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

Re: Proposed Amendments to Sentencing Guidelines for Offenses Involving the Environment

Dear Chairman Wilkins:

These comments are submitted in response to the notice soliciting public comment published by the Commission in the Federal Register on January 2, 1992. 57 Fed. Reg. 90-118. The comments are submitted on behalf of the Subcommittee on Environmental Crimes of the Section of Criminal Justice of the American Bar Association, and reflect the views of the chairman of that subcommittee and not the views of the American Bar Association generally.

Members of the subcommittee have encountered a number of inconsistencies, structural problems and ambiguities with the guidelines for environmental offenses applicable to individuals. Addressing all of these issues requires careful consideration, especially because there is limited experience to date with sentencing environmental offenses. We therefore urge the Commission to continue its broadbased reexamination of these guidelines with a view toward their comprehensive revision and as a necessary precursor to revision of organizational guidelines for environmental offenses. The proposed amendment to Section 2Q1.2 is a beneficial step that we endorse.

Proposed Amendment to Section 2Q1.2

The Commission proposes to amend Section 2Q1.2(b)(4) to make clear that this specific offense characteristic should not be applied if an adjustment under Section 2Q1.2(b)(1) applies. 57 Fed. Reg. at 97. The stated purpose of the proposed amendment is "to

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William Wilkins, Jr., Chairman
February 24, 1992
Page 2

clarify the intent of the guideline and eliminate 'double counting.'" Id. The source of the double counting is identified as an overlap between Section 2Q1.2(b)(1), which requires an adjustment for a "discharge, release, or emission" and Section 2Q1.2(b)(4), which requires an additional adjustment if the discharge occurred "without a permit or in violation of a permit." The notice recognizes that in many cases the "discharge, release, or emission" is not a violation of law unless it occurs without or in violation of a permit.

We applaud the Commission for proposing to correct what we have viewed as an obvious flaw in the structure of the guideline. We believe, however, that the cause of the double counting is more often an overlap between Section 2Q1.2(b)(4) and the base offense itself rather than an overlap between Section 2Q1.2(b)(4) and Section 2Q1.2(b)(1). Those statutes that are at the core of environmental criminal enforcement (Clean Water Act and Resource Conservation and Recovery Act) establish permit-based regulatory schemes. In almost all instances a requisite element of the base offense for a violation of these acts is the failure to obtain or to comply with a permit. Thus, analytically, double counting is avoided if Section 2Q1.2(b)(4) is not applied where the base offense violation requires proof of the failure to obtain or comply with a permit.

The Commission may wish to consider adding to the end of Section 2Q1.2(b)(4) slightly different amendatory language:

Do not apply this adjustment if a
requisite element of the base offense is
the failure to obtain or comply with a
permit.

In any event, the consequence of the language of the proposed amendment or the above language is the same. We strongly feel that an amendment correcting the double counting should be made.

Other Issues

The Federal Register notice solicits comments on two additional issues: 1) an increase in the offense levels of Section 2Q1.2(b)(1), and 2) if Section 2Q1.2 is amended, whether a comparable amendment should be made to the parallel guideline Section 2Q1.3.

1. An increase in the offense levels under Section 2Q1.2(b)(1) would appear to be predicated on the factual conclusion that sentences pursuant to this guideline, at least some of which involved double counting, nonetheless, appropriately penalized or underpenalized defendants. The Federal Register notice does not set forth any factual basis for an increase in the offense levels nor provide any further explanation for this action. Without any factual showing, we have difficulty reaching a conclusion on whether the proposed increase in offense levels is warranted or wise. An upward adjustment is inconsistent with the purpose, intent and history of the Commission in assessing sentences based on historical data. Such an adjustment may leave the Commission subject to the perception that it acted arbitrarily or ideologically.

We would note that for offenses that involve a discharge, release or emission, but do not occur in the context of a permit oriented system, an increase in the offense levels under Section 2Q1.2(b)(1) would significantly increase the severity of punishment for such offenses. Violations of the Toxic Substances Control Act, the Federal Insecticide, Fungicide and Rodenticide Act, the Deepwater Ports Act, the Safe Drinking Water Act, the Outer Continental Shelf Act and some violations of the Clean Air Act and the Comprehensive Environmental Response, Compensation, and Liability Act would receive more severe punishment. Although there may have been few criminal violations of these acts historically, this change would increase the period of imprisonment by 4-9 months for such violations.

2. If Section 2Q1.2(b)(4) is amended to eliminate double counting, we believe a comparable amendment to the parallel guideline, 2Q1.3, is necessary. Section

William Wilkins, Jr., Chairman
February 24, 1992
Page 4

2Q1.3 is the relevant guideline for offenses involving nonhazardous and nontoxic substances. The two guidelines are parallel except for somewhat lower offense levels due, presumably, to the view that less serious offenses result from violations involving nontoxic and nonhazardous substances. Almost all of the offenses subject to application of Section 2Q1.3 (Clean Water Act, Rivers and Harbors Act, Clean Air Act) involve permit-based regulatory systems for which application of Section 2Q1.3(b)(4) would result in double counting. Since enactment of the guidelines, there have been no guideline sentences under the Ocean Dumping Act or the Act to Prevent Pollution From Ships, the other two statutes covered by Section 2Q1.3.

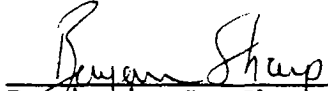
A brief hypothetical demonstrates the mischief that would result from the failure to make a comparable amendment to Section 2Q1.3. The knowing discharge of a hazardous substance (e.g., dioxin, kepone, toluene) into a river without a permit would result in an offense level of 12 without applying Section 2Q1.2(b)(4). Knowingly disposing of a truckload of clean topsoil on the bank of the stream would result in an offense level of 14 with application of 2Q1.3(b)(4), although the harm and culpability are less in this situation.

Conclusion

We strongly urge the Commission to amend Section 2Q1.2 to eliminate the structural flaw that results in double counting in assessing punishment for conduct done without or in violation of a permit. It is necessary that a comparable amendment of Section 2Q1.3 be made. We take no position with respect to the wisdom of increasing offense levels under Section 2Q1.2(b)(1) generally. It is not a sound amendment, however, if its purpose is solely to compensate for the amendment to Section 2Q1.2(b)(4) since it would be seriously overinclusive in increasing the penalty for violations that do not involve permits.

William Wilkins, Jr., Chairman
February 24, 1992
Page 5

Sincerely yours,


Benjamin S. Sharp


Judson W. Starr

Chair of the Subcommittee
on Environmental Crime of
Section of Criminal
Justice

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