

LAW OFFICES
Ballard Spahr Andrews & Ingersoll, LLP
1735 MARKET STREET, 5TH FLOOR
PHILADELPHIA, PENNSYLVANIA 19103-7599
215-665-8500
FAX 215-864-8999
www.ballardspahr.com

BALTIMORE, MD
DENVER, CO
SALT LAKE CITY, UT
VICKSBURG, NJ
WASHINGTON, DC
WILMINGTON, DE

RONALD A. SARACHAN
DIRECT DIAL : (215) 864-8333
PERSONAL FAX : (215) 864-9784
E-MAIL: SARACHAN@BALLARDSPAH.COM

March 1, 2004

United States Sentencing Commission
One Columbus Circle, NE
Suite 2-500, South Lobby
Washington, DC 20002

Dear Commissioners:

This letter is respectfully submitted in response to the Commission's request for public comment, BAC2210-40/2211-01. In particular, my comments relate to Issues for Comment II: Hazardous Materials.

I am a partner in the law firm of Ballard Spahr Andrews & Ingersoll, LLP, practicing in the Government Enforcement/White Collar Crime Group and the Environmental Group. I was formerly Chief of the Environmental Crimes Section of the U.S. Department of Justice. Before that, I was an assistant United States attorney and Chief of Major Crimes in the United States Attorney's Office in the Eastern District of Pennsylvania, where I supervised all the environmental crimes prosecutions in the district.

In its annual submission to the Commission dated August 1, 2003, the Justice Department asked the Commission to consider revising the guidelines for offenses involving the illegal transportation of hazardous materials. In essence, the Department argued that the specific offense characteristics of the applicable sentencing guideline, § 2Q1.2, often do not apply to these "hazmat" offenses and therefore the guidelines are too low. Among other things, the Commission's request for comments lists eighteen possible aggravating factors, (A) through (R), that might be incorporated into the guidelines as specific offense characteristics (hereinafter the "proposed S.O.C.'s"). I suggest the following framework to help simplify and clarify the analysis of these issues.

Crimes involving illegal transportation of hazardous materials can be broken into three categories. The first category consists of acts of terrorism, that is, transportation offenses where the actors intend there to be releases of hazardous materials to the environment. The

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second category consists of other, non-terrorist related hazmat offenses that also result in releases to the environment. These releases are usually accidental. Unlike more typical pollution offenses, which often involve the intentional discharge, release or dumping of waste to avoid the costs of proper disposal, hazardous materials regulations generally involve transportation of valuable products. The release and loss of valuable product into the environment is an unintended result of a hazmat offense. The third category consists of hazmat transportation offenses where there are no releases. As explained below, the sentencing guidelines already address the first two categories of offenses.

As for the first category, terrorist acts, the Department's letter of August 1, 2003 highlights the relevance of hazardous material transportation to acts of terrorism. (see, e.g., Justice Department letter dated August 1, 2003, p. 14: "Illegal transportation of hazardous materials has emerged as a significant terrorist vulnerability. . ."). Certainly, a guideline calculation should be subject to enhancement if a hazmat transportation offense involves a terrorist act. However, § 3A1.4 already provides for an increase in offense level for any offenses involving or intending to promote a federal crime of terrorism. Specifically, it provides for an increase either of 12 levels, or an increase to level 32, whichever results in a higher offense level. Thus, there is no need to modify § 2Q1.2 or Part Q to take into account terrorism since it is already covered in chapter 3, and adding a specific offense characteristic for "a terrorist motive" (item (O) in the proposed S.O.C.'s) appears duplicative of § 3A1.4.

Similarly, with respect to the second category, hazmat offenses resulting in accidental releases, the presence of the releases brings these offenses into the "heartland" of other more typical pollution offenses covered by § 2Q1.2. In particular, the existing specific offense characteristics of § 2Q1.2 already provide a series of cumulative enhancements corresponding to the severity of any releases to the environment. These specific offense characteristics adequately reflect the varying seriousness of offenses that include environmental releases.

Indeed, I am not aware of the Justice Department taking the position that § 2Q1.2 results in sentencing that is in any way inadequate for such environmental crimes. For example, in July 2002, I had the opportunity to testify before a subcommittee of the Senate Committee on the Judiciary on the topic: "Criminal and Civil Enforcement of Environmental Laws: Do We Have All the Tools We Need?" Representatives of the Justice Department, the Environmental Protection Agency and others also testified. While many different "tools" for stronger enforcement were discussed, there was no suggestion that tougher sentences were needed for environmental crimes involving actual releases.

Many of the possible specific offense characteristics listed by the Commission in the Issues for Comment 11 simply repeat ones already included in § 2Q1.2, including the one-time release of hazardous material (§ 2Q1.2(b)(1)(B) – increase of 4 levels), the evacuation of a community (§ 2Q1.2(b)(3) – increase of 4), a substantial expenditure for remediation (*id.* – increase of 4 levels), and the substantial likelihood of death or serious injury (§ 2Q1.2(b)(2) – increase of 9) (items (D), (G), (K), (I) in the proposed S.O.C.'s).

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That leaves the third and final category of hazmat transportation offenses – those that are not related to any environmental release, whether intentional or accidental. This is the only category that arguably is not already addressed under the guidelines, since the enhancements to § 2Q1.2 assume a release or a permit violation. Therefore, the evaluation of the need for additional enhancements and the assessment of what such enhancements might be should be focused on this category. However, the analysis of specific offense characteristics for these non-release cases is especially challenging. In the more typical environmental offenses involving releases, the specific offense characteristics reflect the egregiousness of the offenses based on the actual results caused by the offenses – the repetition and impact of the release or releases of the harmful material into the environment. These impacts are empirically observable and measurable. By contrast, there is no actual harm associated with this third category of hazmat offenses since there are no releases into the environment. Instead, the severity of these offenses arise from the relative risk of harm to the public. The guidelines presently address risk with a departure for offenses that significantly endanger public safety. See § 5K2.14. However, rather than this departure, the Department seeks to add new specific offense characteristics. Accordingly, the specific offense characteristics that might be relevant are ones that serve as surrogates for measuring relative risk to the public. Possible examples of these from the list of proposed S.O.C.'s include the transportation of a hazardous material on a passenger-carrying or other aircraft (item A), the transportation of a hazardous material on any passenger-carrying mode of mass transportation (item B), the concealment of the hazardous material during its transportation (item C), the transportation of radioactive or explosive material (item N), and the failure to properly train transporters (item Q).

The difficulty in assessing these proposals is increased not only by the added difficulty in measuring risk as compared to the impact of actual releases, but also by the absence of a significant body of criminal cases or sentencing experience for hazmat transportation offenses. There are relatively few cases on which to evaluate whether or to what extent current sentencing of hazmat cases is inadequate.

In summary, the analysis of hazardous materials transportation offenses should focus on cases which do not involve an environmental release, because this is the only category that may be outside the "heartland" of environmental crimes cases already adequately addressed by the guidelines. Since the existing specific offense characteristics for cases involving actual environment releases are widely viewed as being adequate, there is no justification for adding new specific offense characteristics that relate to the impact of actual releases. Instead, the justification for any enhanced sentencing would have to be that the current guidelines do not adequately reflect the increased risk to public safety caused by hazmat offenses that do not include environmental releases. Therefore, the only S.O.C.'s relevant to the analysis are those that may reflect increased risk in such cases. Such analysis is made more challenging by the inherent difficulty in basing guidelines calculations on risk, rather than impact, and the small pool of relevant criminal experience on which to draw.

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There are certainly hazmat offenses that can cause very significant risks to public safety, but the trick is to strike a proper balance that avoids painting with too broad a brush.

Respectfully,


Ronald A. Sarachan

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