.5 (n.9).

C. Other Issues in Setting the Base Fine

Knowing endangerment. The knowing endangerment crimes defined by the Clean Air Act, the Clean Water Act, and RCRA vary from the mass of environmental offenses by virtue of their more specific scienter requirement and the very serious potential for harm against which they protect. Also, these crimes are not tied to specific regulatory requirements that may be overbroad or not readily attainable in particular instances. Because knowing endangerments involve the highest degrees of culpable knowledge and foreseeable harm, they are good candidates for setting a high base offense level range. It would make sense to define that range in such a way that the base fine would reach the $1,000,000 maximum where there is a substantial "culpability score" derived from the existing organizational guidelines.

Multiple/Ongoing offenses. Numerous environmental criminal statutes allow for charging on a per day basis. This raises the specter that a defendant might face 30, 60, or hundreds of counts and fines that are in reality disproportionate to the offense committed. We agree with the Advisory Group that this issue must be addressed. We believe that the principles adopted by the Commission in Chapter 3D of the existing guidelines are basically correct: judges should group offenses charged on a per day basis, provide some diminishing increase in sentence for the first five or so additional counts, but cap the increases at that point. Of course, as already noted in Chapter 3D, a situation in which there will be inadequate scope for ensuring appropriate additional punishment for additional crimes can be handled by departure from the guidelines. §3D1.4, comment. (backg'd). In the

environmental context, such a situation might arise in a case of exceptionally deliberate, ongoing violations which are creating serious foreseeable harm on a daily basis. The grouping principles of Chapter 3D also are applicable in the environmental context where issues other than per-day charges arise, such as where the government charges multiple offenses based on one course of conduct. An example is when an offense of failure to obtain a permit is charged in addition to an offense of discharging illegally in violation of applicable limitations.

III. Relating the aggravating and mitigating factors of the existing organizational guidelines to environmental offenses

The existing guideline scheme for determining the scope of imputed corporate liability and for making departures is generally sound and applies equally well to the environmental context as it does to other organizational sentencing. Apart from obvious issues of double counting that may arise in applying some of these provisions to environmental offenses,[3] three areas deserve special consideration or particular emphasis in sentencing environmental crimes.

Collateral consequences--including civil obligations. The potential for debarment or prohibition from government contracting can be a significant sanction in and

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[3] The most significant of these are the departures authorizing upward adjustment for "Risk of Death or Bodily Injury" (§ 8C4.2) and "Threat to the Environment" (§ 8C4.4). The grounds for both departures are inherent elements of a substantive environmental offense and therefore are already dealt with as core considerations in setting the base fine in the manner that we have suggested.

of itself in an environmental conviction under the Clean Air and Clean Water Acts. Economic losses far greater than fines may fall on a defendant that is dependant on sales to the government, while the collateral consequence of debarment will have no effect on a company selling entirely to the private market. Accordingly, a judge should be allowed to adjust the amount of an organizational fine where debarment is likely to have significant consequences so as to avoid this disparity. This would require more than the fine range adjustment provided by the present guidelines.

Remedial costs that greatly exceed gain. In a great many cases the cost of remedying an environmental violation is far greater than the economic benefit derived from committing the violation. This means that the remedial sanction has a sting and a deterrent impact which is much greater than in the case of other economic crimes. Where this disparity between economic gain and remedial loss exists, its deterrent effect should be recognized through fine reduction. The existing guidelines already provide for reduction on these grounds. See §8C4.9.

Prior history of enforcement actions against company. In the environmental context, this factor requires careful judgment that limits its application to indicators of culpability. A number of civil and administrative actions are based on a standard of strict liability and should not be regarded as "misconduct." The same is true in cases of civil liability based on the doctrine of respondeat superior.

IV. Probation

The existing guideline provisions for probation are already directly applicable to companies convicted of environmental crimes. We have seen no evidence of any problem in their application to such cases. Nor do we see any issues unique to environmental organizational sentencing that would warrant probation provisions that are different or more stringent than those applicable to the majority of other organizational offenses.

V. Problems with the Draft Proposal in Light of the Foregoing Principles

We believe that the Advisory Group draft should be modified in accordance with the principles set forth above. With respect to the base offense level, the Advisory Group draft substitutes a ranked series of offense categories--actual release of a hazardous substance, threatened release of a hazardous substance, etc.--for the structure of the present individual environmental guidelines. In a general sense, this is a step in the right direction insofar as the draft's categories can be understood as proxies for foreseeable harm--one of the two key variables that should guide sentencing. These categories, however, fail adequately to reflect real world variations in foreseeable harm, which depend on the facts and circumstances of particular cases. For example, a violation that foreseeably threatens release of substantial amounts of toxic substances to groundwater in an area supplied by residential drinking water wells should be treated more severely than where the same release would not contaminate any groundwater. Although the percentage ranges given by the Advisory Group for each category provide some flexibility, they are insufficient to deal with

the range of foreseeable harm and ultimately rest on categorical proxies for harm which have limited accuracy. Accordingly, the categories proposed by the draft should be replaced by a scale based on the relative degree of foreseeable harm associated with a violation, taking into account the social utility of a defendant's conduct.

The other key variable in determining the base offense level is the degree of defendant's culpable knowledge. The draft addresses culpable knowledge in a narrow and piecemeal fashion after the base fine is established, through some of the aggravating and mitigating factors. Culpable knowledge is such a fundamental consideration in sentencing that it should be an explicit variable in establishing the base fine. The various degrees of culpable knowledge should be ranked on a scale. The score generated by applying this scale to a particular case should be combined with the score for foreseeable harm and net social disutility in order to determine the base fine.[4] For reasons set forth above, we believe that the special features of environmental regulation and enforcement make it unnecessary and counterproductive to use the alternative calculation of economic gain and cost. Such gain/cost calculations should be reserved only for the exceptional case, such as the Valdez oil spill.

With respect to the other basic elements in sentencing decisions, including the problem of multiple violations, aggravating and mitigating factors, and probation, we believe

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[4] Because knowing endangerment violations by definition involve high social disutility and a high degree of culpable knowledge, they can, as already noted, appropriately be dealt with as a distinct category with a higher base fine range tailored to the higher penalties provided by statute.

that the basic structure already adopted for other organizational violations should be followed for environmental violations as well.

The draft, however, proposes a number of fundamental changes and special features in sentencing for environmental violations that are either at odds with or have no counterpart in the organizational guidelines for other violations. For example, the draft departs substantially from § 3D1.4 of the existing organizational guidelines by proposing novel provisions to deal with multiple offenses involving repeated days of violation.

The draft limits the reduction in the base fine based on mitigating factors to no more than 50% of the base fine, or the economic gain from the offense, in contrast to the existing organizational guidelines which allow a reduction in the base fine of as much as 80-95% in cases where the organization has a sound compliance program and has been fully forthcoming and cooperative. The incentive for such programs created by the mitigation afforded under the existing scheme has already begun to produce greater corporate consciousness, improved compliance, and more open dealings with the government. Such an incentive should be maintained. It should not be undercut by imposing unduly rigid specifications on the content of an effective program to prevent and detect violations of the law or by requiring that organizations waive the attorney/client privilege before they will be treated as being cooperative.

The draft also departs from the existing organizational guides in precluding consideration in sentencing of the collateral consequences of conviction, such as contract debarment or "listing"; precluding consideration of defendant's obligation to pay remedial costs; making failure to have an organizational compliance program an aggravating factor rather than simply making the presence of such a program a mitigating factor; imposing new, detailed sentencing requirements and powers with respect to imposition of compliance program obligations; and mandating probation and specifying additional probation conditions. Although many of the draft's probation provisions are substantively similar to those already found in the existing guidelines, the draft interposes several novel features which unduly restrict a judge's discretion.

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

severe criminal sanctions for environmental violations may inhibit companies from entering or continuing certain lines of business, unjustifiably depriving society of economic benefit. Just as there may be harm to the environment and society from choosing too low a level of deterrence, so too it may be counterproductive to overdeter productive economic activity.

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Appendix

BRIEF EXPLANATION AND MOCKUP OF STRUCTURE FOR SETTING A BASE FINE FOR ENVIRONMENTAL ORGANIZATIONAL OFFENDERS

We provide the following in order to show with some specificity how a sentencing scheme based on the concepts we have articulated might look. Given the relatively limited period of time that we were given to analyze and prepare comments to the Advisory Group, we believe this to be a reasonable estimate of how to address the offenses at issue. It is certainly open to refinement. If the Advisory Group wishes, we would be happy further to develop the language, commentary, and explanatory rationale.

The base fine scenario reflects offense levels tied to specific gradations of culpability and a general range of offense levels to be applied to foreseeable harm. Ultimately, suitable offense levels for each gradation of foreseeable harm could be designated as experience develops. The remainder of the existing organizational sentencing scheme should generally be applied as written, except for those few aspects identified above which require specific comment or amendment addressing areas of particular significance in environmental cases.

A. Knowing Endangerment Offenses

A knowing endangerment is an offense committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury. As we indicated in our comments, knowing endangerments represent a fairly discrete and more specifically defined category of environmental criminal offenses. The statutory maximum is $1,000,000.

To maintain consistency with the general organizational sentencing scheme, the base fine range must be selected so as to ensure that the statutory maximum will be assessed in the most egregious instances of organizational culpability, but nevertheless allow for substantial mitigation where the organization is virtually free from blame for the act of its employee. The calculus for achieving such a result is relatively straightforward.

Under the existing organizational guidelines, the fine is determined by first deriving a base fine from a table that corresponds to the offense level for the underlying individual violation. §8C2.4(d). The base fine figure is then multiplied by a factor that corresponds to an organizational "culpability score"--essentially a measure of the severity of imputed corporate liability. Section 8C2.6 establishes a multiplier range of 2 to 4 for instances of maximum corporate culpability, based on a culpability score of 10 or more

"points."[5] Working backward from those multipliers, in order to arrive at a figure of $1,000,000 in cases where organizational culpability for a knowing endangerment is at its apex, the base fine should be set at no more than $250,000. The corresponding offense level would therefore be 17. This would result in an overall guideline fine range of $500,000 to $1,000,000 for a relatively significant organizational role in the offense.[6] In determining the fine within the range, the court would follow the policy statement provisions in §8C2.8. The court would then proceed to consider any other appropriate provisions from Chapter 8.

B. Major Statutory Environmental Offenses

As noted in our comments, setting the base fine for the major statutory environmental offenses requires consideration of a broad array of culpability and foreseeable harm scenarios, but the same basic principle used for calculating knowing endangerments can be employed here as well.

The maximum statutory fine for most environmental organizational felonies is $500,000 (under the Alternative Fines Act). With that as a benchmark, the maximum base fine for an environmental felony amount should be $125,000. This would produce a substantial overall guideline fine range of $250,000 to $500,000 for the most serious environmental offenses.[7] Consistent with the existing scheme, the minimum base fine should remain at $5,000 for the least serious felony circumstances. Judges should be asked to work within this $5,000 to $125,000 range when weighing the combination of factors listed below. Where a negligence or strict liability misdemeanor count is involved, the range should be reduced to $2,500 to $62,500.

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[5] Because the highest culpability score that could be assessed in aggravation is 17 points, the 10 point threshold for receiving the maximum multiplier range allows for a number of differing scenarios that could result in the maximum fine.

[6] Full organizational mitigation would still result in a fine range of $12,500 to $50,000.

[7] Full organizational mitigation would still result in a fine range of $6,250 to $25,000.

Base Fine for Environmental Offenses

For environmental offenses, the factors to be used in setting the base offense level should be 1) the degree of culpable knowledge of the defendant combined with 2) the harm forseeable to the defendant as described below.

In exceptional cases involving egregious organizational misconduct and massive harm, the court may determine the base fine in accordance with §8C2.4(a)(1), (a)(2), and (c).

Culpable Knowledge

The degrees of culpable knowledge attributable to the organization committing the underlying offense are as follows:

- Strict Liability

  Offense level: 0

- Negligence/Collective knowledge

  Offense level: 1

- Knowing offense committed with or without knowledge of legal requirement with reasonable effort to comply including informing the government

  Offense level: 2

- Knowing offense committed with lack of knowledge of legal requirement

  Offense level: 3

- Knowing offense committed with knowledge of legal requirement with reasonable effort to comply but not informing the government

  Offense level: 4

- Knowing offense committed with willful blindness to legal requirement

  Offense level: 5

- Knowing offense committed with knowledge of particular legal requirement without reasonable effort to comply

  Offense level: 6