



U.S. Department of Justice

#37

United States Attorney  
Western District of New York

United States Courthouse  
Buffalo, New York 14202

February 27, 1992

Hon. W. Wilkins, Jr., Chairman  
and Commissioners  
United States Sentencing Commission  
1331 Pennsylvania Ave, N.W.  
Suite 1400  
Washington, D.C. 20004

Re: Proposed Amendment to the  
Part 2Q1.2 Guidelines

Dear Chairman Wilkins & Commissioners:

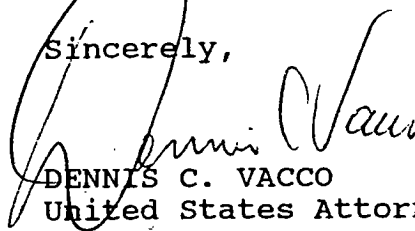
On behalf of the Environmental Subcommittee of the Attorney General's Advisory Committee, I am enclosing comments opposing the proposed amendment to Section 2Q1.2 of the United States Sentencing Guidelines that was published in the January 2, 1992 Federal Register.

At a recent meeting of our Subcommittee, which was held on Monday, February 24, 1992, the proposed amendments were discussed. It was the unanimous opinion of all of the United States Attorneys who attended that we oppose these amendments. Although our opposition is consistent with the position being taken by the Department of Justice, we felt it important for you to understand the views of those who must implement these guidelines on a day to day basis.

As is more fully explained in the attached comments, the proposed amendments will only exacerbate problems that already exist in the application of these guidelines to environmental crimes. We urge the Commission to undertake a thorough re-evaluation of the Part Q Guidelines rather than adopt a piecemeal approach to amending the guidelines.

Thank you for your consideration. Please feel free to contact me if you have any questions about our position.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dennis Vacco", is written over the typed name.

DENNIS C. VACCO  
United States Attorney

Chairman  
Environmental Subcommittee  
AGAC

DCV/taa

COMMENTS TO PROPOSED AMENDMENTS TO THE ENVIRONMENTAL GUIDELINES

Submitted by  
Environmental Subcommittee  
of the  
Attorney General's Advisory Committee

On January 2, 1992, the U.S. Sentencing Commission published in the Federal Register a proposed amendment to Section 2Q1.2 of the environmental guidelines. The Sentencing Commission requested comments on three issues relating to this proposed amendment: 1) whether Section 2Q1.2 should be amended as proposed; 2) whether there should be an adjustment of the guidelines as they relate to offenses involving a discharge, release, or emission of a pollutant; and 3) whether Section 2Q1.3 should be amended to be consistent with the proposed amendment to Section 2Q1.2.

Critics of the Part Q environmental guidelines frequently complain that they provide neither uniformity nor consistent proportionality in sentencing - goals which were express purposes of the Sentencing Reform Act. The amendment as set forth in the January 2, 1992 Federal Register does nothing to remedy the problems encountered when attempting to apply these guidelines but instead will only exacerbate the problems. This proposed amendment is a patchwork attempt to "fix" the Part Q guidelines which would be better benefited by a thorough review. A piecemeal approach to revising the Part Q guidelines should be rejected and the Part Q guidelines should be re-evaluated in toto.

I. Specific Comments as to the Proposed Amendment to Section 2Q1.2

The proposed amendment consists of the addition of the following language at the end of the 2Q1.2(b)(4) specific offense characteristic: "Do not apply this adjustment if an adjustment from (b)(1) applies."

In other words, if the base offense level is increased pursuant to Specific Offense Characteristic 2Q1.2(b)(1)(A) or (B) due to the fact that the violation caused the release, discharge or emission of a hazardous or toxic substance or pesticide (on either an isolated or ongoing, continuous or repetitive basis) the base offense level cannot also be increased pursuant to Specific Offense Characteristic 2Q1.2(b)(4) because the conduct occurred without a permit or in violation of a permit condition. The stated reason for this proposed amendment is as follows:

[I]n some cases, the "discharge, release or emission" is not a violation of law unless it occurs "without a permit or in violation of a permit." Accordingly, it has been contended that applying both of these subsections in the same case is inappropriate double-counting.

The articulated concern about "double-counting" reflects a misunderstanding of the total universe of crimes that are included as part of the Base Offense Level of Section 2Q1.2. Simply because it would not be illegal for someone to treat, store or dispose of hazardous waste unless they do so without a permit or in violation of the terms and conditions of a permit, does not mean that it is "double-counting" to apply both specific offense characteristics 2Q1.2(b)(1) and 2Q1.2(b)(4). Since the Base

Offense Level of this specific guideline is designed to cover conduct that encompasses varying degrees of seriousness -- including offenses that do not involve permits or permit conditions -- it is essential that the Specific Offense Characteristic stay in place until an overall re-evaluation of the guidelines is completed. To modify this provision now will result in inequities in the sentencing of less serious crimes that are encompassed as part of this guideline.

#### A. Legal Analysis

First, it must be remembered that the "base offense level" is not exclusively tied to elements of a specific crime. Rather, it is the threshold level - the "base" - for a group of different crimes that share some commonality. In the case of the 2Q1.2 guideline, the common link between the various statutory sections covered by this specific provision of the guideline is the fact that all of the listed crimes involve, in some way, the mishandling of hazardous or toxic substances and pesticides or recordkeeping requirements related to those types of substances.<sup>1</sup>

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<sup>1</sup> Other examples of crimes that are grouped together with the same base offense level but which have different elements of the offense are found in U.S.S.G. §2A2.2, the guideline provision that covers aggravated assault. Pursuant to 18 U.S.C. §113(c) it is a crime for anyone to assault another person within the maritime or territorial jurisdiction of the United States with a dangerous weapon. The use of a dangerous weapon is an element of this offense yet U.S.S.G. 2A2.2(b)(2) provides an enhancement to the base offense level if a dangerous weapon is used in the crime. Similarly, pursuant to 18 U.S.C. §114 it is a crime for anyone within the maritime or territorial jurisdiction of the United States to pour scalding water, corrosive acid or caustic substances on another person with the intent to maim that person. The act of pouring the liquid will necessarily cause some bodily injury, yet that factor is also listed as a specific offense characteristic

The 2Q1.2 base offense level encompasses offenses involving the actual unpermitted treatment, storage or disposal of hazardous waste resulting in actual contamination of the environment as well as offenses involving the failure to file required reports or maintain records which do not necessarily involve any unpermitted treatment, storage or disposal or any environmental contamination. In fact, the 2Q1.2 section covers offenses as diverse as the dumping of hazardous waste in violation of RCRA, the improper storage of PCBs in violation of TOSCA, to decanting bulk pesticides into unlabeled containers for distribution in violation of FIFRA, and the falsification of shipping manifests.

Section 2Q1.2 also includes offenses for which proof of the violation of a permit is a prerequisite for conviction as well as offenses for which there is no permit requirement at all. In short, the base offense level is simply the starting point. Every defendant convicted of a violation covered by 2Q1.2 starts with a Base Offense Level of 8, even though many of those crimes have different elements, some implicating a permit requirement and others that do not, that make up the individual offenses.

The Specific Offense Characteristics are designed to distinguish the various related but different crimes that are grouped in the 2Q1.2 subsection. These Specific Offense

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that enhances the base offense level. See also: 18 U.S.C. §842(a)(2) and U.S.S.G. §2K1.3(b)(1) - use of false information to obtain explosives; 18 U.S.C. §1465 and U.S.S.G. § 2G3.1(b)(1) - transportation of obscene material for purposes of sale.

Characteristics identify factors that in some way may make the specific crime at issue more, or in some cases, less serious than other crimes that are grouped in the same Base Offense level and thus deserving of a sentence outside the applicable guideline range. It is important to realize that not every specific offense characteristic is applicable to every potential environmental criminal statute encompassed by these guideline sections.

In Chapter One of the Guidelines, the Commission addressed specifically the relationship between the base offense level and specific offense characteristics when dealing with regulatory crimes.

The structure of a typical guideline for a regulatory offense provides a low base offense level (e.g. 6) aimed at the first type of recordkeeping or reporting offense. Specific offense characteristics designed to reflect substantive harms that do occur in respect to some regulatory offenses, or that are likely to occur, increase the offense level.

U.S.S.G, Ch1, Part A, Subsection 4(f).

This structure is followed in the Part Q Guidelines. Specific Offense Characteristic 2Q1.2(b)(1) addresses a specific harm that will not occur in all of the offenses covered by this guideline, namely the actual discharge, release or emission of a hazardous or toxic substance or a pesticide into the environment. Environmental contamination is clearly more egregious than a recordkeeping violation or a violation that is corrected before there is an actual discharge or release.

Specific Offense Characteristic 2Q1.2(b)(4) addresses an entirely **separate** and distinct harm, namely the absence of a required **permit** or violation of a permit condition. The permit requirement is not an element in all of the regulatory offenses that are part of the Base Offense Level. This specific offense characteristic addresses an aggravating factor and regulatory concern that is different and distinct from the actual release or discharge of a contaminant into the environment that is addressed in 2Q1.2(b)(1).

Permits in the environmental regulatory framework are not simply paper exercises or licenses to pollute. They are designed to be the result of an administrative process aimed at preventing pollution and contamination before it occurs. This process includes the collection of the best available information, the evaluation of potential environmental and health risks of the proposed activity, and notice to, and input from, concerned citizens who may be affected by the permittee's activities. The permit process can also be viewed as performing the function of a safety net. Once a company or individual is in the permit system, the permittee is subject to reporting requirements and periodic inspections. The permit process is thus the mechanism used to monitor ~~ongoing~~ activities that have the potential for causing environmental damage with the goal of stopping unsafe practices before they escalate out of control. Individuals or companies who avoid the permitting process entirely deserve to have their sentences enhanced because by avoiding the permit process they

subvert the entire regulatory scheme. When this behavior results in actual environmental damage, it should be subject to the most serious sentences.

Violators who are convicted of violating the terms of their permit are also subject to an enhancement pursuant to subsection 2Q1.2(b)(4). Although the harm to the regulatory system by permit violators is different than those who simply avoid the system altogether, there is still a regulatory interest in assuring that those who apply for and receive permits actually comply with the limitations and requirements in the permit. Clearly, if a defendant actually has a permit and simply ignores its limitations, that factor reflects both knowing intentional conduct and a disdain for the regulatory process.<sup>2</sup> Thus, as has been previously stated, the permit factors addressed in 2Q1.2(b)(4) are a completely separate aggravating factors that are not addressed by the 2Q1.2(b)(1) Specific Offense Characteristic.

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<sup>2</sup> Some argue that the harm to the regulatory system by permit violators is not as egregious as the harm caused by those who avoid the system all together. However, the distinction between permit violators and those who avoid the system all together is not addressed by the proposed amendment.

Another argument that is sometimes made with respect to this subsection of the guidelines is that if a certain type of treatment or disposal activity is so bad that it would never be permitted by EPA, then this specific offense characteristic should not be applied. However, this interpretation of the guidelines would result in a lower base offense level for conduct that was so egregious that it would never be permitted than for conduct that would be allowed within a permit structure.

These are examples of a provision that could be re-evaluated if the Part Q guidelines were reviewed as a whole rather than in piecemeal fashion.

Nor is the structure of the Part Q Guidelines an anomaly when examined within the framework of other guideline sections. Rather the format is similar to guidelines that focus on other categories of crimes. Courts have addressed and rejected similar double counting arguments under other guidelines, for example, in United States v. Braxton, 903 F.2d 292 (4th Cir. 1990) the court rejected the defendant's argument that adding three levels because the victim was a law enforcement officer under 3A1.2 to a conviction for assaulting a federal officer in violation of 18 U.S.C. §111 "double-counted" the "federal officer" element of the underlying crime.<sup>3</sup>

If the application of both 2Q1.2(b)(1) and 2Q1.2(b)(4) constitutes double counting, then another example of "double counting" exists in the 2Q1.2 guidelines. Under the analysis which is the basis for the proposed amendment, it would also be double counting to decrease the final offense level pursuant to 2Q1.2(b)(6) in situations where the offense involved a simple recordkeeping or reporting violation only since the violation of falsification of records is wholly covered by the Base Offense Level.

Since subsections (b)(1) and (b)(4) address different regulatory concerns and different harms (i.e. aggravating factors), the application of both these factors to the same defendant does not constitute double counting. Although subsection (b)(4) may not be the perfect way to account for various aggravating factors that

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<sup>3</sup> Other examples are given supra at footnote 1.

legitimately call for enhancement of a sentence, the proposed amendment not only fails to improve on the existing Part Q guidelines, but will only create additional problems.

B. Practical Ramifications of the Proposed Amendment

The significance of this proposed Amendment is apparent when examining guideline calculations in some actual cases and factual scenarios.<sup>4</sup>

1. U.S. v. Anthony St. Angelo,  
Crim. No. WN-91-0173 (D. Md.)

Anthony St. Angelo was convicted by a jury of four counts of illegal disposal of hazardous waste at his furniture refinishing business which was located in Ijamsville, Maryland. From December, 1987 through March, 1990, St. Angelo directed employees to dispose of spent solvents that were used in the furniture stripping and refinishing business at three different locations liquid waste from the stripping process was sometimes mixed with sawdust and then put into a trash dumpster and sent to a municipal landfill. On other occasions, the spent solvents were mixed with sawdust and the sawdust was spread on the floor of the building to allow the solvents to evaporate. Liquid wastes were also poured down the hillside on the southeast corner of the property with such frequency that a spillway was created down the hill. This same liquid waste was also poured onto the ground in the northwest

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<sup>4</sup> For purposes of this analysis, reference is made only to application of the Part Q Environmental Guidelines. Thus a particular defendant's Final Offense Level might change depending on factors such as whether defendant was given credit for acceptance of responsibility, was determined to be the leader of criminal activity, or used a special skill.

corner of the site. During the execution of a criminal search warrant in March, 1990, soil samples confirmed the presence of spent solvents and high levels of lead in one area of the site.

St. Angelo was not a stranger to the requirements for safe disposal of hazardous waste. He had previously been cited in 1984 by the state for hazardous waste violations when operating a similar business at a different location. At that time, he was told how to properly store his waste and that he needed to get a licensed hazardous waste hauler to remove the waste. Company employees testified that St. Angelo had looked into the cost of properly disposing of the waste but rejected that option since it was estimated that it would cost the company approximately \$1600 a month to legally dispose of the waste that was generated by their operation. During the time period he was in operation, St. Angelo made various misleading representations to the state regulators concerning the nature of his business and the quantity and type of waste he was generating specifically to avoid regulation of his business and detection of his activity.

In short, the overall picture which emerged as a result of evidence presented at the trial was that St. Angelo (1) knew he was dealing with regulated hazardous waste; (2) knew the proper way to handle the waste but deliberately chose to act illegally to save money; and (3) affirmatively attempted to conceal his illegal disposal.

Under the current guidelines, St. Angelo's guideline sentence would be calculated as follows:

|                                                                                            |          |
|--------------------------------------------------------------------------------------------|----------|
| \$2Q1.2(a) Base Offense Level                                                              | 8        |
| \$2Q1.2(b)(1)(A) - continuous or repetitive<br>discharge of a hazardous or toxic substance | 6        |
| \$2Q1.2(b)(4) - involved disposal without a permit                                         | <u>4</u> |
| FINAL OFFENSE LEVEL                                                                        | 18       |

Assuming that St. Angelo has a Criminal History Category of I, his guideline sentencing range would be between 27 and 33 months.

Under the proposed amendment, the district court would have the option of choosing to apply either \$2Q1.2(b)(1) or \$2Q1.2(b)(4) since, arguably, the amendment does not specify which specific offense characteristic must be used. If the court calculated the adjusted offense level using \$2Q1.2(b)(1), St. Angelo's Final Offense Level would only be a level 14, which translates to a sentencing range of 15 to 21 months. If the sentencing judge were to decide to apply a two level "guided" downward departure pursuant to Application Note 4, St. Angelo's final offense level would be 12, which translates to a sentencing range of 10 to 16 months.<sup>5</sup> At this level St. Angelo would be

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<sup>5</sup> Due to the inherent flexibility that is built into the Part Q Guidelines in the Application Notes, St. Angelo's final offense level could vary from a level 14 (15 to 21 months) to a level 24 (51 to 63 months) under the current guidelines. If the amendment is adopted, the Final Offense Level could vary from a level 10 (6 to 12 months) to a level 14 (15 to 21 months). Where an individual is sentenced within the range of 15 to 63 months, (or under the proposed amendments, 6 to 21 months) depends almost solely on the personal view an individual district court judge has of the seriousness of the offense and culpability of the defendant. These Application Notes are thus an invitation to disparate sentences and will result in widely varying sentences from district to district.

eligible to receive a split sentence pursuant to §5C1.1(c)(3) (d)(2). If the court were to choose to apply §2Q1.2(b)(4), the adjusted offense level would only be a level 12 and if a "guided" departure pursuant to Application Note 8 were made, St. Angelo's adjusted offense level would be 10 (a range of 6 to 10 months) and he would be eligible for probation with conditions of confinement pursuant to §5B1.1(a)(2).

2. U.S. v. Marvin Mueller  
Crim. No. 91-00204CR(4) (E.D. Mo.)

Marvin Mueller entered a plea of guilty to the illegal transportation of hazardous waste and the illegal disposal of hazardous waste from his dry cleaning establishment in Saint Louis, Missouri. Marvin had been in the dry cleaning business for nearly twenty years and ran an industrial chemical and solvents supply company for fifteen years. From on or about November 1987 until March 1989, Mr. Mueller illegally stored various waste materials in trailers alongside his dry cleaning business. After the City of Saint Louis fire inspectors finally surveyed his out buildings and noted that there were drums of chemicals stored in the trailers, Mueller contacted someone to "dispose" of these drums for him.

Although Mueller had an existing contract with the Safety Kleen Corporation to dispose of canisters from his dry cleaners, Mueller contacted John Hall and arranged with Hall to have the drums loaded onto a rental truck, taken to a remote area of a neighboring county and "dumped" there. All 23 barrels containing various dry cleaning waste materials were left abandoned on the

roadside. Many of these barrels were ruptured during the unloading or leaking after they were abandoned.

Laboratory analysis done by the Missouri Department of Natural Resources Laboratory showed that these drums contained wastes that met the ignitability characteristic for hazardous wastes.

Based upon his extensive experience in the dry cleaning and industrial chemicals business, Marvin Mueller (1) knew he was involved with materials that were regulated; (2) knew the proper way to dispose of these wastes and deliberately chose to act illegally to save money.

Under the current guidelines, Mueller's presentence guideline calculation should be:

|                     |                                                          |          |
|---------------------|----------------------------------------------------------|----------|
| §2Q.2(a)            | Base Offense Level                                       | 8        |
| §2Q1.2(b)(1)(B)     | Discharge, Release, or Emission of a hazardous substance | 4        |
| §2Q1.2(b)(4)        | Transportation, Treatment or Disposal without a permit   | <u>4</u> |
| FINAL OFFENSE LEVEL |                                                          | 16       |

Assuming this defendant has a criminal history category of I, the guideline range would be twenty-one to twenty seven months. Without the four level enhancement pursuant to §2Q1.2(b)(4), Mueller's final offense level would only be a level 12, which would result in sentencing range of ten to sixteen months.<sup>6</sup> Thus, under the proposed amendment, if a defendant

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<sup>6</sup> At the sentencing in this case, the district court applied a three level "guided" downward departure pursuant to §2Q1.2(B)(4), comment (n.8), and a two level adjustment for acceptance of

illegally stored hazardous waste without a permit, he would end up with the same sentencing range as at a defendant who actually causes a release of hazardous waste into the environment.

## II. Comments on Future Amendments to the Part Q Guidelines

The single most significant factor that undermines certainty when computing a guidelines sentence under Part Q is the wide range of discretion and flexibility afforded to the sentencing court pursuant to the Application Notes that accompany the Part Q Guidelines. These Application Notes act as a broad invitation to the sentencing courts to depart with the result that the adjustments for aggravating factors that are identified as part of the Specific Offense Characteristics are undercut. The uncertainty created by the Part Q guidelines Application Notes makes it very difficult to conduct meaningful plea negotiations and frequently leads to lengthy and protracted sentencing hearings. In addition, and most importantly, as is illustrated by an examination of several cases, it is possible for defendants to receive widely varying sentences for comparable crimes.

In United States v. Wells 922 F.2d 54 (1st Cir. 1991), John Wells and his company, Wells Metal Finishing, Inc, were convicted of knowingly discharging excessive amounts of zinc and cyanide into the City of Lowell's sewer system for approximately two years between 1987 and 1989. At sentencing, the district court

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responsibility pursuant to §3E1.1(a). Thus Mueller's final adjusted offense level was level 11 with a sentencing range of 8 to fourteen months. The district court sentenced him to 4 months confinement and four months of house arrest.

assigned a base offense level of eight to the offense pursuant to U.S.S.G. § 2Q1.2. The court then looked to the Specific Offense Characteristics and increased the base offense level by six levels pursuant to §2Q1.2(b)(1)(A), since the crime involved a continuous or repetitive release of a hazardous substance.

The court also made a two-level upward adjustment pursuant to §2Q1.2(b)(3) finding that there was sufficient evidence to establish that a public utility, the Lowell Water Control Department, was disrupted by the defendant's conduct. As the First Circuit Court of Appeals noted, U.S.S.G § 2Q1.2(b)(3) requires a four level upward adjustment for disruption of a public utility, effectively making the district court's application of this subsection a two level downward departure. Since the district court did not make any specific findings to justify this two level departure, the First Circuit assumed that he had relied on Application Note 7 to §2Q1.2, which states:

Depending upon the nature of the contamination involved, a departure of up to two levels either upward or downward could be warranted.

Finally, the district court reduced the offense level pursuant to §3E1.1 due to the defendant's acceptance of responsibility. Thus the final adjusted offense level was a level fourteen.<sup>7</sup> John Wells was sentenced to fifteen months imprisonment and one year of supervised release.

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<sup>7</sup> Although this crime involved an offense that violated the terms of the defendant's permit with the City of Lowell, no adjustment was made to the offense level pursuant to §2Q1.2(b)(4).

When compared to pre-guideline sentences, John Wells' sentence would be considered to be a stiff sentence. However, under the guidelines as presently structured, this defendant's sentence could have been much longer. A straight forward guideline computation would include a base offense level of 8 pursuant to 2Q1.2(a); an increase of 6 pursuant to 2Q1.2(b)(1)(A) for a continuous or repetitive discharge; and increase of 4 pursuant to 2Q1.2(b)(3) since the offense resulted in disruption of public utilities; and increase of 4 pursuant to 2Q1.2(b)(4) since the company's permit with the municipal government was violated. If the defendant was given credit for acceptance of responsibility, as Wells was, then the final adjusted offense level would have been 18, which would have resulted in a sentencing range of 27 to 33 months. Even if the four levels that are applicable since the crime constituted a violation of a permit are exclude, the adjusted offense level would be 16, with a sentencing range of 21 to 27 months, a significantly different sentence than the sentence Wells actually received.

Well's sentence can be compared to that received by the defendant in United States v. David Boldt, Crim. No. 88- 00084 (D. Mass. 1990) who was convicted of a very similar crime. Boldt, a manager for Astro Circuit Corporation, was convicted by a jury on two counts under the Clean Water Act for discharging electroplating wastes, at the rate of approximately 58,000 gallons a day, into the Lowell, Massachusetts sewer system. The company had been engaged in this activity from approximately May, 1984 to April, 1988. The

evidence established that Boldt was the chemical processing engineering manager from June, 1987 through January 1988 and supervised the discharges during this period. The district court sentenced the defendant to 48 hours of imprisonment, one year of probation and fined him \$1,000. The district court made several downward departures when calculating the 2Q1.2 guidelines, for example refusing to enhance the sentence due to the repetitive discharges pursuant to 2Q1.2(b)(1)(A). The district court also departed based on his finding that Boldt was a "minimal participant" pursuant to U.S.S.G. §3B1.2(a) and had "accepted responsibility" for his crimes. The president of Astro Circuit, Robert McKiel had pled guilty to eleven felony counts under the Clean Water Act and was sentenced to one year, with eight months suspended, and placed on probation for two years. The vice-president was sentenced to nine months, with six months suspended and placed on probation for two years. These sentences are inconsistent with a straightforward guidelines calculation which should have been made as follows:

|                                                                                           |           |
|-------------------------------------------------------------------------------------------|-----------|
| §2Q1.2(a) Base Offense Level                                                              | 8         |
| §2Q1.2(b)(1)(A) - continuous or repetitive<br>discharge of a hazardous or toxic substance | 6         |
| §2Q1.2(b)(1) - involved disposal without a permit                                         | <u>4</u>  |
| <b>FINAL OFFENSE LEVEL</b>                                                                | <b>18</b> |

Even if the court had made two level downward departures pursuant to Application Notes 4 and 7, the resulting guideline offense level should have been a level 14, which would translate to a sentencing range of fifteen to twenty-one months of imprisonment.

The sentences in these cases, involving repeated discharges of hazardous substance, can be contrasted with United States v. Irby, (No. 90-5113, 4th Cir. Sept. 13, 1991), in which the defendant Irby received more than double the term of imprisonment that Wells received for offenses that did not involve hazardous wastes. Mark Irby was the plant manager of a wastewater treatment plant who ordered the discharge of approximately 500,000 gallons of partially treated sewage sludge to local river on a weekly basis for approximately two years. Irby directed subordinates at the wastewater treatment plant to discharge the sludge during night time hours.

At sentencing, the district court assigned a base offense level of six to the offense pursuant to U.S.S.G. § 2Q1.3. The court then looked to the Specific Offense Characteristics and increased the base offense level by six levels pursuant to §2Q1.3(b)(1)(A), since the crime involved a continuous or repetitive discharge of a pollutant and by four levels since the discharges violated the terms of a permit. Thus, the adjusted offense level pursuant to the environmental guidelines was a level 16. The court also increased the offense level by 2 points pursuant to 3B1.1(c) because the defendant was a manager or supervisor of a criminal activity which brought the adjusted offense level to 18 resulting in a sentencing range of 27 to 33 months. Irby was sentenced to 33 months imprisonment to be followed by twelve months of supervised release.

Irby can be compared to United States v. Ted Osborne, Cr. 90-38 (E.D. Ky.). Osborne operated two small wastewater treatment facilities and pled guilty to one felony count under the Clean Water Act for the knowing discharge of sewage pollutants into a creek without a permit. The violations occurred between July 1989 and May, 1990. The district court departed from the guidelines because he concluded that the violations did not cause a significant harm. Osborne was sentenced to six months of home detention, two years of probation and fined \$7,319. Although the magnitude and effect of Osborne's conduct may have been less significant than Irby's, it is still difficult to reconcile the very large disparity in their sentences given the general nature of both crimes.

Another example of how the Part Q guidelines can be interpreted differently by different courts is found by comparing the cases of U.S. v. William Ellen, U.S. v. Ocie Mills, and U.S. v. John Pozsgai<sup>8</sup>

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<sup>8</sup> The sentence imposed in the Pozsgai case has received considerable media attention as an example of the draconian nature of the environmental sentencing guidelines. However, in addition to factual distortions that are contained in many of the media accounts, it is important to note that the sentence in the Pozsgai case was a combination guideline and pre-guideline sentence. In fact, the sentence that the district court imposed on the non-guideline counts was longer than the sentence that he imposed on the guideline counts. At the sentencing hearing, the district court made it very clear that he imposed the sentence because of Pozsgai's flagrantly criminal conduct after seven separate notices from the U.S. Army Corps of Engineers and EPA. In addition, the sentencing court also noted that Pozsgai had violated a Temporary Restraining Order issued by a federal district court judge and had committed perjury before a federal district court judge.

In U.S. v. William Ellen, the defendant was convicted on six felony counts under the Clean Water Act for illegally filling wetlands between October, 1988 and March 1990. During the trial it was established that 86 acres of wetlands were illegally filled despite the fact that Ellen was issued a cease & desist notice from the Army Corps of Engineers and received numerous other warnings from regulators and subcontractors.

Conservatively, Mr. Ellen's actions resulted in the illegal filling of at least 86 acres of very valuable and rapidly disappearing wetlands on Maryland's Eastern Shore. The unregulated filling that occurred at Tudor Farms under Mr. Ellen's supervision destroyed not only the wetlands themselves but also valuable habitat of a variety of animals, including the Delmarva fox squirrel and a bald eagle, two endangered species. One measure of the actual harm done to the site is the fact that the property owner, was required to conduct extensive restoration of the site in an attempt to minimize the adverse environmental impact of Mr. Ellen's conduct. The restoration and mitigation of the site cost close to one million dollars.

At sentencing, the district court arrived at an adjusted offense level of 12. This level was computed as follows:

|                                     |          |
|-------------------------------------|----------|
| 2Q1.3 Base Offense level            | 6        |
| 2Q1.3(b)(1)(A) repetitive discharge | 4        |
| 2Q1.3(b)(4) no permit               | <u>2</u> |
| FINAL OFFENSE LEVEL                 | 12       |

In this case, the district court gave Ellen two different "guided " departures. Relying on Application Note 4, the court applied Specific Offense Characteristic 2Q1.2(b)(1)(A) but made a 2 level downward guided departure because the pollutant was only dirt and because the court concluded that the damage to the marshland could be remediated by mechanical means and because, other than loss of habitat, there was no specific damage to human or animal health. The district court also applied Specific Offense Characteristic 2Q1.2(b)(4) and made an additional two level downward departure pursuant to Application Note 7 for primarily the same reasons that were the basis for the departure under §2Q1.2(b)(1)(A).<sup>9</sup>

In United States v. Mills, No. 88-03100-WEA (N.D. Fla. April 17, 1989), Ocie Mills and Carey Mills, a father and son, were convicted of five counts of unlawfully discharging pollutants into wetlands and one count of unpermitted dredging of a boat canal in navigable waters. The defendants had purchased the property after the prior owner had been issued a cease and desist order by the U.S. Army Corps of Engineers informing them that the area was a wetland which could not be filled. Despite receiving additional

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<sup>9</sup> If the 2Q1.3 Guidelines were to be amended consistent with the proposed amendment to the 2Q1.2 guidelines, Ellen's offense level would be 12 if no additional guided departures were made. Thus under this proposed amendment, Ellen would end up with the same guideline level as a defendant who committed a \$20,000 to \$30,000 fraud scheme which involved more than minimal planning.

With the two "guided" departures discussed above, Ellen's offense level would be 8, which translates to 2 to 8 months of imprisonment. This is comparable to the sentence a bank teller would receive for embezzling \$10,000.

warnings, approximately nineteen truckloads of fill were dumped on a half acre of wetlands. A canal was also dredged without a permit and the dredge material was spread on the site. When the Mills were sentenced on April 17, 1989, they received both pre-guideline and guideline sentences. Ocie and Carey Mills were both sentenced to serve twenty one months of imprisonment to be followed by one year probation. In addition they were fined \$5,000 each and to restore the site during their probationary period. The Mills' guideline calculations were as follows:

|                                     |          |
|-------------------------------------|----------|
| 2Q1.3 Base Offense level            | 6        |
| 2Q1.3(b)(1)(A) repetitive discharge | 6        |
| 2Q1.3(b)(4) no permit               | <u>4</u> |
| FINAL OFFENSE LEVEL                 | 16       |

In United States v. John Pozsgai, No. 88-00450-01 (E.D. Pa.) Pozsgai was charged with dumping at least 443 truckloads of rock and concrete onto approximately 5 acres of wetlands without a permit between the summer of 1987 and the fall of 1988. Prior to purchasing the land which was the subject of the indictment, Pozsgai was warned that it was wetlands and that a permit was required before he could fill the wetlands. Pozsgai ignored this advice and subsequent warnings he received from both the U.S. Army Corps of Engineers and EPA. When Pozsgai continued to ignore these warnings, a Temporary Restraining Order was issued by a federal district judge ordering Pozsgai to cease and desist filling the wetlands. Pozsgai ignored this court order and was indicted in

September, 1988. He was convicted and on July 13, 1989. His guideline calculations were as follows:

|                                     |          |
|-------------------------------------|----------|
| 2Q1.3 Base Offense level            | 6        |
| 2Q1.3(b)(1)(A) repetitive discharge | 6        |
| 2Q1.3(b)(4) no permit               | <u>4</u> |
| FINAL OFFENSE LEVEL                 | 16       |

Pozsgai's resulting guideline range was 21 to 27 months. Pozsgai was sentenced to three years imprisonment on the pre-guideline counts and to 27 months on the guideline counts, the time to be served concurrently. to be followed by five years imprisonment. He was also fined \$200,000 and ordered to restore the wetlands.

As is obvious from a review of these cases, the acreage involved in the Ellen case is far more extensive than the other two cases yet he received by far a much lower sentence than the other two who committed similar offenses and who were charged under the same statute.<sup>10</sup>

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<sup>10</sup> The sentence in the Ellen case, which involved discharges resulting in actual contamination of the environment can be compared to the case of U.S. v. Richard Pond. Pond was the superintendent of a wastewater treatment plant who falsified discharge monitoring reports and who failed to follow sampling protocols set forth as a condition of the wastewater treatment plant's NPDES permit. In this case, there was no evidence of actual discharges in violation of the permit limitations or of any environmental contamination. Pond's final offense level was a level 12 which translated to a sentencing range ten to sixteen months. He was sentenced to eight months of imprisonment to be followed by four months of home detention.

### III. Conclusion

The 1980s was a decade that saw a dramatic increase in the overall number of environmental criminal prosecutions. Congress repeatedly expressed its intent that environmental crimes be treated as serious crimes and not mere regulatory annoyances. However, the sentences imposed in the majority of these cases reflected a reluctance on the part of many judges to impose significant periods of incarceration for violations of the environmental laws. With the advent of the federal sentencing guidelines, the expectations were that environmental criminals would actually be serving time in jail. A review of all of the cases which have been sentenced under these guidelines does not support this expectation. Environmental crimes are "serious" offenses and should be treated as such. Any structuring of the guidelines that results in sentences of probation or community confinement will undercut the deterrent effect of environmental criminal prosecutions.

Although we readily acknowledge that there are some problems with the implementation of the environmental crimes guidelines, the proposed amendment is a piecemeal approach that only **exacerbates** the problems. If promulgated, this amendment will result in ~~some~~ very bizarre and unfair sentences while not addressing some of the areas of the guidelines that do need to be changed. We strongly oppose this amendment and urge the Commission to undertake a overall re-evaluation of these guidelines in order to better effectuate the goals of honesty, uniformity and proportionality.