

**TESTIMONY OF PAUL D. KAMENAR, EXECUTIVE LEGAL DIRECTOR
OF THE WASHINGTON LEGAL FOUNDATION
BEFORE THE UNITED STATES SENTENCING COMMISSION
MARCH 5, 1991**

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Mr. Chairman and Members of the Commission:

My name is Paul D. Kamenar, Executive Legal Director of the Washington Legal Foundation, a non-profit public interest law and policy center that engages in litigation and the administrative process in a number of substantive areas, including criminal law and judicial reform. I have testified before and submitted comments to the Commission on several occasions on behalf of WLF regarding the formulation of the guidelines, and appreciate the opportunity to express our views before the Commission again today.

While we have been generally supportive in the past of substantial periods of incarceration for drug offenders and those convicted of violent crimes, we are also concerned that the Commission's guidelines for non-violent and non-drug regulatory offenses, particularly in the environmental area under Part 2Q, have resulted in substantial periods of incarceration that are wholly unjustified and contrary to Congressional intent that the guidelines reflect the general inappropriateness of any incarceration for first offenders who have committed such regulatory or minor offenses. See 28 U.S.C. 994(j). As I will note in my testimony, some of the proposed guidelines for this cycle graphically illustrate the gross disparities between offense levels for certain serious offenses, such as drug offenses, and the current guidelines for minor regulatory offenses.

Because the Commission, to use its own words, "emphasizes that it welcomes comment on any aspect of the sentencing guidelines, policy statements, and commentary, whether or not the subject of a proposed amendment," I intend to do just that by first making some general observations about the formulation of the guidelines, then commenting on a few of the proposed revisions, and finally, urging the Commission to revisit the environmental guidelines which are desperately in need of revision.

I. General Observations on Guideline Formulation

The Commission has stated that the basic approach it used in devising the guidelines was "the empirical approach that used as a starting point data estimating pre-guidelines sentencing practice." Section 1A3. Indeed, this approach is consistent with the wishes of Congress. 28 U.S.C. 994(m)(requiring Commission to ascertain average sentences of pre-Guideline cases). In some cases, the current guidelines and the ones proposed for this cycle, do not reflect or reveal the empirical research or study conducted by Commission. This general concern was expressed at length by Samuel J. Buffone who testified before the Commission last year on behalf of the American Bar Association, and we believe those concerns remain legitimate ones. This problem is particularly acute with respect to the development of the environmental guidelines, but others could make the same argument with respect to the proposed revisions relating to bribery (Amendment 9(A): Sec. 2C1.1,2), extortion (Amend. 8; Sec. 2B3.2) and other areas.

If the Commission has conducted a work study in particular areas, the Commission should explain its reasons as to why a departure from past sentencing practice is warranted. This is not only sound practice, but is suggested if not mandated by the Commission's own policy. Principles Governing the Redrafting of the Preliminary Guidelines, para. 6 (Dec. 16, 1986)("when departures. . . are substantial, the reasons for departure will be specified").

We also wish to make two recommendations related to this empirical issue that should be relatively easy for the Commission to adopt and would be of considerable help in utilizing the guidelines. One is to list the statutory sentencing range in the applicable statute or statutes which follows each guideline in the Commentary [e.g., for Sec.2D1.8 Renting or Managing a Drug Establishment, the Commentary would read "Statutory

Provision: 21 U.S.C. 856 (0-20 yrs.)]. The Commission currently provides this information under the listing "Background," but only in certain isolated cases. The other recommendation is to list, where available, the average sentence imposed for that category of offenses, preferably both pre-Guideline and the latest post-Guideline figures, if available. For example, the Commission's 1989 Annual Report, Table VI (attached) lists the average sentence for auto theft under the guidelines to be 17 months. The Commission presumably has the figure as to what the average sentence was before the guidelines. While listing these two figures would admittedly constitute rough indicators of pre- and post-Guideline practice, we believe that they would nevertheless assist the courts, probation officers, and practitioners in utilizing the Guidelines, especially since the Commission's Annual Reports, which contain most of this valuable information, are not readily available across the country as are the guidelines themselves.

As a final observation on the promulgation of the guidelines, many have expressed concern that the guideline process is compressed on a short time schedule with insufficient opportunity for comment and deliberation, especially when numerous changes are being offered. While the Commission's organic statute is to a certain extent to blame, we believe that the Commission can alleviate this problem to some degree by parsing out various proposals within the calendar year rather than considering everything by the May 1 deadline. For example, the Commission held separate hearings on the organization sanctions in December, and need not wait until May 1 to submit any final proposal to Congress. Theoretically, the Commission can submit any of its proposals as early as January of the calendar year when Congress begins its regular session, 28 U.S.C. 994(p), and those proposals would take effect 6 months later. Thus, the Commission can now

notice in the Federal Register, or shortly after May 1, other proposals for revising the guidelines, solicit and receive comments, and hold hearings throughout the remainder of this calendar year. The Commission can then formulate and refine its final proposal and have it all ready to be sent to Congress in early January 1992 (and effective by July 1992). By spacing out the various proposals, the promulgation process would be more manageable and allow for more focused debate and comments by the public, rather than the current practice of having hearings even before written comments are all submitted. Most federal agencies require written comments to be first submitted to them which are then studied in depth by both the agency and the regulated community; the subsequent hearings are thus more productive for everyone.

Furthermore, it appears to many that the 180-day waiting period is inordinately long. To my knowledge, Congress has never modified or repealed any of the Commission's proposed changes during this period. Consequently, we urge the Commission to recommend to the Congress that the waiting period be shortened, such as 90-days, and correspondingly advance the May 1 deadline to August 1. We note, for example, that Congress required the Federal Election Commission's proposed rules be sent to Congress for only 30 legislative days for its approval, 2 U.S.C. 438(d)(2), a period of time considerably shorter than 180 calendar days and involving a regulatory subject matter of utmost concern to Members of Congress.

II. Specific Comments on Certain Proposed Amendments

There are a few proposed changes which I would like to address, particularly because they illustrate the disparity between the sentences called for in serious crimes and

those imposed for regulatory offenses under the environmental section.

Proposed Amendment 15: 2D1.8. Renting or Managing a Drug Establishment.

The Commission proposes two options. The first option is geared toward the underlying controlled substance levels found in 2D1.1, and significantly, caps the offense level to 16 if the "defendant had no role in the underlying controlled substance offense other than renting or allowing the use of [his] premises" for drug use or trafficking. Level 16 (21 to 27 months for first offender) is the same level that is easily reached, and has been reached in several cases under Section 2Q1.3, for minor regulatory environmental offenses. Is it fair that hard-working citizens who place clean building sand or topsoil on their own property be given a level 16 under 2Q1.3 because they failed to get a permit under the Clean Water Act (United States v. Mills; United States v. Pozsgai) and incarcerated the same length of time, or more, as those who rent their property to drug manufacturers or dealers to ply their deadly trade on the rest of society.

This is a particularly egregious disparity when one considers both the underlying offenses and the statutory penalties for each of these two offenses. Congress indicated its views of the seriousness of the crime of renting or allowing property to be used by drug dealers, users, or manufacturers such as crack houses and the like by making the penalty up to 20 years and a fine of \$500,000. 21 U.S.C. 856. This is a Class B Felony, the most serious category of crime next to Class A which allows for life imprisonment. And yet the Commission, concerned about the fairness of sentencing such despicable criminals, is seriously considering limiting an entire category of such offenders to a level 16 just because they "had no role in the underlying controlled substance offense other than renting"

their property to the drug dealers or manufacturers? Quite frankly, I don't understand why the Commission is so overly concerned about carving out a relative safe-harbor for this offense, when the core offense conduct, or heartland case, as envisioned by the Congress is the renting of the property or allowing it to be used, regardless of the property owner's role in the underlying offense. This proposal would essentially cap the punishment for a core offense to only approximately 10 percent of the maximum punishment Congress authorized for this crime (Level 16=21-27 mos./240 mos. maximum). At the same time, Section 2Q1.3 allows individuals to be given a level 16 for essentially minor regulatory violations under the Clean Water Act that are far from the core offense of water pollution as envisioned by Congress, and where the statutory maximum is 3 years rather than 20 years. Thus, first time environmental offenders are given 75 percent of the statutory maximum for non-heartland cases (and indeed, as noted in my prior submission to the Commission regarding the application of Part 2Q, the Justice Department in many cases asks for 100 percent of the statutory maximum because the environmental guidelines dictate such absurd results).

Congress dealt severely with the crime of renting or allowing property to be used for drug dealers because of the vital link that criminal activity plays in the distribution system of illegal drugs in this country. If all the vending machines, 7-11's, and other stores in this country were prohibited from allowing their property to be used to sell Coca-Cola, it would be very difficult for the Coca-Cola Company to get its product to its customers. So too, Congress' weapon in breaking the distribution network of illegal drugs was to provide stiff punishment for those who serve as a vital link in this deadly trade. How can the Commission possibly characterize these core violators of the law as

"peripherally involved defendant[s]"? In any event, what is so "anomalous," as the Commission puts it, about a manager of a crack house getting a greater offense level than would otherwise be indicated by the small quantity of drugs confiscated in a particular drug raid, where there is substantial evidence from a stakeout or informers that the owner of the house, apartment, restaurant, or warehouse allowed his premises to be so used over a long period of time? The Commission, rather than worrying so about hypothetical "anomalous results" in this and similar areas, should instead direct its talents and energies elsewhere where real injustice actually occurs under the guidelines, such as in the environmental area.

There are numerous other proposed offenses which call for increases for certain Specific Offense Characteristics, which, when compared to offense characteristics in the environmental section, further illustrate unwarranted disparity. For example, under 2Q1.2 and 2Q1.3, a full 4 points are added on for environmental violations where there was a violation of a permit or failure to have a permit. Aside from the double counting problems universally recognized (except by the courts) in applying this offense characteristic when it is part of the underlying charge, why is 4 points added for not having a permit (for conduct which is not prohibited, but merely regulated) but only 2 points are added, for example, under Amendment 17, **Sec. 2G2.4 Possession of Material Depicting a Minor Engaged in Sexually Explicit Conduct**, where the minor is under the age of 12? Is the depiction of a 5-year old engaging in explicit sex acts with an adult worth only an additional 2 offense levels, but not having a permit for putting topsoil on your own property worth 4? Indeed, even applying the most stringent punishment this Commission has in mind for 2G2.4, namely, a base offense level of 10 rather than 6, and

two points for depicting a minor under the age of 12, the total would be 12 offense levels.

Yet Congress indicated that the maximum punishment should be 5 years for possessing 3 or more items of child pornography. Under the Commission's proposed guideline, an offender with 8 times this amount (24 magazines) depicting 5-year olds in sexually explicit conduct would receive either a level 8 (if the base offense level of 6 is adopted), or 12 (if the base level chosen is 10). A level 12 translates into 10-16 months, well below the 60 months maximum authorized by law, and more likely would result in probation or a short split sentence if the defendant pleads guilty and gets the two point reduction to reduce the level to 10. As with the managing a drug establishment offense, the conduct posed in this hypothetical is the core offense or heartland case. Again, compare this to the 21-27 month sentence for a non-heartland cases of violating the Clean Water Act where the maximum is 36 months. Does the Commission intend that the courts punish certain property owners who place topsoil and clean building sand on their own property and others for minor environmental offenses more severely than certain drug offenders and those who contribute to child pornography? It certainly seems so.

The proposed and current guidelines are replete with instances where offense characteristics are assigned 1 or 2 points that are in sharp contrast to the 4 offense levels for not having a permit under 2Q1.2. See, e.g., 2K1.1 (2 additional points for trafficking up to 75 pounds of explosives); 2K2.1(b)(2) (2 additional points for illegal trafficking of 7 firearms); 2A3.2(b)(1) (only 1 point added to rape of a minor if victim's abuser was custodian or guardian, such as a parent or teacher). See also current guidelines 2A2.2(b)(3) (2 points for bodily injury); 2A4.1(b)(4) (2 points if kidnap victim is held for more than

30 days); 2D1.1 (2 points if drug trafficker possessed firearms). In some cases, these additional offense levels appear too low; in any event, the 4 points assigned for not having a permit under 2Q1.3(b)(4)(with the potential for an adjustment up to 6 points under Application Note 7) is totally out of line with the Commission's other designation of offense characteristics which are related to the actual harm committed, and not imposed for merely because the conduct was unpermitted-- a characteristic inherent in all criminal conduct.

III. Need to Revise 2Q1.2 and 2Q1.3 of the Environmental Guidelines.

As the Commission is aware, our Foundation is particularly concerned with the clearly flawed guidelines under Part 2Q, in particular 2Q1.3 and its companion 2Q1.2 that result in the Justice Department seeking, and the courts imposing, a level 16 for first offenders who place sand, topsoil, or clean non-toxic, non-hazardous fill on their own property without a permit from the Corps of Engineers under the Clean Water Act.

Our concerns were fully addressed in our request to the Commission dated January 15, 1991, a copy of which (minus most of the exhibits) is attached hereto for your convenience. Our client, John Pozsgai, a first offender, is serving 27 months in federal prison for putting topsoil and clean fill on a few acres of his own property. Ocie and Cary Mills served 21 months for putting 19 loads of clean building sand on a quarter-acre lot on which he planned to build his retirement home. Both were assigned a level 16: 6 points for the base offense of discharging a pollutant without a permit; 6 more for discharging the pollutant over a period of time; and 4 more for not having the permit. The district courts and courts of appeals in both cases rejected arguments that this constitutes double counting. The flaws in these guidelines are widely recognized and

documented. See B. Sharp, L. Shen, The (Mis)Application of Sentencing Guidelines To Environmental Crimes, BNA Toxics Law Reporter 189 (July 11, 1990)(attached hereto). In many cases, DOJ is exploiting the flawed guidelines by seeking mandatory minimum sentences under the guidelines for first offenders that are equal to the statutory maximum.

The letter from the Chairman dated February 7, 1991 rejecting our request for the Commission to reconsider this issue is disappointing in many respects. The primary reason offered was the fact that the Commission apparently decided at its January 3, 1991 meeting not to take up the environmental section. However, the entire purpose of our January 15 request was that the Commission's action was not an informed decision because of the misleading information provided to the Commission by DOJ and EPA representatives about the operation of the guidelines. Furthermore, the letter speculates that since the only reason the judge offered for imposing such a harsh sentence on Mr. Pozsgai was his view that Mr. Pozsgai was a "stubborn violator," (the judge referred to no damage caused to the environment) that were it not for the guidelines, Mr. Pozsgai would have likely received a harsher sentence. This speculation is unwarranted for several reasons. In the first place, the maximum sentence for the worst water polluter is 3 years. If this were a pre-guideline case, the worst sentence Mr. Pozsgai would have received would have been 3 years. Under the parole guidelines then in effect, he would be eligible for parole after 1 year, and would no doubt have received it. Furthermore, "stubbornness" certainly does not seem to be a relevant offender or offense characteristic by the Commission for other crimes. Thus, it appears that the judge was able to exploit the flawed guidelines by using the high offense scores to validate his "stubbornness" reason for imposing the harsh sentence. Finally, the letter conveniently ignores altogether the similar unjust sentencing results in the

Mills case and others, and the cogent critique of the guidelines by Messrs. Sharp and Shen.

Finally, the letter concludes that the Commission is busy enough with revising other guideline provisions to take the environmental section up now. This reason is disappointing for a number of reasons.

First, the Commission has had under consideration a full revision of the environmental guidelines since at least January 30, 1989, over two years ago. See Letter to Chairman Wilkins from Thomas L. Adams, Jr. of EPA, dated February 13, 1989 (attached hereto). A third year of delay is simply intolerable, especially for the 50 or so individuals to be sentenced this year under the guidelines.

Second, the suggested revision we offered, namely eliminating or reducing the "no permit" offense characteristic, one of the two sources of the double counting problem, is relatively easy. Indeed, the Commission can still satisfy the publication requirement and meet the May 1 deadline by putting a brief notice in the Federal Register along the lines suggested in our January 15 letter by March 15, for example. Comments could be received by April 15, and the simple change sent to Congress along with the other proposals to Congress by May 1. Further refinements could then be addressed afterward if deemed necessary, but the time and effort for this revision surely is worth the time the Commission is putting in to consider whether managers of crack houses should get a break.

The February 6 letter from the Chairman is also remarkable for what it does not say. First, there is no dispute to our contention that the guidelines are inherently flawed because the Commission failed to compute the average sentences imposed for environmental offenses before the guidelines were enacted as required by Congress in order

to assess whether stiffer sentences were warranted. 28 U.S.C. 994(m). Second, there is no attempt to point to any reasons why the Congress' preference that it is generally inappropriate for the guidelines to impose incarceration for first-offenders for minor violations. It is one thing for the Commission to determine that contrary to the general rule, in appropriate circumstances, that some jail time may be warranted for minor offenses for first offenders (i.e, 2 or 3 months), but levels of 12, 14, 16 and higher are simply overkill. The 21-27 month sentence imposed on Mr. Mills and Mr. Pozsgai translate to an outrageous pre-guideline sentence of 63 to 81 months. Does the Commission really believe that such sentences are what it intended or believes is just?

Finally, the letter does not dispute our contention that the guidelines impermissibly allow for double counting. Indeed, the Chairman even acknowledged during the January 3 meeting that the environmental guidelines have the potential for impermissible double counting, but suggested that the courts can take care of the problem. Several courts, including courts of appeals, have not taken care of the double counting problem, and it behooves the Commission to revise or clarify the guidelines immediately. At a minimum, a simple policy statement can be, and should be swiftly issued to address the double counting flaw that allows judges to impose sentences (at the urging of DOJ) such as that on Mr. Pozsgai, which, according to the Commission's own data, exceeds the average sentence imposed under the guidelines for a host of serious crimes, such as auto theft, larceny, fraud, counterfeiting, and many drug offenses.

Thank you for the opportunity to present these views. I will be happy to answer any questions you may have.

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January 15, 1991

HAND-DELIVER

The Honorable William W. Wilkins, Jr.
Chairman, United States Sentencing Commission
Suite 1400
1331 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Re: Modification of Part 2Q of the Guidelines

Dear Judge Wilkins:

On Thursday, January 3, 1991, the Commission met to discuss what substantive areas of the sentencing guidelines it would consider for possible review. One of the categories briefly discussed was the environmental section, Part 2Q. Commissioner Paul Maloney from the Justice Department referred to a December 24, 1990 letter to the Commission from DOJ signed by Assistant Attorney General Richard B. Stewart and James M. Strock, Assistant Administrator for Enforcement for EPA suggesting that the Commission should defer consideration of revising Part 2Q, allegedly because there had not been enough case history (approximately 24 cases) to evaluate its implementation. This point was reiterated by Mr. Barry Hartman, Mr. Stewart's deputy, who suggested at the meeting that the Commission should "not shoot in the dark and make changes," noting that approximately 50 sentences would be meted out in calendar year 1991 that would provide the Commission with more information, and that only one circuit court had reviewed a Part 2Q case, a Sixth Circuit case which he argued, and was recently decided.¹

During the brief discussion which ensued, you and perhaps another Commissioner acknowledged that Part 2Q guidelines impermissibly allow for double counting, but suggested that the courts can handle that problem. Judge MacKinnon also queried Mr. Hartman about the ratio of civil to criminal prosecutions in the environmental area (approximately 10 to 1) and the relevance of that practice to evaluating the guidelines. The Commission, apparently relying on DOJ's representations, nevertheless did not take up the issue of revising Part 2Q or any section thereunder.

While I was in attendance during that part of the meeting, I did not believe it was appropriate at that time to address the Commission, especially since I had not seen the

¹ Actually, at least three circuits had then reviewed sentences under Part 2Q: the Sixth Circuit (United States v. Bogas), Third Circuit (United States v. Pozsgai), and Eleventh Circuit (United States v. Mills). On January 4, 1991, the day after the Commission's meeting, the First Circuit issued an opinion involving 2Q1.2 in United States v. Wells, bringing the total number of circuits to four. These and other Part 2Q cases will be discussed, infra.

December 24 letter from DOJ.² Indeed, it appeared that perhaps none of the Commissioners had seen the letter since the Commission's Staff Director noted at the meeting that it had just arrived that morning. Having now secured and examined a copy of that letter (Attachment 1), I submit that the reasons proffered by DOJ and EPA to delay modification of Part 2Q or any sections thereunder are totally disingenuous as explained below and in the documents attached.

Accordingly, the Washington Legal Foundation urgently requests the Commission to reconsider this vital issue so that it can make a fully informed decision in this matter. In that regard, I am willing to address the Commission at the earliest opportunity possible for 5 minutes or more if necessary to elaborate further on the points discussed herein and to answer any questions or comment on any written or oral statements that might be made by DOJ or EPA officials at that same meeting. It is my understanding that the Commission has scheduled a meeting for January 22, 1991. While I believe that this issue is of such importance that the Commission should revisit this issue before then, the Commission may find the January 22 date to be a more convenient time to address the issue and, if convinced that Part 2Q needs modification, to do so with this cycle of amendments (since only 19 days would have then elapsed since the Commission's January 3 meeting).

Draconian Sentences Urged by DOJ and Imposed Under Part 2Q

As you know, our Foundation represents John Pozsgai, a 58-year old Hungarian immigrant and self-employed truck mechanic, who received the longest prison sentence in the history of the United States for any environmental offense: 27 months under U.S.S.G. 2Q1.3, for simply placing topsoil and clean (non-toxic, non-hazardous) fill on a couple acres of his own property, an old junk yard that he actually cleaned up. Not a single fish, bird, or sea lion was killed, harmed, or even threatened. Indeed, the government does not dispute the fact that a tiny stream adjacent to Mr. Pozsgai's property actually runs clearer today than it did before he purchased the property due to his clean-up efforts. Yet, since the EPA and U.S. Army Corps of Engineers determined that part of the property (which is zoned light industrial) technically constituted a marginal "wetland," a permit was allegedly needed under the Clean Water Act to place topsoil (a "pollutant") and other clean fill on the property.

The sentencing judge agreed with both the Probation Officer and U.S. Attorney's suggested application of Section 2Q1.3 of the guidelines: 6 points for the base offense of discharging a non-toxic, non-hazardous pollutant without a permit in violation of 33 U.S.C. 1311, 6 more for discharging the pollutant (under 2Q1.3(b)(1)(A)), and 4 more for not having the permit (under 2Q1.3(b)(4)). This double, indeed triple counting, quickly added up to a level 16 which, for a first time offender like Mr. Pozsgai, dictated a 21- to 27-

² I learned of the Commission meeting by happenstance only the evening before, and did not know what would be on the agenda until the meeting was underway. No notice of the meeting was published in the Federal Register or any trade journal that I am aware of, nor was the agenda made available to the handful of persons who signed in at the desk outside the meeting room. If these are indeed public meetings of the Commission, we believe it is in the public interest for the Commission to notice all of its meetings, as is the practice of other agencies and commissions, indicate which ones are open to the public, summarize the agenda, and indicate whether or not members of the public are allowed to comment at the meeting. This practice would also be consistent with the Commission's otherwise open and helpful communications office.

month prison sentence. The court rejected the double counting arguments, refused requests for downward adjustments within the specific offense characteristics, and refused to depart. Although there was little if any environmental harm, the judge imposed the maximum at the urging of the prosecutor who wanted to use Mr. Pozsgai to send a message to all "private land owners," and because the court felt that Mr. Pozsgai was "stubborn." The 27-month sentence is equivalent to a staggering pre-guideline sentence of 81 months (approximately 7 years) since parole was available (and invariably granted) after serving one-third of the sentence.³

Before the guidelines were issued, no one was ever imprisoned for discharging a non-toxic, non-hazardous substance, let alone for such a long period of incarceration. Three months imprisonment for such infractions may be more than necessary to meet the ends of justice; 6 months seems particularly harsh; 12 months is clearly excessive; and anything over 18 months is simply unconscionable. Yet the guidelines as written and as interpreted by DOJ, probation officers, and the courts, mandate at least a level 14, if not a 16, resulting in sentences of up to 27 months for first time offenders such as Mr. Pozsgai whose conduct is far from the core offense or "heartland" case of water pollution.⁴

The Pozsgai case is not an aberration. Ocie Mills and his son Carey were sentenced shortly before Mr. Pozsgai in early 1989 to 21 months in prison under 2Q1.3 for placing 19 loads of clean building sand (technically a "pollutant") on a quarter acre plot on which he had planned to build a retirement home in Florida because part of the property was deemed by EPA to be a wetland (although Florida officials told the Mills' otherwise). United States v. Mills (PCR 88-03100, N.D. Fla.). As in the Pozsgai case, the district court agreed with the prosecutor and probation office that a level 16 was the proper score, mandating a minimum 21-month sentence.

On appeal to the Third Circuit in the Pozsgai case, we argued, *inter alia*, that the sentencing court misapplied the guidelines by double counting and wrongly applied offense

³ Indeed, since some of the filling activity took place before the November 1987 effective date of the guidelines, the judge sentenced Mr. Pozsgai under both the guidelines and the Clean Water Act. The court imposed the maximum sentence under the Clean Water Act of three years for the pre-Guideline counts, a sentence which was essentially ordained given the results suggested by the guidelines. For in order to have some semblance of symmetry between the pre- and post-guideline sentence for essentially the same conduct, the Pozsgai Court could not adopt the Probation Officer's recommendation of a one-year sentence for the pre-Guideline violations (who also determined that this was not a serious offense). Rather, by imposing the maximum three-year sentence (a sentence which one would normally think should be reserved for the worst water polluter rather than for one who caused little if any harm) with parole technically available after one year, the court was able to approximate the guideline sentence of 27 months. Indeed, to be truly symmetrical, the court would need to have imposed at least two consecutive maximum three-year sentences for the pre-guideline counts just to match the guideline sentence.

⁴ The 27-month period of incarceration permitted and imposed under a level 16 for a minor regulatory offense is greatly disproportionate to the average sentence meted out under the Guidelines for a first offender (even excluding those cases where no prison sentence was imposed, i.e., probation) for a serious offense such as Burglary/B&E (24 mos.), and for other serious crimes, even counting those offenses committed by criminals with extensive prior criminal history: Larceny (20 mos.), Embezzlement (10 mos.), Fraud (13 mos.), Drug Offenses-Possession (8 mos.); Drug Offenses-Use of Communication Facility (26 mos.); Auto Theft (17 mos.); Forgery/Counterfeiting (16 mos.); Bribery (17 mos.); and Escape (22 mos.). See Table VI, U.S. Sentencing Commission Annual Report 1989 (Attachment 2).

characteristic 2Q1.3(b)(1) governing discharge of a pollutant since comment n.4 indicates that it applies only if there is "actual environmental contamination," hardly the case involving topsoil, sand, and clean fill. Alternatively, we argued that Section 2Q1.3 itself was unlawfully promulgated because the Commission did not undertake the requisite analysis of pre-guideline sentences in this area as required by 28 U.S.C. 994(m); that the environmental guidelines were inconsistent with Congress's intent that the guidelines "reflect the appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense"; and that they violated Congress' overall intent of reducing sentencing disparities and promoting fairness by causing just the opposite. Without any oral argument, the Third Circuit affirmed both the conviction and the sentence without opinion. 897 F.2d 524 (3d Cir. 1990). Rehearing en banc was summarily denied, and the U.S. Supreme Court denied the petition for writ of certiorari. 111 S.Ct. 48 (1990). Mr. Pozsgai began serving his 27-month sentence on November 23, 1990 at Allenwood Prison (which according to DOJ is over capacity). Attached are copies of the briefs in the case filed in the Supreme Court (Attachment 3). The court of appeals briefs, which treat these arguments in greater detail, can be supplied to the Commission if necessary.

The appeal by Ocie Mills and his son who received a 21-month sentence for placing sand on their property fared no better. The Eleventh Circuit affirmed the conviction and sentence in July 1990 without opinion despite strenuous arguments that the guidelines permit double counting. 904 F.2d 713 (11th Cir. 1990). Unfortunately, the Mills' were denied bail pending appeal and consequently, they have just completed serving their unjust sentences (although they remain on supervised release).⁵

Other environmental cases cited in our Supreme Court brief further illustrate the flaws in the environmental guidelines and their application. For example, federal prosecutors and probation officers are requesting the court to impose a statutory maximum penalty of one year for negligent violations of the Clean Water Act, even though the defendant is a first offender, because the guidelines dictate a minimum over one year. See, e.g., United States v. Fisher, CR 89-234 (D. Ore. Feb. 12, 1990).⁶ This structural problem with Part 2Q that causes minimum guideline sentences to exceed statutory maximums has been thoroughly analyzed and discussed in an article entitled "The (Mis)Application of Sentencing Guidelines To Environmental Crimes," by Benjamin S. Sharp and Leonard H. Shen of Perkins Coie in Washington, D.C., reprinted in BNA Toxics Law Reporter, July 11, 1990 at 189 (Attachment 5).

In another case, a judge who is regarded as environmentally sensitive and who, during her confirmation hearings in 1979, told the Senate Judiciary Committee that she

⁵ Both the Pozsgai and Mills cases have received considerable nationwide media attention, a sampling of which is provided (Attachment 4). We can supply the Commission with a videotape of news coverage of these cases, including NBC's Good Morning America, Cable News Network, and CBS Evening News.

⁶ As Commissioner Gelacak rhetorically questioned Assistant Attorney General Stewart in a related context during the recent hearings on organizational sentencing concerning DOJ's proposal for large fines for environmental offenses, "how on earth do we [the Sentencing Commission] maintain any credibility if we establish a guideline sentencing proposal that exceeds present statutory maximums...?" December 13, 1990 Hearings at 120, lines 12-14.

would not hesitate to put white collar criminals in jail, found it particularly difficult to grant the Justice Department's request to send a first offender to jail for over 51 to 63 months for improperly storing toluene (paint thinner), and instead managed to interpret 2Q1.2 in such a way as to impose 6 months of home detention. United States v. Bogas, 731 F. Supp. 242 (N.D. Ohio 1990). The Justice Department appealed to the Sixth Circuit, and at the urging of Mr. Hartman, the sentence was recently overturned. 1990 WESTLAW 188792 (6th Cir. Dec. 3, 1990). The Sixth Circuit, apparently sympathizing with the possible harsh result on resentencing, noted that the district court might try departing from the guidelines. Something is fundamentally wrong with the guidelines and the way that the Justice Department urges their application, where, in order to achieve rational sentencing in this area, departure must be the rule rather than the exception. In any event, uniformity of sentencing in this area is bound to suffer by relying on the vagaries of departure.

DOJ/EPA December 24, 1990 Letter

In their joint letter to the Commission dated December 24, 1990, Messrs. Strock and Stewart posited three reasons why the Commission should avoid addressing Part 2Q.

"First, the existing guidelines received a good deal of very close attention from you and other Commissioners when they were initially developed in 1986. The result was a set of provisions which were fundamentally sound. Certainly our work with the guidelines so far have revealed no glaring errors or provisions badly in need of revision."

It is my understanding from discussions with current and former Commission officials, and from examining Commission hearings and records, that the environmental guidelines in fact received very little attention by the Commission. Indeed, the Commission did not, as required by law, carefully examine past sentencing practice to determine the average sentences imposed, nor did the Commission articulate any reasons why a radical departure from past sentencing practice was warranted in this area. The result was certainly not a set of provisions which were "fundamentally sound," but rather one which overzealous EPA and DOJ officials and prosecutors can exploit by seeking a way to impose draconian sentences for essentially minor regulatory offenses for first time offenders, and thereby undermining Congress' and the Commission's goals of uniformity and proportionality in sentencing. It is no accident that at public seminars on environmental enforcement, DOJ officials have promised the regulated community a "reign of terror." Naturally, one cannot expect such officials to acknowledge that the unprecedented sentences sought by DOJ and meted out to Mr. Pozsgai, the Mills', and others are the product of "glaring errors."

The second reason given by DOJ/EPA to postpone review of Part 2Q is that they "have not had sufficient experience" with the application of the guidelines to offer modifications because less than 24 cases have been disposed of under the guidelines, and that they expect, according to Mr. Hartman at the meeting, approximately 50 sentences to be imposed this year. Thus, the letter continues, "[b]y waiting another year, we will likely have more than twice as many guidelines cases as we now have [for a total of approximately 75] on which to base any possible changes."

We submit that the current experience with the guidelines is more than sufficient for the Commission to detect and correct the flaws with the guidelines. It is not necessary nor is it in the public interest to wait to have potentially 50 more Pozsgai-type prison sentences to realize that something is seriously awry with these guidelines and/or their application, although DOJ and EPA would no doubt prefer the Commission to believe the contrary.⁷ Indeed, this is a perfect opportunity to make whatever changes the Commission believes is warranted, and then fine tune any of those changes, if necessary, after experiencing another wave of sentences imposed under the modified guidelines.

You have repeatedly and publicly stated that the Commission's duty is to review and revise the guidelines in order to achieve the best possible guidelines. The first signs that something was fundamentally wrong with the environmental guidelines or their application came at least by mid-1989 when I brought to the Commission's attention the unduly harsh and unprecedented sentences meted out in the Pozsgai and Mills cases under 2Q1.3. Some perhaps thought then that the double counting problems experienced in those cases would surely be corrected by the appeals courts (which turned out not to be the case). In any event, the 1989-90 cycle was a good opportunity to correct the problem. By not reviewing Part 2Q then, nor during this 1990-91 cycle, and waiting, as DOJ suggests until the 1991-1992 cycle, the Commission further and unnecessarily postpones correcting obvious problems for three years.

While it is always nice for statisticians to work from ever larger data bases, the Commission should not forget that these guidelines profoundly affect the lives, liberty and livelihood of individuals and their families. If the small number of criminal environmental cases before 1986 was a sufficient data base upon which to devise the guidelines in the first place (according to the EPA, there were only 16 criminal cases in 1985), then surely there are enough post-guideline cases to make an intelligent assessment of the guideline's operation today.

It would be cruel solace indeed for those who have served, are serving, and will likely serve two or more years of hard prison time for minor regulatory offenses to discover much later that the Commission did not intend such harsh results after all, and that had they been properly sentenced, they would have received probation or much shorter prison terms.⁸

⁷ The Justice Department should provide this Commission, and can easily do so, with the Sentencing Memoranda submitted to the court by the prosecutors in these two dozen cases, any defense memoranda, and the actual sentence imposed and the reasons therefor stated by the court. In addition, as for the 50 sentences which DOJ indicates would be imposed this calendar year, DOJ should also provide the Commission a copy of the indictments or information in those cases and indicate whether the defendants have pled guilty or were convicted after trial. See 28 U.S.C. 995(8), (14), (15), (16).

⁸ In that regard, we note that Congress mandated that the Commission "periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section." 28 U.S.C. 994(o). Congress envisioned that guidelines might be reduced, and instructed the Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" to conform to a guideline revised downward. 28 U.S.C. 994(u). If the Commission decides not to review this matter sua sponte, we are prepared to invoke

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The third and final reason for delaying revisions proffered by DOJ/EPA, "even assuming that we had sufficient evidence to undertake a revision," is the alleged shortage of time, particularly because everyone's attention "is focused chiefly upon organizational sentencing guidelines. [DOJ/EPA] believe that the public and the criminal justice system would not be well served by our trying to develop Part 2Q amendments on a compressed schedule." The suggestion that the Commission cannot chew gum and pat its head at the same time insults the Commission and its staff and undermines its duties and responsibilities. Indeed, the fact that the proposed organizational guidelines are being further considered for yet a second year is an argument to initiate public review now rather than uncovering problems a year later that could have been earlier resolved. While organizational sanctions, primarily fines, are a serious issue, it is nonetheless not as a compelling an issue as one that involves substantial deprivation of an individual's liberty and freedom. Furthermore, to the extent that organizational sanctions for environmental offenses are tied into the individual sentencing guidelines in Part 2Q, the issues are intertwined. Additionally, the Commission and DOJ/EPA staff apparently already have done extensive work on revising Part 2Q guidelines.

In any event, there are several suggestions which we are prepared to recommend that would be very easy for the Commission to propose that clarifies the Commission's original intent in promulgating Part 2Q. For example, the double counting problem (which you acknowledged at the January 3 meeting) needs to be addressed because it is not being corrected by the courts. In the Pozsgai and Mills cases alone, approximately 15 district court and court of appeals judges were squarely presented with the issue and saw no problem with it. Thus, 2Q1.3(b)(5) currently states:

(5) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

This provision can be revised to prevent double counting by simply inserting at the end of the following phrase: "but not if the underlying offense charged is a failure to have a permit or is a violation of a permit." A better suggestion would be to eliminate the permit section altogether (or if retained, to reduce the additional points assessed to a more reasonable level such as 1, or at most 2) since most environmental crimes constitute discharges without a permit or are in violation of a permit's conditions.⁹ All crimes, for

^{*}(...continued)

28 U.S.C. 994(s) on behalf of Mr. Pozsgai which allows a prisoner to formally petition the Commission to modify the guidelines. Regardless of what mechanism the Commission uses to revise the guidelines, even if they were to be promulgated this cycle, because of the 180-day delay period for its implementation, Mr. Pozsgai by then would have already served almost one year in prison for his offense, a period of time greater than that which would be dictated, we would hope, by any revised guideline. In addition, such revision could be applied or used to adjust, if warranted, many of the 50 sentences that DOJ indicates will be imposed this calendar year, presumably most of them in the earlier part of this year.

⁹ Even when the offense does not, strictly speaking, involve a violation of a permit, wildly disparate results obtain. In United States v. Wells, 1991 U.S. App. LEXIS 56 (1st Cir. Jan. 4, 1991), the defendant was tried and convicted of repeatedly discharging zinc from his small business above the effluent limits set by the EPA despite repeated warnings to stop. Section 2Q1.2, the applicable guideline which deals with

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that matter, are "unpermitted" by the state. No one is permitted to rob a bank, for example, yet no aggravating points are added to such malum in se crimes because the offender really and truly intended to violate the law and commit the crime without society's permission. With respect to these traditional crimes, the basic rationale for the Commission's additional points is based chiefly on the levels of harm caused by the conduct. On the other hand, Mr. Pozsgai and others can obtain (and indeed he is currently pursuing administratively an after-the-fact permit) "permits" to place fill on one's property or discharge "pollutants." And as even Mr. Stewart himself candidly recognized, "we aren't talking about bankrobbers here, we are talking about [companies engaged in] productive economic activity." Wall Street Journal, Dec. 26, 1990, at 12, col.1.

Similarly, 2Q1.3(b)(1) -- allowing for 4 to 6 additional points for the discharge of pollutants depending upon whether it was continuous or not -- can be easily revised to prevent double counting. Under the current provision, a repetitive discharge of a gallon of oil a day over three months into a river causes an increase of 6 points, yet a one-time spill of 1,000 gallons (or even millions of gallons as in the Exxon Valdez case) adds only 4 points, a difference in points which are crucial in determining whether a first offender is eligible for probation (offense level 10 or less), or even a split sentence (offense levels 11 and 12, where at least 4 to 5 months must be served in prison), or is required to serve a minimum of 12 months, once a level 13 is reached, (see U.S.S.G. 5C1.1), a level quickly attained for even the most minor of environmental infractions.

The current offense characteristics also impermissibly allow the court to consider multiple counts of the same violation as constituting a repetitive discharge to cause 6 points to be added to the base offense level. Multiple fraud counts, for example, are not punished in that manner. See U.S.S.G. 2F1.1. If a criminal defrauded 40 individuals of \$1,000 each as part of a continuous scheme, the total harm of \$40,000 is used to determine the additional level to add, not some arbitrary number because the fraud, however small, was a continuous or repetitive one. Confusion is further added when the Commission in its comment n.4 to 2Q1.3 assumes that "actual environmental contamination" took place when all that is involved is the discharge of clean fill or some other "pollutant" that is easily dissipated or easily cleaned up.

⁹(...continued)

hazardous and toxic pollutants, begins with a base level of 8, two points higher than 2Q1.3 dealing with non-toxic pollutants under which Mr. Mills and Mr. Pozsgai were sentenced. Thus, under a rational and proportional system, one would think that polluters of toxic and hazardous substances would be punished more severely than non-toxic polluters. Yet Mr. Wells' sentence of 15 months (an excessive punishment in its own right for a first offender) is well below the 27 months and 21 months given to Mr. Pozsgai and Mr. Mills (whose respective sentences are approximately 100 and 50 percent greater than Mr. Wells' sentence) due primarily to the fact that the 4 additional points for a permit violation (2Q1.2 (b)(4)) was not included in the Wells case. This was so not because the Court refused to double count, but because Mr. Wells did not violate his permit; rather, he knowingly exceeded an effluent limit set by the EPA and promulgated in the Code of Federal Regulations. Yet if his permit had simply contained the same effluent limit as a condition of the permit, he would have been subject to the additional four points.

Furthermore, the base level of 8 for 2Q1.2 or 6 for 2Q1.3, assumes an underlying violation of some reporting or recordkeeping requirement. U.S.S.G. 1A4(f), p.s. Yet no such requirements were violated in the Mills, Pozsgai, Wells, and many other cases, either because there were no such reporting/record-keeping requirements, or, as in the Wells case and similar cases, the company was reporting accurate, albeit unlawfully high, levels of discharges.

A better suggestion would be eliminate 2Q1.2(b)(1) or 2Q1.3(b)(1) altogether or to substitute them with a provision that simply allows the court to impose from 0 to 4 additional points depending upon the harm to the environment (as currently determined in comment 4.).

The collateral issue raised by Judge MacKinnon at the January 3 meeting regarding the availability of civil and administrative sanctions is indeed a very important one. Many regulatory offenses are disposed of by civil and administrative enforcement actions. For the most part, the level of intent needed to trigger a civil violation is sufficient to convict criminally. The discretion by the government as to how to proceed is truly an awesome power that is often abused. In the Pozsgai case, the civil case had just begun when the case was criminalized. In the Mills, Wells, and other cases, the federal authorities did not even bother with civil remedies, perhaps in keeping with a 1987 DOJ directive (Attachment 6) that DOJ attorneys are encouraged to bring criminal cases first to obtain collateral estoppel for later filed civil cases. As Assistant Attorney General Stewart admitted, DOJ prosecutors "don't have coherent guidelines on how to draw the line between criminal and civil" enforcement. Wall Street Journal, *supra*.

Yet in many cases, infinitely more harmful conduct is handled civilly than criminally, even where the violator was repeatedly warned by EPA of the offending conduct.¹⁰ The point of all of this to demonstrate that unlike bank robbery, arson, and other crimes, there are no civil remedies available to the government to prevent the harmful conduct. The fact that civil remedies are available for regulatory offenses, namely injunctive relief and civil fines, and are used according to DOJ in 10 out of 11 environmental cases, shows that society has decided to use criminal sanctions and incarceration sparingly for these kind of violations. Thus, a more complete data base to use in gauging what the offense levels (and fine levels) should be is not simply culled from the criminal cases for environmental offenses, but from the civil cases as well.

For all of the above reasons, we urge the Commission to reconsider its position on this matter at or before its January 22 meeting.¹¹ At the very least, it behooves the

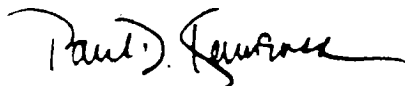
¹⁰ For example, in United States v. BP Oil Corp., (E.D. Pa.), the same U.S. Attorney's Office that prosecuted Mr. Pozsgai found it sufficient to invoke only civil remedies to address an ongoing and knowing water pollution violation far more serious than that committed by Mr. Pozsgai and others. See Oct. 23, 1990 DOJ Press Release (Attachment 7). BP Oil had knowingly violated its permit hundreds of times from 1984 to August, 1990. Similarly, in United States v. Great Lakes Carbon Corp. (E.D. Tex., filed Oct. 12, 1990), DOJ is seeking only civil relief against a polluter "for numerous violations" of the company's permit under the Clean Water Act, including knowing violation of a formal administrative order to stop the pollution. And in United States v. Rhone-Poulenc (S.D. W.Va.-filed Oct. 31, 1990), the civil complaint had to be amended to include violations that occurred after the original complaint was filed.

¹¹ The Commission need not decide now what, if any, revisions it should make. The public notice requirements of 5 U.S.C. 553(b) as required by 28 U.S.C. 994(x) can be satisfied by providing in the Federal Register "either the terms or substance of the proposed rule or a description of the subject and issues involved." 5 U.S.C. 553(b)(3)(emphasis added). Thus, a general notice along the lines that the Commission proposes to revise downward 2Q1.2 and 2Q1.3 by reducing the double counting problems and the high offense levels that result from minor offenses would be sufficient notice to elicit comments. See, e.g., Ethyl Corp. v. EPA, 541 F.2d 1 (D.C. Cir. 1976)(notice need not contain precise proposal agency may ultimately

(continued...)

Commission to issue a policy statement under 28 U.S.C. 994(a)(2) in the interim to express its view that double counting should not occur in applying Sections 2Q1.2 and 2Q1.3. We are prepared to assist the Commission in any way possible to facilitate its resolution of this issue, including working with Commission staff and DOJ/EPA officials.

Respectfully submitted,



Paul D. Kamenar
Executive Legal Director

cc: All Commissioners
John R. Steer, General Counsel
Richard B. Stewart, Asst. Attorney General, DOJ
James M. Strock, Asst. Administrator, EPA

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adopt); Forester v. CPSC, 559 F.2d 774 (D.C. Cir. 1977). If the Commission staff already has proposed revision, that would clearly suffice. The point is that while the Commission is not required to make any changes, the advantages of publishing a general notice are clear: while the Commission is satisfying the notice requirement to elicit comments, the Commission and staff can continue its independent review of Part 2Q. If after receiving comment and further study the Commission decides that no changes are warranted at this time, so be it. But the Commission should not precipitously cast aside its option to review this important issue during this cycle when it is relatively easy to keep that option open.

Table VI

**AVERAGE LENGTH OF IMPRISONMENT FOR PRIMARY OFFENSE CATEGORIES;
AVERAGE LENGTH OF IMPRISONMENT BY PRIOR ADULT CRIMINAL CONVICTIONS***
(January 19, 1989 through December 31, 1989)

Comparison of 27 mos. sentence for first-offender of
minor infraction of Clean Water Act with other crimes/offenders

PRIMARY OFFENSE	AVERAGE LENGTH OF IMPRISONMENT**									
	TOTAL		PRIOR ADULT CRIMINAL CONVICTIONS							
			0 Convictions		1 - 2 Convictions		3 - 4 Convictions		5 or More Convictions	
	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases	Average Months	Number of Cases
TOTAL	57	15,315	51	6,853	56	4,258	65	1,977	73	2,226
Homicide***	123	78	103	35	122	25	101	7	205	11
Kidnapping	191	35	146	8	219	10	225	7	177	10
Robbery	92	816	49	157	65	209	102	171	131	279
Assault	39	151	36	49	37	41	36	26	51	35
Burglary B&E	44	87	24	20	40	25	47	17	62	25
Larceny	20	561	19	159	16	158	17	97	29	147
Embezzlement	10	211	10	156	7	33	16	12	12	10
Tax Offenses	48	24	43	19	14	3	149	2	..	0
Fraud	15	922	13	443	16	241	17	90	23	148
Drug Offenses	77	8,441	67	4,375	77	2,482	94	900	111	684
..Importation & Distribution	8	253	8	114	7	71	6	36	13	32
..Simple Possession****	26	142	24	82	23	40	18	7	46	13
..Communication Facility	17	95	18	26	14	33	20	19	20	17
Auto Theft	16	452	12	139	12	130	22	81	21	102
Forgery Counterfeiting	68	98	56	45	53	26	82	10	114	17
Sex Offenses	17	48	19	38	9	8	12	2	..	0
Bribery	22	319	18	37	19	88	21	69	27	125
Escape	43	945	30	161	27	255	39	203	64	326
Firearms	10	989	7	455	9	219	14	141	16	174
Immigration	58	171	45	93	54	41	82	20	112	17
Extortion/Racketeering	11	35	8	12	10	11	12	5	19	7
Gambling Lottery	26	442	23	230	24	110	32	55	34	47
Other										

- * Of the 21,190 guideline cases, 254 cases involving mixed law counts (both guideline and pre-guideline) were excluded. In addition, 1,804 cases were excluded due to one or more of the following conditions: missing FPSSIS primary offense category (1,565), missing information on prior adult criminal convictions (1,565), or missing sentencing information (299).
- ** The calculation for average prison sentence excludes cases that did not receive a sentence to prison (3,736) and cases that did receive a sentence to prison but the length of the sentence was indeterminable (81). Life sentences were included in the computation of the average (the 38 life sentences were coded as 360 months).
- *** The "Homicide" category includes 1st degree murder, 2nd degree murder, and manslaughter cases.
- **** Because of enhancements in statutory penalties for simple possession, all offenses sentenced under 21 U.S.C. § 844(a) are not restricted to the previous 12 month statutory maximum. Substantially longer penalties are reflected in the averages provided here.

SOURCE: U.S. Sentencing Commission, 1989 Data File, MON1289



[Ed. note: During the month of July, articles in the Analysis and Perspective section of Toxics Law Reporter examine the subject of environmental crimes. In this week's issue, Benjamin S. Sharp and Leonard H. Shen analyze sentencing guidelines for environmental crimes. In the last two weeks of the month, Steven L. Humphreys writes on prosecuting the corporate polluter. Last week's article, by Paul G. Nittoly, discussed current trends in the prosecution of environmental offenses (5 TXLR 161).]

THE (MIS)APPLICATION OF SENTENCING GUIDELINES TO ENVIRONMENTAL CRIMES

By Benjamin S. Sharp and Leonard H. Shen *

When Congress enacted the Comprehensive Crime Control Act in 1984, few environmental lawyers even noticed the event. But years later, as the U.S. Sentencing Commission established by that statute has generated sentencing guidelines and the courts have begun to apply them to actual cases, it is becoming clear that applying the guidelines will result in sanctions far more severe than those reflected in the policy choices made by Congress for many of the underlying environmental offenses. In addition to inconsistencies between the guidelines and the substantive environmental laws, there are many instances in which the guidelines violate legislative directives to the commission in the enabling statute, the Comprehensive Crime Control Act.

A large part of this problem is attributable to the fact that the sentencing guidelines have crammed a complex environmental regulatory system into a Procrustean bed composed of essentially two core guidelines—neither of which reflects fully the policies of the underlying statutes. The misshapen product of this exercise has been the shifting or even reversal of congressional determinations of the relative seriousness of particular environmental crimes, an emphasis on a few key violation circumstances that bear little relation to the environmental statutes, the conversion of the statutory maximum to a mandatory minimum in a host of situations that would not appear to have been contemplated when the underlying statutes were enacted, and several other discrepancies or even plain legal errors.

While not purporting to review comprehensively the application of the sentencing guidelines in the environmental area, this article concludes that the commission seriously needs to reexamine the guidelines that govern environmental violations and makes several suggestions for revision. The article also offers lines of reasoning by which defendants may challenge application of the guidelines to specific cases as inconsistent with environmental statutes and the enabling legislation.

Beginning in the 1970s, Congress considered several pieces of legislation designed to improve federal sentencing practices. See generally C. Ogletree, Jr., "The Death of Discretion? Reflections on the Federal Sentencing Guidelines," 101 *Harv. L. Rev.* 1938, 1944 & n.34 (1988). The most frequent criticism of the existing sentencing practice was that it gave broad discretion to sentencing judges, leading to disparate treatment for similarly situated individuals.

In 1984, Congress enacted the Comprehensive Crime Control Act, which established the U.S. Sentencing Commission as "an independent commission in the judicial branch." 28 U.S.C. §991(a). The commission was tasked to draft sentencing guidelines that would narrow the disparity in sentences imposed on similarly situated offenders for comparable criminal conduct. 28 U.S.C.

§991(b)(1)(B). However, the commission was expected to leave federal judges with sufficient flexibility to impose individualized sentences warranted by mitigating or aggravating factors not taken into consideration in the general sentencing guidelines. 18 U.S.C. §3553(b).¹

Following its creation, the sentencing commission conducted extensive public hearings and a research program analyzing approximately 100,000 federal criminal cases. After receiving considerable public comment on a preliminary draft of the guidelines issued in September 1986, a revised draft was submitted for public comment in January 1987 and became final Nov. 1, 1987.

Because relatively few environmental crimes had reached the sentencing stage before the final guidelines

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¹ Case law has construed this provision very narrowly, as limited solely to circumstances that the commission did not consider or mention. See, e.g., *U.S. v. Lira-Barraza*, ___ F.2d ___, 1990 WL 17296 (9th Cir. Feb. 28, 1990); see also *U.S. v. Uca*, 867 F.2d 783, 787 ("departures are to be the exception, not the rule"); see generally §5K2.0.

were released in 1987, the environmental guidelines did not have an experience baseline as did all other guidelines. As a consequence, the commission appears to have filled the experience void with its own policy choices. Yet as is discussed below, the policy decisions ultimately made by the commission seem unconstrained by congressional directives and at odds with policy choices made by Congress when it enacted the underlying environmental statutes.

The Environmental Guidelines

Seven guidelines deal specifically with the environment. U.S. Sentencing Commission, Guidelines Manual, §§2Q1.1-2Q2.1 (November 1989). Two of these deal with tampering, attempted tampering, or threatened tampering with a public water system; one deals with hazardous or injurious devices on federal lands; one deals with specially protected fish, wildlife and plants; and one deals with knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides or other pollutants. This article does not address these guidelines, which apply to relatively esoteric environmental provisions that are only rarely used.

The vast majority of environmental crimes under the principal statutes are subsumed under §2Q1.2—"Mishandling of hazardous or toxic substances or pesticides; recordkeeping, tampering, and falsification"—and §2Q1.3—"Mishandling of other environmental pollutants; recordkeeping, tampering, and falsification." See Attachment A for these guidelines. Most of the underlying environmental crimes are misdemeanors. See Attachment B for a summary of covered offenses.

As with all types of crime covered by the guidelines, each environmental guideline establishes a numerical "base offense level" for a particular criminal offense and adjusts this level in light of a host of "specific offense characteristics" recited by each guideline.

The resulting number is further adjusted by factors such as whether the victim was known to be particularly vulnerable or was an official, or was physically restrained in the course of the offense, see §3A.1; whether the defendant played an organizing role or was a minimal participant and whether the defendant abused a position of trust or used a special skill that significantly facilitated the offense, see §3B.1; and whether the defendant has clearly demonstrated an acceptance of responsibility, see §3E.1.

The resulting offense level is plotted on a matrix or "Sentencing Table" published by the commission, against a "Criminal History" axis which is derived from the defendant's past criminal record or criminal livelihood. The final sentence is selected by a judge from a range corresponding to the appropriate offense level and criminal history category set forth in that matrix. Absent specified circumstances, courts are not free to depart from the range, and departures are reviewable on appeal by the government. 18 U.S.C. §3742(b).

Guidelines' Excessive Sentences

One of the most glaring problems with the environmental guidelines is that they result in sentences in

many cases that exceed the maximum allowed by the underlying environmental statute. This not only alters or reverses the congressional determination of the seriousness of the category of offense, but impermissibly reduces the range of sentences required by the Comprehensive Crime Control Act to a single term of imprisonment—the statutory maximum. Furthermore, the guidelines fail to contemplate sentences other than imprisonment for first offenders of the environmental laws. The guidelines thus both violate the sentencing commission's enabling statute and conflict with the underlying environmental laws.

Several categories of environmental crimes are misdemeanors. All Toxic Substances Control Act (TSCA) criminal violations are misdemeanors, with a maximum imprisonment term of one year and a maximum fine of \$25,000 per day of violation. 15 U.S.C. §2615(b). Most Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) violations are similarly punishable by up to one year imprisonment, although a private applicator may be imprisoned only for a maximum of 30 days. 7 U.S.C. §1361(b). Clean Water Act negligent violations also trigger a one-year imprisonment maximum. 33 U.S.C. §1319(c)(1).

No Distinction Between Felony, Misdemeanor

Yet because the guidelines fail to distinguish between misdemeanors and felonies, these statutory maximum terms may often be exceeded by a sentence calculated under the guidelines. For example, the shortest guideline sentence available for a base level offense violation of FIFRA by a private pesticide applicator (base level 8 = 2-8 months) is twice the statutory maximum. See §2Q1.2.²

Of particular note, a violation of the Clean Water Act has been transformed by application of the guidelines into a much more serious transgression than the statute itself would suggest. The CWA sets a statutory maximum of three years imprisonment for knowing crimes (one year for negligence) that do not rise to the level of a "knowing endangerment." 33 U.S.C. §1319(c)(2).

Despite this statutory maximum, the guidelines' choice of specific offense characteristics will in virtually all cases assure a minimum offense level of 14-18 for any CWA violation, even those involving a nonhazardous pollutant such as fill dirt. This would result in a sentence just within the statutory maximum range for a felony and well over the maximum for a misdemeanor for a defendant with no prior criminal history, and a sentence above the statutory maximum for defendants with any prior history. See Attachment C.

² The Application Notes accompanying §2Q1.2 (Note 4) and §2Q1.3 (Note 3) indicate that downward departures may be appropriate for negligent violations. No guidance is provided suggesting how great a departure may be warranted or whether wholesale abandonment of the guidelines for misdemeanors is appropriate. Some courts have likened the notes to legislative history that cannot override the guideline or be resorted to unless there is facial ambiguity in the guideline. See, e.g., *U.S. v. Anderson*, No. 89-10059 (9th Cir. Feb. 8, 1990).

Four-Level Increase For Permit Violations

For example, specific offense characteristic (b)(4) requires a four-level increase for discharges without a permit or in violation of a permit (in the case of non-hazardous water pollutants) or for disposal without a permit or in violation of a permit (in the case of hazardous water pollutants). Since virtually all violations of the CWA involve discharge in violation of or without a permit, they will automatically result in an effective base level of $6+4=10$.

Next, characteristic (b)(1) requires a four-level increase for any discharge of a pollutant, which by definition will always be the case whenever there has been a discharge in violation of a permit.³ (If the discharge is ongoing, continuous, or repetitive—again the likely scenario for CWA violations—there will be a six-level increase.) Finally, many discharges into publicly owned treatment works (POTWs) would qualify as “disruption of a public utility,” requiring an additional four points.

The total offense level for virtually any CWA violation is thus at least 14, and under a substantial proportion of CWA cases, closer to 18 or 20—right at the statutory maximum level. Thus, for example, the court in *U.S. v. Mills*, (N.D. Fla. April 17, 1989), appeal pending, (11th Cir.), sentenced two defendants each to 21 months in prison for filling with dirt a 75' X 300' wetlands, invoking the “ongoing or repetitive release” characteristic of §2Q1.3(b)(1) and the discharge without a permit characteristic of §2Q1.3(b)(4).

Statutory Maximum Controls

It is true that the guidelines provide that where the guidelines sentence would exceed the statutory maximum, the statutory maximum controls. See 18 U.S.C. §3559(b); §5G1.1 (statutory maximum governs as to an imprisonment term); see also §5E1.2(c)(4) (statutory fine if based on a per day violation will govern instead of the guidelines fine). It is, of course, clear that an independent agency cannot lawfully pre-empt Congress' judgment in the original substantive statute by prescribing a regulatory sentence more severe than the appropriate maximum sentence for particular environmental violations.

But the guidelines effect an analogous result of questionable validity. The sentencing commission has compressed the range of sentences available, turning the penalty into a mandatory minimum (and maximum) for many types of crimes. Although there may be no per se constitutional defect in mandatory minimum sentencing, see, e.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986), by establishing what amounts to a flat sentence, the guidelines violate the Comprehensive Crime Control Act itself, which requires that the commission establish a sentencing range for each category of offense. See 28 U.S.C. §994(b)(1); see also *Mistretta v. U.S.*, —

³ Although the guidelines do not define pollutant, the CWA does. A pollutant includes “dredged, spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. §1362(6).

U.S. —, 109 S. Ct. 647, 656 (1989). Furthermore, for sentences involving imprisonment, Congress mandated that “the maximum of the range established for such a term shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months.” 28 U.S.C. §994(b)(2). Where the guidelines result in a minimum sentence of one year for misdemeanors or a sentencing range for felonies where the minimum is less than 25% below the maximum, it is clear that the guidelines are inconsistent with their enabling legislation.

Sentencing First Offenders

This result also violates Congress' mandate that “the commission shall insure that the guidelines reflect the general inappropriateness of imposing a sentence to a term of imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence or an otherwise serious offense.” 28 U.S.C. §994(j). Because very few of the misdemeanor violations of TSCA or FIFRA, or a negligent violation of the CWA, can be considered a “crime of violence or an otherwise serious offense,” the imposition of not only a sentence of imprisonment, but the maximum available sentence, violates the leniency Congress required for a first offender. *Id.*

Finally, as a policy matter, it is troubling that whole categories of environmental crimes have suddenly been transformed into mandatory minimum violations by a commission that was not charged by Congress to rewrite priorities in environmental enforcement. Apart from tending to transform a statutory maximum into a sentencing minimum, the fact that these specific offense characteristics are virtually always triggered in, for example, the CWA context means that a CWA violation per se will be treated much more seriously than another environmental violation—even if Congress assigned a lower statutory maximum to the CWA than, for example, many RCRA permit violations. Compare 33 U.S.C. §1319(c) with 42 U.S.C. §6928(d). Indeed, this uniform aggravation of sentencing for CWA violations disrupts the carefully crafted hierarchy of criminal penalties (with different prison terms for negligent, knowing, and knowing endangerment crimes) established by Congress' 1987 CWA amendments.⁴

Specific Offense Characteristics

Most guidelines in areas other than the environmental area cover specific crimes (e.g. perjury) and use the

⁴ Another example of a shift in or even reversal of Congressional priorities can be found when the guidelines are applied to FIFRA. Violations of FIFRA's proprietary information confidentiality requirements are punishable by three years, 7 U.S.C. §1361(b)(1)(C), by comparison to the one year maximum for most other FIFRA violations. See 7 U.S.C. §1361(b)(1)(A). Yet the guidelines would turn on its head Congress' determination of the relative severity of these offenses, in part because the guidelines fail to provide any enhancement for illegal disclosure of confidential information. Thus, the proprietary information violation would merit only an 8 (the base level under §2Q1.2), whereas most pesticide releases would be base level 8 plus either 4 (for a single release) or 6 (for a continuous release). See Appendix C.

offense characteristics to differentiate common circumstances surrounding a crime (e.g., causing physical injury to a person or resulting in substantial interference with the administration of justice) as aggravating or mitigating factors. See §2J1.3. By contrast, the environmental guidelines attempt to encompass a dazzling range of offenses under two guidelines that cannot reasonably be tailored to the diversity of crimes to which they apply. The offense characteristics and their Application Notes cannot apply the myriad factual circumstances that may aggravate or mitigate so many offenses. As a consequence, neither the base levels nor the offense characteristics are common to the bulk of the offenses covered. Moreover, the specific offense characteristics used as adjustment factors fail to follow the logic of the underlying environmental statutes. We briefly discuss each characteristic below.

• Single release v. repetitive release

Both §2Q1.2 and §2Q1.3 provide for increasing the base offense level by six levels "[i]f the offense resulted in an ongoing, continuous, or repetitive discharge . . . of a pollutant into the environment," while the base offense level may be increased by only four levels "if the offense otherwise involved a discharge, release, or emission of a pollutant." §2Q1.2(b)(1); §2Q1.3(b)(1).

It certainly makes good policy sense to impose a greater sentence where a continuous or repetitive environmental discharge is occurring. But this guideline ignores the fact that the environmental statutes already provide for separate counts for such discharges, and the criminal fine provisions of both the statutes and the guidelines, see §5E1.2(c), allow per-day fines. Cf. *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 791 F.2d 304, 316 (4th Cir. 1986) (assessing protracted CWA civil violations at approximately \$5,000 per day), *rev'd on other grounds*, 108 S. Ct. 376 (1987); *U.S. v. T & S Brass and Bronze Works Inc.*, 681 F. Supp. 314, 322 (D.S.C. 1988) (imposing \$1,000 per day for RCRA civil violation) 3 TXLR 1027; *U.S. v. SCM Corp.*, 667 F. Supp. 1110, 1128 (D. Md. 1987) (assessing sequential Clean Air Act violations at \$10,000 per day).

The underlying statutes are thus already finely tuned to increase the ultimate penalty in accordance with the continuous or repetitive nature of a discharge. But the guidelines now double-count a multiple-discharge violation by increasing the offense level for each individual violation as well as allowing sentencing for multiple counts. See §5G1.2. Because many CAA and CWA discharge violations involve dozens or even hundreds of days of effluent or air emission releases, increasing the penalty will be called for in most circumstances under the guidelines—despite the fact that Congress, when it established the availability of per-day violation fines in the environmental laws, already determined the appropriate degree of enhancement to be charged for repetitive violations.

• Likelihood of death or serious injury

§2Q1.2 and §2Q1.3 provide for an increase of nine and 11 levels, respectively, where the offense "resulted in a substantial likelihood of death or serious bodily injury." At the outset it should be noted that few environmental violations, even criminal ones, rise to the level of creating a substantial likelihood of death or serious bodily injury. For example, in the 13-year history of TSCA Section 8(e), 15 U.S.C. §2607(e), which requires reporting of information which reasonably supports the conclusion that a substantial risk of injury to health or the environment is posed by a chemical, no criminal charges have ever been brought by the Environmental Protection Agency under this provision. Nonetheless, it makes good policy sense to punish with particular severity environmental violations that create the greatest health and safety threat—even it means reserving one of five specific offense characteristics for one of the least likely circumstances of an environmental crime.

The problem lies in the fact that different offense increases are provided for hazardous (increase of nine) when compared to nonhazardous pollutant violations (increase of 11) which result in a likelihood of such serious injury. The net result is that the same total offense level (17) is available for a violation that results in serious injury, regardless of whether the violation involved a hazardous or a nonhazardous pollutant. The commission apparently contemplated that the harm would be the same regardless of the hazardous nature of its source, and hence the same sentence would be appropriate.

This also may be a reasonable policy decision. If it is, the question arises why it is not applied uniformly to violations that fall short of a likelihood of death or serious bodily injury. Why should the same environmental injury which happens to fall short of creating death or serious bodily injury not trigger the same penalty, regardless of whether it is caused by a hazardous or a nonhazardous pollutant? Why make a policy distinction between hazardous and nonhazardous and apply it only to a few isolated cases, and not apply it to the bulk of environmental crimes?

The guidelines' failure to address this issue at best raises questions about how seriously the commission takes its own distinction between hazardous and nonhazardous materials—and at worst creates an unwarranted inequity in treatment between those who cause lesser environmental harm as a result of a "hazardous" substance discharge and those who have mishandled "nonhazardous" pollutants but with substantial harmful result.

• Disruption of public utilities, community evacuation, or substantial cleanup expenditures

Both §2Q1.2(b)(3) and §2Q1.3(b)(3) require an increase of 4 levels if an offense "resulted in disruption of public utilities or evacuation of a community, or if

cleanup required a substantial expenditure." But the wholesale equating of a widespread community evacuation with a "substantial" cleanup makes little sense when the environmental harm or threat present in a widespread evacuation is compared to even a minimal hazardous waste site cleanup. Even the initial investigation of a non-National Priorities List site may often cost several hundred thousand dollars. If such an expenditure is considered "substantial"—a reasonable construction given the guidelines' complete absence of explanation of the term—even a minor problem of surface soil contamination would be comparable to situations requiring a public evacuation.

Furthermore, it is ambiguous whether a cleanup funded by a defendant triggers this element; if so, there is a strong incentive for a defendant not to undertake mitigation efforts, since the prison term will be the same regardless of whether it is the defendant or the government who performs cleanup. It is true that, for a few environmental crimes not subject to a "per day" fine calculation, a defendant's cleanup efforts will likely reduce the "pecuniary gain" from the crime and hence reduce the fine imposed. See §5E1.2(c)(4). But few defendants would choose to expend cleanup monies in the hope of reducing their fines, if the certain price is an increase of 4 offense levels—which translates into several months or more of extra imprisonment.⁵

• Disposal without or in violation of a permit

Section 2Q1.2(b)(4) provides for an increase of 4 levels if the offense "involved transportation, treatment, storage, or disposal without a permit or in violation of a permit." Section 2Q1.3(b)(4) provides for the same increase if the offense involved "a discharge without a permit or in violation of a permit."

The language and the statutory citations accompanying these provisions suggest that §2Q1.2 was intended to govern RCRA permit violations, and §2Q1.3 was intended to govern CWA permit violations that do not involve hazardous pollutants.⁶ But while it may make sense to create an aggravating offense characteristic based on failure to obtain or comply with a permit where RCRA statutory penalties are relatively stringent (two year and five year offenses, 42 U.S.C. §6928(d)), there is no reason to apply this uniformly to CWA offenses. The CWA statutory penalties (one year v. three year offenses, 33 U.S.C. §1319(c)) are differentiated based solely on intent. Yet no offense characteristic addresses that factor; instead, both CWA misdemeanors and CWA felonies, which virtually always involve a permit violation, are uniformly treated with the (b)(4) aggravating factor.

⁵ Again there is a discrepancy between the guideline and the Application Note which, unlike the guideline, suggests that only "public" cleanup expenses are covered. At least one prosecutor has asserted that private cleanup costs trigger this provision.

⁶ The conclusion is not stated in the guidelines; it is deduced from the fact that §2Q1.2(b)(4) refers to "treatment, storage, or disposal"—key RCRA terms—and cites to RCRA, 42 U.S.C. §6928(d), whereas §2Q1.3(b)(4) refers to "discharge" without a permit—the key CWA term—and cites to the CWA, 33 U.S.C. §1319(c).

In sum, there is no apparent correlation between the widely ranging statutory provisions of the CWA and RCRA and the sentences that result from application of the guidelines. Nor does the guidelines' distinction between RCRA and CWA nonhazardous violations have any basis in the underlying statutes, apart from the general fact that some RCRA permit violations (those not involving used oil) have greater sentences than some CWA permit violations (those that do not involve a knowing violation).

To some degree, the Application Notes to these guidelines provide additional discretion for "departures" from the guidelines that can reduce the inequities produced or match the sentences more closely to those suggested by the substantive statutes. But why create a system whose basic components require constant tinkering in order to correct their inherent inconsistencies with environmental laws? Furthermore, is it appropriate to give certain circumstances the *prima facie* applicable status of a specific offense characteristic, while giving other circumstances—including the important factor of whether conduct was negligent rather than knowing—the status of "departures" which a court must justify and which are not subject to specific numerical boundaries? See, e.g., §2Q1.2, Application Note 4 ("In cases involving negligent conduct, a downward departure may be warranted"); §2Q1.3, Application Note 8 (where defendant has violated an administrative order, "an upward departure may be warranted").

Distinction Unsound

The guidelines' inconsistency with the environmental statutes lies not just in the specific offense characteristics, but even in their fundamental, overarching framework. As already noted, the guidelines create a general distinction between hazardous and nonhazardous pollutants, with a greater offense level for hazardous pollutants. See "Background" note to §2Q1.3 ("The section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.")

To some degree, this distinction tracks that of the environmental statutes themselves, some of which—the Comprehensive Environmental Response, Compensation, and Liability Act and RCRA are examples—limit their reach to listed or readily identifiable "hazardous" wastes or substances.⁷ The sentencing commission appar-

⁷ While this distinction is the clear intent of the two guideline provisions, §2Q1.2 fails to cite the correct CERCLA provision in identifying the statutory list of hazardous substances. See Commentary to §2Q1.2, "Statutory Provisions" (citing 42 U.S.C. §9603(b), (c), (d)). The correct citation should be 42 U.S.C. §9602. Although Application Note 3 does mention the CERCLA hazardous substances list, the failure to cite §9602 in the "Statutory provisions" section at least creates an ambiguity whether a hazardous substance which is not hazardous under any of the other cited statutes would be governed by §2Q1.2 rather than §2Q1.3.

A further example of unnecessary ambiguity arises from the guidelines' inconsistent and incomplete citation of the environmental statutory provisions. For example, §2Q1.2 cites to both the "prohibited acts" sections of TSCA and FIFRA, and those statutes' generic penalty provisions, but cites only to the generic penalty provisions of

ently assumed that Congress, by enacting laws which dealt specifically and only with hazardous substances, was making a policy determination that such substances were a greater threat to society than nonhazardous substances, and therefore any violation involving such substances would per se be worthy of a greater penalty.

The problem with applying this distinction in the sentencing context is that Congress has gone one step beyond the gross distinction between hazardous and nonhazardous pollutants, and actually enacted laws governing certain nonhazardous substances and assigned specific criminal penalty ranges for violations of those laws. Parts of RCRA, the CWA, and the CAA, for example, clearly govern nonhazardous substances.

Therefore, if the sentencing commission is seeking to embody policy decisions about the seriousness of an offense, it should look to the specific penalties provided in the environmental statutes themselves, not to the precursor, blunderbuss distinction between "hazardous" and "nonhazardous" pollutants that may have governed when Congress was simply trying to determine what types of substances would be covered by an emerging statute. It is that statutory penalty attributable to a specific nonhazardous pollutant offense which should govern, not a generic distinction between hazardous and nonhazardous substances.

Congress' Policy On Penalty Ranges

Looking, then, to the specific penalty ranges dictated by Congress for nonhazardous pollutants, we discover that Congress intended to make the same penalty available for nonhazardous violations as for hazardous substance violations. The same penalty provisions with the same penalty ranges apply to both hazardous and nonhazardous substances in these statutes. See, e.g., 33 U.S.C. §1319(c); 42 U.S.C. §6928(d); 42 U.S.C. §7413. It is clear that Congress did not differentiate between, for example, a discharge of soil into waters in excess of Total Suspended Solids limits in an effluent permit, and a discharge of benzene in violation of a similar provision in the same permit. The hazardous/nonhazardous distinction between §2Q1.2 and §2Q1.3 is unsupported by the statutes.

Furthermore, by making a hazardous/nonhazardous distinction which is not apparent in the underlying statutes, the guidelines tend to level out sentences among different types of statutes. For example, TSCA and FIFRA violations with a maximum prison term of one year, CAA violations with a maximum term of three years, and RCRA violations with a maximum term of five years are all governed by §2Q1.2 and the same base offense level.

the CWA, CAA, and Safe Drinking Water Act. Similarly, §2Q1.3 cites to both the substantive provisions and the generic penalty provisions for unlawful obstruction of a navigable waterway, but cites only to the generic penalty provisions of the CWA and CAA. The commission should amend the statutory citations for both guidelines either to include substantive provisions and their penalty provisions for all relevant statutes, or to include only the generic penalty provisions of these statutes.

The leveling effect is only slightly mitigated by the specific offense characteristics, since only two of those characteristics—the one providing for a 4-level increase for permit violations, see §2Q1.2(b)(4), and the one providing for a 2-level decrease for "simple recordkeeping or reporting violations only," see §2Q1.2(b)(6)—tend to apply differentially and in the right direction among the different environmental statutes.¹

Conclusion

The structural and specific problems only briefly discussed in this article are certain to generate real-life horror stories as the growing number of criminal cases in the pipeline reach the point of sentencing under the guidelines. Indeed, problems such as the "mandatory minimum" effect of the guidelines may support sound judicial challenges to such sentences, as violations of the Comprehensive Crime Control Act's mandates of a sentencing range or of leniency for first-time offenders. In any event, the sentencing commission should act quickly to review the guidelines with closer attention to the diversity of offenses and the policy choices reflected in statutory maximum sentences provided by the underlying environmental statutes.

At least three general reforms of the environmental guidelines are suggested by our discussion. The first should be to create a base offense level and specific offense characteristics which will only rarely, if ever, range above the statutory maximum provided by the underlying statutes—and to provide for the leniency Congress intended to give first offenders. It is reasonable to assume that when Congress allowed "up to" X years imprisonment for a particular type of violation, it intended the range of sentences from zero months to the maximum to be employed, depending on a review of all the circumstances of the particular case. A similar intent to establish a range of penalties is unequivocally expressed by the Comprehensive Crime Control Act itself. Any guideline which results in top-loading the sentences at or near the statutory maximum does violence to the intent of both statutes.

The second reform should be to base the specific offense characteristics on policy concerns reflected by the environmental statutes, not the few crude concerns identified in the guidelines. Some preliminary guidance can perhaps be gleaned from EPA's civil penalty settlement policy documents, both the generic Civil Penalty Settlement Policy and the statute-specific (or even the program-specific) settlement policies issued by EPA. These guidance documents identify some of the factors that the agency will look to in setting the civil penalty for a particular environmental violation. The policies' attention to the violator's prior compliance history and

¹ §2Q1.2(b)(4) tends to increase the sentence for RCRA permit violations above the sentence equally applicable to TSCA and FIFRA violations, and thus brings the sentence closer to the five-year maximum allowed by RCRA. §2Q1.2(b)(6) tends to decrease the sentence for TSCA and FIFRA violations, many of which will fall into the "simple recordkeeping or reporting" category, and thus brings the sentence closer to the one-year maximum allowed by those statutes.

degree of willfulness, for example, find little counterpart in the sentencing guidelines, which look rather narrowly only to the defendant's actual criminal history.

Third, the commission should seriously consider increasing the number of guidelines that deal specifically with environmental crimes. Perhaps the fundamental problem with the guidelines is that they attempt to squeeze the enormously complex regime of multi-media environmental laws into essentially two narrow guidelines. Important distinctions between the various statutes must be addressed through the clumsy use of specific offense characteristics and Application Notes which provide either too little or too much discretion to vary the final sentence according to a limited few parameters. But no matter how well-chosen the base offense level or the specific offense characteristics, it is unlikely that any two guidelines and their satellite corollaries can do justice to the infinite permutation of violations possible under the many environmental laws. The creation of one

guideline for each substantive statute, or for each medium polluted, or some demarcation other than a simple hazardous/nonhazardous distinction, may bring a court closer to the mark set by Congress.

Ultimately, the lodestar of any reform should be to track faithfully the policies and structures of the environmental laws. Unless a fundamental consistency with the underlying statutes is assured, the commission will continue to invite courts faced with flagrantly inequitable results to depart as a matter of course from the guidelines' factors; to disregard the guidelines entirely; or worse, to twist the often ambiguous and skeletal language of the guidelines in a way never intended by the commission so as to reach a court's desired result. By forcing courts to choose between perpetrating injustice and creating such twisted law, the guidelines may encourage judges to seize back and abuse the very discretion intended to be taken from them.

APPENDIX A. SENTENCING GUIDELINES

PART Q. OFFENSES INVOLVING THE ENVIRONMENT

§2Q1.1. Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(a) Base Offense Level: 24

Commentary

Statutory Provisions: 33 U.S.C. §1319(c)(3); 42 U.S.C. §6928(e).

Application Note:

1. If death or serious bodily injury resulted, an upward departure may be warranted. See Chapter Five, Part K (Departures).

Background: This section applies to offenses committed with knowledge that the violation placed another person in imminent danger of death or serious bodily injury.

Historical Note: Effective November 1, 1987.

§2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification

(a) Base Offense level: 8

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or

(B) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.

Commentary

Statutory Provisions: 7 U.S.C. §§136j-136l; 15 U.S.C. §§2614 and 2615; 33 U.S.C. §§1319(c)(1), (2), 1517(b), 1321(b)(5); 42 U.S.C. §§300h-2, 6928(d), 7413, 9603(b), (c), (d); 43 U.S.C. §§1350, 1816(a), 1822(b).

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly construed as including failure to report discharges, releases, or emissions where required; the giving of false

information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. "Simple recordkeeping or reporting violation" means a recordkeeping or reporting offense in a situation where the defendant neither knew nor had reason to believe that the recordkeeping offense would significantly increase the likelihood of any substantive environmental harm.

3. This section applies to offenses involving pesticides or substances designated toxic or hazardous at the time of the offense by statute or regulation. A listing of hazardous and toxic substances in the guidelines would be impractical. Several federal statutes (or regulations promulgated thereunder) list toxics, hazardous wastes and substances, and pesticides. These lists, such as those of toxic pollutants for which effluent standards are published under the Federal Water Pollution Control Act (e.g., 33 U.S.C. §1317) as well as the designation of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act (e.g., 42 U.S.C. §9601(14)), are revised from time to time. "Toxic" and "hazardous" are defined differently in various statutes, but the common dictionary meanings of the words are not significantly different.

4. Except when the adjustment in subsection (b)(6) for simple recordkeeping offenses applies, this section assumes knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.

5. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation, a departure of up to two levels in either direction from the offense levels prescribed in these specific offense characteristics may be appropriate.

6. Subsection (b)(2) applies to offense where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

7. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.

8. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels either upward or downward may be warranted.

9. Where a defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section applies both to substantive violations of the statute governing the handling of pesticides and toxic and hazardous substances and to recordkeeping offenses. The first four specific offense characteristics provide enhancements when the offense involved a substantive violation. The last two specific offense characteristics apply to recordkeeping offenses. Although other sections of the guidelines generally prescribe a base offense level of 6 for regulatory violations, §2Q1.2 prescribes a base offense level of 8 because of the inherently dangerous nature of hazardous and toxic substances and pesticides. A decrease of 2 levels is provided, however, for "simple recordkeeping or reporting violations" under §2Q1.2(b)(6).

Historical Note: Effective November 1, 1987.

§2Q1.3. Mishandling of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) (A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by 6 levels; or

(B) If the offense otherwise involved a discharge, release, or emission of a pollutant, increase by 4 levels.

(2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 11 levels.

(3) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by 4 levels.

(4) If the offense involved a discharge without a permit or in violation of a permit, increase by 4 levels.

(5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

Commentary

Statutory Provisions: 33 U.S.C. §§403, 406, 407, 411, 1319(c)(1), (c)(2), 1415(b), 1907, 1908; 42 U.S.C. §7413.

Application Notes:

1. "Recordkeeping offense" includes both recordkeeping and reporting offenses. The term is to be broadly

construed as including failure to report discharges, releases, or emissions where required; the giving of false information; failure to file other required reports or provide necessary information; and failure to prepare, maintain, or provide records as prescribed.

2. If the offense involved mishandling of nuclear material, apply §2M6.2 (Violation of Other Federal Atomic Energy Statutes, Rules, and Regulations) rather than this guideline.

3. The specific offense characteristics in this section assume knowing conduct. In cases involving negligent conduct, a downward departure may be warranted.

4. Subsection (b)(1) assumes a discharge or emission into the environment resulting in actual environmental contamination. A wide range of conduct, involving the handling of different quantities of materials with widely differing propensities, potentially is covered. Depending upon the harm resulting from the emission, release or discharge, the quantity and nature of the substance or pollutant, the duration of the offense and the risk associated with the violation a departure of up to two levels in either direction from that prescribed in these specific offense characteristics may be appropriate.

5. Subsection (b)(2) applies to offenses where the public health is seriously endangered. Depending upon the nature of the risk created and the number of people placed at risk, a departure of up to three levels upward or downward may be warranted. If death or serious bodily injury results, a departure would be called for. See Chapter Five, Part K (Departures).

6. Subsection (b)(3) provides an enhancement where a public disruption, evacuation or cleanup at substantial expense has been required. Depending upon the nature of the contamination involved, a departure of up to two levels in either direction could be warranted.

7. Subsection (b)(4) applies where the offense involved violation of a permit, or where there was a failure to obtain a permit when one was required. Depending upon the nature and quantity of the substance involved and the risk associated with the offense, a departure of up to two levels in either direction may be warranted.

8. Where a Defendant has previously engaged in similar misconduct established by a civil adjudication or has failed to comply with an administrative order, an upward departure may be warranted. See §4A1.3 (Adequacy of Criminal History Category).

Background: This section parallels §2Q1.2 but applies to offenses involving substances which are not pesticides and are not designated as hazardous or toxic.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 205).

CHAPTER FIVE — DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. A sentence is within the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. §3553(a).

Historical Note: Effective November 1, 1987.

PART A — SENTENCING TABLE

Commentary

Application Notes:

1. The Offense Level (1-43) forms the vertical axis of the Sentencing Table. The Criminal History Category (I-VI) forms the horizontal axis of the Table. The intersection of the Offense Level and Criminal History Category displays the Guideline Range in months of imprisonment. "Life" means life imprisonment. For example, the guideline range applicable to a defendant with an Offense Level of 15 and a Criminal History Category of III is 24-30 months of imprisonment.

2. In rare cases, a total offense level of less than 1 or more than 43 may result from application of the guidelines. A total offense level of less than 1 is to be treated as an offense level of 1. An offense level of more than 43 is to be treated as an offense level of 43.

3. The Criminal History Category is determined by the total criminal history points from Chapter Four, Part A. The total criminal history points associated with each Criminal History Category are shown under each Criminal History Category in the Sentencing Table.

Historical Note: Effective November 1, 1987. Amended effective November 1, 1989 (see Appendix C, amendment 270).

The Sentencing Table used to determine the guideline range follows:

**APPENDIX B.
ENVIRONMENTAL CRIMES
SUBJECT TO SENTENCING GUIDELINES SECTIONS 2Q1.2 and 2Q1.3**

VIOLATIONS SUBJECT TO SECTION 2Q1.2:

Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §1361.

- Registrant, applicant, or producer who knowingly violates FIFRA may receive up to \$50,000 fine and/or one year imprisonment.
- Commercial applicator of a registered pesticide or any person not described above who knowingly violates FIFRA may receive up to \$25,000 fine and/or one year imprisonment.
- Private applicator who knowingly violates FIFRA may receive up to \$1,000 fine and/or 30 days imprisonment.
- Any person who, with intent to defraud, uses or reveals confidential formula information acquired under FIFRA may receive up to \$10,000 fine and/or three years imprisonment.

Toxic Substances Control Act, 15 U.S.C. §2615.

- Any person who knowingly or willfully violates TSCA may receive up to \$25,000 fine per day of violation and/or one year imprisonment.

Clean Water Act, 33 U.S.C. §1319(c)(1), (2).

- Any person who negligently violates CWA or negligently introduces into a sewer system or publicly owned treatment system (POTW) any pollutant which such person knew or reasonably should have known could cause personal injury or property damage, and which causes such POTW to violate any effluent limitation or permit condition, shall receive a fine of not less than \$2,500 nor more than \$25,000 per day of violation, and/or imprisonment for up to one year. A second or further violation of this provision may result in a fine of up to \$50,000 per day of violation, and/or imprisonment of up to two years.
- Any person who knowingly violates the CWA or knowingly introduces into a sewer system or POTW a pollutant under the terms described above shall be fined not less than \$5,000 nor more than \$50,000 per day of violation, and/or be imprisoned for up to three years. A second or further violation of this provision may result in a fine of up to \$100,000 per day of violation and/or imprisonment of up to 6 years.
- Any person in charge of a vessel or of an onshore facility who fails to notify the United States of a discharge of oil or a hazardous substance from such vessel or facility may be fined up to \$10,000 and/or imprisoned for up to one year.

Deepwater Port Act, 33 U.S.C. §1517(b).

- Any person in charge of a vessel or a deepwater port who fails to notify the Secretary of Transportation as soon as he has knowledge of a discharge of oil may receive up to \$10,000 in fines and/or up to one year imprisonment.

Safe Drinking Water Act, 42 U.S.C. §300h-2.

- Any person who willfully violates the underground injection control laws promulgated pursuant to the SDWA may be imprisoned for up to three years, and/or fined in accordance with Title 18 of the U.S. Code.

Resource Conservation and Recovery Act, 42 U.S.C. §6928(e).

- Any person who knowingly violates RCRA by transporting or causing to be transported any hazardous waste without a permit, or by knowingly treating, storing, or disposing of any hazardous waste without a permit or in knowing violation of a permit, may receive a fine of up to \$50,000 per day of violation and/or up to five years imprisonment.
- Any person who knowingly violates any other provision of RCRA may receive a fine of up to \$50,000 per day of violation and/or up to two years imprisonment.
- A second or further violation of RCRA may result in a fine and/or imprisonment term up to double the maximum appropriate for a first violation.

Clean Air Act, 42 U.S.C. §7413.

- Any person who knowingly makes any false statement, representation, or certification in any document filed or required to be maintained by the CAA or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device required to be maintained by the CAA may be fined up to \$10,000 and/or imprisoned up to six months.
- Any person who commits any other knowing violation of the CAA may be fined up to \$25,000 per day of violation and/or imprisoned up to one year. A second or further conviction under this provision may result in a fine and/or term of imprisonment up to double the maximum appropriate for a first violation.

SENTENCING TABLE (in months of imprisonment)

Criminal History Category (Criminal History Points)

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
1	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6
2	0 - 6	0 - 6	0 - 6	0 - 6	0 - 6	1 - 7
3	0 - 6	0 - 6	0 - 6	0 - 6	2 - 8	3 - 9
4	0 - 6	0 - 6	0 - 6	2 - 8	4 - 10	6 - 12
5	0 - 6	0 - 6	1 - 7	4 - 10	6 - 12	9 - 15
6	0 - 6	1 - 7	2 - 8	6 - 12	9 - 15	12 - 18
7	1 - 7	2 - 8	4 - 10	8 - 14	12 - 18	15 - 21
8	2 - 8	4 - 10	6 - 12	10 - 16	15 - 21	18 - 24
9	4 - 10	6 - 12	8 - 14	12 - 18	18 - 24	21 - 27
10	6 - 12	8 - 14	10 - 16	15 - 21	21 - 27	24 - 30
11	8 - 14	10 - 16	12 - 18	18 - 24	24 - 30	27 - 33
12	10 - 16	12 - 18	15 - 21	21 - 27	27 - 33	30 - 37
13	12 - 18	15 - 21	18 - 24	24 - 30	30 - 37	33 - 41
14	15 - 21	18 - 24	21 - 27	27 - 33	33 - 41	37 - 46
15	18 - 24	21 - 27	24 - 30	30 - 37	37 - 46	41 - 51
16	21 - 27	24 - 30	27 - 33	33 - 41	41 - 51	46 - 57
17	24 - 30	27 - 33	30 - 37	37 - 46	46 - 57	51 - 63
18	27 - 33	30 - 37	33 - 41	41 - 51	51 - 63	57 - 71
19	30 - 37	33 - 41	37 - 46	46 - 57	57 - 71	63 - 78
20	33 - 41	37 - 46	41 - 51	51 - 63	63 - 78	70 - 87
21	37 - 46	41 - 51	46 - 57	57 - 71	70 - 87	77 - 96
22	41 - 51	46 - 57	51 - 63	63 - 78	77 - 96	84 - 105
23	46 - 57	51 - 63	57 - 71	70 - 87	84 - 105	92 - 115
24	51 - 63	57 - 71	63 - 78	77 - 96	92 - 115	100 - 125
25	57 - 71	63 - 78	70 - 87	84 - 105	100 - 125	110 - 137
26	63 - 78	70 - 87	78 - 97	92 - 115	110 - 137	120 - 150
27	70 - 87	78 - 97	87 - 108	100 - 125	120 - 150	130 - 162
28	78 - 97	87 - 108	97 - 121	110 - 137	130 - 162	140 - 175
29	87 - 108	97 - 121	108 - 135	121 - 151	140 - 175	151 - 188
30	97 - 121	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210
31	108 - 135	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235
32	121 - 151	135 - 168	151 - 188	168 - 210	188 - 235	210 - 262
33	135 - 168	151 - 188	168 - 210	188 - 265	210 - 262	235 - 293
34	151 - 188	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327
35	168 - 210	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365
36	188 - 235	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405
37	210 - 262	235 - 293	262 - 327	292 - 365	324 - 405	360 - life
38	235 - 293	262 - 327	292 - 365	324 - 405	360 - life	360 - life
39	262 - 327	292 - 365	324 - 405	360 - life	360 - life	360 - life
40	292 - 365	324 - 405	360 - life	360 - life	360 - life	360 - life
41	324 - 405	360 - life	360 - life	360 - life	360 - life	360 - life
42	360 - life	360 - life	360 - life	360 - life	360 - life	360 - life
43	life	life	life	life	life	life

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9603(b).

• Any person in charge of a vessel or facility from which a hazardous substance is released (other than a federally permitted release) under certain circumstances and who fails to notify the United States of such release shall be fined in accordance with Title 18, U.S. Code, and/or imprisoned for up to three years. The term of imprisonment may range up to five years for a second or subsequent conviction.

• Any facility owner/operator or transporter of hazardous substances to a facility who knowingly fails to notify the United States of the existence of such facility, the amount and type of hazardous substances found there, and any known, suspected or likely releases from such facility, shall be fined up to \$10,000 and/or imprisoned for up to one year.

• Any person who knowingly destroys, mutilates, erases, conceals, or otherwise renders unavailable or falsifies any records with respect to hazardous substances at a facility shall be fined in accordance with Title 18, U.S. Code, and/or imprisoned for up to three years (or up to five years for a second or subsequent violation).

Outer Continental Shelf Lands Act, 43 U.S.C. §1350, §1822(b).

• Any person who knowingly and willfully violates the OCSLA, any lease or regulation issued under the OCSLA, makes any false statement in any document filed or required to be maintained, falsifies or tampers with any monitoring device, or reveals any confidential data under the OCSLA may be fined up to \$100,000 per day of violation and/or imprisoned up to ten years.

• Any person in charge of a vessel or offshore facility which is involved in an oil pollution incident and who knowingly fails to notify the United States may be fined up to \$10,000 and/or imprisoned up to one year.

VIOLATIONS SUBJECT TO SECTION 201.3:**Rivers and Harbors Act, 33 U.S.C. §406, §411.**

• Any person who wrongfully constructs bridges, piers, or otherwise obstructs a navigable waterway shall receive a fine not less than \$500 and not more than \$2,500, and/or be imprisoned up to one year.

• Any person who deposits refuse in a navigable waterway, takes possession of or uses or injures any harbor or river improvements, or obstructs a navigable waterway with a vessel, loose timber, or craft shall receive a fine not less than \$500 and not more than \$2,500, and/or be imprisoned not less than thirty days nor more than one year.

Clean Water Act, 33 U.S.C. §1319(c), and Clean Air Act, 42 U.S.C. §7413

• For violations involving a nonhazardous or nontoxic pollutant: same maximum fines and imprisonment terms noted supra under, §2Q1.2.

Ocean Dumping Act, 33 U.S.C. §1415(b).

• Any person who knowingly violates the Ocean Dumping Act may be fined up to \$50,000 and/or imprisoned for up to one year.

Act to Prevent Pollution from Ships, 33 U.S.C. §1908.

• Any person who knowingly violates the Act or the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships (the "MARPOL Protocol") may be fined up to \$50,000 and/or imprisoned up to five years.

**APPENDIX C.
EXAMPLES OF ENVIRONMENTAL SENTENCING INEQUITIES**

<u>Statutory Provision</u>	<u>Statutory Penalty</u>	<u>Sentencing Guideline Provision for Typical Offense</u>	<u>Guideline Penalty</u>	<u>Inequitable Result</u>
1. FIFRA 7 U.S.C. §1361(b)(2) (private pesticide applicator)	Up to 30 days	2Q1.2(a) base offense	8 2 - 8 months	Guidelines <u>always</u> impose statutory maximum.
2. CWA 33 U.S.C. §1319(c)(1) (negligent discharge of pollutant)	Up to 1 year	2Q1.3(a) base offense	6	Guidelines <u>always</u> impose statutory maximum.
		2Q1.3(b)(1)(B) discharge	4	
		2Q1.3(b)4 permit	4	
			14 15 - 21 months	

3. CWA 33 U.S.C. §1319(c)(2) (negligent discharge of pollutant)	Up to 3 years	2Q1.3(a) base offense	6	Guidelines typically impose statutory maximum.
		2Q1.3(b)(1)(B) continuous discharge	6	
		2Q1.3(b)(3) disruption of facility	4	
		2Q1.3(b)(4) permit	4	
			20	33 - 41 months
4. Violation of MARPOL Protocol 33 U.S.C. §1908 (discharge of pollution from ship)	Up to 5 years	2Q1.2(a) base offense	8	Guidelines typically impose <u>less</u> for this felony
		2Q1.2(b)(1)(B) discharge	4	
			12	10 - 16 months
5. FIFRA 7 U.S.C. §1361(b)(3) (disclosure of confidential pesticide information)	Up to 3 years	2Q1.2(a) base offense	8	Guidelines typically impose <u>less</u> for this felony violation than sentence for FIFRA misdemeanor.
		2Q1.2(b)(6) simple record-keeping	- 2	
			6	0 - 6 months

SUMMARY OF DEVELOPMENTS

ENVIRONMENTAL EXPOSURE

Agent Orange

GOVERNMENT, INDUSTRY MANIPULATED RESULTS OF HERBICIDE STUDIES, FORMER OFFICIAL SAYS

A former top U.S. Navy official who ordered extensive spraying of the defoliant Agent Orange during the Vietnam War told a House subcommittee June 26 that the government and the chemical industry manipulated the results of scientific studies and suppressed evidence of adverse health effects of the dioxin-containing herbicide.

Retired Admiral Elmo R. Zumwalt Jr., who completed his own review of the scientific literature on Agent Orange in May as a special assistant to Veterans Affairs Secretary Edward J. Derwinski, asserted in his testimony that there is "credible evidence" linking certain cancers and other illnesses with the defoliant.

However, Zumwalt said, "government and industry officials credited with examining such linkage intentionally manipulated or withheld compelling information on the adverse health effects associated with exposure to the toxic contaminants contained in Agent Orange."

Efforts "to distort the record" on the herbicide "were so appallingly egregious that they continue to needlessly muddle the debate on the human health effects of toxic dioxins," Zumwalt said in prepared testimony before the House Government Operations Subcommittee on Human Resources and Intergovernmental Operations.

Determining the relationship between Agent Orange exposure and health effects such as cancer and other disorders is critical because of demands from veterans from the Vietnam War for compensation for a host of diseases which veterans' groups say are caused by Agent Orange.

At the hearing, Zumwalt presented the results of a review of studies on Agent Orange and other dioxin-con-

taining herbicides which he conducted along with a panel of scientific experts assembled specifically for that purpose. According to Zumwalt's report, 28 health problems, including a number of cancers, neurological defects, and immune system disorders, are related to Agent Orange exposure.

In part because of Zumwalt's review, the Department of Veterans Affairs has ruled that it will consider as service-related and therefore eligible for compensation two cancers for Vietnam veterans: non-Hodgkin's lymphoma and soft-tissue sarcoma.

In making that decision, Derwinski, the Veterans Affairs secretary, indicated that it was "as least as likely as not" that Agent Orange exposure was related to the illnesses, although the department has still not said there was a causal relationship between the defoliant and the cancers.

Conventional Propaganda

In testimony before the subcommittee that was highly critical of both government and industry studies that for years were used to deny compensation to veterans, Zumwalt recalled that he had suspected that the Hodgkin's disease and non-Hodgkin's lymphoma from which his son suffered and later died was related to his exposure to Agent Orange in Vietnam.

Yet, at the time, "the conventional propaganda" of the government held that there was insufficient evidence to support a linkage, he said. Zumwalt noted, however, that there is now "a clear consensus" among epidemiologists, toxicologists, and immunologists that substances found in Agent Orange, including the dioxin 2,3,7,8-TCDD, "are extremely toxic to animals" and, by extrapolation, to humans.

Among the studies Zumwalt reviewed were two conducted by the federal Centers for Disease Control. The first, called the Agent Orange Validation Study, began

REVIEW & OUTLOOK

Property Busters

Fans of "Ghostbusters" will recall that the movie featured a pompous bully from the Environmental Protection Agency. Well, life is imitating art in Morrisville, Pa., where a flabbergasted truck mechanic is discovering how little regard the EPA has for property rights. Somehow only Bill Murray could muster the bemused astonishment needed for this role.

John Pozsgai is a 57-year-old self-employed mechanic who bought and tried to improve what amounted to an illegal dump next to his home. For his trouble, he's earned a criminal sentence of three years in prison and a \$202,000 fine for fouling U.S. "wetlands." If his experience is the shape of environmental law enforcement to come, Mr. Pozsgai can be forgiven for wondering why he ever fled Communist Hungary in 1956.

Mr. Pozsgai set off on his crime spree when he bought a nearby lot to expand his back-yard truck-repair business. The 14-acre lot would remind no one of the Everglades. It's bordered by a tire shop, lumberyard and four-lane expressway, and for 20 years was used by neighbors as an unofficial dump site. Its only endangered species were 7,000 old tires, rusting cars and assorted junk. Mr. Pozsgai proceeded to clear the mess and spread a layer of clean landfill



Clean Water Violation



eagerly deposited by area contractors, as the nearby photos attest.

Somehow his enterprise offended the EPA's enforcers, apparently energized by George Bush's "no net loss of wetlands" campaign pledge. Most Americans probably figure that means protecting Cape Cod or the great blue heron. And indeed the

Pozsgai parcel was not even listed on the U.S. National Wetland Inventory Map. But the EPA judged that Mr. Pozsgai's vacant lot contained a stream—dry for most of the year—that somehow crossed the expressway and ran into a glorified ditch known as the Pennsylvania Canal. The EPA also cited as evidence the presence of skunk cabbage, a common weed, and sweet gum, a common tree. By this definition of "wetlands," just about any large American rain puddle will qualify as protected.

The Feds began to harass Mr. Pozsgai to get a permit for his property improvement, though Mr. Pozsgai claims state officials told him he could go ahead without one. The doughty Feds even staked out the property with a video camera to tape trucks dumping dirt. After the Feds got a restraining order, Mr. Pozsgai obliged by putting up barricades, but a few uninformed truck drivers still dumped their unhazardous dirt—providing more evidence against the evil emigre.

The Justice Department then charged him with 40 violations of the Clean Water Act, though the act never even uses the word "wetlands." The act merely bans the polluting of "navigable waters" of the U.S. The bar against polluting "wetlands" is a bu-

reaucrat's interpretation of this typically ambiguous congressional law. The jury that convicted Mr. Pozsgai can be forgiven if it was as confused as the prosecutors.

At the sentencing, U.S. Attorney Seth Weber invoked President Bush's campaign pledge and claimed, "A message must be sent to the private landowners, the corporations and developers of this country." Presumably that message is that property owners who offend the government's environmental zealots will end up as indicted felons. Drug dealers can plea bargain, but "landowners" go directly to jail. In a similar case in Pensacola, Fla., a man and his son have been convicted for cleaning out a drainage ditch. Mr. Pozsgai would be in the slammer already if his case hadn't been appealed by the Washington Legal Foundation, a public-interest group. An appellate ruling may come as soon as Friday.

We've thought for some time that environmentalism and property rights are on a collision course. A free society should have room for both, but that's impossible so long as EPA Administrator William Reilly and his crusaders think individual rights have to be sacrificed to their view of the public good. John Pozsgai knows what that means.

Forbes

JANUARY 22, 1990

Dangerous criminal nabbed!

Who is the most notorious environmental criminal in the U.S.? Would you believe a Hungarian immigrant named John Pozsgai? Pozsgai, who owns a small truck-repair shop, was convicted in late 1988 of violating the Clean Water Act. His sentence: three years in the slammer and a \$202,000 fine, the stiffest penalty ever for an environmental violation. His crime? Filling in 5 acres of a 14-acre parcel he owns in Morrisville, Pa., near Trenton, without a permit.

Pozsgai, 58, came to the U.S. in the

aftermath of the 1956 Hungarian uprising. In 1987 he bought the 14-acre tract so he could expand his business. The property had been used as a dump for years, so Pozsgai began cleaning it up, hauling away more than 7,000 used tires and other debris. He also began filling in the land with clean fill and topsoil.

Unfortunately, Pozsgai's property had been classified as federal wetlands because of a small stream that runs along its edge in wet weather. And he got repeated warnings from local and federal environmental authorities that he could not fill in his

land without the proper permit. Pozsgai contends that a series of engineers he hired could not figure out how to file the necessary forms.

The sentence was the maximum allowed, unheard of in a case that involved no hazardous chemicals and no prior convictions, according to the Washington Legal Foundation, which has taken up Pozsgai's case. Pozsgai knowingly and repeatedly violated the law, say the feds, and now must pay the price.

The wetland outlaw's appeal is scheduled to be heard this month.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 13 1989

OFFICE OF
ENFORCEMENT AND
COMPLIANCE MONITORING

The Honorable William W. Wilkins, Jr., Chairman
The United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Suite 1400
Washington, D.C. 20004

Dear Judge Wilkins:

Among the federal regulatory agencies, few have assigned more resources and importance in working closely with the U.S. Sentencing Commission in the development of sentencing guidelines, first for individual defendants, and then with regard to organizational defendants, than the Environmental Protection Agency. Former Administrator Lee Thomas not only personally followed the Agency's efforts in this regard, but last October also conveyed to the Commission, through correspondence, his personal comments on the draft organizational guidelines. In addition, the Deputy Assistant Administrator for Criminal Enforcement, Paul R. Thomson, Jr., testified to the full Commission in December 1988. The Office of Criminal Enforcement Counsel has also recently chaired several meetings and provided extensive data for research personnel of the Commission who are examining how business entities have been penalized for environmental violations.

It is in light of this record of positive support and cooperation between the Commission and the Agency that I convey our concern about the manner by which the Commission has undertaken to enact the proposed revision of Part Q, Offenses Involving the Environment, of the Sentencing Guidelines.

Our concern is that the Sentencing Commission did not inform my office nor consult with my staff on a matter of such obvious interest to the Agency as a revision of the sentencing guidelines for environmental offenses. In October 1988, the Office of Criminal Enforcement Counsel understood, apparently mistakenly, as result of communications with the Commission staff that the Commission for the foreseeable future had abandoned its pursuit of any substantial revision of Part Q. It was with considerable surprise that we learned on January 30, 1989 that a full revision of Part Q was under active consideration and had

been developed to the point of being presented to the full Commission within two weeks for possible publication in the Federal Register. This information and a copy of the draft revision was not provided to the EPA by the Sentencing Commission, but through the Environmental Crimes Section of the Land and Natural Resources Division of the Department of Justice. It was indeed perplexing that the Commission (as indicated by the enclosed Commission letter of January 3, 1989) provided a draft of the revision to the Department of Justice for its review and comment in early December, but the Agency did not receive the draft revision until January 30, 1989. In the legislation creating the U.S. Sentencing Commission, Congress specifically directed that in "fulfilling its duties and exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system", 28 U.S.C. § 994(o).

To avoid a reoccurrence of this situation and to foster a continuing close working relationship, we would request that the Agency be consulted at the earliest possible date in the formulation process of any Guideline revisions that would impact on environmental criminal enforcement.

Sincerely,



Thomas L. Adams, Jr.
Assistant Administrator

Enclosure

cc: Commissioner Nagel