judicial discretion in sentencing can produce sentences that are unexpected or inappropriate in particular cases.[16/] Such rules should not be adopted until they have been tested against and found consistent with the mainstream of sentencing precedent. That mainstream represents the collective wisdom of many jurists responding to all the facts in particular cases. Such background and precedent therefore should not lightly be disregarded. If that body of precedent is found to be flawed in some way, such as by an alleged historical tendency to sentence certain types of violations too lightly, that finding should be articulated and made subject to public comment.[17/] Unfortunately, it is not clear that the Draft is based on any analysis of relevant environmental or other sentencing precedent[18/], as it should be.

It would be preferable for the Commission to develop a non-binding policy statement regarding environmental sentencing,

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[15/](...continued)
upon, empirical data"). Before promulgating the sentencing guidelines for organizations at Chapter Eight, the Commission "tested" those guidelines by comparing their effect to the sentences actually imposed on 774 organizations from 1988 to mid-1990. U.S. Sentencing Commission, Supplementary Report on Sentencing Guidelines for Organizations at 17-24 (Aug. 30, 1991).

[16/] As discussed below, we believe that the Draft is a case in point.

[17/] See, e.g., U.S.S.G. §1.A3 (p.s.) (Nov. 1992) (the Commission found that sentences for economic crime tended to be light compared to sentences for other offenses, and sought to correct that in issuing the individual sentencing guidelines).

[18/] We understand that only seven sentences have been reported to date applying Chapter Eight. Before developing a new set of organizational sanctions, it also would seem appropriate to evaluate a larger body of experience under the existing sentencing guidelines for organizations.

rather than binding sentencing guidelines. Such a statement could, for example, emphasize what should be the most important factors in distinguishing between large and small penalty situations[19/], and point out any problems in previous sentencing practice that should be avoided in future sentences. Such a statement could avoid the probably impossible task of developing mathematical formulas that fairly address all relevant factors in this complex area.

COMMENTS ON THE DRAFT

Taking the Draft as a whole, the Coalition's main concern is that it seems designed to penalize environmental violations more stringently than other offenses by organizations, and it applies these Draconian penalties even to low-culpability offenses. Ways in which the Draft is more stringent than Chapter Eight of the existing sentencing guidelines include:

(1) setting the base fine amount at least as high as the costs attributable to the offense, even in the case of negligent and strict liability offenses;

(2) using the sum of (i) the offender's economic gain and (ii) any costs resulting from the offense as a floor for the base fine, rather than using only the larger of the two;

(3) omitting procedures for grouping multiple counts and multi-day violations, such as at existing Chapter 3D;

(4) creating a new, hyper-detailed definition of a company compliance program that merits penalty mitigation;

(5) capping the cumulative effect of mitigating factors;

19/ As discussed further below, we would urge that degrees of scienter be one of the primary determinants of the magnitude of criminal sanctions.

(6) not capping the cumulative effect of aggravating factors; and

(7) reducing judicial discretion in devising appropriate probation requirements.

In other words, a consistent tendency of the Draft is to ratchet up from the non-environmental sentencing guidelines for organizations. The Draft provides no rationale for doing so. Perhaps some of the drafters believe that environmental offenses are more serious and/or require more deterrence than other crimes by organizations. However, even if that were true for some environmental crimes (such as where management chooses to break the law with awareness of serious harm that may result), that is not true for the much more common violations that in theory could be (though usually are not) prosecuted criminally. The Draft's failure to sufficiently distinguish between these two general categories is a fundamental flaw.

We address particular aspects of the Draft below.

I. Calculating the Base Fine

A. Gain and Loss Calculations Generally Should Not Be Required Because They Will Unduly Complicate and Prolong the Sentencing Process

One should not attempt to quantify economic gain to the offender or costs attributable to the offense in cases where doing so would unduly complicate or prolong the sentencing process. That limitation is provided in 18 U.S.C. § 3571(d) and is properly reflected in the existing guidelines at §8C2.4(c). This same principle should apply in guidelines for environmental sentencing. Environmental sentencing guidelines should recognize

that in most cases, evaluating gain and loss calculations will be too fraught with uncertainty and too burdensome for the court to be worthwhile. They therefore should be made part of the sentencing process only in exceptional circumstances.[20/]

For example, in the case of isolated violations of management requirements (such as reporting or recordkeeping requirements), it may be difficult to quantify the costs saved by the offender. The prosecution might argue that the company should have had more or better-training compliance staffers. If so, the debate could easily degenerate into a "battle of the experts", none of whom would have any clear basis for proving what different staffing or organizational approach would have been necessary and appropriate to prevent the violation.

In the case of violations that involve postponing large capital expenditures for pollution control equipment, there is more of a basis for quantifying the defendant's gain from a violation. Even then, however, determining what assumptions should be the basis for such calculations can be difficult. EPA has designed a computer model to calculate benefits from environmental noncompliance (the "BEN" model). But that model is fundamentally flawed in a number of ways, and simply does not

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[20/] DOJ reached the same conclusion in 1990. Statement of Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division, Before the U.S. Sentencing Commission Concerning Sentencing Guidelines for Organizational Offenders (Dec. 13, 1990) (hereinafter "1990 DOJ Statement") at 1-6.

incorporate a number of important factors that would be necessary to calculate accurately economic benefits.[21/]

The same principle should apply to calculating the costs attributable to an offense. "Costs" attributable to an environmental offense in general are particularly difficult to quantify, as discussed further below.

B. Natural Resource Damages Generally Should Not Be Recovered as a Fine

To the extent that costs are used as a basis for a fine, they should not be based on dollar values assigned to the "material degradation of a natural resource".[22/] Attempts to quantify such costs almost always will unduly complicate and prolong the sentencing process, and therefore should be left to be addressed by civil remedies. Attempts to quantify so-called "non-use values" in particular should be avoided.

1. Avoid Undue Delay and Complication

Virtually any future "material degradation of a natural resource" resulting from an environmental violation, as described by the Draft, can be subjected to an action by one or more natural resource trustees to recover damages under Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") or under the Oil Pollution Act of 1990

21/ Jasbinder Singh, "EPA's Narrow Definition of Economic Benefit Vastly Increases Its Economic Benefit Estimate", 23 Envtl. L. Rep. 10,121 (Envtl. L. Inst.) (Mar. 1993).

22/ Draft, Step I, Application Note 4.

(the "OPA").[23/] Exceptions include damages from those very few pollutants that are neither "hazardous substances" as defined under CERCLA nor "oil" as defined under the OPA.[24/]

However, it is clear from Department of Interior regulations[25/] and from experience that the quantification of natural resource damages is a slow, expensive, complex, and controversial process. Such calculations for sentencing purposes would involve substantial expense and delay, disproportionate to the benefit to the sentencing process.

Even if such costs arguably are "reasonably quantifiable" in certain cases, they are better quantified by the authorized natural resource trustees (such as the U.S. Department of the Interior, the National Oceanic and Atmospheric Administration, and state analogues) who have, or at least are in a good position to develop, expertise and consistency in making such calculations, unlike prosecutors and federal district courts. If none of the authorized trustees choose to seek recovery of natural resource damages under CERCLA or the OPA, such as because the quantification effort would not be justified by the damages at stake or for other reasons, neither should the criminal

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[23/] 42 U.S.C. § 9607(a)(4)(C); 33 U.S.C. § 2702(b)(2)(A); 40 C.F.R. § 300.600.

[24/] 42 U.S.C. § 9601(14); 33 U.S.C. § 2701(23).

[25/] See 43 C.F.R. Part 11 (governing natural resource damage assessments under CERCLA). Parallel regulations to govern natural resource damage assessments under the OPA have been proposed but not yet promulgated by the National Oceanic and Atmospheric Administration ("NOAA"). 58 Fed. Reg. 4601, 4602 (Jan. 15, 1993).

justice apparatus entangle itself in that quantification process.[26/]

2. Do Not Include "Non-Use" Values

If, contrary to the above recommendation, natural resource damages are made part of the cost calculation, their quantification at least should exclude so-called "non-use" or "passive-use" values (such as so-called "existence value", "option value", and "bequest value"). Studies have shown that the "contingent valuation" method that has been used to assign dollar amounts to these values, which relies on opinion surveys, is grossly unreliable; it creates internally inconsistent and greatly overstated estimates of such values.[27/] Even more than for other theoretical components of natural resource damage values, attempting to quantify these so-called values would violate the principles of both consistency in sentencing (because of the wild variations possible from these unreliable techniques) and fairness (because of their tendency to overstate). Even if a reasonably accurate contingent valuation survey could be conducted under procedures that might be developed in the future, the process clearly would be so time-consuming and expensive as to be impractical for sentencing purposes.[28/]

[26/] See also the related point at I.C. above regarding double recovery.

[27/] See, e.g., Report of the NOAA Panel on Contingent Valuation (58 Fed. Reg. 4601 (Jan. 15, 1993)), and articles cited therein.

[28/] See id. at 4610-4614.

C. Double Payment of Costs Generally Should Not Be Required

Costs resulting from an offense also generally should not be recovered as part of a criminal fine where the same costs would be recovered twice. Specifically, costs borne by others should not be part of the base fine calculation in any case where such costs either (1) will be recovered from the offender through other components of the sentence, such as through an order for restitution or remediation or (2) are likely to be recovered in a civil suit or other proceeding separate from the sentencing proceeding. The potential for double recovery may be larger in the environmental area than for traditional crimes. As discussed above, environmental statutes generally authorize substantial civil penalties, create broad remedial authorities such as under CERCLA,[29/] and create an extensive agency infrastructure to implement those provisions.

Such double-recovery or double-punishment might be justified in particularly egregious cases to serve the purposes of deterrence or punishment, such as in cases involving willful wrongdoing. But in other cases, such as those involving little culpability, double recovery would be excessive and without justification in terms of either deterrence or punishment.

29/ 42 U.S.C. §§ 9606, 9607.

D. Costs Attributable to the Offense Should Not Set a Floor for the Base Fine Unless the Loss Was Caused Intentionally, Knowingly, or Recklessly

Even when costs attributable to the offense are sufficiently quantifiable, they should not be a basis for a fine except "to the extent that the loss was caused intentionally, knowingly, or recklessly", as stated in existing § 8C2.4(a)(3). For this sentencing purpose, "intentionally" and "knowingly" should not be understood to refer to mere "general intent", i.e., that the defendant knew or was conscious of his actions. Rather, in this context, "specific intent" should be required, meaning that the offender either intended to cause the loss or knew that the act was illegal.

No reason is articulated in the Draft for treating environmental offenses differently from all other offenses. If this deviation from precedent is based on an assumption that large fines may be both necessary and effective to deter certain types of violations, that rationale should be articulated and subjected to public comment. In fact, that assumption is not valid for all or even most environmental offenses, as discussed below.

A need for deterrence may justify including costs in the fine basis, in cases of calculated wrongdoing. But it is not clear that one generally can or should try to deter strict-liability or negligence offenses, which essentially are caused unintentionally, not consciously chosen by the offender.

Similarly, a fine based on costs resulting from a strict-liability or negligence offense may be too large to be justified by a punishment rationale. If, for example, large harms result from a faultless accident or careless error, a fine as large as these costs may be so large as to constitute excessive and unfair punishment. Therefore, in cases of negligence or strict liability, costs should be addressed in a criminal sentence (if at all) only in the context of restitution or remedial orders.[30/]

E. Costs Borne by the Defendant Should Not Be A Component of a Fine

The Draft requests comment on whether costs borne by a defendant should be part of the cost component of a base fine. We can not imagine any reason to include such costs in the base fine calculation, except as an offset to the defendant's economic gain. To the extent a defendant incurs such costs, taxing the defendant again for such costs as part of a criminal fine has no apparent basis in deterrence, just punishment, or other sentencing principles.

F. Economic Gain Should Not Include Profits Unrelated to Wrongful Aspects of the Offense

It is not clear why the already-defined term "pecuniary gain"[31/] should be replaced by the new term "economic gain" in Step I(a)(1) of the Draft. At a minimum, the concept of

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[30/] See 18 U.S.C. §§ 3551, 3556 and U.S.S.G. §§8B1.1, 8B1.2 (authorizing restitution and remedial orders).

[31/] See U.S.S.G. §8A1.2, comment. (n.3(h)).

"economic gain" should be consistent with the use of "pecuniary gain" in existing §8C2.4(a)(2).

If for some reason a new term such as "economic gain" needs to be defined for corporate environmental sentencing guidelines, the definition in the Draft should be more clearly limited to profits resulting from the wrongful aspect of the offense conduct. Although we infer that this was the Draft's intent, our concern is that the phrase "profits directly attributable to the offense conduct" in Application Note 3 could be read too broadly, particularly when violations take place in connection with legitimate, economically productive activity.

For example, if a company manufacturing consumer products omits certain labelling required on a product, the "offense conduct" may be defined under the relevant statute as the sale of a mislabeled product.[32/] A prosecutor might argue that all profits resulting from the sale of that product therefore result from the "offensive conduct" and should be recovered in a fine. However, that clearly would be an unfair and arbitrary result if none or only a small portion of those profits can be attributed to the omission of the label.

Similarly, construction of a "major source" or "major modification" in an air quality attainment area is prohibited under the Clean Air Act prevention of significant deterioration

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32/ See, e.g., 58 Fed. Reg. 8136, 8169 (Feb. 11, 1993) (to be codified at 40 C.F.R. §§ 82.124) (prohibiting the introduction into interstate commerce of a product containing or manufactured with ozone-depleting substances such as chlorofluorocarbons, unless in compliance with specified warning requirements).

("PSD") program, unless the facility first obtains a preconstruction permit.[33/] As a part of the PSD permitting process, a facility generally must install the "best available control technology".[34/] If a company expanded a facility without obtaining a PSD permit for its facility modification, it might be appropriate for the company to disgorge through a fine the amount of money that it saved by doing so. Those savings might include, for example, the deferred cost of not having to install the best available control technology. If the appropriate technology were installed during the modification, the savings still might include the avoided cost of preparing the permit application and the savings resulting from a quicker construction start. There would be no justifiable basis, however, for recovering all profits attributable to the increased sales due to the plant expansion. Application Note 3(h) of the Draft should clarify this point.

G. Economic Gain Should Not Routinely Be Combined With Costs Attributable to the Offense

Step I(a)(1) of the Draft states that "the economic gain plus costs directly attributable to the offense" should set a floor for the base fine. This is fundamentally and radically different from the approach in the existing guidelines, at §8C2.4, which uses only the larger rather than the sum of these

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33/ 42 U.S.C. § 7475(a); 40 C.F.R. § 52.21.

34/ 40 C.F.R. § 52.21(j).

two as a floor for the base fine.[35/] The Draft does not explain why environmental violations should thus be treated differently from all others; nor is any reason for doing so apparent to the Coalition.

There may be certain cases where imposing such a fine would be appropriate. For example, where a company's management violated the law in a calculated decision to save money with awareness of the risk of damages to others, a fine as large as the sum of the two amounts might be appropriate (1) to remove ill-gotten gains; (2) to provide sufficient deterrence; and (3) to reflect the seriousness of the offense and provide just punishment. But, to paint a different picture, if a low-level employee contrary to company instructions violated a regulation, and the damages resulting were truly unexpected and unforeseeable, those different circumstances should be treated differently from the prior example; i.e., the fortuitous costs resulting should not necessarily be the basis for a fine.[36/]

If Step I(a)(1) is modified to conform to §8C2.4, as we recommend, the ability to in effect double the larger of the offender's gains or the offense's costs could still be preserved

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[35/] 18 U.S.C. § 3571(d) authorizes a fine up to double the "gross gain" or "gross loss", whichever is larger, so a fortiori there may be statutory authorization for a fine equal to the gain plus the loss. But Section 3571(d) merely says that such a fine "may be" imposed, leaving the other considerations that guide sentencing free to operate.

[36/] In addition, I.A through I.F above discuss other particular categories of cases where costs should not be a component of a base fine.

for appropriate circumstances. Specifically, one could do so only at the stage of applying aggravating factors. We would recommend doing so in cases that reflect high degrees of culpability.

H. Not All Multi-Day Violations Should Be Treated the Same

Some statutes authorize penalties to be assessed for each day of violation (e.g., 42 U.S.C. §§ 6928(d), 7413(e)(2)). When a single violation extending over multiple days can be treated under the statute as a separate violation each day, the guidelines should not create a presumption in favor of, but rather should prohibit, simply multiplying the penalty applicable to a single violation by the number of days. Judges should retain broad discretion to deal with the varying kinds of multi-day penalties. If guidelines are created to govern this question, something analogous to the existing rules at Chapter 3D for grouping multiple counts should be used.

The degree of culpability in multi-day cases often is not proportional, if it is related at all, to the number of days. For example, in some cases a multi-day violation will result from a single act or omission which goes uncorrected for a number of days. The failure to discover and correct the violation may merit a somewhat larger penalty the more time passes, but not the same penalty as if the original act was repeated each passing day.

In addition, the degree of harm resulting from an offense often is not related to or at least is not directly proportional

to the number of days the offense continued. For example, once one improperly fills a wetland, the harm after 100 days is at most slightly larger than the harm after one day; it certainly is not 100 times larger.

Simply multiplying the maximum penalty times the number of days of violation can quickly lead to an authorized fine that would be astronomical and shockingly inappropriate in many cases, particularly in cases involving relatively low degrees of culpability. For example, at $50,000 per day (e.g., 42 U.S.C. § 6928(d)), a violation under RCRA continuing for one year is equivalent to a potential fine of $18.2 million. Even more extreme, a corporation's "knowing"[37/] failure to make a report required under the Clean Air Act can in theory be fined at up to $500,000 per day,[38/] or $15 million per month for a late report. Such massive penalties almost always are grossly disproportionate to the harm committed. Indeed, even EPA's civil penalty policies generally renounce "stacking" per-day penalties in this manner.[39/]

37/ As noted above, through the theory of respondent superior, the knowledge of a single errant employee can be imputed to the corporation.

38/ See 18 U.S.C. § 3571(c)(4) and 42 U.S.C. § 7413(c)(2)(B).

39/ See, e.g., Clean Air Act Stationary Source Civil Penalty Policy at 12 (Oct. 25, 1991) (reflecting the duration of a violation by adding to the "gravity component" of a base fine an amount ranging from $5,000 for the first month to $55,000 for the fifth year); RCRA Civil Penalty Policy at 22-25 (Oct. 1990) (similarly, adding between $100 and $5,000 per day after the first day of a continuing violation, although statute permits

(continued...)

Although Comment 1 to Step I of the Draft authorizes the sentencing court to reduce excessive repetition of "counts" to "a representative number" to avoid over-punishing such multi-day violations, this authority may not apply if a multi-day violation is charged as one count with a large (multi-day) penalty. In other words, it is not clear that even this limited authority granted by the Draft to deviate from large "statutory maximums" piled up through count proliferation would apply to the multiple-day issue. This may be only a technical oversight in the Draft, but its consequences are drastic.

Even to the extent that the Draft grants count-reducing discretion to the sentencing court, it says at Comment 3 that such authority should be used "sparingly". However, the huge authorized penalties that can accumulate from even a relatively minor violation are so disproportionately large that one should not attach any presumption of correctness to them. Instead, courts should have a free hand to make as much or as little use

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[39/](...continued)
assessment of up to $25,000 per day); [TSCA] Inventory Penalty Policy at 4-5 (June 23, 1980) (disavowing use of per-day civil penalty assessments for violations because "[s]uch an approach ... would result in excessive penalties"); see also Final Penalty Policy for Sections 302, 303, 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation and Liability Act at 20-21 (June 13, 1990) (allowing per-day penalty assessments at the discretion of the enforcement team); Polychlorinated Biphenyls (PCB) Penalty Policy at 13-14 (Apr. 9, 1990) (fines of $25,000 per day for continuing violations can result in "an excessive penalty in the absence of aggravating factors such as a history of violations or a risky storage environment").

of the multi-day penalty authority as seems called for in light of all the circumstances.[40/]

If the Commission ever attempts to create binding environmental sentencing guidelines, existing §3D1.4 and the rest of Chapter 3D illustrates how one could address multi-day violations without either (1) mandating or encouraging inappropriately high base fines or (2) leaving judges with unlimited discretion. The Coalition will not attempt here to specify the exact formula that should be used. But Comments 1 and 2 in the Draft identify some relevant factors that could play a role in the calculation (e.g., the extent which (1) there were independent volitional acts; (2) a violation continued after being discovered by management; (3) there was a negligent failure to discover; and so on). Low-culpability offenses should rarely if ever merit a multi-day fine.

I. The Maximum Statutory Fine Should Not Be a Starting Point

The maximum statutory fine should not be the starting point from which one "counts down" to calculate a base fine. Instead, one should "build up" a base fine from components reflecting the nature of the offense. Using the maximum statutory fine as the starting point often will lead to penalties not commensurate with the offense.

40/ See, e.g., United States v. Louisiana-Pacific Corp., 682 F. Supp. 1141, 1164-66 (D. Colo. 1988) (recognizing the complexity of the PSD program, as well as other mitigating factors, court declines to impose the maximum civil penalty of $25,000 per day for over one year of violations and instead imposes penalty of only $65,000).

First, as outlined above, if multi-day penalties apply, then the "maximum statutory fine" often becomes so ridiculously high, and so imperfectly related to either the seriousness of the offense or the culpability of the violation, that it is nonsensical as a starting point for base fine calculations.

Second, even if the multi-day problem were eliminated, some single-day penalties are so large as to be inappropriate starting points for evaluating some offenses.[41/] For example, most violations of the Clean Air Act involve actual releases, such as releases that exceed emissions rates set by a permit. Step I(a)(2) of the Draft would appear to lump all actual releases under offense type (b), which has a penalty range of between 60% and 90% of the statutory maximum. Sixty to ninety percent of one statutory maximum, $500,000,[42/] is $300,000 to $450,000. It is inappropriate for the Draft to mandate these large numbers (even the low end of that range) for trivial releases.

The latter example also illustrates a third problem with the Draft's base fine table: it does not adequately distinguish between the trivial and the disastrous. In other words, penalizing the illegal release of a drop at $300,000 does not provide a sufficiently different sentence from the $450,000 fine that would apply to a very large release. The base fine table

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41/ See, e.g., 18 U.S.C. § 3571(c) and 42 U.S.C. § 7413(c) (making many offenses under the Clean Air Act punishable at up to $500,000 per day).

42/ See id.

therefore violates the goal of proportionality in sentencing (i.e., treating different offenses differently).

II. Aggravating and Mitigating Factors

A. Aspects of the Offense Should Not Be Used As Aggravating Factors

Several proposed aggravating factors relate to the seriousness of the offense and not necessarily to the culpability of the offender (i.e., Step II(b) ("Threat to the Environment"), (c) ("Threat to Human Life or Safety), and (j) ("Absence of a Permit")). Such factors should be included instead in the base fine, and adjustments to the base fine should be based on degrees of culpability.

Such an approach would more closely parallel the approach in existing Chapter Eight for other offenses by organizations (i.e., separating characteristics of the offense into one phase and characteristics of the offender into another phase, then essentially multiplying the resulting two components together to obtain the ultimate penalty range). Partly for that reason, it would be easier for parties to understand such an approach, predict its effects, and apply it in sentencing proceedings.

The Draft's approach sets the stage for double-counting. For example, whether an offense was committed which "knowingly" affects both (1) which offense type is applied in Step I and (2) whether the aggravating and mitigating factors at Step II(d) and (m) apply.

As another example of the double-counting problem, absence of a permit is listed in the Draft as an aggravator, but it may

be the underlying offense. Obviously it makes no sense to have an action which serves both as an offense and as the offense's own aggravator.

B. Violation of an Order Should Not Be an Aggravator

Violation of an order should not be treated as an aggravating factor in cases where as a practical matter it is necessary to and is in good faith intended to obtain judicial review. In such cases, violation of an order does not indicate contempt for the law or a high degree of culpability, but instead is a necessary mechanism to test challenges made in good faith to the agency's claim of authority.

Many courts have held that a company cannot obtain pre-enforcement review of an agency compliance order under the Clean Air Act.[43/] For instance, in the Fry Roofing case, EPA ordered the facility to abate its emission of visible smoke, which EPA claimed was exceeding opacity restrictions set forth in the applicable regulations. The company believed it was complying

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43/ E.g., Lloyd A. Fry Roofing Co. v. EPA, 554 F.2d 885 (8th Cir. 1977) (denying pre-enforcement review of compliance order under Clean Air Act); Asbestec Constr. Serv., Inc. v. EPA, 849 F.2d 765 (2d Cir. 1988) (denying pre-enforcement review of order demanding that asbestos-removal company follow stringent requirements to minimize asbestos emissions); Solar Turbines Inc. v. Seif, 879 F.2d 1073 (3d Cir. 1989) (declining review of order requiring company to cease construction of new facility); Union Elec. Co. v. EPA, 593 F.2d 299 (8th Cir.) (declining to review EPA notice of violation for sulfur dioxide emission standards, despite fact that company had filed for variances from the standards with state regulators), cert denied, 444 U.S. 839 (1979). But see Conoco Inc. v. Gardebring, 503 F. Supp. 49 (N.D. Ill. 1980) (granting review of EPA notices of violation, noting that review is not meant to delay enforcement of applicable regulations, but rather to determine the validity of EPA's interpretation of its regulations).

with an exemption to the opacity restrictions and therefore sought judicial review of the order. The court however held that the company could not obtain judicial review of the merits of its defense except by violating the agency order.[44/] Such judicial interpretations put facilities in the difficult position of having either to comply with an order that may impose expensive requirements or to violate the order and risk daily civil penalties in a subsequent enforcement action. If such violations are criminally prosecuted at all, the court therefore should have the discretion to impose a reduced or zero penalty in appropriate circumstances.

C. Scienter Should Be Given Great Weight

Different degrees of scienter are used as an aggravating factors at Step II(d) and as a mitigating factor at Step II(m). Fundamental distinctions certainly should be made based on degrees of scienter and courts should retain the discretion to impose no penalty in cases of low culpability. The issue of scienter seems to us so important in distinguishing between various nominally criminal offenses that perhaps scienter should be a major consideration in selecting the base fine level, rather than treating it merely as an aggravating or mitigating factor.

The Comment in the Draft regarding Step II(d) should recognize another consideration not listed there. Take for example the common scenario of a company which finds that its air pollution control devices are not meeting the levels of

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44/ 554 F.2d at 887-91.

efficiency required by permit or violation. After various efforts to investigate and fix the problem that do not succeed, the company may then notify the relevant regulatory agency, order new equipment, and install the new equipment to correct the problem. Most people would consider this course of action reasonable and responsible, not deserving of a civil penalty, and certainly not of a criminal penalty.

However, continuing to operate the plant while unable to meet the emission limits technically could be considered (and prosecuted) as a "knowing and willful intent to violate the law", even where shutting the plant down for months is the only alternative. A violation evidencing such intent "merits the greatest enhancement", according to the Draft's Comment to Step II(d). If for whatever reason a prosecutor sought and obtained a criminal conviction for this sort of non-covert, low-fault, low-harm type of violation, the judge should retain the discretion to treat this as a low-culpability matter, meriting nominal or potentially no penalty. Judges should retain similar authority in other types of offenses that involve little scienter or other types of culpability.

D. Prior Civil Compliance History

Step II(f) states that prior civil adjudication should be considered only to the extent that it evidences both (1) "similar misconduct" and (2) "a disregard by the organization of its environmental regulatory responsibilities". These are important limitations that should be retained, if prior civil noncompliance

is made an aggravating factor. Below are some specific factors that should be recognized by the guidelines and by sentencing courts applying these limitations on what constitutes relevant prior civil noncompliance.

First, as the Draft seems to recognize at Comment 1, a large corporation subject to many complex environmental regulations may well have a record of some prior violations, despite strenuous good faith attempts to ascertain and comply with the law. An environmental violation at one of many facilities, particularly if a relatively minor violation, does not necessarily imply that all other facilities are or should be on notice, or that a subsequent violation of the same type by another facility therefore indicates a callous disregard for the law. The implication of prior violations should be viewed in the full context, including the scope and structure of the organization.

Similarly, the history of corporate succession can be important in evaluating the relevance of a prior offense. If one company or business is acquired by another, the pre-acquisition compliance history of the acquiree should not automatically be treated as if it was the compliance history of the acquiror. It is not necessarily reasonable to expect that the facilities of the acquiror would be aware of the prior violations of the acquiree, and therefore be on special alert to avoid repeating them. Further, to automatically burden companies with the compliance histories of the companies they acquire could deter

acquisitions of troubled companies by more stable companies, which can be an efficient means of reforming "bad actors".

The Draft asks whether a consent decree should be considered to be a prior adjudication for purposes of this aggravating factor. A consent decree should not be so counted. First, to do so would discourage settlements.[45/] Second, it also would improperly assume that a consent decree indicates a violation. Consent decrees typically include a statement that the party settling with the government does not admit that a violation occurred. In fact, in many cases a valid dispute may exist over a question of fact or law that determines whether a violation occurred, but the facility nevertheless agrees to settle to achieve repose and avoid litigation costs. If such settlements will prejudice a company in potential future sentencing proceedings, companies will litigate more often and will settle less often than before.

45/ The same consideration applies to plea bargains and nolo contendere pleas in the criminal context. We suggest evaluating (1) the extent to which the existing sentencing guidelines have decreased defendants' willingness to enter into plea bargains and (2) the resulting additional burden on the justice system.

III. Commitment to Environmental Excellence

As a preliminary matter, we are concerned that the phrase "environmental excellence" as used in the caption of Step II(k) could be interpreted to mean that only a certain percentage of all companies could have a compliance program that would qualify for this mitigating factor. We urge a clarification that Step II(k) sets out an absolute rather than a relative standard. We see no reason why most or all companies in an industry should not be able to implement compliance programs that would merit mitigation of potential penalties. Our more specific comments on the standard as defined in Step III are outlined below.

A. Environmental Compliance Should Not Be Subject to a Special Set of Criteria

Whatever standards are developed to evaluate worthy compliance programs should be just that: standard, across all compliance areas. Many companies already have refined their compliance programs, created internal guidance documents, and communicated these guidelines throughout the corporation in reliance on the existing Commentary regarding what constitutes an effective compliance program.[46/] These efforts should not be rendered obsolete without a compelling reason.

Further, creating differing criteria for different management issues (environmental, worker health and safety, food and drug, etc.) is unnecessarily awkward and burdensome and may even become internally inconsistent. Instead, it will be much

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46/ U.S.S.G. § 8A1.2, comment. (n.3(k)).

easier, and more effective in the long run, for management to communicate one set of compliance program principles to all employees.

This is particularly true because the boundaries between various compliance areas are neither clear nor fixed. For example, many companies manage environmental and health and safety programs jointly; some do not. As a further example, a staff sanitarian applying pesticides at a food processing facility simultaneously implicates (1) environmental, (2) health and safety, and (3) food and drug regulatory compliance issues. Clearly, it would be wholly unworkable to have one set of internal reporting rules (for example) for one compliance topic, and a slightly different set for another topic.

Therefore, criteria with binding effect in the guidelines should be general enough to apply to all compliance areas. If any special considerations are worth noting for one area, such as the environmental area, they should be articulated at most as policy statements.

B. Sentencing Guidelines Should Not Attempt to Micro-manage Organizations

Sentencing guidelines should give incentives for and credit to good faith efforts to implement effective programs, but should not stifle creativity by legislating in the area of business management. Steps II(k) and III seem to micro-manage a corporation's design of an effective environmental compliance program. A mitigating factor certainly should exist for good faith, well-calculated programs, but should allow more

flexibility than Step III currently does for recognizing alternative approaches. The existing sentencing guidelines and the DOJ policy regarding exercise of prosecutorial discretion[47/] reflect a more appropriate level of detail.

This micro-management is contrary to the best recent trend in environmental regulation, which is to set a general performance standard or overall pollution reduction goal and then let the market and the ingenuity of American industry find the best way to meet that standard or goal. This philosophy has been endorsed by environmental groups, the Administration, and Congress, as reflected in examples such as the allowance trading programs to reduce acid rain; encouragement of market-based trading mechanisms (including economic incentives such as fees and marketable permits) under the 1990 Clean Air Act Amendments for nonattainment areas, and the new operating permit rules; "offsets" and "bubbles" utilized in the New Source Review program; and credits for early emission reductions under the 1990 air toxics provisions.

For example, Step III(b) requires a corporate policy requiring that "employees report any suspected violation to appropriate officials within the organization, and that a record be kept by the organization of any such report". But what if, for example, a company had a decentralized (sometimes known as a

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47/ U.S. Department of Justice, "Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violator" (July 1, 1991).

"quality circle") approach that delegated to groups of manufacturing employees the authority to (among other things) directly correct a violation, and that approach generally was very effective for that company? Why should that company's decentralized approach -- its standard, effective way of doing business -- have to be modified, with perhaps disruptive effects? This example merely illustrates that, even though much of Step III may seem reasonable at first blush, one can not sufficiently anticipate the number of other ways that organizations could find to achieve the same ultimate goals equally well or better.

Similarly, why must Step III(b) as quoted above create a new records-creation rule and records-retention policy for this particularly type of report, which could be inconsistent with records retention policies that otherwise apply generally throughout the company?

As another example, Step III(c) calls for multiple redundant monitoring methods, ranging from continuous monitoring, to scheduled inspections, to random (in some cases "surprise") inspections. In some cases, such multiple redundancy will be obvious overkill. In addition, some of these methods may be inappropriate in particular circumstances. For example, some companies have found surprise inspections to be no more effective at detecting problems than scheduled inspections, and have found the latter to be much more effective at educating those being evaluated and fostering a shared commitment to environmental compliance.

Further, union contracts or other legal constraints may delay or otherwise limit management's ability to implement some of the specific procedures called for by proposed Step III.

Finally, we are concerned that it may not be possible as a practical matter to gain the benefit of Step II(k). One can expect some prosecutors to focus on the offense in question in an attempt to show that the compliance program was not good enough to earn this mitigation credit. (Specifically, the prosecutor could argue that the offense shows that management's prior determination that its compliance program would "achieve and maintain compliance" must not have been a "reasonable" determination, therefore eliminating this as a possible mitigator.)[48/] Of course, if such an argument routinely succeeded, it would render Step III(k) a nullity. The provision therefore should be reworded or a stronger commentary should be added to require looking at the compliance effort as a whole, and not give undue weight to the exceptional problem.

[48/] Comment 3 to Step III states that, if an organization reasonably believed its program was sufficient, then mitigation should be applied "even though that commitment proved insufficient to prevent the offense of conviction". However, a stronger comment is needed to correct the tunnel vision that may result from focusing on the case at hand. The latter tendency is suggested, for example, in DOJ's 1990 comments criticizing a proposed mitigation factor based on overall compliance program efforts. DOJ then complained that "these programs are easily produced on paper and shown to a court but, by definition, have failed to prevent a violation." 1990 DOJ Statement, supra, n.20, at 1-7.

C. Excessive Documentation Requirements Should Not Be Imposed

The Draft's Comments 1 and 3 seem to demand pre-offense documentation of all elements of the compliance program since little other evidence of the program appears acceptable. The Draft recognizes the differences between large and small companies in Comment 2 regarding methods of compliance, but unlike the existing guidelines, it seems to expect the same degree of program documentation from all sizes of companies. This is unnecessarily burdensome and unrealistic. The Draft instead should accept alternative types of evidence, including testimony, particularly from smaller companies.[49/]

IV. General Limitations

A. There Should Not Be a 50% Cap on the Cumulative Effect of Mitigating Factors

The 50% cap on the cumulative effect of mitigators in Step IV(a) of the Draft is short-sighted, unfair, and simply indefensible. It is short-sighted because it will reduce or eliminate the effectiveness of those mitigating factors that presumably are intended to create incentives for desired behavior.[50/] It is unfair because it leaves insufficient room within the guidelines to reduce penalties for nominally criminal

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[49/] Of course, pre-offense program documentation may be more persuasive in a defensive context than after-the-fact testimony. But such degrees of credibility can be weighed by the sentencing court in deciding whether to apply this mitigator.

[50/] E.g., Steps II(k) ("Commitment to Environmental Excellence"), II(l) ("Cooperation and Self-Reporting"), and II(n) ("Remedial Assistance").

offenses with very low degrees of culpability. It is indefensible to deviate so extensively from the existing guidelines for other offenses without a compelling rationale for that difference in approach.[51/] We question whether so restricting a judge's ability to fit a sentence to the relevant characteristics of the offense and the offender would satisfy Constitutional requirements of due process. Mitigators instead should be allowed to have substantial effect, as under existing Chapter Eight.

B. There Should Be a Cap on Aggravators

There should be a cap on the cumulative effect of aggravators, just as there is for mitigators. The maximum total effect of all aggravators should be predictable and designed-in, to achieve the statutory purpose of predictability and certainty in sentencing.

As a drafting matter, it may be more manageable to abandon the approach of using percent adjustments to the base fine as presently used in Step II, and instead to follow the example of the existing guidelines at §8C2.6 and establish a range of possible multipliers.

[51/] The existing sentencing guidelines for corporations allow mitigators to reduce a base fine to as little as 5%. U.S.S.G. §8C2.6.

V. Probation

We see no reason why the existing guidelines regarding probation for corporations, which currently apply to environmental offenses, should be modified. Our specific concerns about the Draft's proposed revisions are outlined below.

A. The Government Should Not Overuse Compliance Program Probation Conditions

The sweeping authority granted by Step V invites overuse. Step V provides the government with the authority to hire consultants to study a company's compliance program and to design and monitor the implementation of a new one, all with an eye towards the supposedly ideal set of program principles set out in Step III. This may create a powerful incentive for EPA to find violations as an excuse to "reform" companies. It is all too easy to foresee courts, overburdened and uninterested in getting mired in the details of management systems, then rubber-stamping the requests of DOJ (on behalf of EPA in particular) for aggressive use of this authority. That would result in unnecessary costs being piled on the offender (both out-of-pocket costs and management costs).

B. Courts Should Retain Discretion Regarding When to Impose Compliance Program Conditions

The guidelines should never mandate an overhaul of a company's compliance program, but rather should allow the court to determine when such an effort is necessary. Several deviations of a few words each from the existing sentencing guidelines combine to push the sentencing court into authorizing

the offender-funded, government-driven makeover. The "necessary" threshold in §8D1.1 of the existing guidelines has been lowered to "advisable" in Step V(a); what was a "Policy Statement" in §8D1.4 has become a requirement at Step V(c)(4); and "may" in §8D1.4 has become "shall" in Step V(c)(4). The court should remain free to tailor probation requirements to the needs of the particular case.

C. Courts Should Retain Discretion Regarding the Scope of Compliance Program Conditions

The guidelines should not routinely require an across-the-board overhaul of a company's compliance program, but rather should encourage the court to determine the necessary breadth of such an effort. An environmental violation often may be traceable to specific problems in one aspect or area of a company's compliance program, rather than indicate that the entire program is ineffective. Although Step V(c)(4) refers to what the court "deems necessary", any guideline or policy statement that is developed specific to environmental offenses should contain more explicit recognition that probation conditions focused on the known problem often will be appropriate.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 273-4500
FAX (202) 273-4529

July 18, 1994

MEMORANDUM:

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

FROM: Mike Courlander

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

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

COALITION FOR CLEAN AIR IMPLEMENTATION

2300 N Street, NW
Washington, DC 20037
(202) 663-8879
(202) 663-8007 Facsimile

July 13, 1994

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

Dear Sir or Madam:

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

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

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

Sincerely,

Quinlan J. Shea, III 105

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

Enclosure

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

The Coalition for Clean Air Implementation
2300 N Street, N.W.
Washington, D.C. 20037
(202) 663-8879

July 13, 1994

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

July 13, 1994

INTRODUCTION

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

American Automobile Manufacturers Association

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

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

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

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

Association of International Automobile Manufacturers

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

American Forest & Paper Association

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

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

American Iron & Steel Institute

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

American Mining Congress

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

American Petroleum Institute

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

SUMMARY OF ARGUMENTS

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

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

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

DISCUSSION

I. The November Draft is Fundamentally Flawed

A. Problems Carried Over from the March Draft

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

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

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

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

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

4/ November Draft, §9C1.2(a).

5/ Id., §9E1.2(b).

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

7/ November Draft, §9E1.2(c).

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

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

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

B. New Problems

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

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

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

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

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

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

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

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

2. The Offense Level Fine Table

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

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12/ U.S.S.G. §§8C2.5, 8C2.6.

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

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

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

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

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15/ November Draft, §9E1.1.

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

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

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

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

3. Repetitive Counts

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

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

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

20/ November Draft, §9E1.2(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

II. How the Commission Should Proceed

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

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

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

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

1. An Environmental Offense May Involve Little Scienter or Culpability

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

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

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

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

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

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

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

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

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

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

B. The Commission Should Define "Heartland" Offenses

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

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

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

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

C. The Commission Should Evaluate Sentencing Practice to Date

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

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

28/ See note 23, supra.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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33/ Id. at 11.

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