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December 10, 1991

HAND DELIVERY

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

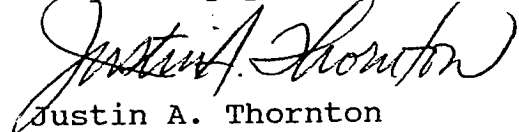
Re: Proposed Amendments to
Environmental Guidelines

Dear Judge Wilkins:

On behalf of the environmental guidelines subcommittee of the Practitioners' Advisory Group, I am enclosing our comments to the Staff Working Group's proposals of December 4, 1991 regarding amendments to the environmental sentencing guidelines. In short, we believe there currently is insufficient information available to justify amending the present environmental guidelines and, accordingly, we urge the Commission to defer publication of the proposed amendments.

We appreciate the opportunity to provide the Commission with our observations regarding this important matter. The members of our subcommittee responsible for drafting the attached comments include Steve Cowen, Jim Becker, Lloyd Guerri, and myself. Should you or any of your fellow Commissioners have any questions or comments, please do not hesitate to contact me or any of our subcommittee members.

Very truly yours,



Justin A. Thornton

Enclosure
JAT/wab

MEMORANDUM

December 10, 1991

TO: Chairman Wilkins
Commissioners

FROM: Practitioners Advisory Group

RE: Environmental Working Group's Proposed Amendments to
§§ 2Q1.1, 2Q1.2, and 2Q1.3

We understand from the Commission's staff that the Environmental Working Group is submitting for Commission consideration proposed amendments to the individual guidelines for environmental offenses, in particular §§ 2Q1.2 and 2Q1.3. The Practitioners' Advisory Group was not involved in the working group's formulation of the proposed amendments, and only recently has received the proposal. Our review of the proposal, therefore, has been undertaken in a short time frame. Nevertheless, it is apparent from our review that the proposed amendments are highly problematical, and we strongly urge the Commission to defer publication of the proposal for comment.

We have several concerns. First, the amendment of these particular sections is based on woefully insufficient data. We respectfully submit that to avoid confusion over the implementation of Commission guidelines and to maintain public confidence in the integrity of the guidelines, it is imperative that the Commission avoid substantive amendments of its guidelines except when there is a compelling need to do so based on sufficient experience. It disserves the interests of justice

to amend guidelines when there is little experience with the existing guidelines and accordingly little empirical evidence of implementation problems. Amendments that constitute a significant shift in structure or emphasis from the original guidelines should be adopted only when experience with the guidelines clearly demonstrates that amendment is necessary. Amendments founded on theoretical concerns or limited experience will undermine confidence in the guidelines and raise doubts about the objectivity of the guideline amendment process.

Our reading of the proposed changes indicates that they would not constitute minor technical adjustments, but instead would work substantive changes in the guidelines, often resulting in sharp increases in potential sentences. Yet, there is no sound experience base for making these changes. Since the promulgation of the original guidelines in 1987, there have been only 48 cases involving the two sections for which substantive amendments are proposed, §§ 2Q1.2 and 2Q1.3. There was only one case involving sentencing under § 2Q1.1 [Preliminary Report to the Commission: Environmental Working Group, November 6, 1991.] The Commission simply lacks a sufficient experience base with environmental sentencing to conclude that there is a need to substantively amend guidelines adopted only four years ago.

Just last year, the Department of Justice and Environmental Protection Agency in a joint letter formally advised the Commission that there was insufficient experience with the guidelines to merit amendment. These agencies stated

that the guidelines were "fundamentally sound," and were not badly in need of revision. The agencies wrote:

"[T]he existing guidelines received a good deal of very close attention from you and the 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." [Letter dated December 24, 1990, from James M. Strock, Assistant Administrator, Office of Enforcement, Environmental Protection Agency and Richard B. Stewart, Assistant Attorney General, Environment and Natural Resources Division.]

The working group report does not indicate that there has been a superseding letter from these Federal enforcement agencies, nor does it explain what has transpired in the ten months since the joint EPA/DOJ letter that justifies reevaluating the soundness of the guidelines.

Our second concern is that the proposal's goal of removing the modest degree of flexibility in the current guidelines will result in arbitrary sentencing. Environmental offenses may be the most difficult of crimes to pigeonhole into discrete categories. An individual can be convicted of environmental offenses not only for knowing or reckless conduct, but often for merely negligent conduct. The actual impact on the environment can be of almost infinite variety, from inconsequential to disastrous, and the applicable statutes and regulations provide a wide range of non-criminal sanctions and remedies for the conduct covered by the guidelines. For these reasons, this is a singularly difficult area in which to "tighten up" guidelines in a rational manner.

For example, the proposed guidelines attempt to quantify degree of injury or risk, but the level increases are arbitrary. A risk of "adverse health effects" to 10 persons would result in a one level increase, while the same risk to 100 persons would result in a three level increase. Proposed § 2Q1.2(b)(4)(A). While it may be desirable to avoid the cliffs caused by the current guidelines for "substantial likelihood of death or serious bodily injury," the Commission does not have an experience base from which to make the gradations proposed by the working group. It does not significantly advance the sound application of the guidelines to replace cliffs with arbitrarily angled slopes. Without a sufficient empirical basis for the gradations proposed, it is preferable to permit a sentencing judge the flexibility to determine whether this special offense characteristic applies, based on the court's familiarity with the full details of a particular incident.

Another example of the proposal's arbitrariness is the two level increase "[i]f the offense created a substantial likelihood of substantial damage to wildlife, plants, or other natural resources." Proposed § 2Q1.2(b)(5)(A). Given the elasticity of this particular concept, there may be few environmental violations which would not fall into this category. Presumably this general threat of harm to the environment has already been taken into account in the base offense levels originally adopted by the Commission.

Perhaps the most glaring example of arbitrariness is the proposal's "reduction" in the case of negligence. Proposed

§ 2Q1.2(b)(7). This proposal, according to the working group memorandum of December 4, 1991, "specifies a relatively constant 55-60% reduction in cases that involve negligent misconduct, rather than knowing or reckless misconduct." The proposal would also eliminate the current Application Note No. 4, which states that the guidelines assume knowing conduct, and that in cases involving negligent conduct, a downward departure may be warranted. The 49 cases available for study cannot possibly contain sufficient data from which the Commission could conclude that a specific percentage reduction is appropriate for the negligent offender, much less exactly what that percentage should be. Great injustices could result from adopting this guideline, with negligent offenders receiving substantial but unwarranted prison time. It is preferable for the Commission to leave in place the Application Note authorizing a downward departure, rather than adopt an approach which arbitrarily discounts sentences.

While we have not had the opportunity to fully study the proposal, it is apparent that this proposal is an attempted overhaul of the current guidelines, not a minor change. The Commission does not have adequate data from the 49 guideline cases to engage in such an overhaul. The proposal would create more problems than it would solve in an area of enormous complexity. Because no compelling need for amendment has been demonstrated, nor can it be on such a limited record, we urge the Commission not to go forward with the proposal.

If the Commission nevertheless determines to publish the working group proposal, the Practitioners Advisory Group respectfully requests that the Commission also publish the working group's analysis of the 49 cases examined, together with the attached questions seeking public comment on the proposed amendments.

1. Is the Commission's data base, consisting of approximately 49 cases in which district courts have applied the existing environmental guidelines to individual offenders, an adequate foundation upon which to amend the existing guidelines?
2. Should the base offense levels for misdemeanor environmental offenses be set separately, taking into account the statutory maximum prison term of one year for misdemeanors? Or should there be some form of downward adjustment or departure from felony offense levels where the conduct involved (such as "negligence" violations) only rises to the level of a misdemeanor?
3. Should there be some form of downward adjustment in offense level or departure where the conduct involved is only "reckless?" What about for conduct which, although "knowing" for purposes of certain environmental offenses, is lacking a specific intention to violate environmental regulatory offenses?
4. Are the costs of cleanup, evacuation, or disruption of a public utility a meaningful measure of environmental harm such that the offense level should increase as the above costs increase?
5. Is it feasible to have stepped increases in the base offense level for offenses that result in injury to human health or life or in a substantial likelihood of such injury? If so, how will such injury or the likelihood of such injury be measured?