

March 28, 2006

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Attention: Public Affairs

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Re: Comments of the Corporate Environmental Enforcement Council
Chapter Eight Privilege Waiver
United States Sentencing Commission Notice of Proposed Amendments and
Request for Public Comment

Dear Docket Clerk:

On behalf of the Corporate Environmental Enforcement Council ("CEEC"), an organization of 29 major corporations that focuses exclusively on civil and criminal environmental enforcement issues, we appreciate the opportunity to submit these comments to the United States Sentencing Commission ("the Commission") regarding the Commission's proposed amendments to the United States Sentencing Guidelines ("the Guidelines") and request for public comment (71 Fed.Reg. 4782 (Jan. 27, 2006)), and specifically topic B.12, the Chapter Eight Privilege Waiver.

CEEC has worked extensively on all aspects of environmental enforcement, and has previously submitted comments to the Commission and to the Advisory Group on Organizational Guidelines and met with members and staff to address issues of concern, including specifically issues relating to Chapter Eight, the Organizational Sentencing Guidelines. CEEC has also worked on environmental enforcement issues closely with the United States Environmental Protection Agency, the United States Department of Justice, and state environmental agencies and enforcement officials.

CEEC's members have been at the forefront of the development and implementation of innovative environmental management systems and self-assessment by the regulated community over the past decade. CEEC's members have long recognized the substantial benefits that are realized when effective voluntary compliance programs are put in place – benefits including improved environmental performance, reduced risk to human health and the environment, and higher compliance levels.

To that end, while CEEC has supported the inclusion of provisions in the Organizational Guidelines recognizing the importance of such a voluntary program to prevent and detect criminal conduct, we have consistently expressed our concern with respect to provisions that could weaken or undermine the incentives for and effectiveness of such voluntary compliance programs. CEEC is concerned that the sentence that was added to the commentary at §8C2.5(g)

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with respect to the waiver of attorney-client privilege and work product protections is such a provision, and we urge the Commission to delete this sentence from the commentary and replace it with a statement that waiver of this privilege and protection is not to be considered in assessing the degree to which a company cooperates in a government investigation.

As set forth in the Federal Register Notice announcing the proposed amendments to the Guidelines and requesting comment on specific issues, the Commission has been asked to reconsider the commentary at §8C2.5(g) that was added as part of the Commission's 2004 amendments to Chapter Eight. The sentence at issue involves the potential decrease in the culpability score if a defendant organization has "self-reported, cooperated with the authorities, and accepted responsibility," and specifically the issue of whether waiver of attorney-client privilege and of work product protections is a prerequisite to such a decrease.

The commentary as amended provides that such waiver is not a prerequisite "unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization." USSG, §8C2.5(g), comment. (n.12) (Nov. 2005). The issue of whether this language is having or could have "unintended but deleterious effects" has been raised in numerous requests to modify or remove this language that have been submitted to the Commission since the effective date of the amendments, and in testimony offered to the Commission at its public meeting in November, 2005. 71 Fed. Reg. 4803-04. As a result, the Commission is seeking comment on whether the commentary language is having unintended consequences and whether it should be deleted or amended to address these consequences.

As an initial matter, it is our experience that organizations look to Chapter 8, and specifically Section 8B2, for guidance as to what the government believes constitutes an effective compliance program. It is critical to recognize that most companies do not look for this guidance in the context of evaluating potential decreases in the culpability score in an ongoing governmental investigation or prosecution; rather, as companies set up internal compliance programs, including programs involving compliance with environmental laws and regulations, they look to a broad array of sources for information, and Chapter 8 of the Guidelines serves as one of the more important resources. It is also worth noting the stated goal of the Chapter 8B2 guideline: "the requirements set forth in this guideline are intended to achieve reasonable prevention and detection of criminal conduct for which the organization would be vicariously liable." USSG, §8B2.1, comment. (backg'd).

Internal environmental compliance programs are much more sophisticated and developed than they were in 1991, when Chapter 8 was added to the Guidelines. These compliance programs rely in large part on the free flow of information between corporate officials, including corporate counsel, compliance managers, environmental health and safety professionals, and employees whose day to day jobs involve, in some part, compliance with environmental laws. They also include various types of "reporting up" provisions, both formal/written and informal/oral.

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It is the experience of CEEC member companies that many of the individuals in the environmental compliance chain are cognizant of the fact that they will, at some point, be reporting directly to legal counsel, whether within the corporation or outside counsel. It has also been a widely held belief that these types of communications fall within the well-established attorney-client relationship, and are protected in the same manner as an individual's communications with his or her lawyer. This is critical, as the free flow of information is the lynchpin of these internal compliance programs.

Conversely, the free flow of communications can be adversely affected if the person communicating the information believes, correctly or incorrectly, that the information will not be protected. While the Commission included language in the Reason for Amendment (Supplement to Appendix C (Amendment 673)) regarding its expectation that the government would require such waivers "on a limited basis," the adverse impact on the free flow of information is felt whether or not that expectation is correct.¹

From the perspective of a company employee that is reporting on an environmental compliance issue to legal counsel, he or she must assume that the government may require that the company waive the attorney-client privilege and/or work product protection that applies to that communication in the context of a governmental investigation. Further, it is our experience that the employee would also likely believe that a company from whom such a waiver is requested would presumably agree to waive the protections, in its own self-interest. This is especially true as the issue of waiver arises in the context of evaluating whether the company is "cooperating" with an government investigation – refusing a request/demand to waive would almost ensure a negative finding on cooperation.

As a result, while the Commission may expect that the government will not require a waiver as a matter of course, in fact that is exactly what an employee (such as an environmental compliance manager) would expect. In that situation, those who report up the environmental compliance chain may rightly view legal counsel conducting an investigation as simply as a potential conduit for enforcement sensitive material to be channeled to the government. The effect is that such persons may be discouraged from making full disclosure to legal counsel. As a result, the environmental management systems and self-assessment/compliance programs suffer, as the success of those systems depends on full and frank assessment and reporting of environmental compliance issues.

¹ Although we do not address the issue in these comments, we cite with approval two statements presented to the Commission at its November 15, 2005 Public Meeting: the Statement of Tina S. Van Dam, National Association of Manufacturers, on behalf of The American Chemistry Council, The Association of Corporate Counsel, and The National Association of Manufacturers, and the Statement of Donald C. Klawiter on behalf of the American Bar Association, with respect to surveys conducted by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers that indicate that in practice the government's practice of seeking or demanding a waiver is not, in fact, limited, and citing to a specific example where Justice Department prosecutors have demanded privileged materials in the context of an environmental investigation.
http://www.ussc.gov/corp/11_15_05/VanDam-ACC-NAM.pdf; http://www.ussc.gov/corp/11_15_05/Klawiter-ABA.pdf.

CEEC submits that this result is unacceptable at all levels. If this language in the Guidelines causes environmental self-assessment/compliance systems to break down due to an unwillingness on the part of employees to engage in full and frank assessment and disclosure, this section of the Guidelines is not only not achieving its intended result (promoting existence of a program that prevents and detects criminal conduct), it is in fact defeating it. Likewise, from a company's perspective the goal of promoting environmental compliance and promptly identifying and correcting noncompliance is defeated if the person responsible for detecting and reporting such noncompliance is disincentivized from doing so for fear that the company could be forced to waive the attorney-client privilege and disclose the information to the government.

CEEC does not believe that the Commission intended this result when it adopted the subject commentary. Despite the lack of intent, we believe that these unintended consequences are occurring, and that the Commission must affirmatively act to address the situation. In order to reverse course, CEEC urges the Commission to delete the commentary at issue and replace it with a statement that waiver of attorney-client privilege and/or work product protection is not to be considered by the government when evaluating whether a company in question is "cooperating" with a government investigation for purposes of Section 8C2.5(g) of the Guidelines.

CEEC appreciates the opportunity to submit these comments to the Commission, and looks forward to continuing to work with the Commission on issues relating to the Guidelines. Please do not hesitate to call me if you have any questions with respect to these comments or would like any additional information.

Sincerely yours,



Kenneth R. Meade
Counsel, Corporate Environmental Enforcement Council

cc: Steve Hellem, Exec. Dir.
Corporate Environmental Enforcement Council

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