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William Wilkins, Jr., Chairman
United States Sentencing Commission
1331 Pennsylvania Avenue
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Attention: Guideline Comment

Dear Chairman Wilkins:

This letter comments on the Commission's proposal to amend Section 2Q1.2(b)(4), 57 Fed. Reg. 97, January 2, 1992. It supports the proposal but urges the Commission to undertake more substantial review of the guidelines for environmental offenses.

Proposed Amendment to Section 2Q1.2. The proposal is to clarify that an adjustment should not be made under Section 2Q1.2(b)(4) for offenses involving violations without or in violation of a permit, if an adjustment has already been made under Section 2Q1.2(b)(1) for violations involving a discharge, release or emission. The purpose of the proposal is to eliminate double counting of the same factor. There is double counting when an adjustment is made on account of the lack or violation of a permit in most offenses subject to this guideline, since most offenses prosecuted under it involve permit requirements.

Indeed, there is a good case for eliminating Section 2Q1.2(b)(4) altogether. Because most prosecutions for offenses covered by the guideline involve violations of requirements to secure a permit or of permit conditions, the real overlap is between the base offense and Section 2Q1.2(b)(4). Moreover, an offense flowing from the lack or violation of a permit is not necessarily more serious than an offense not involving a permit. The Clean Water Act, 33 U.S.C. §§1251 et seq., (CWA) for instance, forbids industrial discharges directly into our nation's water, except in compliance with a federal or state permit, but allows discharges indirectly into these waters without a permit, through publicly owned sewage treatment plants. Notwithstanding this permitting disparity, the CWA imposes similar technology based pollution treatment requirements on both direct and indirect

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discharges. Section 2Q1.2(b)(4) would enhance a penalty for a minor violation of a direct discharge permit but not for a serious violation of indirect discharge requirements. Some, but not all, of the latter might receive compensating enhancements for disruption of a public utility (the public sewage treatment plant), under Section 2Q1.2(b)(3).

Similarly, the Resource Conservation and Recovery Act, 42 U.S.C. §§6901 et seq. (RCRA), at §6925(a), forbids disposal of hazardous wastes at a facility lacking a permit or in violation of a permit. Excluded from wastes governed by RCRA are polychlorinated biphenyls (PCBs), which are regulated under the Toxic Substances Control Act, 5 U.S.C. §§2601 et seq. (TSCA), at §2605(a). See the exclusion in RCRA for PCB disposal at §6925(a). Regulations under TSCA forbid disposal of PCBs at a facility lacking EPA approval or in violation of the terms of the approval, but do not require a permit, 40 CFR §§761.70(d) and .75(c). Thus offenses involving the disposal of chemical wastes will ordinarily be subject to the permit enhancement of §2Q1.2(b)(4), unless the chemical wastes are PCBs. This is anomalous because Congress regarded PCB disposal to be serious enough to treat it in a separate statute.

Finally, Section 2Q1.2(b)(4) should be deleted entirely or modified substantially because it is fatally ambiguous. For instance, what does "permit" mean? The TSCA/PCB problem described above might be alleviated if "permit" includes government approvals not specifically denominated as permits. Does it? The CWA/indirect discharge problem described above might be alleviated if "permit" includes a permit issued to the indirect discharger by the sewage treatment plant. Does it? If so, what if the sewage treatment plant regulates indirect dischargers by contract or ordinance rather than by permit? While the broad readings suggested could alleviate apparent gaps in the enhancement, they go too far. They would enhance the sentence for a federal offense if it happened to violate the terms of a municipal permit of a type not contemplated by the federal statute violated. These are but some of the ambiguities in the enhancement that need to be cured if it is retained at all. Incidentally, although Section 2Q1.2(b)(4) refers to transportation of hazardous substances without or in violation of a permit, no federal permit is required for transportation of any material under any of the statutes covered by §2Q1.2. RCRA comes closest, it establishes requirements for transporters of hazardous waste, but doesn't require them to secure permits, 42 U.S.C. §6923.

Comparable Amendment of Section 2Q1.3. If Section 2Q1.2 is amended as proposed, a comparable amendment should be made in 2Q1.3 for the same reasons. Indeed, if no comparable amendment is made, anomalous results would follow. Consider the case of two surface

water discharges next to each other, each discharging in violation of its respective permit but one discharging an extremely hazardous waste grossly in excess of its permit limits, and the other discharging an innocuous waste marginally in excess of its permit limits. Only the innocuous violation would receive an enhancement, to the end that the innocuous violation would receive a more serious sentence than the extremely hazardous violation.

Possible Increases in Base Levels. Base levels should not be changed, and certainly not increased, without a thorough overhaul of the guidelines. The basic problem with the guidelines is that they do not differentiate serious from innocuous violations. That is not to gainsay the efforts of the drafters of the guidelines, for to do so adequately is truly difficult. Virtually every violation of the environmental statutes can be prosecuted civilly or criminally. Determining whether a given violation should be pursued civilly or criminally may be easy in extreme cases, but requires good judgment in others. Since almost any violation of these statutes will result in incarceration under the guidelines, even for first offenders, the Commission should either substantially revise the specific offense characteristics and application notes to truly let the punishment fit the crime or allow judges greater discretion for downward adjustments.

Consider the case of the loving father who takes his young son to the shores of Chesapeake Bay and teaches him to skip stones on its placid waters. Unfortunately, he is apprehended by a zealous EPA agent and is ultimately charged with violating the CWA for discharging a pollutant (the rock, see CWA 502(6)) into the waters of the United States (Chesapeake Bay) from a point source (his hand, a "discrete conveyance" under §502(14)) without a permit. Worse, the rock contains copper, a hazardous pollutant under Superfund (40 CFR §302.4). If you don't think the hand will qualify as a point source, substitute a sling shot. In calculating the sentence, Section 2Q1.2 will be used because the substance discharged is hazardous. The base level is 8. There is a discharge under §2Q1.2(b)(1), leading to an enhancement of at least 4, and of 6 if the activity is repeated. It is without a permit, for another enhancement of 4 under 2Q1.2(b)(4). The father played an organizing role leading to violations by his son, for an enhancement of 4 under §3B1.1(a). Thus the resulting offense level is at least 20-22, calling for a sentence of 33 to 51 months. Even without the permit adjustment, the level would be 16-18, for a sentence of 21 to 33 months.

If the example seems farfetched, consider actions that have been considered violations of the CWA or RCRA in the absence of a permit: dropping dummy bombs on an ocean bombing range in routine Navy training (CWA), Weinberger v Romero-Barcelo, 456 U.S. 305 (1982); adding chlorine and alum to a drinking water reservoir by

water department employees to purify the water (CWA), Hudson River Fishermen's Ass'n. v City of New York, 751 F. Supp. 1088 (S.D.N.Y. 1991), affd. 940 F. 2d 649 (2nd Cir. 1991); shooting lead shot on a skeet shooting range (RCRA), Connecticut Coastal Fisherman's Association v Remington Arms Company, Inc., Slip Op. Civ. No. B 87-250 (EBB) (D. Conn., Sept. 11, 1991).

The activities in these cases would not be widely regarded as criminal behavior and, unless aggravated by other factors, do not warrant significant incarceration. Yet they are treated virtually the same under the guidelines as activities which cause considerable ecosystem damage and would be widely regarded as criminal behavior and do warrant significant incarceration. The reason is not far to seek.

The environmental statutes are complex and far reaching. They are typically over-inclusive to assure that no pollution sources are overlooked. They can be violated in technical ways or in substantive ways. Violations can be de minimis or serious. Congress has recognized the inappropriateness of applying the same sanction to all violations by providing a broad range of remedies and sanctions: notices of violation; administrative cease and desist orders; administratively assessed penalties; civil injunctions; civil penalties; contractor debarment; and criminal sanctions. The administering agencies have recognized the inappropriateness of applying the same sanction to all violations by developing policies to guide enforcement officials in applying appropriate sanctions for different types and levels of violation. The courts have recognized the legitimacy of decisions by administering agencies in applying these different sanctions or in not enforcing at all against some types of regulatory violations, according the agencies the presumption of prosecutorial discretion, see Heckler v Chaney, 470 U.S. 821 (1985). In a civil enforcement context, courts have repeatedly held that the de minimis nature of a violation of these statutes cannot be argued as a legal defense, but can be considered by courts as an equitable defense, when it comes time for the court to assess a penalty or fashion another remedy. No such safeguards against draconian enforcement exist when it comes to criminal enforcement of the same statutes for the same offenses. The administering agencies don't make the decisions on whether to prosecute offenses criminally, those decisions are made by criminal prosecutors. Those prosecutors may lack the perspective that the agencies have to sort out serious from trivial violations. As a result, an offense which an administering agency might regard as not warranting civil action or as warranting only a small administrative penalty could nevertheless be prosecuted criminally. The harsh consequences of this for less serious offenses could be ameliorated by imposing lesser criminal sanctions, such as probation. The guidelines preclude this for almost all violations of these statutes.

The proposed amendments are the first step toward making the sanctions imposed under the guidelines for environmental crimes more reflective of the nature of the underlying offenses. But they are only the first of many needed steps.

Very truly yours,



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Professor of Law

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