and produces all reports containing the results, the contents of audits and internal investigations (whether or not they relate to the offense or the facility in question). Further, the government informs XYZ that if the privilege is not waived, it will be put to substantial effort and expense in preparing for sentencing hearings, etc. and that XYZ will therefore be deemed not to have cooperated with the government and will lose the "cooperation" credit as well. XYZ is thus in the "Catch-22" situation of either waiving both the attorney-client and the self-evaluative privilege or losing two otherwise available mitigation credits. It is even possible that the overly zealous prosecutor would seek an increase of the penalty due to the "aggravating factor" of lack of an effective compliance program.

Such a scenario has other implications which will go far beyond that particular action. In particular, waiving such privilege will have a chilling effect on the free flow of information in

future audits and internal investigations, and will hamper in-house counsel's ability to render legal advice to management or to correct undisclosed problems.[8]

These potential problems have existed with respect to the existing Guidelines, and were one of the bases for making the existing Guidelines inapplicable to corporate environmental penalties. These problems, however, have not been addressed in the Draft and should be addressed.

b. The Requirement that Standards And Procedures Must Be "Necessary" to Achieve Compliance

Under the existing Guidelines, organizations must establish standards and procedures that are "reasonably capable of reducing the prospect" of noncompliance. (§8A1.2, Application Note 3(k)(1)). Further, "[f]ailure to prevent or detect the instant offense, by itself, does not mean that the program was not

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[8] The Draft suggests that a corporation, as a part of its own disciplinary measures, may be required to report suspected misconduct on the part of its employees to appropriate regulatory authorities. (Step III(f)). Such a requirement would have a substantial chilling effect on internal reporting of problems, and especially of "negligence" crimes. For example, if a potential violation results from negligence and an employee knows that, by reporting it to his or her superiors, there is a chance that he or she will be turned over to the authorities for criminal prosecution, that employee will naturally be extremely reluctant to report the problem. Thus, the problem will go unremedied and may get worse over time.

effective." Id., Application Note 3(k).[9]

In Contrast, the Draft requires that the standards and procedures adopted by a corporation must be "necessary to achieve compliance" (Step III(a)).

The result is a requirement which, when applied in a real-world setting, renders the requirements of Step III unattainable. This requirement is especially burdensome given the complex compliance issues that large companies must address.

Further, this requirement would certainly not achieve any meaningful coordination between individual and corporate culpability. To the contrary, this provision states, in effect, that if an individual commits an environmental crime in his

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[9] The Draft also suggests that a corporation must require "that employees . . . report a suspected violation to appropriate officials within the organization, and that a record . . . be kept by the organization of any such reports" (Step III(b)) imposes a standard which is, for all practical purposes, impossible to meet.

In typical situations in large manufacturing plants, if someone accidentally punctures a drum containing hazardous materials or drops and breaks a bottle containing a hazardous material, it could be extremely difficult to ascertain his or her identity, especially if other employees become aware that the "at fault" employee's name may be given to government authorities if his involvement is later discovered (e.g., Step III(f) of the Draft suggests that as a "disciplinary mechanism", it may be necessary to turn the employee's name over to enforcement agencies). Further, it would be impossible, as a practical matter, to discipline an employee for failure to report a suspected violation.

capacity as an employee, any compliance program of the corporation employing him will automatically fail to meet Step III standards.

c. Management Involvement

The Draft also requires that "in the day to day operation of the organization, line managers, including the executive and operating officers at all levels, [must] direct their attention . . . to . . . improving the organization's compliance with environmental laws." Such managers would also be required to "routinely review . . . reports, direct the resolution of identified compliance issues, and ensure application or the resources and mechanisms necessary to carry out a substantial commitment." (Step III(a)).

The Draft would also require that "[t]o the maximum extent possible . . . the organization [must analyze] and design . . . the work functions assigned to its employees and agents so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization." (Step III(b)).

These requirements describe an unachievable ideal and attempt to make it a requirement for all organizations. It is a certainty that no organization would ever be able to achieve this standard,

especially when such organization's efforts will typically be viewed in the context of twenty-twenty hindsight.

In fact, these requirements appear to be an attempt to impose the Advisory Group's environmental management concepts, which can best be described as a slapdash borrowing of certain elements of "Total Quality Management", upon every "line manager" at every organization which exists in United States. Such imposition blithely ignores the fact that management methods, responsibilities, authorities and constraints will vary from level to level, process to process, product to product, organization to organization, etc. The approach taken in the Draft is inflexible and unworkable. In addition, the Draft apparently assumes that for a compliance program to be effective, such management oversight must be on a "day-to-day", "routine" and apparently constant basis. Again, this assumption renders the requirements in Step III unworkable.

Finally, while these provisions arguably "address" issues of coordination between individual and corporate culpability, they appear to do so in such a fashion that any misconduct by an individual would almost universally be deemed a basis for corporate culpability as well, because any existing management systems would again be almost automatically deemed inadequate.

d. Imposition of Draconian Monitoring and Reporting Requirements

The continuous on-site monitoring requirement of Step III(c)(ii) of the Draft is impossible to meet and is potentially incredibly expensive. For example, doing spot monitoring of every hazardous air pollutant or criteria pollutant under the Clean Air Act for one source of emissions (such as a boiler) could easily cost $20,000 to $40,000. A recent Wall Street Journal article reports that it took months to monitor all potential emissions sources at a given facility. What Really Pollutes? Study of a Refinery Proves an Eye-Opener, Wall St. Journ., Mar. 29, 1993, at A1 col. 1. In many cases, there was no protocol or accepted test for such monitoring. Stated another way, audits of the scope envisioned in the Draft are impossible to perform using any kind of a cost effective basis or in any kind of meaningful time frame.

3. The Circumstances of Application of these Standards Will Result in Universal Inapplicability

In addition, consideration must be given to the circumstances in which compliance programs will be reviewed. They will always be reviewed in hindsight and will always be reviewed in the adversarial context or, at the very least, in the quasi-adversarial context of settlement negotiations. For these

reasons, and by virtue of the inflexible and virtually impossible to meet standards that the Draft would impose, it is indeed likely that the "availability" of a compliance program as a mitigating factor would amount to an illusion.

4. These Changes Do Not Reduce (And May Aggravate) the Difficulties With The Existing Guidelines Which Led To Exclusion of Corporate Sentencing for Environmental Crimes In The First Place

Finally, the Bases for Exclusion discussed in Section II, supra, are not addressed in any meaningful manner by the imposition of draconian requirements for an effective environmental compliance program. For example, the enhanced requirements further eliminate any meaningful distinction between civil and criminal misconduct (i.e., questions concerning the required mental state for "criminalizing" activities are not addressed or resolved by toughening these requirements). Problems with definition or loss or gain are also not resolved by making these requirements tougher. Questions or problems concerning the coordination between individual and corporate sanctions are also not addressed by the tougher requirements. Finally, while questions concerning the relevance of the size of a corporation are addressed in a limited way in Comment 3 to Step III of the Draft, the original Guidelines already stated that the formality and pervasiveness of a program would vary with the size of a corporation. § 8A1.2, Application Note 3(k)(i). As a result, stiffening and toughening these requirements for all corporations in the Draft does not

address these concerns in any meaningful way.

In actuality, the hindsight application of the requirements for an effective compliance program proposed by the draft increase the difficulties with coordination between individual and corporate culpability by effectively making it impossible for a corporation to have an effective compliance program. In addition, other aggravating factors, such as management involvement, scienter and concealment aggravators, fail to take the existence of a compliance program into account and base mandatory aggravation factors upon culpable conduct of even one individual, regardless of rank and regardless of any meaningful corporate "involvement" in the misconduct.

In sum, Step III of the Draft attempts to impose requirements for an effective compliance program that will, especially using "hindsight" application in the prosecutorial context, be impossible to meet. These requirements, moreover, either do not address or actually heighten the Reporting Concerns, Intent Problems and Coordination Issues which are some of the Bases for Exclusion of corporate environmental sentencing from the existing Guidelines. Accordingly, Step III should be scrapped.

B. AGGRAVATING AND MITIGATING FACTORS

The Draft, like the existing Guidelines, provides that the base fine can be adjusted by application of various aggravating and mitigating factors. (Step II). However, the Draft uniformly modifies these factors to make application of the factors harsher and to provide for harsher penalties. In fact, the Draft would almost universally compel the application of some aggravating factors and the inapplicability of some mitigating factors.[10]

Again, these modifications either fail to adequately address the Bases for Exclusion discussed in Section II, supra, or they compound the problems that had led to exclusion of corporate environmental sentencing from the ambit of the existing Guidelines in the first place.

1. Management Involvement

The original Guidelines provide for an upward adjustment if a "high level" individual was involved, or if "tolerance of the offense by substantial authority personnel was pervasive throughout the organization." (§ 8C2.5). The Draft, on the other hand, would increase the penalty imposed if a single "substantial

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[10] See also, BRT Comment at 12-13.

authority" individual or a "corporate manager" is involved. (Step II(a))[11]. The accompanying comments also indicate that involvement of anyone other than a "loading dock foreman or night watchman" could trigger the aggravator. This factor further fails to take into account the degree of culpable intent of the employee, situations involving rogue employees, or the existence of an effective compliance program.

Again, no reason is given for these changes.

Finally, these changes do not reduce concerns based upon issues of scienter as an element of culpable corporate conduct or difficulties of coordination between individual and corporate culpability. To the contrary, by increasing fines to corporations if any employee other than a night watchman was "involved", regardless of questions of intent, application of this aggravating factor would effectively be automatic and universal. Stated another way, the Draft itself has fully justified the concerns of the business community that Sentencing Guidelines might be automatically used to hold corporations accountable for the actions of very low level individuals,

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[11] To the extent that "substantial authority figures" are not "line management" and have no authority in the area wherein a violation occurs, it is nevertheless arguable under Step II(a) that the aggravator would apply if even one such figure is deemed to have "condoned" or "recklessly tolerated", not the crime itself, but rather, "conditions which perpetuated a significant risk that criminal behavior . . . would occur." Application of this standard could well be universal.

regardless of the element of intent and in spite of everything a corporation might reasonably be expected to do to prevent such occurrences.

2. Scienter

The Draft imposes another change in this area. The existing Guidelines provide for an aggravator if an "individual within high-level personnel of the organization" participated in the conduct or if "tolerance . . . by substantial authority personnel was pervasive throughout the organization." (§ 8C2.5(b)). The Draft essentially transforms this aggravator into two aggravators: a "Management Involvement" aggravator (discussed in the preceding section) and a separate "Scienter" aggravator. (Steps II(a) and II(d)). Further, the scienter aggravator may be applied if even one employee, regardless of rank, participated.

Other problems, which render the application of this aggravator almost universal, stem from the definitions of the culpable conduct and intent used in Step II(d). First, the "knowledge" element applies to a person's "engaging in conduct". Simply stated, it is impossible for a person "unknowingly" to engage in conduct unless that person is mentally incompetent, sleepwalking or not in control of his body. Thus, the only real element of "intent" is whether the person took an action "under circumstances that evidenced at least a reckless indifference to

legal requirements." Since the term "reckless indifference" is undefined, it is open to interpretation by judges and prosecutors. Further, in the area of public health crimes, it is not difficult to imagine an over-zealous prosecutor taking the position that failure to know or look up the contents of any environmental statute by a person engaged in production or handling of waste would constitute "reckless indifference to legal requirements." See, e.g., United States v. Johnson & Towers, Inc., 741 F.2d 662, 669 (3d Cir. 1984), cert. denied, 469 U.S. 1208 (1985) ("where obnoxious waste materials are involved, . . . anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation"). Consequently, there is again the significant potential that attempted application of this standard by prosecutors would be both automatic and universal.

Yet again, no reason has been given for this change. Yet again, difficulties with scienter and with coordination between individual and corporate culpability are dealt with in such a harsh, inflexible and universal fashion that the concerns of the business community have not been reduced, but have instead been fully justified.

Finally, the juxtaposition of this aggravator with the mitigating factor that is available only when "no employee" had culpable knowledge (Step II(m)) (and assuming the Step II(m) Absence of

Scienter mitigation factor could and would actually be applied in some situations) implies that base fines would either be automatically enhanced or automatically reduced. This not only raises questions as to what the base fine is supposed to be, it also is at odds with the purpose of the Sentencing Commission to provide an element of certainty and predictability in the area of criminal penalties. A scheme whereby fines can oscillate up or down depending upon the presence or absence of scienter or the presence or absence of an "effective" compliance program manifestly does not serve this purpose.

3. Concealment

The existing Guidelines provide that "obstruction of justice" on the part of the "organization" is an aggravating factor. (Step II(g)) The Draft extends this aggravator to concealment by "any employee", regardless of that employee's level and regardless of whether such conduct occurred in spite of the existence of a compliance program designed, among other things, to minimize that possibility. (Step II(g)). Further, the Draft does not provide an exception in the case of rogue employees. To the contrary, the comment to this section in the Draft indicates that the aggravator would apply even in situations where one employee withholds information from another employee. There is also an indication that such "concealment" also can be used as an

indicator of culpable knowledge under the "scienter" aggravator. See Comment to Step II(d).

The impact of this provision is that a corporation would be penalized for the actions of dishonest employees in spite of its best efforts to prevent such conduct. Application would also be virtually automatic and would apply almost universally, even in cases where, for example, one employee, regardless of rank and regardless of the existence of policies or procedures reasonably designed to prevent or deter such conduct, withholds, even from another employee, information that is required to be reported.

Again, no reason is given for this change. Again, this change fails to reduce, and, in fact, heightens and justifies, concerns with issues of corporate "scienter" and lack of coordination between individual and corporate "wrongs". Finally, application would be harsh and inflexible. The best efforts of corporations to prevent such problems would not count.

4. Absence of Permits

This aggravator (Step II(g)) has no analogue under the existing Guidelines, and no reason has been given for its inclusion. It does not address any of the Bases for Exclusion discussed in Section II, supra.

More importantly, existing legislative and regulatory scheme under most environmental laws is based upon the existence and contents of permits. For example, the Clean Air Act's permitting provisions encourage the states to incorporate the requirements of that Act into the provisions of all permits. 42 U.S.C. § 7661c(f)(1). It does not require a great stretch of the imagination to envision a situation in which an overly zealous prosecutor takes the position that violation of permit conditions are the equivalent under the Draft to an activity that "occurred without a requisite permit". This possibility, coupled with the suggestion in the comment to Step II(j) of the Draft that the aggravator would also apply "to situations covered by a federal, state of local permit, but where the permitting authority would never issue a permit for the type of conduct in question," would render this aggravator applicable in virtually every situation which involves violations of environmental laws.

In short, this is another aggravator whose application would be automatic and universal and which does not address <u>any</u> of the Bases for Exclusion. It should be eliminated.

5. <u>Prior Civil/Criminal Compliance History</u>

The provisions of the existing Guidelines took into account the fact that crimes of "separately managed businesses" should not be

a part of prior civil or criminal compliance history. (§ 8C2.5(c)). That requirement is eliminated in the Draft with respect to civil compliance issues. (See Steps II(e), II(f)). Further, the provisions of the existing Guidelines apply in the Civil context only if the prior adjudication involved "similar misconduct", while those provisions in the Draft would also apply to any "prior civil or administrative adjudication." In the criminal context (and again, unlike the existing Guidelines), the prior adjudications would apply with respect to violations of any "federal or state environmental law", regardless of whether such violation involved similar misconduct.

As an example of the potentially harsh effect of these changes, if a wholly owned, but separately managed, subsidiary of a corporation located in Maine executes a consent decree involving a civil fine for recordkeeping violations, and if, four years later, a separately managed division of the parent corporation is found guilty of a wholly unrelated permit violation, the Draft would require an automatic enhancement. Such result would not occur under the original Guidelines.

Further, these changes do not address the concerns that led to the inapplicability of the existing Guidelines to environmental penalties, in that it does not adequately address issues of intent, and fails completely to address Reporting Concerns, issues concerning cooperation, Gain or Loss Difficulties or

Coordination Concerns.

6. Violation of an Order

While this section is not substantively different from the provisions of the existing Guidelines, it is nevertheless problematic in that it fails to take into account the existing practice of environmental officials of utilizing civil or administrative Consent Decrees as a settlement device. Those Consent Decrees typically contain provisions to the effect that a corporation will not again violate the particular statute in question. These provisions could arguably last forever. Accordingly, it could create a difficult and, it is believed, unanticipated situation wherein an aggravating factor would automatically be applied if a separate subsidiary or division in a different state was involved, however inadvertently, in a violation of that law five, ten or even fifteen years down the line. Such application would be unduly harsh, and the possibility of such application should be guarded against by appropriate drafting.

7. Self Reporting

One of the bases for making the existing Guidelines inapplicable to corporate environmental penalties concerned questions about

reporting requirements. During the development of Chapter Eight of the original Guidelines, the Commission concluded that because "self reporting of criminal conduct may open the door to a criminal sanction, civil liability and adverse effects to reputation," it is "important to provide a clear and definite incentive for firms to self-report offenses." Methodology Used to Develop Offense Level Table and Assign Weights to Mitigating Factors in Draft Chapter Eight, U.S. Sentencing Commission Memorandum 29, n. 38 and at 26, n.7 (Nov. 16, 1990). Nevertheless, the Draft renders the mitigation credit unavailable in situations wherein "reporting of the offense [is] otherwise required by law." Step II(l)(1). Thus, in the context of environmental laws, which frequently impose mandatory reporting obligations, availability of this mitigating credit is rendered largely illusory. Accordingly, the incentive to self report is also rendered nonexistent.

Another problem stems from the availability of credit for "fully cooperating". In particular, the problem stems from how regulatory officials may interpret the term "fully cooperate".

In the previous example of XYZ corporation, it is possible that government officials would routinely refuse to agree that mitigation credits for an environmental corporate compliance program are available unless XYZ waives privilege and produces the contents of all audits and internal investigations. Further,

it is possible that such government officials would inform XYZ that if the privilege is not waived, XYZ will be deemed not to have cooperated with the government and will lose the "cooperation" credit as well. XYZ is thus in the "Catch-22" situation of either waiving both the attorney-client and the self-evaluative privilege or losing this mitigation credit.

These potential problems have existed with respect to the existing Guidelines, and were one of the bases for making the existing Guidelines inapplicable to corporate environmental penalties. These problems, however, have not been addressed and should be addressed.

8. Remedial Assistance

Inclusion of this provision is a laudable attempt to encourage responsible behavior on the part of organizations. Unfortunately, the availability of a restitution credit is limited to restitution "in addition to any legally required restitution or remediation." (Step II(n)). Due to the availability of injunctive, administrative and third party remedial and restitutionary relief, this limitation will likely render the availability of this mitigation credit largely illusory.

C. OTHER ASPECTS OF THE DRAFT'S SCHEME (SPECIFICALLY, ITS INTRUSIVE AND UNWARRANTED "PROBATION" REQUIREMENTS.)

There are three other aspects of the Draft's sentencing scheme which would ordinarily merit additional comment. Those aspects are the limitations on fine reductions without corresponding limitations on enhancements, count stacking, and the probationary aspects of the Draft. By virtue of the discussion of these issues in the Other Comments,[12] discussion here will be limited to a brief discussion of the unwarranted effect of the "probation" recommendations on organizations.

Specifically, the intrusive nature of the Draft's probation provisions is evidenced by the language of the probation provision calling for an effective compliance program. If, at the time of sentencing, the corporation is found not to have an effective compliance program, the provision expressly calls for government review and court approval of any compliance program proposed by the corporation, as well as court retention (at the Company's expense) of experts to design it if the organization's program is not "satisfactory". Further, the Draft provides for court orders requiring: (a) thorough review of the defendants

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[12] With reference to probation, see BRT Comment at 15-17; NAM Comment at 20-21; Officials' Comment at 18. With reference to count stacking, see NAM Comment at 15-17; Officials' Comment at 15; BRT Comment at 17. With reference to the lack of limits on enhancements, see BRT Comment at 12; NAM Comment at 4.

books and records; (b) periodic reports to "any person or entity designated by the court"; (c) inspections of its facilities; and (d) "testing and monitoring" of its operations. (Step V(c)(4)).

These provisions amount to an egregious attempt to impose external controls upon corporations, where the sole basis is lack of an effective compliance program (presumably measured by the impossible standards set forth in Step III of the Draft).

IV. SUGGESTED ACTIONS

The Officials' Comment generally suggests that reference to the existing Guidelines, with modifications as indicated, would be sufficient. Caterpillar is on the whole in agreement with those suggestions. However, Caterpillar would go further to suggest that unless future efforts provide realistic resolutions to problems such as problems with privilege, unworkable requirements for compliance programs, problems with whether Consent Decrees should be counted as prior civil or criminal adjudications, whether provisions of Consent Decrees should constitute "Orders" which might give rise to fine increases in the event of future "violations", aggravating factors whose applicability could be universal, mitigating factors which are largely illusory,

problems with corporate "knowledge", realistic and flexible coordination between individual conduct and corporate culpability and problems with reporting and cooperation requirements, the result will remain unworkable.

If these concerns cannot be adequately addressed, Caterpillar would suggest that Guidelines along the lines envisioned are not the answer, and that the area of corporate environmental crimes may be an area which is so complex, and which is so manifestly not susceptible to resolution by use of Sentencing Guidelines, that the Advisory Group should consider the possibility of utilizing policy statements that can act as guides to the federal Courts, rather than utilizing inflexible and otherwise unworkable Sentencing Guidelines.

Respectfully submitted,

Caterpillar Inc.

ATTACHMENT A

DIFFERENCES BETWEEN ORIGINAL AND
DRAFT COMPLIANCE PROGRAMS

1. The original Guidelines require adoption of standards and procedures which are "reasonably capable" of reducing the prospect of criminal conduct. The original Guidelines also contemplate that criminal actions by employees will not automatically result in a program's being deemed ineffective. On the other hand, the Draft requires that the policies and procedures must be "necessary to achieve environmental compliance."

2. The original Guidelines provide that a corporation should "hav[e] in place and publiciz[e] a reporting system whereby employees and other agents could report criminal conduct to others within the organization without fear of retribution." The Draft makes it a "requirement that employees report any suspected violation to appropriate officials ... and that a record will be kept by the organization of such reports."

3. The Draft requires that "to the maximum extent possible ... the organization has analyzed and designed the work functions . . . so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization." The original Guidelines impose no such requirement.

4. The Draft, in its section on Disciplinary Procedures, includes the gratuitous requirement that the organization, as a part of its disciplinary activities, may be required to report "individuals' conduct to law enforcement authorities." This requirement is not contained in the original Guidelines.

5. Evaluation and Improvement requirements under the Draft include implementation of "a process for measuring the status and trends of its effort to achieve environmental excellence, and for making improvements or adjust, as appropriate in response to those measures." This requirement includes "a periodic, external evaluation of the organization's overall programmatic compliance effort." In other words, each organization would be required to hire an outside management consultant and to have measurement and improvement mechanisms. The original Guidelines contain no such explicit requirement.

6. The training and publication portion of the original Guidelines calls for taking "steps to communicate effectively its standards and procedures to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical matter what is required." The requirements in the Draft are much more specific. For example, all organizations must develop and implement "systems or programs that are adequate to:

a. maintain up-to-date-, sufficiently detailed understanding of all applicable environmental requirements by those employees and agents whose responsibilities require such knowledge;

b. train, evaluate, and document the training and evaluation, of all employees and agents of the organization, both upon entry into the organization and on a refresher basis, as to the applicable environmental requirements, policies, standards (including ethical standards) and procedures necessary to carry out their responsibilities in compliance with those requirements, policies and standards."

7. The Draft requires implementation of "a system of incentives, appropriate to [the organization's] size and the nature of its business, to provide rewards (including as appropriate, financial rewards) and recognition to employees and agents for their contribution to environmental excellence. In designing and implementing sales or production programs, the organization has insured that these programs are not inconsistent with environmental programs." This requirement does not appear anywhere in the original Guidelines.

8. The requirements for monitoring and reporting programs are also much more detailed. The Draft would require organizations to design and implement, "with sufficient authority, personnel and other resources, the systems and programs that are necessary for:

a. frequent auditing ... and inspection (including random, and, when necessary, surprise audits and inspections) ... to assess, in detail, their compliance with all applicable environmental compliance requirements . . . as well as internal investigations and implementation of appropriate follow-up countermeasures with respect to all significant incidents of noncompliance;

b. continuous on-site monitoring, by specifically trained compliance personnel and by other means, of key operations ... that are either subject to significant environmental regulation, or where the nature or history of such operations suggests a significant potential for noncompliance;

c. internal reporting ...:

d. tracking the status of responses to identified compliance issues, to enable ... documented resolution of environmental compliance issues by line management: and

e. redundant, independent checks on the status of compliance.

Again, these specifics are not found in the original Guidelines.

9. The Draft requires "line managers, including the executive and operating officers at all levels" to "direct their attention" in the "day-to-day operation of the organization" to "measuring,

maintaining and improving the organization's compliance with environmental laws. This must be done through "routine management mechanisms utilized throughout the organization (e.g., objective setting, progress reports, operating performance reviews, departmental meetings). The original Guidelines set no such requirements, but merely require the organization to adopt "standards and procedures reasonably capable of reducing the prospect" of noncompliance.

10. The Draft requires line managers to "routinely review environmental monitoring and auditing reports, direct the resolution of identified compliance issues, and ensure application of the resources and mechanisms to carry out a substantial commitment." The original Guidelines set no such requirements, but merely require the organization to adopt "standards and procedures reasonably capable of reducing the prospect" of noncompliance.

UNITED STATES SENTENCING COMMISSION
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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,

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