



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

MAR 22 2010

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

Michael Courlander
United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500
Washington, DC 20002-8002
Attention: Public Affairs

Re: Comments by the United States Environmental Protection Agency (EPA)
Regarding the Notice of Proposed Amendments to the Sentencing Guidelines for
United States Courts, 75 Fed. Reg. 3525 (Jan. 21, 2010)

Dear Mr. Courlander:

The EPA submits the following comments to express support for the United States Sentencing Commission's proposed amendments to § 8D1.4 of the sentencing guidelines regarding recommended conditions of probation for organizations.

In particular, the EPA supports the following proposed amendments to § 8D1.4 of the sentencing guidelines set forth at 51 Fed. Reg. at 3534-35:

- (1) the consolidation of probationary terms imposed to enforce both monetary penalties and non-monetary requirements so that all conditional terms of probation are available for consideration by the sentencing court under a revised § 8D1.4(b);
- (2) the addition of specific language allowing the sentencing court to require the organization to retain an independent, properly qualified corporate monitor under a revised § 8D1.4(b)(3); and
- (3) the addition of specific language allowing the sentencing court to require the organization to submit to a reasonable number of regular or unannounced examinations of facilities subject to probation supervision under a revised § 8D1.4(b)(6).

These proposed revisions to the recommended conditions of probation for organizations are especially important to environmental crime cases. Monitoring of ongoing compliance with environmental laws and regulations by an organization as a condition of probation can involve

complex scientific, technical and regulatory issues that are typically beyond the scope of a probation officer's expertise. Allowing the court to require retention of an independent, properly qualified corporate monitor with appropriate environmental expertise would greatly improve the effectiveness of probationary oversight for organizations convicted of environmental offenses.

The addition of language allowing the sentencing court to require the organization to submit to a reasonable number of regular or unannounced inspections would, to a substantial degree, close a critical gap that has existed in the organizational guidelines since their beginning in 1991. The proposal would allow access to and examination of facilities that were the subject of an environmental crimes prosecution to assure that the facilities are in compliance with environmental laws.

In order to complete the closure of that gap, EPA recommends that the proposed amendment be further modified to *include the right to sample* during the examinations. Therefore, subsection B should be amended to include the underlined phrase set forth below:

(B) a reasonable number of regular or unannounced examinations of facilities, including collection of pertinent facility samples, subject to probation supervision;

The need for these changes, as noted above, goes back to 1991, when USSG § 8D1.4 was created. Written from a financial crime perspective, the provision focused upon matters that would be reflected in written records, allowing as a condition of organizational probation "a reasonable number of regular or unannounced examinations of its books and records at appropriate business premises" and "interrogation of knowledgeable individuals within the organization." That original provision was a useful start; however, in its January 21 proposal the Commission has recognized that for some types of offenses evidence of continued violations of probation and/or the law may not show up on paper – and knowledgeable individuals may well lie about the facts to cover up the violations. Site inspections, of course, like access to books and representatives, also have their limitations in terms of determining whether a defendant is in compliance with environmental laws. An inspection may establish whether or not a defendant is properly operating equipment or properly storing hazardous wastes, but it alone cannot reveal the nature of a waste in terms of identity or concentration, both of which commonly are critical to environmental compliance. Therefore, both site access and the authority to take samples should be added to the amendment in order to provide critical supplemental oversight of a defendant during probation.

EPA believes that the Commission's proposed amendments to USSG § 8D1.4 would provide very valuable improvements to the conditions of probation that could be imposed on organizational defendants convicted of environmental offenses. Due to the unique nature of environmental compliance, the addition of language to specifically allow collection of samples during regular or unannounced inspections proposed in § 8D1.4(b)(6) would further the Commission's goal of providing the sentencing court with sufficient tools to ensure ongoing environmental compliance of an organization during its term of probation.

If you have further questions regarding EPA's comments on the Commission's proposed amendments, please contact Eric Nelson of my staff at (303) 462-9456.

Sincerely,

A handwritten signature in cursive script that reads "Cynthia Giles". The signature is written in black ink and is positioned above the printed name and title.

Cynthia Giles
Assistant Administrator