



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

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OFFICE OF ENFORCEMENT

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

Dear Judge Wilkins:

On January 2, 1992, the United States Sentencing Commission, through the Federal Register, solicited comment on a draft amendment to Part Q (Offenses Involving the Environment) of the Sentencing Guidelines. The stated purpose of the proposed amendment is to rectify the perception of "double counting." As stated below, the Agency believes adoption of this amendment is not warranted because it goes beyond what is necessary to accomplish the Commission's purpose. The Agency suggests that a more limited amendment may accomplish the Commission's objective.

The Commission also solicited comment as to whether, if the above proposed amendment were adopted, a comparable amendment to Guideline Section 2Q1.3 is equally warranted. The principal distinction between the two sections is to have a two-level higher base offense level for offenses involving hazardous or toxic substances or pesticides as compared to other environmental pollutants. Insofar as the double counting issue is therefore equally pertinent to both, we recommend that they jointly be amended or not amended.

We note at the outset that the Sentencing Commission's Environmental Sentencing Guidelines Workgroup considered the possibility of eliminating both the permit and discharge factors as separate specific offense characteristics in favor of incorporating them into a higher base offense level or focusing more on the resulting environmental or community harm caused by a discharge or release. Although the Workgroup adjourned in November before reaching agreement as to a new structure for Part Q, it is our understanding that the Workgroup, in a different format, will resume its mission later this month. Rather than attempt a partial fix as now proposed by the Commission, it may be best to await the comprehensive amendments to Part Q likely to be forthcoming during the next year.



Should the Commission chose to proceed with amendments at this time, the Agency submits that the Commission's purpose of correcting possible double counting could be more precisely accomplished merely by deleting the words "or in violation of a permit" from (b)(4). The perception of double counting arises because the offense of violating a condition of a permit, as found in RCRA and the CWA, presumably is covered in the base offense level and yet serves also as the basis for an increase in the offense level under (b)(4). The focus of (b)(4) should be on whether the offense occurred outside the regulatory scheme. A violation of a permit condition usually constitutes a less serious disregard for the public welfare than totally circumventing the permitting process.

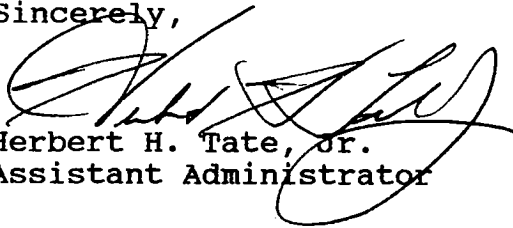
This is in keeping with the basic thrust of the Guidelines. Through a generic guideline, the Commission sought to broadly identify the relevant features of an environmental offense pertinent to determining the severity of the penalty. The occurrence of a discharge and the failure to have a permit are distinct elements of environmental offenses. Each of the two specific offense characteristics at issue (causing a release, and not having a permit) reflects a different indicator of the seriousness of an environmental crime and each is independently justifiable. Crimes where both apply are particularly serious, and neither alone would adequately capture that level of seriousness.

With respect to the Commission's question whether, in conjunction with its proposed amendment, the offense levels for (b)(1) should be increased 2-4 levels, the Agency is concerned that adoption of the Commission's amendment without a corresponding four-level increase in the offense levels for (b)(1) will have the effect of lowering the available range of imprisonment from twelve to twenty months for the large majority of defendants prosecuted for environmental offenses. Many cases identified as appropriate for criminal enforcement involve a discharge or release of a hazardous substance or other pollutant into the environment and the willfulness of the violation as demonstrated by a total failure to obtain a permit.

As every environmental statute has come up before Congress for reauthorization, Congress has consistently increased the severity of the punishment available for criminal violations. A lessening of the sentences that would result from adoption of the amendment without an accompanying increase in the offense levels would be contrary to Congressional intent. Furthermore, the Commission has stated that the purpose of the amendment is solely to correct any inappropriate double counting, and is not to cause a substantive altering of the sentences imposed for this type of crime. Accordingly, EPA strongly recommends that, if the

proposed amendment must be adopted, it be done in conjunction with a four-level increase in (b)(1) of both 2Q1.2 and 2Q1.3.

Sincerely,



Herbert H. Tate, Jr.
Assistant Administrator

cc: Barry M. Hartman
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Environment and Natural Resources Division
U.S. Department of Justice