

TESTIMONY OF THE UNITED STATES DEPARTMENT OF JUSTICE

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HAZARDOUS MATERIALS TRANSPORTATION

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BEFORE THE
UNITED STATES SENTENCING COMMISSION

- - -

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INTRODUCTION

Members of the Commission--

Thank you for inviting us today to discuss the pending proposal for the adoption of a new sentencing guideline for hazardous material (“hazmat”) transportation crimes.¹

In 1998, the most recent year for which data is available, more than four billion tons of hazardous material in approximately 800,000 shipments were transported in the United States.² In 2000, more than 17,000 hazardous material incidents were reported to the Department of

¹ This statement contains in abbreviated form many of the comments made by the Department in its March 1, 2004, submission to the Commission.

² Report of the Senate Commerce, Science and Transportation Committee on the “Surface Transportation Safety Reauthorization Act of 2003,” S. REP. 108-215, at 11 (2003).

Transportation.³ These incidents resulted in 13 fatalities and 244 injuries directly attributable to the hazardous materials being transported⁴, such as the explosion of petroleum in a tanker truck.

In the wake of September 11, 2001, concerns about the safety and security of hazmat transportation have grown. The events of that day revealed the vulnerabilities of an open and free society such as ours, and compelled a close and ongoing examination of how best to minimize those vulnerabilities consonant with our traditions of liberty. Unquestionably, the transportation of hazardous materials presents one of our Nation's significant vulnerabilities, and the Department of Justice recognizes that it has an important role in helping to ensure the safe transportation of hazardous materials.

Two years ago, the Department's Environment and Natural Resources Division launched an initiative to more strictly enforce the federal Hazardous Materials Transportation Law, 49 U.S.C. §§ 5101-5127 ("HMTL"). The purpose of this homeland security initiative is to make it more difficult for terrorists and other criminals to transport hazmat illegally, and to ensure that industries regulated under the hazmat transportation laws comply with those laws so as to reduce the risks inherent in the transportation of hazardous material.⁵

³ Id., at 11-12.

⁴ Id.

⁵ The purpose of the HMTL is "to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. § 5101.

The Department has a compelling interest in assuring that the sentences of cases brought under its Hazmat Initiative provide adequate punishment and deterrence. While the bulk of hazmat transportation is done legally, the sheer volume of hazmat shipments provides opportunities for those who might choose to jeopardize homeland security. Because of the risks to life, public health, and the environment associated with hazmat crime, violators must face at least the possibility of imprisonment to provide adequate punishment and deterrence. Yet, under existing law, only probation would be imposed in the majority of cases, which is neither adequate punishment nor deterrence in comparison with the harm and risk of harm posed by hazmat violations.

My testimony today addresses the following issues: first, why the existing guideline treatment of hazmat offenses is inadequate; second, why a new hazmat guideline is necessary; third, a description of some elements the Department believes should be included in a new guideline; fourth, why recently passed legislation in the Senate to reauthorize the Hazardous Materials Transportation Law supports adoption of a new hazmat guideline; and fifth, a response to some of the concerns expressed in other comments regarding the pending proposal.

I. Existing Guideline Treatment of Hazmat Offenses is Inadequate

As stated in our letter to the Commission on August 1, 2003, and our written comments submitted March 1, 2004,⁶ the Department believes that the guideline currently covering hazmat

⁶ The letter responded to the Sentencing Commission's notice of proposed amendments to the sentencing guidelines and request for public comment, published in the Federal Register on December

transportation crimes, §2Q1.2, is poorly suited to such offenses and, in most instances, will result in sentences of probation which are insufficient to provide adequate deterrence.⁷

Hazmat transportation offenses are substantially different from pollution crimes covered by §2Q1.2. Section 2Q1.2 was intended to cover hazardous and toxic wastes, particularly in the context of ongoing, continuous, or repetitive releases, and the failure to obtain government permits required to lawfully discharge or release those wastes into the environment. Offenses involving the transportation of hazardous materials, on the other hand, most often will not involve releases but rather valuable products moving in commerce, for which permitting ordinarily is not required.⁸

Since the specific offense characteristics of §2Q1.2 are chiefly designed for pollution crimes involving hazardous *wastes*, their application in the prosecution of transportation crimes involving hazardous *materials* are likely to yield sentences that are inadequate for punishment and deterrence. For example, §2Q1.2(b)(1)(A) provides a 6-level enhancement for repetitive pollution crimes, but only if a release into the environment occurs. This approach is appropriate to pollution crimes that commonly involve repetitive releases of hazardous wastes, such as an industrial facility's unpermitted

30, 2004. 68 Fed. Reg. 75,340.

⁷ In developing our comments, the Department consulted extensively with interested U.S. Attorneys' Offices, the Department of Transportation and the Department of Homeland Security (Coast Guard).

⁸ There is at least one exception. Motor carriers that transport certain especially dangerous hazardous materials (e.g., explosives and radioactive materials) must obtain a safety permit from DOT. 49 U.S.C. § 5109.

discharge of waste into a river. However, it is poorly suited to crimes involving the transportation of hazardous materials. Most hazmat crimes do not involve releases, and yet repetitive behavior that increases the risk of release is common. Thus, the 6-level enhancement under §2Q1.2(b)(1)(A) likely will be applied infrequently to hazmat crimes.

Similarly, §2Q1.2(b)(4) provides a 4-level enhancement for violations involving transportation, treatment, storage, or disposal without, or in violation of, a permit. While the environmental laws regulating hazardous and toxic wastes typically require a person to obtain a permit from the government before releasing such substances, the laws governing the transportation of hazardous materials do not require persons involved with such activities to obtain a government permit.⁹ Rather, the hazmat transportation regulatory scheme requires information about hazards to be provided through paperwork, placarding, and labeling. Thus, §2Q1.2(b)(4) would almost never be applied to hazmat transportation crimes.

Without these two specific offense characteristics in §2Q1.2, i.e., for releases into the environment, and for discharges without or in violation of a permit, traditional pollution offenses would rarely result in jail time. These offense characteristics are the core enhancements for pollution crimes and, as the foregoing discussion makes clear, are unlikely to apply to the majority of hazmat crimes. As a result, guideline sentences for hazmat crime typically will be 10 levels lower than for comparable pollution crimes.

⁹ Id.

II. A New Hazmat Guideline is Necessary

To adequately deter and punish offenses involving the transportation of hazardous material, a guideline specifically tailored to such offenses should be adopted. A new hazmat guideline should cover violations of 49 U.S.C. §§ 5124 [Hazardous Materials Transportation Act] and 46312 [Transporting Hazardous Materials Aboard an Aircraft], as well as some provisions of 60123 [Hazardous Liquid Pipeline Safety Act].

Given the inherent danger posed by the transportation of hazardous materials, the base offense level of a new guideline for hazmat crimes should be at least eight. Enhancements for repetitiveness and concealment, common aggravating factors in hazmat crimes, as well as an enhancement for hazmat violations on passenger-carrying modes of transportation, should be included. The latter enhancement is unique to hazmat transportation offenses and is best illustrated by the following example. If an incident arising from a hazmat crime takes place on a passenger-carrying aircraft there is little room for error or time to take corrective action and options for escape are virtually nonexistent. Many deaths can be anticipated from such an incident, as was the case with the 1996 ValuJet crash into the Everglades which killed all 110 passengers on board. The cause of the crash was determined to be a fire generated by mislabeled oxygen canisters in the plane's cargo hold.

A comparative calculation for the ValuJet crash underscores the need for a new guideline. Under current §2Q1.2, if culpable individuals had been charged and convicted of hazmat crimes, the total offense level for the conduct that resulted in the crash would have been 17 (8 for the base offense

level and 9 for the deaths), yielding a sentence of 24-30 months. The total offense level under a new hazmat guideline as we envision it would be 30 (10 for the base offense level, 14 for the deaths, and 6 for the passenger-carrying mode of transportation), yielding a sentence of 97-121 months. We respectfully submit that a sentence of 97-121 months more closely approximates a just punishment for criminal violations that resulted in the deaths of 110 people.

Another case example which provides a compelling justification for a new guideline is *United States v. Emery Worldwide Airlines, Inc.*, S.D. Ohio CR 3-03-113 (2003). In this case, over a period of years, there were hundreds of instances when hazmat was transported on Emery aircraft without notification to the pilots. Under current §2Q1.2, had an individual been prosecuted, the total offense level would be 8 – the base offense level, and nothing more. However, under an appropriate hazmat guideline, the total offense level would likely be 16 (10 for the base offense level, 2 for a pattern of activity, and 4 for concealment), clearly a more appropriate offense level for repeatedly putting flight crews' lives at risk.

The Department also believes that enhancements for injury or death, releases, and public and private harms (such as expenditures for cleanup, emergency responses, evacuation of communities, or disruption to utilities) should be included in a new guideline. These enhancements, similar to the ones presently in §2Q1.2, would be graduated to reflect the range of harm that can result from hazmat violations.

Finally, a new guideline should allow for an upward departure if the offense was committed with a terrorist motive. In certain terrorist cases, §3A1.4 of the guidelines will ensure that hazmat crimes committed by terrorists would be appropriately sentenced. Any other terrorism-related hazmat cases also should be subject to some upward adjustment/departure.

III. Pending Senate Amendments to the Hazardous Materials Transportation Law

As the Commission is aware, the Senate passed legislation on February 12, 2004, which contains provisions that would strengthen and improve programs to ensure the safe transportation of hazardous materials. See S.1072, 108th Cong., 2d. Sess, Title IV, Subtitle D.¹⁰ Significantly, the new legislation, if enacted, would increase the maximum sentence for hazmat crimes, from five to twenty years, further highlighting the shortcomings of the existing sentencing guidelines for hazmat crime. The pending legislation would not expand the definition of hazmat crime, however, so it would serve no purpose to delay enactment of the proposed hazmat guidelines.

The pending legislation is largely designed to respond to the critical problem of undeclared or hidden shipments of hazardous materials. It would enhance the Department of Transportation's authority to inspect hazmat shipments and detect violations of the HMTL.¹¹ It would also strengthen both civil and criminal enforcement by:

¹⁰ The short title for subtitle D is the "Hazardous Material Transportation Safety and Security Reauthorization Act of 2004." S. 1072, § 4401.

¹¹ S. 1072, § 4439.

- ! authorizing DOT to refer cases to the Attorney General for civil judicial action;¹²
- ! increasing the maximum civil administrative penalty from \$27,500 to \$100,000;¹³
- ! lengthening the document retention period from one to three years;¹⁴
- ! increasing the maximum period of imprisonment from five to twenty years for anyone who knowingly misrepresents or tampers with a hazmat shipment, or who willfully violates the HMTL and thereby causes a release of a hazardous material;¹⁵
- ! providing that each day a violation continues constitutes a separate violation;¹⁶ and
- ! allowing for restitution under Title 18, U.S. Code, for criminal violations of the HMTL and the statute governing the transportation of hazardous materials aboard aircraft, 49 U.S.C. § 46312.¹⁷

While significant, these provisions would not change the basic legal framework of the HMTL that has been in place for many years, and would not change the substantive nature of the crimes under that law. As a result, the proposed statutory amendment provisions neither obviate the need for a new hazmat guideline nor require the Commission to postpone adoption of a new guideline. Rather, the proposed criminal penalty increases demonstrate Congressional intent that hazmat crimes deserve higher maximum sentences. A failure to adopt a new hazmat guideline, providing for longer sentences in

¹² S. 1072, § 4440(b).

¹³ S. 1072, § 4441.

¹⁴ S. 1072, § 4429(c).

¹⁵ S. 1072, § 4442(b).

¹⁶ S. 1072, § 4442(b).

¹⁷ S. 1072, § 4447(b).

hazmat cases, would frustrate Congressional intent to impose more severe sanctions against hazmat criminals.

Two additional reasons counsel strongly against deferring adoption of a new guideline specifically tailored to hazmat crimes because there is legislation pending in Congress. First, authorization for the HMTL expired in 1998. Bills have been introduced unsuccessfully in Congress every year since 1998 to reauthorize and amend HMTL. There is no guarantee that S.1072 or analogous legislation will be enacted into law this year, or next. Awaiting Congressional action thus may result in deferral of this important issue for many years.

Second, since the Commission first addressed hazmat crimes in a guideline in 1987, the HMTL has been amended a number of times, most significantly in 1990. None of the subsequent amendments prompted the Commission to revise guideline treatment for hazmat crimes, and, as explained above, there is no reason to believe that the provisions of S. 1072 relating to hazmat transportation, if enacted, would require guideline revisions. The core legal framework of the HMTL, including the provisions that criminalize certain violations of the HMTL, has been in place for almost 15 years. It is experience gleaned under this core legal framework that has made it clear to the Justice Department that adoption of a new sentencing guideline for hazmat crimes is necessary.

In sum, while the pending legislation would amend a number of important HMTL definitions¹⁸ and expand the category of persons who are subject to Federal hazmat regulations,¹⁹ it would not create any new crimes under the HMTL, nor would it substantively alter any existing crimes under the HMTL. The hazmat provisions in S. 1072, assuming they are enacted, would have no impact on the enhancements that we recommend for sentencing criminal defendants convicted of HMTL violations.

IV. Response to Other Comments

Four other parties have submitted comments relating to hazmat transportation crimes in response to the Commission's December 30, 2003, Federal Register notice. Two common themes are raised: first, that existing guidelines are adequate; and, second, that there is a dearth of cases from which to develop more focused specific offense characteristics for hazmat crimes.

We disagree. First, as we have already explained, the existing guidelines are geared to pollution crimes, and include core specific offense characteristics that are not applicable to most hazmat

¹⁸ For example, section 4422 would make a minor change to the current HMTL definition of "commerce" to provide jurisdiction over hazardous materials activities being conducted on a U.S.-registered aircraft anywhere in the world. S. 1072, § 4422. Section 4422 would also make a minor change to the definition of "person" to clarify that the hazmat regulations, including hazmat training requirements, apply to persons who prepare or accept hazardous materials for transportation in commerce such as non-shipper personnel who prepare hazmat for transportation on behalf of a shipper and non-carrier personnel who accept hazmat. *Id.*

¹⁹ S. 1072, § 4423(c). For improved safety and security purposes, the amendment would expand the category of persons currently subject to Federal hazmat regulation to include persons who prepare or accept hazmat for transportation, persons who are responsible for the safety of transporting hazmat, persons who certify compliance with any requirements under the HMTL, and persons who misrepresent whether that are engaged in a function listed under 49 U.S.C. § 5103(b)(1)(A).

cases. Second, there have been a sufficient number of cases from which to develop hazmat guidelines. In the last five years alone, more than 30 hazmat cases have been prosecuted, not enough to constitute a robust enforcement program, but more than enough cases from which to extrapolate appropriate hazmat guidelines.

We briefly address below the remaining comments submitted to the Commission:

Institute of Makers of Explosives.

We appreciate the support of the Institute of Makers of Explosives (IME) for the adoption of a new guideline specific to hazmat transportation crimes. The IME is intimately familiar with at least one significant group of hazardous materials that are transported in commerce, and it is an organization that can only benefit from the safe and legal handling of hazardous materials. While not suggesting a specific number, IME (at 2) recommends a base offense level that is conservative given the diversity of potential hazards posed by hazmat transportation. That is a reasonable recommendation. We agree that a guideline with a base offense level of 20, for example, would be inappropriate for these crimes. However, the level should be no lower than the base of 8 that covers hazardous waste crimes under §2Q1.2. If the Commission decides to include a reduction provision, such as that in §2Q1.2(b)(6) for “simple record keeping and reporting violations,” any such decrease should be limited to offenses that have no potential for resulting in a release of hazardous materials which may affect the public, property, or the environment. With respect to IME’s suggestion that DOT’s hazmat classification system be

incorporated into a new guideline, it is a tempting approach; however, having explored it, we were unable to devise a means of incorporating it that would not unduly complicate sentencing.

Ronald A. Sarachan

Mr. Sarachan points out (at 2-3) that consideration of hazmat transportation crimes in relation to sentencing guidelines should be broken into three categories: terrorist crimes; crimes involving releases; and crimes involving risk to the public even though no release occurs. He maintains that the first of these categories is adequately covered by current guidelines outside of Part 2Q, while the specific offense characteristics already in §2Q1.2 are sufficient to deal with the second category. Therefore, the focus of any change to the current guideline treatment of hazmat crimes should be upon the third category, risk to the public despite no release (which may be reflected by such factors as illegal transportation of hazardous material on passenger-carrying modes of transportation or by concealment of hazardous material during its transportation).

We agree with Mr. Sarachan that terrorists are more likely to be sentenced under other guidelines, and it is true that a number of the specific offense characteristics for hazmat release crimes would be similar to those in §2Q1.2. But hazmat release crimes still would result in disproportionately lower sentences under §2Q1.2, because they generally would not involve permitting violations. Moreover, there are other specific offense characteristics that should be applied to hazmat release crimes, but that are not included in the current §2Q1.2, for example, hazmat unlawfully placed on passenger-carrying modes of transportation. Section 2Q1.2 is simply inadequate to provide appropriate punishment for hazmat crimes.

Association of Oil Pipelines

The comments submitted by the Association of Oil Pipelines (AOPL) take the position (at 3) that, for the bulk of hazmat transportation crimes, existing §2Q1.2 is sufficient. However, AOPL fails to acknowledge that a number of the major specific offense characteristics in §2Q1.2 are not geared to hazmat crimes, and that there are circumstances unique to hazmat crimes for which no specific offense characteristic exists in §2Q1.2 or elsewhere in the guidelines. As indicated earlier, §2Q1.2 does not take into account characteristics, such as repetitiveness without release and concealment during transportation, which pose risks to the public without creating substantial likelihood of death or serious bodily injury.

We disagree with AOPL's contention that the adoption of a hazmat guideline would be premature because the hazmat regulations are undergoing fundamental changes. It is our understanding that regulatory changes currently in progress at DOT will not substantially affect the core hazmat regulations. DOT has a lengthy track record of administrative enforcement of these core regulations. Therefore, there is no basis for the gradualism or for the delay in specific guideline treatment of hazmat crimes that AOPL advocates.

American Chemistry Council

The American Chemistry Council (ACC) opposes the creation of a new guideline for hazmat crimes. Their arguments are divided into several parts, the first being that §2Q1.2 already provides ample punishment for hazmat crimes (at 13-14), an assertion that we have refuted earlier in this

statement and in comments the Department has submitted to the Commission. The hypothetical ACC uses – a terrorist attack with a gasoline tanker being detonated in a shopping center – is only relevant to extreme cases. It ignores the fact that for many serious, but less dramatic hazmat cases, §2Q1.2 would yield only the base offense level of 8.

To support its current adequacy argument, ACC also points to a possible legislative increase of the maximum sentence for a hazmat crime from five years to twenty years. However, that reliance reflects a basic misunderstanding of the relationship between statutory crimes and sentencing guidelines. Regardless of how high Congress may set the maximum imprisonment for a given crime, that maximum is largely meaningless unless there are guideline provisions that generate total offense levels allowing sentences at or near that maximum. The operation of current §2Q1.2 will not change regardless of the maximum statutory sentence for a hazmat crime.

ACC's assertion (at 16) that specific guideline treatment of hazmat offenses would unfairly criminalize the "innocent or at least non-intentional conduct" of people exploited by terrorists again reflects an apparent misunderstanding of the relationship between statutory crimes and sentencing guidelines, but from a different perspective. The guidelines do not create crimes; they only set the rules for sentencing those already convicted of crimes. The crimes to which a new hazmat guideline would apply require the government to prove knowing or willful conduct to secure conviction. Conduct not proved to involve those mental state standards could not reach the stage of being sentenced as a hazmat crime.

No doubt most hazmat prosecutions, as ACC notes (at 16), will be against conventional violators, not against terrorists. However, those conventional violations are not adequately covered by §2Q1.2. A guideline that sentences hazmat violators in a manner proportionate to sentencing for environmental crimes of similar gravity would be entirely in keeping with the purpose of the sentencing guidelines – to provide adequate punishment and deterrence for similar classes of crimes. However, sentences requiring some period of imprisonment for hazmat crimes will be unlikely without adoption of a new guideline.

CONCLUSION

There is no dispute about the need to deter and adequately punish crimes involving the transportation of hazardous material. In order to achieve this goal, an important homeland security measure, a new guideline for hazmat crimes should be adopted. We are greatly concerned about our ability to promote increased compliance with hazmat laws if all but the most egregious violations will result only in sentences of probation. We urge the Commission to consider a new hazmat guideline consistent with the recommendations made by the Department of Justice. I would be happy to answer any questions that you may have about my testimony.