

#21

WASHINGTON LEGAL FOUNDATION

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WASHINGTON, D. C. 20036
202-857-0240

March 2, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, N.W.
Washington, D.C.

Re: Comments of Proposed Amendments to Guidelines

Dear Commissioners:

In addition to my testimony submitted and delivered on February 25, 1992, I would like to add the following comments on behalf of the Washington Legal Foundation to the Commission's proposed changes to Section 2Q2.1 relating to protection of Fish, Wildlife, and Plants.

In particular, we take exception to the Commission's proposed revision of Section 2Q2.1(b)(2)(A) and (B). With respect to (b)(2)(B), the Commission proposes increasing the sentencing level if the offense "involved a pattern of similar violations." As I pointed out in my testimony on February 25, 1992 with respect to Section 2Q1.2 and 2Q1.3 of the environmental guidelines and Section 2N2.1 regarding Food and Drug laws, past administrative, civil, or criminal history is totally inappropriate when considering offense characteristics. Rather, past misconduct is clearly an offender characteristic and is already accounted for either in the criminal history category, or in Section 4A1.3 which allows a court to depart if that history does not adequately represent the prior misconduct of the defendant.

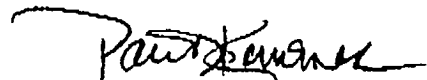
With respect to revising the term "pecuniary gain" under 2Q2.1(b)(2)(A), the Commission proposes to add Application Note 1 which defines pecuniary gain to include cases where "losses are reduced (e.g., farmer destroys migratory birds to prevent their consumption of cereal grains." We think that this example is an extremely unfortunate one to use as one justifying an increase in punishment. Indeed, to prohibit a farmer from protecting his or her own property raises serious due process and "takings" considerations under the Fifth Amendment. See, e.g., Christy v. Lujan, 109 S.Ct. 3177 (1989)(dissenting opinion to denial of certiorari by Justice White). The right to protect one's property as Justice White notes is a fundamental right at common law. See also Burrows v. City of Keene, 432 A.2d 15, 19 (N.H. 1981).

In the Christy case, the farmer killed a grizzly bear which had been eating the farmer's sheep; an administrative action was filed against him under the Endangered Species Act and he was fined \$2,500. The farmer filed a civil suit arguing that the law constituted a taking of his property just as surely as if federal rangers took his sheep and fed them to the bears. The Commission appears to be insensitive to legitimate property rights of farmers and property owners (with respect to wetland violations) who reasonably use and protect their own property. Why should a farmer protecting his grain from the ravages of nature be faced with a criminal penalty greater than a person who wantonly and senselessly shoots and kills endangered species for no reason whatsoever? Why does the Commission equate the conduct of an farmer protecting his crop from being devoured by common blackbirds with greedy poachers who kill rare and endangered species and sell their parts here and abroad?

The Christy case further illustrates the capricious manner in which the Justice Department exercises its prosecutorial discretion in bringing criminal rather than civil charges as more fully described in my testimony. If a person poisons a common blackbird that is causing a nuisance, a violation of the Migratory Bird Treaty occurs which is a strict liability crime. In United States v. Von Fossan, 899 F.2d 636 (7th Cir. 1990), a criminal case was filed against a man who poisoned common blackbirds because the town fathers of Springfield, Illinois told him to get rid of the birds on his property making a nuisance. While it is perfectly lawful to shoot and kill them, the law prohibits poisoning them. As Judge Easterbrook noted in Von Fossan, "[c]an it be that the Migratory Bird Treaty Act condemns as criminal anyone who takes (effective) steps to rid his land of pigeons carrying histoplasmosis? The answer is 'yes' [because courts have held that] the Migratory Bird Treaty Act establishes a strict liability offense." 899 F.2d at 639. As Judge Easterbrook further noted, Mr. Von Fossan should consider himself "lucky" because he was sentenced to probation for a pre-guideline offense. A similar offense today would likely draw a prison sentence under the guidelines, and almost certainly so under the proposed amendments despite Congress' command that probation be the appropriate punishment for minor non-violent offenses (against humans) for first offenders.

The Commission also proposes to change 2Q2.1(b)(3)(B) by eliminating the notion that a quantity of protected fish or birds were killed, and to substitute "(ii) any fish, wildlife, plant or endangered or threatened species" list regardless of the number killed. Again, lucky for our farmer in Christy that only administrative charges were brought; if the proposed changes are adopted, we predict that the Commission will see more John Pozsgai-type cases where substantial prison time is imposed for minor regulatory offenses. The Commission has not indicated that there are any studies showing why the current guidelines in this area are not sufficient to meet the ends of punishment and are in need of revision. We urge the Commission not to make any changes in this section without further study, review, and justification.

Respectfully submitted,



Paul D. Kamenar
Executive Legal Director

TESTIMONY OF
PAUL D. KAMENAR,
EXECUTIVE LEGAL DIRECTOR
WASHINGTON LEGAL FOUNDATION

before the
UNITED STATES SENTENCING COMMISSION

February 25, 1992

Mr. Chairman and Members of the Commission:

My name is Paul D. Kamenar; I am the Executive Legal Director of the Washington Legal Foundation, a nonprofit public interest law and policy center that has participated in Commission hearings and proceedings over the years. Thank you for the opportunity to testify again today before the Commission on the proposed revisions of the sentencing guidelines and other aspects of the guidelines. My remarks will be brief although I hope to supplement these comments with further written comments for the record.

While I will focus my testimony on the proposed changes to the environmental guidelines, specifically Proposed Amendment 10 to Section 2Q1.2, I would also like to make some general observations about proposed changes to certain other parts of the guidelines.

Proposed Change To Section 2Q1.2

As the Commission is well aware, we have been urging the Commission over the years to remedy the fundamentally flawed environmental guidelines that mandate offense levels of 16 or higher for minor regulatory environmental offenses. Such levels result in minimum prison terms of 21-27 months for first time offenders where little, if any, harm to the environment occurred. In some cases, the court is required to sentence first time offenders to prison for the statutory maximum term (e.g., three years for a Clean Water Act violation or one year for negligent violation) because the guidelines dictate sentences that exceed those statutory maximums. I refer the Commission to the prior testimony and submissions we have made describing this problem in greater detail and incorporate them here by reference.

These statutory maximum sentences as the mandatory minimum are clearly unjust and undermines the credibility of this Commission as Commissioner Gelacak pointed out to then Assistant Attorney General Dick Stewart at last year's Commission's hearings regarding the levels of fines to impose for environmental offenses.

A major part of the problem with the environmental guidelines (but by no means the only one) is one recognized by the Commission in the proposed change: the inappropriate double-counting of offense characteristics. To illustrate: a person who places topsoil or clean building sand on their own property without a permit which the EPA deems to be a wetland is charged with "discharging pollutants without a permit" under the Clean Water Act. That person receives a level 6 for the base offense under 2Q1.3 for discharging pollutants without a permit; 4-6 more points under 2Q1.3(b)(1) for discharging the so-called pollutant; and 4 more points for not having the permit under 2Q1.3(b)(4), for a total of a 14-16 offense level for a minor offense resulting in substantial prison time (up to 27 months) for a first offender. That sentence is not only clearly unjust, it is inconsistent with Congress' command that the guidelines "reflect the general 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. . . . " 28 U.S.C. 994(j).

While we believe that the environmental guidelines are in need of major revision, we nevertheless support the proposed revision that would at least partially address the double-counting problem by excluding the 4 points to the offense level for not having a permit where the underlying offense already includes the failure to have the permit as an element of the offense.

As for the Commission's inquiry as to whether this change in Section 2Q1.2 (dealing with toxic/hazardous substances) should be applied to the parallel provision in Section 2Q1.3 for non-toxic substances, we believe the changes should apply to both sections to be consistent. There is no principled reason why a double-counting flaw should be eliminated in one section but not the other.

The Commission also seeks comment as to whether there should be any adjustments to (b)(1)(A) or (b)(1)(B) upward of 2 to 4 levels each. We strongly oppose any adjustments

in this regard; there has been no evidence or showing that these offense characteristics are too low; if anything, they are too high. As it now stands, a typical environmental case involving a discharge of a pollutant, regardless of whether any harm to the environment occurred, automatically results in a score of at least 12-14 under 2Q1.2 (8 points for the base; 4-6 for the discharge) and 10-12 levels under 2Q1.3 (6 for the base; 4-6 for the discharge). There is no reason why these already high levels should be increased further to the high levels of 14[16] to 16[18] under 2Q1.2 and to 12[14]-14[16] for non-toxic substances under 2Q1.3.

Indeed, one could argue that even with the current levels in (b)(1)(A) and (B), double-counting would still occur in many cases because that specific offense characteristic-- requiring 4 to 6 additional levels-- apply to a discharge of a pollutant; yet the discharge is also the underlying conduct charged in the indictment and presumably already accounted for in the base offense level. Thus, in accordance with the Commission's query as to whether "other adjustments should be made to the specific characteristics in subdivisions (b)(1). . . to address the perception of double counting," this problem should also be addressed. In short, the current guidelines impermissibly allow for triple-counting in many cases, and the Commission's proposal to eliminate at least one source of the double-counting (i.e., the permit provision) should, at a minimum, be adopted.

Consideration of Prior Offender Misconduct As Offense Characteristics

While this concludes our comments with respect to this specific environmental proposal, we would also like to comment generally on any future changes of the environmental guidelines, or indeed, of any other category of offenses, that would include as a specific offense characteristic the prior misconduct of the defendant as it pertains to past violations of administrative orders and the like. We believe that the Commission is improperly blurring the distinction between offense characteristics and offender

characteristics. One of the latest staff drafts to the environmental guidelines, for example, would have a specific offense characteristic based on past violations of administrative or civil orders or directives.

This issue, however, is already addressed by the Commission in Commentary 9 to Section 2Q1.2 which cross-references to Section 4A1.3 (Adequacy of Criminal History Category). That section allows the court to depart from the guidelines if the criminal history score does not adequately represent the prior misconduct of the defendant. Accordingly, that notion of past misconduct, whether for prior crimes or violations of administrative orders, should not be built into the offense characteristics for this or any other category.

In that regard, we note the Commission is currently considering such a proposal with respect to Section 2N2.1 regarding violations of Food and Drug laws. Option 2, for example, proposes to increase the base offense level by at least two levels under (b)(1) for a prior conviction, and under (b)(2) by at least two, and more likely four levels for a single violation of a administrative order. Putting aside the anomalous result that a person can receive up to an additional 4 points for a technical violation of an FDA administrative order, whereas that same person would get assessed only 2 points for a felony criminal conviction, any consideration of prior misconduct more properly should be left to the sentencing court to decide where within the range dictated by the guidelines should the court set the sentence.

We believe, as do many other observers, that the Commission should not attempt to account for every conceivable aspect of an environmental offense, all of which results in a higher offense levels. Once that level is reached, there really is nothing left for the judge to consider in deciding where within that range a sentence should be imposed. Indeed, the same alleged aggravating characteristics that drove the offense levels higher may be used by the court yet again to impose a sentence at the high end of the range in the high offense level, causing yet another, more sinister double-counting problem.

Past misconduct for regulatory offenses also should not be considered as a specific offense characteristic because that factor is considered by the government in deciding whether to bring criminal charges in the first place or allowing less drastic civil or administrative remedies solve the problem. Thus, with respect to two individuals who engaged in identical conduct and had the same intent to commit the offense, the government may choose to resolve one case administratively or civilly, and the other criminally. The fact that the latter individual is branded a felon because the government decided to prosecute based on past administrative misconduct, already accounts for this past conduct and should be used again against the defendant to punish him further; this too, would be another form of double-counting. Indeed, there are many regulatory cases where more serious offenses with repeated past administrative violations are still prosecuted civilly while less serious offenses are prosecuted criminally.

For example, the same U.S. Attorney's office in Philadelphia that prosecuted our client John Pozsgai for putting clean fill on his property with no resultant environmental harm and sending him to prison for 27 months, the longest sentence in U.S. history for any environmental crime, resorted only to civil proceedings against BP Oil for causing major pollution of the Delaware River by repeatedly violating EPA discharge levels over six years. I am also enclosing a recent letter from WLF to EPA Director William Reilly disputing his testimony to Congress that EPA seeks criminal prosecutions against wetland violators only after less drastic measures have failed to further demonstrate the arbitrariness of the prosecutorial decisionmaking process.

As the Commission revises the environmental guidelines, it should not only eliminate the double-counting, but also take into account the multitude of environmental laws with sentences ranging from 60 days to 5 years or more. The one-size-fits-all approach of the current guidelines are producing grossly unfair prison sentences not only disparate within the same category of offenses, but also as noted earlier, producing disparate sentences compared

to other more serious crimes.

For example, as noted in my prior testimony, the Commission has set a base level of only 16 for running a crack house under Section 2D1.8 where the maximum term for that serious crime is 20 years. Yet a level 16 is easily reached for many minor environmental offenses with statutory maximum terms of three years or less. Likewise, the Commission would provide only for a level 6 with no specific offense characteristics for illegal using registration numbers to manufacture controlled substances. This would invariably result in probation; yet Congress set the maximum term of 4 years for this crime. Thus, where "heartland" violations of certain drug laws occur, the Commission's guidelines produce sentences on the low range of the scale; on the other hand, where non-heartland or non-serious violations of the environmental laws occur, the resulting prison sentence is at or near the top of the statutory maximum.

There are several ways to solve this problem. One is to have a guideline for each environmental statute; after all, if the Commission can devise some 20 separate guidelines for drug offenses under Part D, it can do the same for environmental statutes. The other approach would be to have one guideline with some kind of multiplier to apply at the end of the computation process with the multiplier based on the maximum sentence allowed under the particular statute so that statutory maximum or near maximum sentences are not the norm. To use a rough example, if a the particular environmental statute calls for a one-year maximum and the guideline produces a range near that level, if the offense is an average type of offense, then the multiplier could be .5, thereby allowing the sentence to fall in mid-range of the statutory maximum. If the offense is not serious, and it is a first offense, we emphasize yet again that probation should be the norm as Congress intended. Furthermore, the Commission should keep in mind the basic sentencing principles that Congress mandated in 18 U.S.C. 3553(a) and 3572 relating to conservation of punishment. In other words, fines, restitution, conditions of probation (such as clean up costs, etc.) constitute punishment

and that in many regulatory infractions, any prison sentence, let alone excessive ones, simply constitutes gratuitous punishment. It is one thing for the Commission to conclude that in a particular case, a prison sentence should be imposed; the Commission has yet the further responsibility for ensuring the sentence range actually arrived at is one that is reasonable and proportionate. As it now stands, there is a sharp cliff between level 12 and 13 with the latter level (and one easily reached under the environmental guidelines) resulting in a mandatory prison term of one year (comparable to three years for pre-Guideline sentences where parole after serving one-third the time was the norm for minor offenses). We will be glad to work with the Commission in the coming months to develop just and reasonable environmental guidelines.

Category O Offender Level

As a final and general comment on the Commission's proposal to have a Category O for criminal history, we support such an idea. Indeed, we believe that this concept is consistent with what Congress has stated with respect to special treatment of those who are first offenders who have not committed a serious crime. As we study the Commission's report in this regard, we hope to provide further comment on this proposal.

Thank you for this opportunity to testify before you today.

FEBRUARY 25, 1992



U. S. Department of Justice
United States Attorney
Eastern District of Pennsylvania

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Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106
(215) 597-2336
October 23, 1990

PRESS RELEASE

United States Attorney Michael M. Baylson and EPA Regional Administrator Edwin B. Erickson announced today an agreement between the United States and BP Oil Corporation, Incorporated under which BP Oil will pay the largest fine assessed by the United States against a company in 13 years for water pollution violations. The agreement, reflected in a Consent Decree lodged with the Court today, assesses a penalty of \$2.3 million against BP Oil for discharging pollutants over a period of six years into the Delaware River in violation of its wastewater permit and the Clean Water Act. BP Oil owns and operates an oil refinery in Marcus Hook, Delaware County, Pennsylvania.

Baylson stated that this is the second largest penalty ever collected by the United States in an enforcement action under the Clean Water Act. "No company will be allowed to profit from violating our environmental laws," according to EPA Administrator William K. Reilly. "The Bush Administration is committed to assuring clean water for all Americans."

As a result of this enforcement action, BP Oil spent over \$25 million to build a new wastewater treatment system to cure the

years of violations of the Clean Water Act. Prior to this settlement, BP Oil was in constant violation of the law. Its unlawful discharges included excess oil and grease, ammonia, solids and various oxygen demanding pollutants.

BP Oil's violations contributed to two important pollution problems in the Delaware River that the United States is seeking to correct through this and other enforcement actions. First, oxygen demanding pollutants placed into the River deplete the River's oxygen supply, making it impossible for many fish to survive and reproduce. Second, poly aromatic hydrocarbons present in the oil and grease in the discharge from BP have the potential to become concentrated in fish and shellfish to undesirable and unsafe levels. Although BP Oil is not the only source of the pollutants, their past violations were a major contributor to the pollution problem in the River.

Erickson stated that, "The penalty paid in this case demonstrates the government's commitment to protecting the Delaware Estuary. It sends a message to industrial polluters that cutting corners in protecting the environment does not pay. EPA intends to assure a steady improvement in the quality of water in the Delaware River through vigorous enforcement actions against polluters."

Under a separate agreement BP Oil paid the Commonwealth of Pennsylvania \$109,000 for the same permit and Clean Water Act violations and will pay the United States \$2,191,000.

This \$2.3 million settlement recovers the money BP Oil saved by not installing the wastewater treatment equipment necessary to

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January 10, 1992

The Honorable William K. Reilly
Administrator
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

Re: Wetlands Enforcement Policy

Dear Mr. Reilly:

On October 22, 1991, you testified before the Subcommittee on Water Resources of the House Committee on Public Works and Transportation about the EPA's wetlands policy under Section 404 of the Clean Water Act in general and about EPA's wetlands enforcement policy in particular. On page nine of your testimony, a copy of which was recently brought to my attention, you told the subcommittee that "Section 404 enforcement is another area plagued by misinformation" and that you welcomed the opportunity to explain "the process under which we choose enforcement actions." In the course of doing so, however, it appears that you may have misled the committee about EPA's enforcement policy. The Washington Legal Foundation demands that you clarify your remarks and set the record straight.

You initially noted that EPA's "primary goal in enforcement is environmental protection. Therefore, EPA seeks timely removal of the illegal discharge and restoration of the site, where appropriate." You then proceed to respond to charges that the EPA is engaged in heavy-handed treatment of alleged wetland violators by seeking criminal prosecution. In particular, you mention WLF's client John Pozsgai, a self-employed truck mechanic who was criminally prosecuted and imprisoned for three years for putting topsoil and clean fill on a couple acres of his own land to build a garage. The property was an old dumpyard zoned light industrial that he cleaned up which, even by EPA's strict standards, contained wetland areas of marginal ecological value at best, and one where an after-the-fact permit would be normally processed.

You assured the congressional committee that in the Pozsgai case "[a]s in other criminal wetlands enforcement cases, the federal government initiated stiff [criminal] enforcement action [against Pozsgai] only after less drastic and more conciliatory measures failed." (emphasis added). The clear import and context of this statement suggests that EPA seeks criminal action in wetland cases only after less drastic administrative and civil enforcement actions have been exhausted. If this was the impression which you were trying to convey to the committee, it is clearly a false one based on a review of the criminal wetland actions brought by EPA. The facts show that EPA is quick to seek criminal action without either letting the less drastic civil enforcement measures take their course, or by by-passing those less drastic measures altogether, with the result that the allegedly offending fill material remains on the so-called wetland while the offender spends months and years in prison for what many regard, even conservationists, as a minor regulatory offense.

With respect to the Pozsgai case, you suggested to the committee that criminal action was absolutely necessary to stop the filling activity because Mr. Pozsgai allegedly ignored

"10 warnings, as well as a temporary restraining order issued by a Federal judge, to stop filling wetlands on his property without first obtaining a Section 404 permit." Reilly Testimony at 11. According to the record in the case, there were only three written letters, two from the Corps of Engineers and one from the EPA; none of them constituted formal cease and desist orders as required by the Corps of Engineer's own regulations (33 C.F.R. 326.3(c)). With respect to the TRO, Mr. Pozsgai was arrested by EPA special agents on September 12, 1988 before there was any adjudication or finding of any violation of that order; indeed, all filling on the property ceased a week or so before he was arrested. As Chief Judge John Fullam who handled the civil TRO case admonished the government attorney at the September 16, 1988 hearing (transcript attached):

THE COURT: Now, I read somewhere in the paper. . . that criminal prosecution has been instituted * * * [W]hose idea was that?

GOV'T ATTY: Our criminal division, sir.

THE COURT: Do you and the criminal division ever talk to each other?

GOV'T ATTY: Yes, we do.

THE COURT: Did it not occur to you this was a rather stupid kind of timing?

* * * *

It might have been a little more civilized and sensible to wait until after today.

Clearly the EPA was not really interested in letting the less drastic measures work; formal administrative proceedings were incomplete, and the civil proceedings were just getting started when the EPA and the Department of Justice sought the most drastic remedy possible --felony criminal charges-- when all filling had stopped even before any civil adjudication was made. Even the pretext of using less drastic civil proceedings has been abandoned in most, if not all, of the other criminal wetland proceedings:

United States v. Ocie Mills. Mr. Mills and his son served almost two years in federal prison for putting 19 loads of clean building sand on a quarter-acre lot of his in Florida. The EPA did not file any civil enforcement action and instead sought criminal indictments. If EPA's goal was truly environmental protection, EPA would have filed a civil suit ordering the removal of the so-called "pollutant." Instead, the sand remained on the property over two years while Mr. Mills and his son were in prison; and now that they're out, it appears that the property was not even a wetland to begin with, let alone an important one, and that criminal prosecution may have motivated because of Mr. Mills' public complaints about the EPA's enforcement tactics.

United States v. Jones; Ellen. Criminal charges were brought against a property owner and his project manager for disturbing wetlands in the course of creating a 2,800-acre preserve and wildlife sanctuary. Approximately 14 acres of wetlands had been filled, but 56 acres, five times that amount, were created. Again, no civil action was brought which would require removal of the allegedly offending fill material; instead, the owner and project manager were indicted in May 1990 and later convicted.

United States v. Ramagosa, et al. A family-owned home-building business and its owners were indicted on felony charges for allegedly filling wetlands on a couple of home sites, even though the administrative proceedings had not been resolved, and the Corps

refused to process an after-the-fact permit. In any event, less drastic civil enforcement actions were never sought before the government resorted to criminal sanctions.

United States v. Hartford Assoc. In late June, 1991, attorneys for Hartford Assoc. agreed in an administrative proceeding to restore an area of land in Elkton, Maryland where the EPA claimed that some fill was placed on a wetland, although jurisdiction was questionable. Despite this apparent resolution of the matter, on July 3, 1991 EPA Special Agent Susan Helbert served Grand Jury Subpoenas for documents about the matter, and on October 7, 1991, no less than ten (10) FBI and EPA agents, armed with a search warrant, conducted a surprise raid (lasting almost nine hours) on the company's and lawyer's offices housed in the same building, at first refusing to give the attorney the search warrant or allowing him to call his outside counsel, grabbing the phone from his hand. Again, no civil enforcement action was filed, and indeed, the administrative resolution of the case was being undertaken; yet criminal enforcement proceedings were initiated. In both the Hartford case and the Pozsgai case, EPA also conducted video surveillance of the so-called wetland area.

Clearly, these cases suggest that the EPA prefers to utilize taxpayers' funds for what many have called Gestapo-type tactics against private property owners rather than more rational, and indeed, more environmentally prudent civil and administrative proceedings, contrary to import of your congressional testimony. It is incumbent upon you to correct your testimony, and indeed, to provide the committee with the case information on all criminal wetland enforcement actions to demonstrate whether the government exhausted less drastic enforcement measures as you suggest.

The criminal enforcement actions are particularly reprehensible where your agency is regulating private property, and where the definition of what even constitutes a wetland is a highly controversial and debatable subject, as evidenced by the EPA's current proposal redefining wetlands.¹ In addition, Executive Order 12,630 (Mar. 15, 1988) requires government agencies to be sensitive to private property rights, and there are serious takings implications under the Fifth Amendment of the failure by the government to provide permits in these cases as evidenced by the Loveladies Harbor case in the court of appeals and the Lucas v. South Carolina Coastal Council case before the Supreme Court. Thus, property owners being sent to prison for putting topsoil on their property without a permit may even be entitled to compensation for a denial of an after-the-fact permit.

¹ In the Pozsgai case, for example, the government conceded that his property is above the headwaters and thus is covered by Nationwide Permit No. 26. Under government regulations, "an application for a . . . permit does not have to be made." 33 C.F.R. 320.1(c)(emphasis added). Indeed, even in your testimony, you accurately state that fill material on such isolated wetlands "will have only minimal adverse environmental effects." And yet Mr. Pozsgai received the longest prison term in U.S. history for any environmental offense, including the dumping of toxic and hazardous wastes, and all he did was place topsoil and clean fill on his property which he cleaned up. Indeed, the tiny drainage stream adjacent to his property in Morrisville, PA actually runs clearer today thanks to his clean-up efforts. The flooding incident you cited in your testimony regarding Pozsgai's property is also misleading since it was a minor isolated event which occurred long before most of the fill was placed on the property; rather, it occurred shortly after Pozsgai removed the blockage of tires from the stream which was then re-aligned to flow closer to his neighbors property, suggesting that the incident was not caused by unpermitted filling activity. In any event, under the proposed EPA wetland regulations, it is clear that Mr. Pozsgai's property would not even qualify as a wetland because it is not saturated to the surface or inundated with water. According to the U.S. Sentencing Commission, the three-year prison sentence imposed is longer than the average sentence imposed on repeat criminals convicted of larceny, fraud, many drug offenses, and other serious crimes. WLF has pending with President Bush a commutation petition to allow Mr. Pozsgai to serve the remainder of his three-year prison term under home detention so he can return to work there as a truck mechanic and take care of his 62-year old ailing wife.

I would also like to call your attention to a letter WLF sent early last year to Congressman John LaFalce of the House Small Business Committee (copy enclosed) pointing out that recent government reports show that we are not losing 500,000 acres of wetlands a year, or 250,000 acres, figures which you and others at EPA are fond of repeating without citing any authority, and which, in turn, are reported in the press as fact. Indeed, we may be actually gaining wetland acreage as farmers allow converted cropland to revert to wetlands. Your touting the values of wetlands in your October 1991 testimony is also misleading since not all wetlands have the same function and values, and it is wrong to treat them so categorically. Thus, when you boasted in your testimony, "I know of a wetland outside of Chicago that removed 90% of the toxics and heavy metals that entered it," Reilly Testimony at 3, you could just have easily stated that the government knows of a salt marsh in Massachusetts where pollutants of nitrogen and phosphorus increased 20 percent as water filtered through the wetland. Wetlands: Their Use and Regulation (Washington, D.C.: U.S. Congress, Office of Technology Assessment) at 51 (1984).

The point is that not all wetlands are of equal ecological value, and if the government begins compensating property owners for requiring them to keep their wetland property in its natural state, it will begin to prioritize its values and refrain from regulating, let alone filing senseless criminal charges, against private property owners who, like Mr. Pozsgai, own wetlands of marginal ecological value. The real policy issue should be not how many inches water must be within the surface of the property or for how long before it is a wetland; rather, the real question is whether the federal government is willing to pay for these wetlands, or whether it should use creative incentives such as the "Swampbuster Program" under the Food Security Act of 1985 or tax breaks to encourage property owners to voluntarily keep their property in its natural state.

Your pseudo-market approach to preserving wetlands that you outline in your testimony which entails "mitigation banking" and "compensation" by the owner to the federal government is fundamentally flawed. Property owners are not required to "compensate" the government for the reasonable use of their property, it's the other way around. Indeed, all of the mitigation requirements you and the Corps have imposed on property owners over the years can be properly characterized as "out and out extortion" to use a phrase the Supreme Court did to characterize similar exactions in the Nollan v. California Coastal Comm'n case. Millions of dollars of liability by the government, with interest, are looming over all of these past wetland conditional permits and denial of permits, not to mention the negative impact on the economy where jobs were lost in the name of preserving wetlands. For some reason, this larger issue seemed lost, or was never raised, in the no net-loss of wetlands debate.

We look forward to your correction of your public statements regarding EPA's criminal enforcement policy.

Sincerely yours,



Paul D. Kamenar
Executive Legal Director

encl.

cc: Vice-President J. Danforth Quayle
Attorney General William P. Barr
Congressman Henry J. Nowak,
Chairman, House Subcommittee on Water Resources