any other DOE facility by $4.9 million. It is difficult to understand logically how the criminal prosecutors, two of whom devoted more than three years to the investigation, are the subjects of such severe criticism, when other regulators, who had responsibility for this and other DOE facilities long before execution of the search warrant, largely escape comment.

☐ *Midnight Burning at Rocky Flats*. In the *Rocky Flats* investigation, one of the more spectacular allegations of misconduct investigated by the government related to charges of so-called midnight burning: incineration of mixed hazardous and nuclear wastes that was allegedly concealed from the public. If these charges had been true, such actions would have constituted knowing violations of DOE policy with potentially serious effects on nearby urban and suburban populations. After years of investigation, however, the prosecution team reported: "the UNITED STATES has concluded that the Building 771 incinerator was not operated contrary to the DOE ordered shutdown."[106]

Congressional investigators publicly disagreed with the prosecutions' conclusions that no incineration occurred after the DOE ordered the incinerators shutdown in December 1988.[107] According to the Wolpe Committee, there was evidence that secret midnight burning had occurred as part of a phased shutdown. One would expect a congressional committee to document such a serious charge carefully. The Committee's Report, however, cites no significant supporting evidence.

The Committee bolsters its allegations by citing testimony of the lead FBI agent in the case.[108] The basis for the agent's opinion, however, is not supplied.[109] Moreover, if the Committee had attempted to confirm the agent's uncorroborated charges, it would have reported that *none* of the other principal members of the prosecution team in the case (including the lead Denver-based prosecutor, whom the Committee generally praised for his aggressiveness, the lead ECS attorney, and the lead EPA agent) agree with the lead FBI agent's conclusion that the secret incineration had occurred.[110] Thus, the Committee's conclusion about midnight burning flies in the face of the available evidence.

"Political" Interference

Within the context of the congressional oversight investigations, concern over "political" interference has generally taken the form of inquiries into possible attempts by political appointees at the DOJ to influence investigations of the Bush Administration's political allies. The Dingell and Wolpe Reports do not find that any fixing of cases occurred. Indeed, one of their criticisms of the ECS generally is that *career* ECS prosecutors (and in some cases, assistant U.S. Attorneys) *concurred* with decisions not to prosecute, or to accepts pleas, that the congressional investigators believed to be too lenient.[111] The GW Report, consistent with its general methodology, repeats rumors of "possible" political influence voiced by the Report's (anonymous) sources, but itself actually makes no "finding" of political influence.[112]

"Political" pressure, however, takes many forms. Congressional oversight of prosecutors is inherently political. Poorly or unfairly conducted oversight itself can become a threat to the orderly administration of justice. Rather than evaluating each case on its merits, prosecutors may be tempted to seek what they believe will be politically acceptable results. Counsel for an individual against whom charges were dismissed in the *PureGro* matter[113] de-

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106. Plaintiff's *Sentencing Memorandum* at 106-16, *United States v. Rockwell* (No. 92-CR-107) (D. Colo., filed Mar. 26, 1992) (footnote omitted). The omitted footnote states that prior to the shutdown (and presumably outside the relevant statute of limitation), the DOE had authorized use of this incinerator for incineration of hazardous waste, even though the incinerator lacked a permit. The DOE had previously acknowledged these prior uses of the incinerator, which were not part of the "midnight burning" controversy.

    Prosecutors also concluded that an incinerator in another building (number 776) "was not used to treat or dispose of hazardous or mixed waste." *Id.* at 107.

107. *See* WOLPE REPORT, *supra* note 3, at 91 and notes 108-09, *infra*.

108. The Committee also cites the existence of certain documents whose significance is unclear. WOLPE REPORT, *supra* note 3, at 93-94.

109. The Committee largely bases its charge on the following exchange, as reported by the Committee:

    > Ms. Holleman: Did you have any evidence that DOE had specifically ordered the incinerator to run during this time [after December 1988]?
    >
    > Mr. Lipsky [The lead FBI agent in the case]: The answer to that question would require me to provide grand jury information protected by Rule 6(e) of the Federal Rules of Criminal Procedure.
    >
    > Ms. Holleman: Do you know who in DOE, let's say, modified the shutdown order and told Rockwell, yes, you can shut down in this orderly fashion?
    >
    > Mr. Lipsky: The answer to that question would require me to provide grand jury information protected by Rule 6(e) of the Federal Rules of Criminal Procedure.

    WOLPE REPORT, *supra* note 3, at 93. Fed. R. Crim. P. 6(e) prohibits a government agent from publicly disclosing matters occurring before a grand jury.

110. The views of the members of the prosecution team were obtained during interviews with the author of this Dialogue in November 1993

111. In addition, the Dingell and Wolpe Reports were highly critical of individual decisions made by political appointees, but did not generally attribute the mistakes alleged to overtly "political" causes.

112. According to the Report:

    > While this Report makes no direct findings of political interference in individual ECS cases, federal prosecutors and investigators have given the Project detailed allegations of such conduct.

    GW REPORT, *supra* note 15, at 31.

    The GW Report declines to repeat these unproven allegations in more detail, reportedly so that the specific officials accused could be given an opportunity to respond. *Id.* at 31. In June 1993, the GW Project Director nevertheless stated in an article for the *Washington Post*:

    > Environmental crimes is the most visible example of a section compromised by political operatives. People were promoted within the environmental crimes section because of their willingness to carry the water for the Bush White House and political appointees.

    Isikoff, *supra* note 23.

    Similarly, in September 1993 the GW Director charged that "[n]ever before [have] line prosecutors faced such political interference in handling individual cases," and that "career prosecutors . . . were forced to drop charges against criminals due to political interference from Reagan and Bush administration officials." *Civil-ect Speech to Heritage Foundation Raises a Ruckus*," CORP. CRIME REP., Sept. 6, 1993, at 1.

113. *United States v. PureGro et al.*, CR90-228AAM to -323AAM (E.D. Wash.). In *PureGro*, the corporation and four employees were initially indicted for alleged felonies relating to the handling of pesticides. The government subsequently dismissed charges against all individuals.

scribed the issue this way in a letter to the GW Project Director:

> Although your article suggests you think the government decisions made in *PureGro* were political ones, the opposite is true. It would have been politically expedient to maintain the charges in the case as they were originally filed. EPA headquarters and local investigating staff, including those who testified before [Rep.] Dingell last fall, would have been happier. The Washington State Attorney General's Office would have been happier. The government would have been seen as aggressively prosecuting environmental crime. Instead, the Department of Justice did what it is supposed to do, decide cases based on the facts and the interests of justice.[114]

Based on the record to date, the congressional investigators have made no attempt to limit the "political" impact of their own investigations to legitimate areas of policy. They have instead personalized the debate, going so far as to characterize exercises of prosecutorial discretion as actions taken by political "hack[s]."[115]

Environmental Criminal Prosecution During the 1980s

Whatever one believes about former President Bush's claim to be the "environmental President," environmental criminal prosecution flourished under the Reagan and Bush Administrations. The ECS was established in 1983.[116] Since then, it has grown from 5 to approximately 30 attorneys. Its total budget increased dramatically over the same period. Prosecutions have increased from 40 in fiscal year 1983, to 125 in fiscal year 1991.[117] Multimillion dollar criminal fines like those assessed in recent years against large companies such as Exxon, Rockwell, and United Technologies Corporation do not in themselves evidence a cozy attitude toward industry. Even if, as the GAO's latest statistics show, the majority of prosecutions have been led by local U.S. Attorneys' Offices,[118] those offices were generally headed by political appointees.

In the face of these statistics, the Dingell and GW Reports make the bald assertion that however much federal prosecutions increased during the 1980s, they should have increased more.[119] According to the GW Report, the DOJ's average of 100-120 environmental prosecutions per year "is surprisingly low."[120]

Although the Reports' assertion is an arguable hypothesis, neither Report offers any objective evidence to support this theory in the face of the apparent pattern of enforcement noted above. Both Reports ignore or avoid any of a number of benchmarks they might have used. Did, for example, the relative number of state criminal prosecutions dramatically outstrip federal prosecutions over the relevant time period? How did federal and state prosecutions from the same states compare? What was the trend in federal *civil* enforcement statistics over this period?[121] Are civil and administrative cases ahead or behind of the criminal trend? Do differences in cases brought in different geographical regions overshadow differences between the ECS and certain U.S. Attorneys' Offices?

The only objective benchmark suggested by the GW Report to support its claims appear to be an expected level of prosecutions "given the size of industrial production in this country."[122] It is unclear, however, how one can estimate the likely number of environmental crimes (and the desired number of environmental prosecutions) based solely on the nation's gross domestic product. Reliance on the size of the nation's economy alone to estimate optimal levels of criminal enforcement ignores numerous other relevant sources of data. For example, American companies spend billions every year for pollution control.[123] Partly as a result of these expenditures, air and water pollutants from industrial sources like those targeted by the GW Report have generally *decreased* since 1970 (not increased as the Report's theory would suggest).[124] Ambient concentrations have similarly shown a general decrease.[125] Moreover, although the U.S. economy generates enormous amounts of pollutants, much of this pollution is generated quite legally, and should not affect the optimal level of environmental prosecution.

This is not to say that environmental progress has been made independent of environmental enforcement—the two obviously go hand-in-hand. Nor is this argument intended to suggest that the current system of enforcement could not be improved. Nevertheless, the strong upward trend in

114. Letter from David V. Marshall, counsel for individual defendant, to Jonathan Turley 5-6 (Apr. 11, 1993) (on file with author). The letter was written in the context of an article published by the Project Director in the *Wall Street Journal* discussing, among other matters, the *PureGro* case.

115. *See* GW REPORT, *supra* note 25, at 29 (description of former Assistant Attorney General Hartman as "political hack" is, according to the GW Project's sources, "understated"). The GW Law Center did not interview Mr. Hartman before publication of this charge.

116. For a concise history of the ECS, *see* Judson W. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental Criminal Prosecutions and the Work That Remains*, 59 GEO. WASH. L. REV. 900-15 (1991).

117. *See* Department of Justice Press Release (May 8, 1992) (as measured by annual number of indictments). The same statistics on the increase in indictments can be found in the GW Report itself. *See* GW REPORT, *supra* note 15, at 7. Since fiscal year 1987, the annual number of indictments has generally been between 100 and 135.

The cited DOJ Release is relatively imprecise in defining the data upon which it is based. The GAO STUDY, *supra* note 11, provides a more detailed statistical analysis of federal environmental prosecutions generally for the fiscal years 1988 to 1993.

118. *See* GAO STUDY, *supra* note 11, at 27.

119. *See* DINGELL REPORT, *supra* note 4, at 2 (DOJ enforcement figures "do not indicate how much more could have been achieved but for the actions of the ECS"); GW REPORT, *supra* note 15, at 13.

120. GW REPORT, *supra* note 15, at 13.

121. Although the GW Report vaguely refers to the absolute number of civil cases, it cites no statistics. *Id.* at 13.

122. *Id.* at 13.

123. The U.S. Department of Commerce estimates that private businesses in the United States spent between $30 and $50 billion a year each year between 1972 and 1990 (in 1987 dollars). *See* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: 23RD ANNUAL REPORT 283 (1993).

124. *See, e.g., id.* at 8, 326 (reporting decreased emissions of air pollutants, including particulates, sulfur oxides, nitrogen oxides, volatile organic compounds, carbon monoxide, and lead since 1970).

125. *See id.* at 321 (modest decline in ambient concentrations of selected water pollutants), *id.* at 329 (general decline in concentration of air pollutants including particulates, sulfur oxides, nitrogen dioxide, ozone, carbon monoxide, and lead). Water statistics should be used with some caution due to the relatively small percentage of pollutant loadings attributable to industrial sources that are the typical targets of environmental prosecutions.

criminal prosecutions during the 1980s, appears to support a conclusion other than that suggested by the GW and Dingell Reports.

Proposed Rules of Principled Congressional Oversight

From the foregoing discussion, it is apparent the Dingell, GW, and Wolpe Reports all are seriously flawed. How, though, should congressional investigations be conducted? This Dialogue proposes certain basic principles, as set forth below.

The first rule of principled oversight (or of journalism or scholarship) involving criminal matters should be the recognition of the adversarial balance that lies at the base of our criminal justice system. Investigators should examine, equally and fairly, opposing positions on a particular issue. This does not mean that every congressional hearing or report must be a full-blown criminal trial. But where evidence of the guilt or innocence of individuals is the subject of a congressional hearing, congressional investigators should recognize the misleading and unfair effect that any oversight may have if it is limited solely to one side or the other.

The second rule of principled oversight should be fair standards of judgment regarding prosecutorial conduct. Prosecution is not a science, and reasonable prosecutors and agents may disagree reasonably over the merits of a particular case. Sophisticated congressional oversight should recognize this fact, rather than harp on everyday differences in evaluating particular cases. Similarly, a prosecutor should be able to conclude that the proof in a particular case may not be adequate to sustain a conviction of a particular crime without being subject to charges that he or she is sympathetic to the type of crime in question. It is unfair to label a specific prosecutor "soft" on crime based on his or her evaluation of a single case.

As corollary to this second rule, congressional oversight should also have the sophistication to distinguish between advocacy positions taken for purposes of bargaining, and positions resulting from the practical difficulties in proving even the strongest criminal cases. While it may always be possible to argue that a compromise may have resulted in less than the maximum possible penalty, Congress should not routinely criticize criminal pleas unless it is prepared to live with losses by the government in marginal or risky cases.

Third, congressional investigators should be mindful of the inherent difficulties of staging a "balanced" congressional hearing where key factual issues are hotly disputed. Recent history offers classic examples of how normal partisan politics can hamper balanced proceedings where Congress itself attempts to act as a neutral fact finder and weigh guilt or innocence in individual cases.[126]

Certain types of oversight are inherently difficult to perform fairly in the naturally political forum of a congressional hearing. As a practical matter, which political party is genuinely likely to provide balance by speaking on behalf of those accused of crimes against society, whether environmental or other? The temptations of demagoguery in this area must be consciously anticipated and avoided. As a result, congressional investigators should be especially sensitive to the particular difficulty, and in some cases the improbability, of attaining a fair balance in overseeing individual criminal investigations.[127]

Fourth, investigators should respect the elaborate system of protections that the U.S. Constitution,[128] courts, and legislature have established for protecting the rights of those under criminal investigation or indictment. Congressional hearings should not, for example, be an excuse for allowing government agents (or members of Congress) to avoid the burden of proof that the government would normally bear in asserting that unindicted suspects are guilty of criminal activity. Nor should congressional investigations be a back door for waiving protections of unindicted individuals normally provided by rules of grand jury secrecy. If a prosecutor or other government agent engaged in such conduct directly, he or she would probably be subject to disciplinary action. Congressional investigators should not effectively negate such standards in the name of oversight without a clear and convincing reason for waiving the normal rules.

Conclusion

As a result of their flawed methodology, the Dingell, GW, and Wolpe Reports paint an erroneous and misleading picture. In the world of the congressional critics, prosecutors walk away from "airtight" cases without explanation, and attorneys who have chosen environmental prosecution as their specialty exhibit an irrational and possibly subversive hostility to their work. In this world, certain cases cannot be lost, even though seemingly strong cases are lost in the real world every day:[129] to be accused is to be convicted, and for a prosecutor to fail to seek an indictment in any case presented by an investigating agent evidences a lack of environmental purpose.

The Dingell, GW, and Wolpe Reports ignore the essential

126. Relevant examples range from the Iran/Contra matter to the nomination of Justice Clarence Thomas.

127. In this context, it is notable that neither the House nor Senate Judiciary Committees as such have played any role in the current dispute. (Rep. Schumer serves on the Judiciary Committee, but appears to have been acting in his capacity as an individual representative with respect to the GW Report.) The most active committee to date, Rep. Dingell's, generally has responsibility for EPA, and not the DOJ.

128. Former Attorney General Benjamin Civiletti has taken the position that Congress' recent threat to issue subpoenas to career prosecutors to obtain testimony regarding specific prosecutions undermines the executive branch's constitutional authority and exceeds Congress' legitimate oversight authority. *See* Civiletti, *supra* note 23. Congressional representatives have contested Civiletti's claims. *See, e.g.*, Reid P.F. Stuntz, Remarks at the American Law Institute-American Bar Association Course of Study: Criminal Enforcement of Environmental Law (Oct. 7, 1993) (on file with author) (current congressional efforts at oversight are necessary for Congress to fulfill its legislative functions).

From a more academic point of view, Prof. Kenneth Culp Davis has long advocated increased scrutiny of prosecutorial discretion. *See, e.g.*, KENNETH CULP DAVIS, DISCRETIONARY JUSTICE 188-90, 224-25 (1971).

129. At least one member of the Dingell Committee exhibited a more realistic view of the inherently tenuous nature of even seemingly straightforward prosecutions. *See* DINGELL HEARING, *supra* note 4, at 198 (statement of Rep. Eckart regarding his own humbling experiences as a prosecutor):

> I lost my first seven trials that I prosecuted. I lost—a guy had had his driving license suspended but for work privileges. He left work at 2:30 in the afternoon and was found inebriated, relieving himself in a beer joint parking lot at 1:30 in the morning, totally inebriated, and I tried to prosecute him because he [obviously] was not . . . driving home from work. I lost that one.

role of the prosecutor as a seeker of justice. It is in all citizens' interest that a prosecutor be able, in good faith, to decline a case against a particular suspect without being accused of endorsing the underlying crime.[130] The congressional attacks on career attorneys who have declined to prosecute cases that the attorneys believed to be unsupported by the evidence, if allowed to stand unchallenged, will have the opposite effect.

Notwithstanding the enormous resources devoted to them, the Dingell, GW, and Wolpe Reports fail to provide a meaningful basis for addressing important questions about the future of the ECS. For example, would environmental prosecution be more effectively handled by main DOJ or by local U.S. Attorneys? Bureaucratic struggles between main DOJ attorneys and U.S. Attorneys' Offices have existed for many years. Some types of cases (such as tax and antitrust prosecutions) have been effectively handled by centralized prosecution, while most others have been delegated to local U.S. Attorneys. Are environmental criminal violations, like tax violations, so different from typical white-collar matters that they would benefit from a specialized office to prosecute them? Even if the answer to this question is "yes," is the benefit of such specialization lost when the appointed central authority must try to manage criminal cases from a long distance (as ECS attorneys typically do)? Would the ECS be more effective if joined to the DOJ's Criminal Division? Would the benefits of specialization remain without the concomitant difficulties if the typical ECS attorney were a legal specialist or advisor, rather than a trial attorney as is now in theory the case? What is the likelihood that local U.S. Attorneys in some regions of the country would tend to minimize environmental prosecutions against local companies?[131]

Rep. Dingell's GAO study is a step in the right direction. Its careful statistical approach is far more important than the superficial inquiries about organizational "cultures" that have dominated the congressional studies to date. We should look forward to the day when congressional committees devote less effort to shallow sermonizing, and more to serious study of the difficulties of environmental criminal prosecution, and how the government's criminal enforcement powers can best promote a sound system for regulating industrial pollution.

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130. In several well-known recent cases, overly aggressive prosecutions have led to undesirable results. In *Demjanjuk v. Petrovsky*, 1993 U.S. App. LEXIS 29694 (Nov. 17, 1993), the Circuit of Appeals for the Sixth Circuit held that DOJ attorneys engaged in misconduct by failing to disclose exculpatory evidence in litigation that led to the extradition of a subject of investigation (an alleged Nazi concentration camp guard) and the subject's trial on capital charges in the State of Israel. *Id.* at 3. In *Jacobson v. United States*, __U.S.__, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992), the Supreme Court held that government investigators had entrapped a defendant convicted of receiving child pornography. In a third, widely publicized case, the DOJ voluntarily dismissed charges originally brought against James Beggs in connection with a fraud investigation in the defense industry. *See U.S. Admits Error in Fraud Case*, CHICAGO TRIBUNE, June 23, 1987, at A13 ("The government is standing up and saying we were wrong."). Prior to dismissal of the case, Beggs was forced to resign from his position as administrator of the National Aeronautics and Space Administration.

In light of the ultimate disposition of these cases, a decision to decline prosecution in any of the cases should not have been interpreted to mean that the prosecutors in question generally opposed prosecution of crimes related to the Holocaust (in the case of *Demjanjuk*), or child pornography (in the case of *Jacobson*), or defense fraud (in the case of Beggs). The congressional investigations that form the subject of this Dialogue, however, uniformly attribute such improper motives to the prosecutors they investigated. *See, e.g.*, GW REPORT, *supra* note 15, at 16 (characterizing named prosecutors as exhibiting "a noted disinclination to prosecute environmental cases"); DINGELL REPORT, *supra* note 4, at 36-37, 45 (characterizing prosecutors' concerns about the validity of contemplated charges as "weak," "absurd," and "ma[king] little sense"); WOLPE REPORT, *supra* note 3, at 12 (DOJ officials "appeared to place little value on environmental crimes").

131. The tendency of environmental cases to result in Balkanized decisionmaking has long been noted. *See generally* BRUCE A. ACKERMAN & WILLIAM T. HASSLER, CLEAN COAL/DIRTY AIR (1981).

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William R. Phillips
Vice President, Law

March 1, 1994

Honorable William H. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building
Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Re: Environmental Sentencing Guidelines

Dear Mr. Wilkins:

I am writing to express Aerojet's serious concerns with the proposed environmental sentencing guidelines issued by the Advisory Working Group on November 16, 1993, and our strong belief that further review and drafting work, with the active participation of corporate experts, is necessary.

Aerojet is the aerospace segment of GenCorp, engaged primarily in propulsion, electronics and ordnance work for DoD and NASA programs.

In general, we agree with the dissenting views of Messrs. Guerci and Hemphill of the Advisory Working Group submitted on December 8, 1993. We also endorse the comments of Don Fuqua, President of the Aerospace Industries Association, in his letter to you of February 28, 1994. Following are some of our principal concerns:

- We question at the outset whether environmental offenses should be the subject of a separate set of sentencing guidelines. This question is all the more pressing because the basic thrust of the proposed guidelines is to elevate penalties for environmental violations well above those for

other types of corporate crimes -- as though environmental crimes were inherently more serious and culpable than, say, fraud or antitrust offenses. In fact, it is commonly understood that environmental violations most often occur without deliberation or bad intent and sometimes even without knowledge on the part of the corporate managers involved. Strict liability is the order of the day in the environmental arena, even in criminal enforcement, where the element of criminal intent is often set aside on the basis that environmental violations are "health and welfare offenses." Thus, the entire concept of special, more onerous sentencing for environmental crimes runs counter to common sense and fairness.

- Most of the "Specific Offense Characteristics" used to increase fines from the "Base Offense Level" relate to the environmental effects of the violation and have nothing to do with what should be the principal factor in determining a sentence: the state of mind (or relative culpability) imputed to the corporation from the intentions and actions of its managers and employees.
- The draft guidelines provide that in no event shall a fine be less than the "economic gain" of the offender plus costs directly attributable to the offense. The "economic gain" is to include all cost savings the offender realized by avoiding or delaying compliance. However, such costs obviously cannot be established on any factual basis and would have to be addressed by hindsight and speculation. And how can an "economic gain" be established at all when, as is very often the case, the environmental incident could not reasonably be foreseen? (For

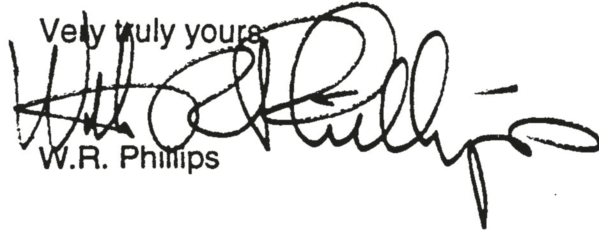
example, even a well designed and maintained waste facility may malfunction under circumstances that subject the company to liability.) By definition, "economic gain" presumes conscious avoidance or delay by company managers, which may not be factually true at all, even in a criminal proceeding.

- In these and other ways, the guidelines are structured to raise penalties to the upper end of the statutory sentencing range, so that the minimum and maximum fines stated in the statute have no real meaning. The McKenna & Cuneo law firm, in a letter of December 23, 1993, estimated that "the average penalty under the guidelines would increase almost 70% over the penalties presently being imposed for the same violations."
- As has been pointed out by other commenters, the compliance program set out in the guidelines is too extensive and too rigid to function as a true lever for compliance, or as an equitable base for mitigation of penalties. To require the local auto repair shop and General Motors to meet the same compliance criteria is inherently unfair. Even more unfair is the requirement that <u>every</u> criterion be met as a condition to sentencing relief. The old-fashioned virtues of "trying hard" and "substantial compliance" should have some place in environmental sentencing.
- The draft guidelines embrace the idea of court-managed probation of corporate environmental offenders, despite the generally negative record of corporate probation in other areas, and despite the courts' obvious lack of expertise in environmental technology and management.

Probation may be necessary to bring a real corporate outlaw into compliance, but should be reserved for the extreme situation.

Thank you for your attention to these comments.

Very truly yours,



W.R. Phillips

cc: Don Fuqua

Courlander

UNITED STATES SENTENCING COMMISSION
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WASHINGTON, DC 20002-8002
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March 4, 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.

BEFORE THE
UNITED STATES SENTENCING COMMISSION

THE ADVISORY WORKING GROUP ON ENVIRONMENTAL OFFENSES:
DRAFT SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES

COMMENTS OF THE
ASSOCIATION OF AMERICAN RAILROADS

The Association of American Railroads (AAR),[1] on behalf of its member railroads, submits the following comments on the Draft Sentencing Guidelines for Environmental Crimes (Draft Guidelines) proposed by the Advisory Working Group on Environmental Offenses. See 58 Fed. Reg. 65764 (December 16, 1993).

AAR shares the concern underlying the Draft Guidelines, that environmental laws be fairly and effectively enforced and that compliance be encouraged for all business organizations. However, AAR opposes the adoption of the Draft Guidelines in their current form on several grounds, discussed fully below. Chief among these objections are the elimination of organizational culpability as an important factor and the limitation of judicial discretion in inappropriate ways. Adoption of this proposal will lead to the imposition of unconscionably severe penalties for minor environmental violations, as well as a confusing and inconsistent method of dealing with organizations as criminal defendants.

The Draft Guidelines, without any articulable rationale for doing so, would impose sentences which are different and more stringent than those for other organizational crimes. There is no reason to believe that criminal violations of environmental laws impose unique or more severe consequences upon society than other types of organizational crimes; certainly there is no compelling reason for instituting an entirely different and complex sentencing scheme. The available evidence indicates that very few environmental crimes result in identifiable harm; the spectacular oil spill or dumping of toxic chemicals into a water supply is by far the exception and not the rule. Rather, most environmental crimes involve violations of paperwork requirements, reporting requirements, permit conditions or other technical regulations. These regulatory offenses are not significantly different from those which are not "environmental" and thus remain under U.S.S.G. Chapter 8.

The Draft Guidelines assess the seriousness of a violation in an overly simplistic way and thus exclude highly relevant considerations. The

---

[1]AAR is a trade association whose member railroads operate 75 percent of the line-haul mileage, employ 89 percent of the workers, account for 91 percent of the freight revenue of all railroads in the United States, and operate almost all of the nation's inter-city passenger trains.

Guidelines inappropriately group all "hazardous or toxic substances" together; in fact, materials categorized as hazardous or toxic differ widely in their toxicity and the degree to which they pose a threat to human health or the environment. Sentences for environmental crimes involving a toxic or hazardous substance should, in many cases, reflect the relative toxicity, quantity, and concentration of the material, as well as the circumstances of its release. Similarly, the Guidelines err in treating all permit violations the same. As a consequence of these problems, the numerical system set out in the Guidelines for ranking offenses does not reflect all the factors relevant to determining the seriousness of any given violation.

The Draft Guidelines are also seriously flawed because they fail to account for culpability as the primary factor in sentencing, including issues of intent, knowledge, and ability to control. It is important to remember that an organization, which is only vicariously liable, is not identical to an individual, who is personally liable. The degree of knowledge and control by the corporation in the misdeeds of its employees should be a highly relevant factor in the establishment of an appropriate penalty, yet the Guidelines give no weight to this factor at all. For instance, a company may itself be found criminally liable even when the employee actually committing the criminal act does so in violation of company policy and against instructions and then conceals his activity from company management. This may not be an unusual situation for a large company with many employees, some of whom may save themselves time and effort by engaging in activities which they know to be forbidden. Such a situation is obviously relevant to the question of culpability and can occur regardless of the sophistication and thoroughness of the type of compliance program described in the Guidelines. The existence of an audit and compliance program is thus not instructive on the question of whether, in a specific instance, the corporation knew of or exercised control over the commission of a particular violation. This critical question is entirely absent from consideration under the draft.

The failure to consider corporate culpability is especially damaging when one considers the hundreds of thousands of environmental regulatory provisions of which one can unwittingly run afoul. Under these circumstances, even the most sophisticated, well-intentioned, and well-informed environmental professional may fail to note or may misinterpret a regulatory provision. Although such inadvertent behavior may be sufficient to support liability in some cases, it does not justify imposition of a harsh penalty under the sentencing scheme. Heavily regulated industries such as railroads must operate within a maze of federal regulations of all kinds and thus inadvertent violations are not unlikely.

The credit for corporate compliance programs provided for in the Draft Guidelines does not alleviate the failure of the Guidelines to consider culpability. As a practical matter, very few organizations will be able to achieve a compliance program meeting the Guidelines' requirements. It is unrealistic to demand that every aspect of a corporate compliance program conform to the detailed guidelines for such programs;

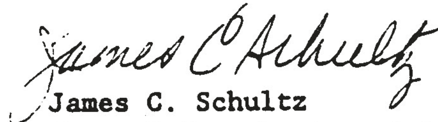
even for a corporation with a good program and a solid commitment, this kind of perfection is unlikely to be achievable.

Even if a corporation's compliance plan were to meet the Guidelines' extremely high standards, the degree of mitigation offered for this factor is severely limited and much too low; in all probability, even a corporation minimally culpable would pay an excessive penalty. Given the difficulty of complying with the Guidelines' requirements for compliance plans and the lack of sufficient rewards for doing so, the Guidelines provide little incentive to engage in the strenuous and expensive exercise of designing a "Cadillac" compliance plan.

The Guidelines also fail to take into account the numerous and varied other methods by which a violator is made to pay for its errors. Civil administrative and judicial penalties are available to punish non-compliance, as well as injunctive relief to force companies to take often expensive corrective measures to achieve compliance. Any environmental damage which may have resulted from the violation is compensable through suits by governments for natural resource damage and by individuals for tort damages. Corporations which do business with the government are potentially subject to debarment from government contracts, a result which can have disastrous consequences for some companies. None of these factors, which may have a significant economic impact on a corporate violator, is considered in determining an appropriate criminal fine under this proposed sentencing scheme.

It is undisputed that the environmental criminal laws should be vigorously, fairly and effectively enforced. Because they do not account for all the relevant considerations that should be taken into account in imposing sentences, the proposed Guidelines do not accomplish this objective. Therefore, AAR urges the Commission to reject these proposals and adopt standards which more fully reflect the true range of factors which should be considered by the courts in exercising informed sentencing discretion.

Respectfully submitted,



James C. Schultz
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February 24, 1994

Aerospace Industries Association

Don Fuqua
President

February 28, 1994

Honorable William H. Wilkins, Jr.
Chairman
United States Sentencing Commission
Federal Judiciary Building
Suite 2-500
One Columbus Circle, N.E.
Washington, D.C. 20002-8002

Dear Chairman Wilkins:

On November 16, 1993, the Advisory Working Group on Environmental Sanctions submitted its revised draft environmental sentencing guidelines to the Commission. On December 16, 1993, the commission published a notice requesting public comments on the Advisory Working Group's proposal. We are pleased to respond to your request for comments.

The Aerospace Industries Association (AIA) is the non-profit trade association representing the nation's manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment.

AIA has closely followed the activities of the commission during the past several years. To the extent possible, we have also tried to monitor the activities and progress of the Advisory Working Group in drafting its proposed environmental sentencing guidelines. We carefully reviewed the Advisory Working Group's March 1993 draft guidelines, and submitted comments to the commission on May 13, 1993 (Copy attached).

However, in reviewing the Advisory Group's November 1993 draft, it is obvious that none of our earlier comments have been adopted by the Advisory Group. In addition, this later draft creates new issues that have not been the subject of public comment, but should be. In light of the number of deficiencies that we see in the Advisory Group's draft, we urge the commission to reject the revised guidelines -- at least until there has been an opportunity for the commission to obtain both oral and written comments from interested parties. AIA would be pleased to participate by providing detailed comments.

With respect to the November draft, we are particularly concerned about several key approaches which provide the foundation for the entire draft guidelines. These include:

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-- the radical departure from the use of dollar amounts to the use of percentages of the maximum statutory fine and the use of standards unique to this section;

-- the unprecedented establishment of a minimum fine that could obviate the important mitigation factors of the guidelines, such as those for effective compliance programs, voluntary clean-up, or cooperation with administrative agencies;

-- the mandate that organizations establish a separate and distinct environmental compliance program divorced from a company's other compliance programs, and

-- a mandate for a standardized, inflexible environmental compliance program that ignores an organization's size, contact with hazardous substances, or past compliance.

Any of these issues should be enough for the commission to withhold approval of the Advisory Working Group's recommendations until the implications of its suggestions have been carefully reviewed. Taken together, we believe the case is compelling for outright rejection, or at least delay.

We would welcome the opportunity to submit more detailed comments to the commission during a public notice and comment period. In the interim, if AIA can provide you or your staff with any additional information, please do not hesitate to contact Patrick Sullivan of my staff at (202) 371-8522.

Sincerely,

Don Fuqua

Enclosure

DF:pds

LeRoy J. Haugh
Vice President
Procurement and Finance
(202) 371-8520

May 14, 1993

Advisory Working Group on Environmental Sanctions
United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, D.C. 20002-8002

Dear Sir or Madam:

In response to your request for comments on the working draft of recommended environmental sentencing guidelines, some of our member companies have provided their comments directly to your office. However, we as an association have not previously responded and would like to do so at this time. Our preliminary study of the draft guidelines gives us several concerns which are discussed below. The Aerospace Industries Association (AIA) is the nonprofit trade association representing the nation's manufacturers of commercial, military, and business aircraft, helicopters, aircraft engines, missiles, spacecraft, and related components and equipment.

We believe that the draft guidelines would severely punish even corporations that had taken all appropriate preventive actions. One way the draft guidelines accomplish this result is by limiting mitigation credit to 50% of the base fine. By contrast, under the Organizational Guidelines, a fine range between 5% and 20% of the base fine is theoretically possible.

A somewhat related matter is the aggravating factor for prior history which does not consider the "quality" of that history. A corporation that had prior convictions or adjudications in spite of vigorous compliance efforts would have its sentence aggravated to the same extent as an environmental scofflaw. Considering the quality of the prior offense would be consistent with the provision for mitigation credit for offenses involving a lack of scienter. If prior convictions or judgments were based on strict liability or collective knowledge standards, then the "aggravation" caused by such prior history should be reduced as well.

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The description of a compliance program necessary to satisfy the mitigating factor of "Commitment to Environment Compliance" goes into excessive detail. A more general, and shorter, description with some discretion left to the judge would be more appropriate.

While in general the efforts of the Sentencing Commission are aimed at limiting the discretion available to sentencing judges, the area of environmental enforcement is one that calls for more discretion than represented either in the current draft or in the prior guidelines issued by the Commission. Discretion is particularly appropriate because much of the conduct now being dealt with via criminal enforcement occurred at a time when such conduct was being regulated administratively, civilly or not at all. While government can certainly change its enforcement priorities to respond to increasing public sensitivity to environmental issues, the ability to soften the impact of unexpected changes in government priorities should reside with the courts. The very high fine levels and low standards of culpability also call for the availability of greater discretion.

The aggravating factor of "concealment" does not recognize that in many instances so-called corporate crime involves employees violating company policy as well as the law. Nevertheless, the aggravating factor applies even if the employee attempted to conceal information from his employer as well as the government. This aggravating factor should be limited to actions of certain employees and should exclude actions intended to deceive the organizational defendant as well.

The aggravating factor of "lack of a permit" seems redundant since some conduct is illegal only because of the absence of a permit. This aggravating factor should be eliminated, or at least limited to cases where the absence of a permit is not a necessary element of the offense.

We are also concerned that if the government contests the adequacy of a compliance program, the defendant could be required to fund the dispute. The guidelines authorize the court to hire experts, at the defendant's expense, to evaluate the compliance program. Since the costs to the government to challenge a program would therefore be minimal, such government contentions are certain to be a regular feature of every sentencing under these guidelines. A far preferable approach would leave discretion to the judge to determine appropriate methods for testing the adequacy of a program should he or she determine it to be necessary.

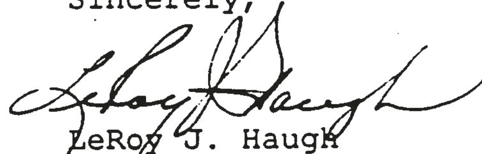
Conspicuous by their absence are discussions of deviations from the guidelines. The organizational guidelines set out circumstances when a court may make a "departure" from the guidelines, such as for extremely low or high culpability. The environmental draft has no such provisions.

Finally, the base fine table "re-legislates" decisions already made by Congress. By using percentages of the maximum fine which vary based on the extent to which the conduct harms or jeopardizes people or the environment, the guidelines do what Congress has already done. The Clean Water Act for example provides for criminal fines between $25,000 and $250,000 per day determined by the same sort of factors.

We understand the difficulty in developing a set of guidelines for such a complex area. However, the draft as presently written falls far short of being an acceptable solution. We recommend, if the Commission is unable to arrive at a workable and fair set of guidelines, that no guidelines be issued. Causing industry to litigate the inequities in any set of guidelines rather than addressing the issues directly is not a solution. Rather the Commission would be better served by issuing a set of broad principles for sentencing and abandoning the development of a detailed set of flawed guidelines.

If we can be of further assistance, please do not hesitate to contact the undersigned at (202) 371-8520.

Sincerely,



LeRoy J. Haugh

LJH/pds

BEFORE THE UNITED STATES SENTENCING COMMISSION

COMMENTS OF UNION PACIFIC RESOURCES CO. ON ORGANIZATIONAL SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES PROPOSED BY THE SENTENCING COMMISSION'S ADVISORY WORKING GROUP

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COMMENTS OF UNION PACIFIC RESOURCES CO. ON ORGANIZATIONAL SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES PROPOSED BY THE SENTENCING COMMISSION'S ADVISORY WORKING GROUP

Union Pacific Resources Co. ("UPRC"), a subsidiary of Union Pacific Corporation, is one of the largest independent oil and gas exploration and production companies in the United States. UPRC is headquartered in Fort Worth, Texas, and has over 1400 employees. With 42 operated and non-operated rigs currently drilling for oil and gas in the United States, UPRC has been the most active driller in this country for the past two years. UPRC also operates several natural gas processing plants, has interests in coal and trona mines, and owns or leases the minerals in over 8 million acres of land in the United States, 806,000 of which have been developed for oil and gas production.

UPRC respectfully submits the following comments on the organizational sentencing guidelines for environmental crimes proposed by the Advisory Working Group of the United States Sentencing Commission.

INTRODUCTION

Broadly speaking, punishment schemes -- whether criminal fines, civil penalties, imprisonment, or other -- may be evaluated from two distinct and important perspectives. The first of these is utilitarian: it views punishment as a means of achieving a desired end, typically, inducing actors to take the appropriate level of precautions to avoid certain societal harms; this perspec-

tive accordingly focuses primarily on issues of deterrence.[1] The second perspective is retributive and is grounded in traditional moral notions of just deserts: it assesses a proposed punishment scheme in terms of its capacity to treat individual offenders according to the nature of the offense committed, to distinguish appropriately among differently situated offenders, and to impose penalties that are reasonably proportioned to the underlying offense.[2]

The discussion that follows applies these two distinct perspectives in analyzing the Working Group's Proposed Guidelines for Environmental Sanctions for Organizations. In Section I (pages 3-20, infra), we examine the Proposed Guidelines from an economic/ deterrence approach to sentencing, concluding that the structure of the proposal is very poorly designed to achieve rational deterrence. In Section II (pages 20-30, infra), we discuss what we believe are certain serious deficiencies in the proposal from a fairness standpoint.

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[1] The "'utilitarian' position" asserts that "what justifies the practice of punishment is its propensity to protect society from harm." H.L.A. Hart, Punishment and Responsibility: Essays In The Philosophy of Law 72 (1973).

[2] For descriptions and applications of "utilitarian" arguments, see generally J. Bentham, An Introduction to the Principles of Morals and Legislation (1970); J.S. Mill, Utilitarianism (13th ed. 1906); H. Sidgwick, Methods of Ethics 411-95 (7th ed. 1962); J. Smart & B. Williams, Utilitarianism: For and Against (1973). For comparable descriptions and applications of "non-utilitarian" arguments, see generally R. Dworkin, Taking Rights Seriously 184-205 (1977); C. Fried, An Anatomy of Values 207-36 (1970); Anscombe, Modern Moral Philosophy, 33 Philosophy 1 (1958).

Overall, it is our submission that the current framework is too flawed in concept to provide a suitable basis for organizational sentencing for environmental crimes. We therefore believe that the Commission should reject the current proposal and remand the matter to the Working Group for further study.

I. THE PROPOSED GUIDELINES ARE FUNDAMENTALLY FLAWED FROM AN ECONOMIC/DETERRENCE APPROACH, AND WOULD CAUSE MASSIVE OVERDETERRENCE AND CHILL SOCIALLY USEFUL ACTIVITY.

A. The Utilitarian Perspective

1. By its nature, utilitarian analysis -- the economist's stock in trade -- focuses on the costs and benefits of punishment. The utilitarian asks: How much punishment is necessary to provide sufficient incentives to avoid commission of a particular offense? How much punishment is "too much"? And what form should any punishment take? For several reasons, sentencing of corporations, particularly for environmental offenses, is especially well suited to such utilitarian inquiries.

First, deterrence -- a quintessentially utilitarian objective -- should be the primary objective of organizational sentencing in general. To be sure, general penal philosophy, developed in the context of sentencing of individuals, recognizes a variety of objectives in sentencing -- principally, retribution, or punishment; deterrence; and incapacitation. But incapacitation is essentially inapplicable to organizations other than those that exist solely for unlawful ends. Moreover, retribution should be at most a very subordinate ingredient of organizational sentencing. When a fine is imposed on an individual defendant, he must pay the

fine. By contrast, when a fine is imposed on an organizational defendant, the onus of the fine falls directly upon the shareholders and indirectly upon the employees and customers of the defendant, virtually all of whom, in the case of most publicly-held corporations, will be personally innocent of wrongdoing.[3] Because it is rarely appropriate to measure a fine upon a corporation by its advancement of the goals of retribution or incapacitation, effective deterrence should provide the fundamental measure of criminal fines directed at organizational defendants.

Further, utilitarian analysis makes particularly good sense in the context of environmental offenses. Environmental laws are unusually complex and pervasive, and thus potentially apply to a wide array of conduct that is not manifestly or inherently antisocial. Unlike more traditional, non-regulatory offenses -- such as robbery, extortion, or embezzlement -- environmental offenses, of one degree or another, may often be an unavoidable incident to the lawful course of business for many companies. This is especially true because firms are charged with the responsibility for monitoring and controlling the activities of large numbers of individuals in their employ -- a difficult task for the best-intentioned.

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[3] The Supreme Court has recognized this precise point in the course of holding municipalities immune from punitive damages: "Regarding retribution, it remains true that an award of punitive damages against a municipality 'punishes' only the taxpayers, who took no part in the commission of the tort. * * * Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

As a result, companies "must engage in legitimate professional activities that are regulated in significant part by criminal sanctions; to this extent, they become unavoidably 'entangled' with the criminal law."[4] Moreover, at the end of the day, what we can most appropriately demand of companies -- and what is most socially useful -- is that they take reasonable measures to avoid infractions of the law. Reasonable measures, presumably, are those that are neither so few as to be ineffectual in preventing environmental harms, nor so many as to squander, past the point of diminishing return, resources that could more beneficially be applied elsewhere (for example, to job creation). A utilitarian approach recognizes these factors by requiring firms to internalize the costs of environmental offenses.

2. From an economic perspective, an optimal punishment scheme must take account of three fundamental principles:

First, the amount of a fine should generally be based on the costs or harms associated with an offense. By ensuring that the company internalizes the full social costs generated by its conduct, a punishment scheme creates appropriate incentives to alter corporate behavior and thereby reduce the incidence of environmental damage.[5] But a fine based on costs alone will often under-deter environmental harms because companies will discount

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[4] J. Coffee, Jr., Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. Rev. 193, 219-220 (1991).

[5] See, e.g., Block, Optimal Penalties, Criminal Law and the Control of Corporate Behavior, 71 B.U.L. Rev. 395 (1991).

costs by the percentage likelihood of escaping liability altogether due to non-detection. Accordingly, in calculating the fine it is also necessary to adjust upward to reflect the probability of escaping detection. In general, the resulting calculation will yield the proper level of deterrence of the offense.[6]

Second, and crucially important to a rational scheme of deterrence, the determination of the fine must take into account all of the monetary consequences to the company resulting from the offense. As one commentator has noted, "[a] million dollar fine affects firms in the same way as a million dollar private settlement or a comparable loss in reputational capital."[7] Accordingly, "sentencing guidelines should allow the judge to consider other direct monetary costs incurred by the firm, including private settlements, cleanup costs, and remedial action taken to ensure future compliance."[8] It is in this respect that the current proposal is perhaps most gravely deficient.

Third, care must be taken, in setting fines for criminal conduct, to avoid overdeterrence -- which results from the failure to credit against a criminal fine the monetary exactions imposed as a result of civil and administrative actions, as well as moneys voluntarily expended to remediate the harms. As one former member

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[6] Id. at 397.

[7] Cohen, Corporate Crime and Punishment: An Update on Sentencing Practice in the Federal Courts, 1988-1990, 71 B.U.L. Rev. 247, 279 (1991).

[8] Ibid. Accord, Alschuler, Comment: Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand, 71 B.U.L. Rev. 307, 308 (1991).

of the Sentencing Commission has noted, "any penalty structure that exceeds the expected losses generated by a prohibited activity will impose costs exceeding its benefits."[9] "Because firms will generally respond to penalties by adjusting their prevention activities so as to minimize their combined prevention and expected penalty costs, supraoptimal penalties will produce supraoptimal levels of control and suboptimal levels of consumption."[10]

Overdeterrence has important practical consequences, particularly in the context of environmental offenses committed by business organizations. Many criminal prosecutions of organizations for environmental crimes arise from either accidents that have serious societal consequences (e.g., a discharge of waste that imperils the safety of drinking water, or an oil spill that causes extensive damage to wildlife, beaches, etc.) or from the wrongful actions of relatively low-level employees -- actions that may stem from inadequate training or supervision but that do not reflect deliberate corporate policy to disobey the law. These offenses may occur despite the fact that the firm has taken reasonable measures to avoid their occurrence. Even where it has not, the purpose of any monetary sanction is to create appropriate incentives for the offender and others like it to take reasonable precautions to prevent future similar occurrences.[11] The imposition of fines

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[9] Block supra note 5, at 408.

[10] Id. at 408-09.

[11] We put to one side, for purposes of this discussion, the case in which company policy-makers deliberately opt to disobey the law. To begin with, we believe that such cases are relatively rare

greatly in excess of the relevant societal costs arising from the infraction will overdeter the offense conduct -- i.e., cause firms to overinvest in precautions to avoid the infraction.

Such overinvestment will, at a minimum, raise the costs of the products produced by the firm, without reaping any commensurate benefit in environmental protection. At worst, it will cause firms to withdraw from activities that carry excessive risk of liability, depriving the public both of useful products (such as child vaccines) and of jobs. As Professor Coffee has cautioned, "if the fine is severe enough to threaten the solvency of the corporation, the predictable response will be a cost-cutting campaign involving reductions in the work force through layoffs of lower echelon employees who received no benefit from the earlier crime."[12] See also Huber & Litan, The Liability Maze: The Impact of Liability Law on Safety and Innovation (Brookings 1991); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (O'Connor, J., concurring in part and dissenting in part).

As we show below, the Working Group's proposal violates these elemental principles of rational deterrence. It neither credits non-fine costs incurred by an offender (causing overdeterrence in

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(leaving aside criminal-purpose organizations). In any event, because deliberate environmental crimes by organizations would almost always be economically motivated, a system that sets punishments at a level sufficient to deprive the organization of any prospect of illicit gain should suffice to remove fully the incentive to commit a contemplated offense.

[12] Coffee, "No Soul To Damn: No Body To Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 Mich. L. Rev. 386, 401 (1981).

virtually all cases) nor adjusts the fine on the basis of the likelihood of escaping detection (producing underdeterrence in some cases). It therefore is bound to fail any test based on the accomplishment of rational deterrence.

B. The Charged-Offense Scheme Set Forth In Section 9B2.1 of the Proposed Guidelines Is Indefensible On Deterrence Grounds.

Under the Working Group's proposal, a court must begin by determining the "primary offense level," derived from the table set forth in Section 9B2.1. After adjusting for various aggravating and mitigating factors (see pages 26-30, infra), the offense level is then converted to a prescribed percentage of the maximum statutory fine.[13]

From the outset, however, this "charged-offense" approach is fatally flawed -- since it makes the criminal sanction imposed on the organizational defendant largely a function of the prosecutor's charging practices. Moreover, this regime makes no adjustments for collateral sources of deterrence, including private civil actions, penalties, and remediation costs. In short, there is little reason to anticipate that the Working Group's proposal will produce penalties that appropriately deter environmental offenses.

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[13] Moreover, at that point, the fine may be increased to equal the sum of the economic gain plus costs associated with the offense. See pages 18-20, infra.

1. A Charged-Offense Regime Likely Will Result In Either Overdeterrence or Underdeterrence.

Viewed from an economic perspective, Section 9B2.1 is, at best, an arbitrary method of determining appropriate penalties for environmental wrongdoing. As noted above, appropriate levels of deterrence can usually be achieved by imposing penalties equal to the social costs engendered by the offense, adjusted to reflect the risk of non-detection (with credits for non-fine economic losses incurred by the offender). There is no reason to believe that the maximum statutory fine -- on which Section 9B2.1 is predicated -- bears a particularly close relation to the social costs generated by any specific infraction.[14] Moreover, the proposal does not differentiate between violations based upon the amount of pollutants discharged or the likelihood of significant harm. As a general matter, therefore, fines based on charged-offenses will not result in optimal deterrence levels. Indeed, any appropriate fit between fine levels and desirable levels of deterrence would be pure happenstance.

2. By Placing Excessive Discretion In The Hands Of Federal Prosecutors, A Charged-Offense Regime Creates The Potential For Extreme Overdeterrence.

Under Section 9B2.1, a convicted organizational defendant would be fined within a narrowly-bounded percentage of the maximum statutory fine that could be imposed for each offense of which the

[14] True, the congressional choice of a maximum fine would, in theory, reflect its judgment as to the gravity of the most serious form of a given offense. In practice, however, the available criminal fines are not meaningfully calibrated to achieve this end.

defendant is convicted. Under a percentage of the maximum system, however, it is essential that significant judicial sentencing discretion be retained. Otherwise, the penalty inflicted on an organization convicted of violating the environmental laws would be too directly linked to the prosecutor's charging decisions.

While a prosecutor retains power under any charged-offense sentencing regime to influence the penalty imposed on a defendant, the particular features of the environmental law increase the prosecutor's power significantly. As the Working Group has acknowledged, environmental law provides a great potential for "count proliferation." Section 9E1.2, Comment 1. Such count proliferation is likely to take one of two forms in the environmental context. First, a single criminal act may simultaneously violate a number of different environmental laws: For example, a corporation that illegally discharges hazardous wastes into a stream and fails to report that release may be found guilty of violating simultaneously the Clean Water Act, the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-87, CERCLA, and the Emergency Planning and Community Right to Know Act, 42 U.S.C. §§ 11001-50. Second, commission of environmental offenses that are continuing in nature arguably would enable the prosecutor to split the offense and "stack" the charges: For example, assuming that a defendant has released pollutants into its treatment system and from the system into navigable waters and has exceeded its permitted allowances for a period of one year, a prosecutor may arguably charge the defendant with 365 separate

violations of the Clean Water Act, 33 U.S.C. § 1319(c)(1), as well as 365 violations of RCRA. 42 U.S.C. § 6928(a). Prosecutorial charging practices in the environmental field thus could force absolutely staggering fines if, as in the proposed guidelines, the penalty is directly linked to the offenses charged.[15]

Either of these forms of count proliferation will typically yield criminal fines that are indefensible on economic grounds. First, where a particular act results in simultaneous violations of CERCLA, the Clean Water Act, and RCRA, and in the consequent imposition of three separate criminal fines, the result will more likely than not be overdeterrence, especially when one adds the civil remedial costs also borne by on the environmental wrongdoer. Second, while it is true that cumulative fines for ongoing environmental violations may be appropriate from an economic perspective where each continuing day of violation creates additional social costs, many criminal offenses under the environmental laws, even if ongoing, do not give rise to increasing costs -- e.g., the recordkeeping offenses under CERCLA, 42 U.S.C. § 9603(b). And even where ongoing criminal conduct entails social costs, those costs are often accounted for through civil or administrative remediation.

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[15] Because of the extensive media and public attention given environmental issues in recent years, it is likely that prosecutorial discretion to charge multiple offenses under the environmental laws will be exercised frequently. Just as "the determination [to prosecute] seems based more on the media attention given a particular environmental accident than on the conduct of the company involved," so may the decision as to what or how many offenses to charge be a function of external political forces. Locke, supra, 16 Colum. J. Env. L. at 326.

Because application of Section 9B2.1 will generally expose defendants to the risk of massive fines bearing little or no rational relationship to appropriate levels of deterrence, it is essential that the Guidelines contain an effective mechanism for cabining the effects of inappropriate count proliferation. The grouping rules contained in the individual guidelines, U.S.S.G. § 3D1.2(d), would provide such a mechanism.

Nevertheless, the Working Group expressly rejects the grouping rules applicable to the individual guidelines, concluding -- without explanation -- that "[a]pplied to environmental offenses, this approach could understate the harms that environmental crimes can cause." Section 9E1.2, Comment 1.[16] Instead, the Working Group proposes a pale substitute, allowing for a modest downward adjustment where a court concludes, "in the interest of justice," that "the total fine calculated under this Chapter would be unjust as a result of excessive repetition of counts relating to a course of offense behavior that is ongoing or continuous in nature and does not involve independent volitional acts." Section 9E1.2. And even "in the interest of justice," a court may not truly "group" the excessive counts, but must instead increase the total fine by

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[16] It should also be noted that the Working Group <u>has</u> chosen to apply grouping rules to situations in which a defendant is simultaneously charged with both environmental and non-environmental crimes. Section 9B2.1, Application Note 2. There is no discernible reason why these rules would be any less appropriate in the context of multiple environmental counts alone. Indeed, because a prosecutor could evade the grouping rules by simply declining to charge an organizational defendant with non-environmental crimes, the application of the grouping rules itself becomes a function of prosecutorial charging practices under the scheme contemplated by the Working Group.