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

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

CONCLUSION

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

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

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

P:\CLI\12\35\3006\MISC\COMMENT.2

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

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April 16, 1993

INTRODUCTION

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

American Automobile Manufacturers Association

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

Association of International Automobile Manufacturers

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

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

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

American Forest & Paper Association

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

American Iron & Steel Institute

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

American Mining Congress

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

The Coalition's Interest in Commenting

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATUTORY BACKGROUND

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

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

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

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

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

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

ISSUANCE OF ENVIRONMENTAL SENTENCING GUIDELINES IS NOT WARRANTED

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

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

9/ 18 U.S.C. § 3553(a).

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

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

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

[12/] See, e.g., 42 U.S.C. § 6906.

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

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

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

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

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

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

(continued...)

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]

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[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.

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April 6, 1994

MEMORANDUM:

TO: Chairman Wilkins
Commissioners
Senior Staff

FROM: Mike Courlander

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

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

CIEA
COALITION
FOR IMPROVED
ENVIRONMENTAL
AUDITS

March 31, 1994

Ms. Tracey Dickerson
U.S. Sentencing Commission
One Columbus Circle, N.E.
Suite 2500 -- South Lobby
Washington, D.C. 20002

Dear Ms. Dickerson:

On behalf of the Coalition for Improved Environmental Audits ("CIEA"), we submit the following comments on the U.S. Sentencing Commission's November 1993 working draft of recommended sentencing guidelines for organizations convicted of environmental crimes. The CIEA membership appreciates the opportunity to comment on these guidelines.

CIEA membership includes corporations and trade associations committed to establishing useful and effective environmental and health and safety auditing programs. To encourage such programs, CIEA advocates the creation of a legal privilege to protect against the unwarranted disclosure of environmental audits. CIEA's comments do not address the guidelines as a whole, but rather are specifically focused on the need for the guidelines to encourage environmental auditing through adoption of an environmental audit privilege.

COMMENTS

1. The U.S. Sentencing Commission Should Amend the Proposed Environmental Sentencing Guidelines to Specifically Include an Environmental Auditing Privilege

Given the growth and complexity of environmental laws and regulations, responsible organizations must utilize environmental audits as a tool to help ensure environmental compliance and avoid the risk of civil or criminal penalties. Environmental audits are "systematic, documented, periodic and objective reviews by regulated entities of facility operations and practices related to meeting environmental requirements." 51 Fed. Reg. 25,004 (July 9, 1986). Environmental audits are the best means for an organization to evaluate candidly its level of compliance and implement any corrective actions that are necessary to come into compliance.

Regulated entities are currently caught in a "Catch-22." On the one hand, in order to be truly useful to an organization, an environmental audit needs to be brutally honest in its evaluation of an organization's compliance status. Honest and objective reports are the best means to encourage organizations to make the necessary changes to bring them into

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compliance with environmental laws and avoid penalties. However, on the other hand, brutally honest auditing often puts companies at risk that outside sources will use the internally prepared environmental audits to the detriment of the organization that prepared the audit. Under the current laws in most jurisdictions, enforcement officials and private plaintiffs may obtain an organization's environmental audits and use them to prove both the existence and corporate knowledge of environmental violations. As a result, many organizations have been deterred from performing effective and candid self audits, thereby depriving themselves, the surrounding community and the environment of the benefits that audits provide.

To extract the full benefit from an environmental audit, an organization must be able to candidly evaluate its environmental performance without fear that the information will be used by outside sources, especially by government agencies to bring enforcement actions. The only way to accomplish this goal is for the courts and government agencies to establish a legislative privilege for environmental audits.

The creation of an auditing privilege would encourage the very type of auditing envisioned by the U.S. Environmental Protection Agency and the U.S. Sentencing Commission. The creation of an audit privilege would allow organizations to prepare objective audits that accurately critique an organization's compliance status without the fear that the information would be used against them. This, in turn, would foster "full and frank" communications within an organization, leading to higher levels of environmental compliance.

CIEA members support the Commission's recognition of the importance of environmental audits and the use of "frequent auditing" as a mitigating factor to lessen the penalty assessed against an organization convicted of an environmental crime. Pursuant to section 9C1.2 of the guidelines, a court, after determining a defendant's base fine, may mitigate the penalty if, among other criteria, the organization demonstrates that prior to the offense it was committed to environmental compliance. CIEA believes that a corporation which can demonstrate that it has adopted and implemented a comprehensive environmental compliance program that includes systematic environmental auditing, should be entitled to protection against the unwarranted disclosure of those audits. Anything less will result in audits which fail to achieve their intended purpose. The Commission should further encourage effective auditing by specifically providing for an auditing privilege. Such a privilege would end the uncertainties surrounding whether such audits are privileged or whether the information is discoverable, and give organizations the flexibility they need to effectively evaluate and correct any compliance problems.

2. The Commentary to Section 9C1.2(b) Should Clarify that an Organization's Failure to Disclose an Environmental Audit Would Not be Considered a Failure to Cooperate With the Appropriate Authorities

Section 9C1.2(b) provides that a court may reduce an organization's base fine by three to six levels if the organization can demonstrate that:

> (a) prior to an imminent threat of disclosure or government investigation, and (b) within a reasonably prompt time after becoming aware of the offense, [the organization] reported the offense to appropriate governmental authorities, [and] fully cooperated in the investigation. . . .

The Commentary to this section states that before a court may apply the three to six level reduction, the "court must determine that the organization has fully cooperated with the exception of supplying the names of individuals or privileged information." In addition, in order for the court to determine that an organization fully cooperated with the government authorities, it must also conclude that the organization "provided all pertinent information known to or ascertainable by it that would assist law enforcement personnel in identifying the nature and extent of the offense."

Because the laws in most jurisdictions do not recognize a privilege for environmental audits, pursuant to the Commentary, an organization that does not voluntarily disclose the results of its environmental audits would be precluded from having its base fine mitigated, even if that organization had implemented a systematic auditing program. Such a result would further discourage organizations from conducting useful environmental audits. If the only "benefit" derived from an audit program is to provide outside sources with information necessary to initiate a suit against the organization, then there is no incentive for an organization to conduct a thorough and accurate audit. Given the voluminous nature of environmental regulations, even the most environmentally responsible organizations, when audited, will periodically identify areas of non-compliance.

To encourage all organizations to implement auditing programs, the guidelines should be drafted in a way that encourages organizations to perform audits by rewarding those organizations that utilized audits prior to the violation that led to the conviction. Organizations that have implemented an auditing program should not be punished to the same degree as organizations that choose to forego auditing altogether.

Therefore, the Commission should amend the Commentary to 9C1.2(b) to establish that environmental audits are considered "privileged" for purposes of section 9C1.2(b), and that an organization that meets the criteria of this section remains eligible for mitigation, regardless of whether it discloses the actual auditing conclusions to outside sources.

3. The Commentary to Section 9D1.1 Should Clarify That Environmental Audits are Privileged And Are Not Subject to Disclosure

Pursuant to section 9C1.2, a court may mitigate an organizations criminal penalty provided that it determines that an organization, prior to the particular offense, was committed to achieving environmental compliance. In order for a court to conclude that an organization was committed to environmental compliance, it would have to determine that the seven factors established under section 9D1.1(a) were satisfied. Pursuant to section 9D1.1(a)(3), the court would have to conclude, *inter alia*, that the organization had designed and implemented, with sufficient authority, personnel and other resources, the systems and programs that are necessary for "frequent auditing."

The overriding purpose of section 9D1.1 is to encourage organizations actively to engage in those activities that help ensure environmental compliance and to reward those organizations that have implemented auditing programs. As discussed above, the best means to encourage auditing is to prevent outside sources from obtaining audits and using the audited information against an organization that is actively engaged in an effort to improve its compliance status. A qualified privilege would not shield organizations that perform "sham" audits, provided that such a privilege was tied to the determination that an organization was truly engaged in a remedial effort. For example, only those organizations that actively apply their audits to correct a given compliance problem as part of ongoing remedial efforts would qualify for the privilege. This can be assured if the company demonstrates compliance with the criteria for environmental compliance programs established under section 9D1.1(a).

A qualified audit privilege would encourage more organizations to implement auditing programs and result in less violations in the future. Moreover, as qualified, the privilege would not undermine the effectiveness of these guidelines by allowing organizations that are not otherwise committed to environmental compliance to qualify for an audit privilege.

Therefore, CIEA recommends that the Commission amend section § 9D1.1 to establish a qualified environmental audit privilege, provided that audits are prepared as a part of a comprehensive environmental compliance program that meets the requirements of section 9D1.1(a).

We hope that you find these comments helpful during your review of the working draft of the sentencing guidelines for organizations convicted of environmental crimes. If

you have any questions or would like us to provide additional information, please do not hesitate to contact us.

Sincerely,

JOHN L. WITTENBORN
STEPHANIE SIEGEL
Counsel

COMMENTS OF CATERPILLAR INC.

TO "PROPOSALS TO U.S. SENTENCING COMMISSION

BY ADVISORY WORKING GROUP ON ENVIRONMENTAL OFFENSES"

ISSUED NOVEMBER 16, 1993

Caterpillar Inc. appreciates the opportunity to submit its comments on the "Proposals to U.S. Sentencing Commission by Advisory Working Group on Environmental Offenses" issued on November 16, 1993 (the "Proposal").[1] In support of these

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[1]For purposes of this Comment, and for the convenience of the reader, the following terms are used:

Working Group	The Advisory Working Group on Environmental Offenses for the U.S. Sentencing Commission
Original Comments	Caterpillar Inc.'s Comments to the Draft Proposal submitted on May 10, 1993
Commission	The U.S. Sentencing Commission
Draft Proposal	The "Draft of 'Recommended Sentencing Guidelines Setting Forth Criminal Penalties for Organizations Convicted of Federal Environmental Crimes'" prepared by the Working Group and released for comment on March 5, 1993
Existing Guidelines	The current Sentencing Guidelines as applied to organizational crimes
Officials' Comment	Comments of Former Ranking Justice Department and EPA Officials on Draft Environmental Guidelines Prepared by Advisory Working Group on Environmental Sanctions
Dissent	Dissenting Views by Lloyd S. Guerci and Meredith Hemphill, Jr. dated December 8, 1993

Comments, Caterpillar has attached as Appendix A a "redline" version of the Proposal that highlights all differences between the text of the Draft Proposal and the current Proposal.

I. INTRODUCTION

Caterpillar believes that the potential impact of the Commission's work in this area cannot be understated, and appreciates the Commission's willingness to solicit comments on the Working Group's Proposal early on in its deliberative process. It is hoped that the Commission will bring a fresh perspective and approach to this issue and that any proposals issued by the Commission for comment will not repeat the mistakes of the Working Group. More importantly, it is hoped that the Commission will give serious consideration to the comments of Caterpillar and others, so that the process of soliciting comments will not be given the appearance of being a meaningless procedural hurdle.[2]

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[2] A review of the Redline shows that the Proposal contains almost no substantive changes from the text of the Draft Proposal, even after submission of over one hundred comments and the testimony of over 30 individuals that were almost universally critical of the Draft Proposal. Significantly, in the face of overwhelmingly negative comments, the only substantive change to the Draft Proposal's provisions concerning Compliance Programs, Probation and Aggravating or Mitigating Factors was the removal of scienter from consideration as an aggravating or mitigating factor. The actions of the Working Group, and its insistence on keeping its deliberations secret, suggest that its members have had no intention to take the pervasive and often thoughtful comments of interested parties into account in their deliberations.

Lamentably, lack of any substantive change in the Working Group's Proposal from its previous draft render Caterpillar's Original Comment to the Draft Proposal as applicable today as it was in May of 1993, and it has been attached hereto as Appendix B and is incorporated herein by reference in order to ensure that it is properly before the Commission. Caterpillar's remaining comments will highlight those areas of the Proposal that are of particular concern to Caterpillar.

II. CULPABILITY AND SERIOUSNESS OF THE OFFENSE

One of the fundamental flaws of the Draft Proposal is its failure to adequately address issues of culpability and the seriousness of the offense in question. The Draft Proposal fails to adequately address difficulties in applying the culpability of individuals within an organization to the organization itself, especially in areas where the individual is a "rogue" or where the individual's conduct occurred in spite of the best efforts of the organization to detect and prevent it.

Caterpillar's Original Comment pointed out many such defects in the Draft Proposal,[3] including the fact that the Draft Proposal's

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[3] Original Comment at 21-26. In its Original Comment, Caterpillar discussed the almost universal applicability of Aggravating Factors and the almost universal unavailability of Mitigating Factors under the scheme set forth in the Draft Proposal. Id. at 22-32. With exception of the deletion of the sections dealing with scienter, none of the aggravating or