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Natural Resources
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March 2, 1992

United States Sentencing Commission
1331 Pennsylvania Avenue, NW
Suite 1400
Washington, D.C. 20004

re: Proposed Amendments to Sentencing Guidelines --
Environmental Crimes (57 Fed. Reg. 90, January 2, 1992)

Dear Members of the Commission:

The Natural Resources Defense Council (NRDC), Friends of the Earth, and the National Audubon Society are pleased to submit the following comments on proposed amendments to the Sentencing Guidelines that affect environmental offenses. (57 Fed. Reg. 90, January 2, 1992.) Collectively, these organizations represent approximately one million members and supporters nationwide who advocate stronger laws and stricter enforcement of laws designed to protect human health and the environment.

We were disappointed that the Commission elected last year not to submit to Congress proposed sentencing guidelines for organizations convicted of environmental crimes.¹ Moreover, we believe that the existing sentencing guidelines for individuals convicted of environmental crimes contain more comprehensive flaws than are addressed in the January 2, 1992 proposal. Based on research conducted by NRDC in connection with a law review article in the *George Washington Law Review*,² we concluded that sentences imposed for environmental crimes are well below the level sufficient to deter these crimes in the future.

Consequently, we question whether it is appropriate to address a single, isolated issue outside of the context of the broader review necessary to address environmental crimes adequately. We understand that the Commission is in the process of creating an advisory committee to assist the Commission in such a review, and request that the nonprofit environmental advocacy community be

¹ See Comments of NRDC et al. on Sentencing Guidelines for Organizations, dated April 9, 1990 and January 10, 1991, which we ask to be incorporated herein by reference.

² "Environmental Crimes: Raising the Stakes," 4 G. Wash. L. R. 781 et seq. (April 1991). Copies of this article are enclosed for the Commission's convenience.

represented in this process, so that an adequate diversity of interests is considered.

If the Commission proceeds with its proposed changes at this time, however, we have the following comments:

Sections 2Q1.2 and 2Q1.3

We oppose the proposed addition of language at the end of sections 2Q1.2(b)(4) and 2Q1.3(b)(4). The existing guidelines do not result in double-counting because subsections (b)(1) and (b)(4) address different types of aggravating conduct or effects.

The baseline offense levels for both 2Q1.2 and 2Q1.3 apply to any crimes involving mishandling of environmental pollutants, including not only releases, but reporting, recordkeeping, equipment and facility maintenance, etc. Other portions of these sections add or subtract from the baseline levels based on different indicators of conduct or harm. Subsections (b)(1) address the result of the conduct, which is release of pollutants into the environment. Subsections (b)(2) address the nature of the conduct, which is release without a permit or in violation of a permit.

It is true that, in some cases, no offense has been committed unless the release occurred without or in violation of a permit. In other cases, however, such as the discharge of DDT under the Clean Water Act, an offense has been committed independent of permitting requirements, because the discharge is prohibited altogether. Ironically, under the current system the release of a pollutant that is prohibited entirely receives a lower offense level than the release of a pollutant which may be released if permitted (and in accordance with that permit). Moreover, we believe that releases without any permit warrant higher upward adjustments (for example 6 levels) than releases in violation of a permit, because in the latter case the defendant showed some intent to act within the regulatory system. To address these issues comprehensively, a different hierarchy than either the existing guideline or the proposed revision appears appropriate:

1. Baseline offense for any violation involving pollutants;
2. Increase offense levels based on environmental result:
 - a. where the violation resulted in a release to the environment (maintaining the current distinctions between hazardous and other pollutants, and between continuous, repetitive or single releases) (b)(1);

- b. where the release resulted in a substantial likelihood of death or serious bodily injury (b)(2);³ and
 - c. where the release resulted in disruption of utilities, evacuation or costly cleanup ((b)(3)).
3. Increase offense levels based on conduct, scaled according to the nature of the conduct:
- a. highest increase for discharge of pollutants that are prohibited entirely;
 - b. next highest increase for discharge without a required permit;
 - c. next highest increase for discharge in violation of a permit;
 - d. next highest increase for monitoring, recordkeeping or reporting violations with intent to conceal substantive offense; and
 - e. no additional increase for simple monitoring, recordkeeping or reporting violations.

Particularly if the Commission adopts the proposed amendment to address double counting in 2Q1.2(b)(4), however, we strongly support the proposal to increase adjustments by four levels each in sections 2Q1.2(b)(1)(A) and (B) (as well as 2Q1.3(b)(1)(A) and (B)).⁴ For the reasons articulated in our previous comments and in the enclosed law review article, particularly the data on the adequacy of sentences that have been imposed to date for persons and organizations convicted of environmental crimes, increased offense levels are needed to address environmental crimes appropriately relative to other types of offenses. This proposed change also would more properly reflect the difference in severity between environmental offenses that result in releases of toxic and other pollutants, and other types of offenses (such

³ In addition, this category should be expanded, or a separate provision should be established, to address serious harm to the environment -- such as loss of fish or wildlife.

⁴ This would increase the adjustments under 2Q1.2(b)(1)(A) and 2Q1.3(b)(1)(A) to 10 levels, and the adjustments under 2Q1.2(b)(1)(B) and 2Q1.3(b)(1)(B) to 8 levels.

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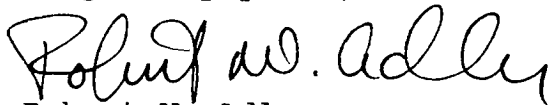
as recordkeeping, reporting, maintenance of equipment and facilities, etc.).

Section 2Q2.1

We support the proposal to expand the coverage of the guideline addressing Specially Protected Fish, Wildlife and Plants. We also understand the Commission's desire to specify the types of fish and wildlife subject to increased offense levels under 2Q2.1(b)(3)(B), to include the Marine Mammal Protection Act, the Endangered Species Act, and the Convention on International Trade in Endangered Species. However, we believe the proposed list is incomplete. Other statutes designed to protect defined populations (and for which criminal sanctions exist) include the Migratory Bird Treaty Act and the Wild Free-Roaming Horses and Burros Act. (It is possible that other statutes and treaties should be listed as well.)

Thank you for the opportunity to comment on these proposed changes. We look forward to the Commission's more comprehensive review of sentencing guidelines for environmental crimes.

Very truly yours,

A handwritten signature in cursive script, reading "Robert W. Adler".

Robert W. Adler
Senior Attorney