UNITED STATES SENTENCING COMMISSION
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December 6, 1993

MEMORANDUM

FROM: Phyllis J. Newton
Staff Director

SUBJECT: Report from Advisory Group on Environmental Sanctions

On November 16, 1993, the U.S. Sentencing Commission received the attached draft of proposed sanctions for organizations convicted of environmental offenses prepared by an independent Advisory Working Group on Environmental Offenses. The draft constitutes the final report of this panel comprising individuals from the government, defense bar, business community, public interest groups, and academia. The draft proposal represents solely the work of the Advisory Group; the proposal has been submitted to the Sentencing Commission for its consideration. It should be clear that while the Commission appreciates the efforts of the Advisory Working Group, the draft being circulated is not a reflection of the Commission's position, but rather a reflection of the Advisory Working Group's efforts to delimit the parameters of what they determined was a viable and reasonable structure.

The Advisory Working Group's draft proposal is being made available to interested individuals and groups to stimulate and facilitate comment on the issue of sanctions for organizations convicted of environmental offenses. The Commission welcomes comments on the advisory group's proposal, as well as the submission of alternative approaches.

Please mail your comments and suggestions to my attention at the above address. Staff from the Commission's Communications Unit can be reached at (202) 273-4590 to answer any general questions you may have about the draft proposal.

PART A - GENERAL APPLICATION PRINCIPLES

§9A1.1 Applicability of Chapter Nine

This Chapter applies to the sentencing of all organizations for environmental criminal violations.

Commentary

Application Notes:

1. "Organization" means "a person other than an individual." 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

§9A1.2 Application Instructions - Organizations

(a) Determine from Part B (Fines) the sentencing requirements and options relating to fines:

(1) If the organization operated primarily for a criminal purpose or primarily by criminal means, apply §9B1.1 (Determining the Fine - Criminal Purpose Organizations).

(2) Otherwise, apply §9B2.1 (Primary Offense Level) to determine the primary offense level for violation.

(b) Determine from Part C (Culpability Factors) the aggravating and mitigating factors applicable to the violation:

(1) Apply §9C1.1 (Aggravating Factors in Sentencing) to determine whether any aggravating factors apply to the violation.

(2) Apply §9C1.2 (Mitigating Factors in Sentencing) - to determine whether any mitigating factors apply to the violation.

(3) To determine the basis for mitigation due to an organization's prior commitment to

environmental compliance, refer to Part D (Commitment to Environmental Compliance).

(c) Determine the final organizational fine under Part E (Fine Calculation and General Limitations):

(1) Apply §9E1.1 (Fine Calculation) to determine the percentage of the maximum statutory fine corresponding to the offense level from Parts A through D.

(2) Apply §9E1.2 (General Limitations) to determine that the organizational fine satisfies minimum sentencing standards while guaranteeing that the organization is able to satisfy the fine imposed.

(d) Determine from Part F (Probation - Organizations) the sentencing requirements and options relating to probation.

Commentary

Application Notes:

1. Determinations under this Chapter are to be based upon the facts and information specified in the applicable guideline. Determinations that reference other chapters are to be made under the standards applicable to determinations under those chapters.

2. The following are definitions of terms used frequently in this Chapter:

(a) "Counts" under this Chapter are defined as any punishable instances of violation, including days of violations.

(b) "Costs" under this Chapter include the following, provided they are reasonably quantifiable: 1) actual environmental harm, proximately caused by the offense conduct including material degradation of a natural resource, and 2) harms incurred and remediation or other costs borne by others. If any component of such costs cannot be reasonably determined, the remaining determinable component shall be used for measuring environmental costs.

(c) "Economic gain" means 1) the economic benefits that an offender realized by avoiding or delaying capital costs necessary to comply with the environmental statute, based upon the estimated cost of capital to the offender; 2) the continuing expenses (e.g., labor, energy, leases, operation and maintenance) the offender avoided or delayed by noncompliance; and 3) other profits directly attributable to the offense conduct which is described in the criminal charges.

(d) "Environmental requirements" include all legally enforceable environmental compliance obligations imposed by federal, state or local statute, regulation, permit, judicial or administrative decree, order and agreement, or other similar means.

(e) "High-level personnel of the organization" means individuals who have substantial control over the organization or who have a substantial role in the making of policy within the organization. The term includes: a director; an executive officer; an individual in charge of a major business or functional unit of the organization, such as sales, administration, or finance; and an individual with a substantial ownership interest.

(f) "Offense" means the offense of conviction and all relevant conduct under §1B1.3 (Relevant Conduct) unless a different meaning is specified or is otherwise clear from the context.

(g) "Material degradation" means the causing of, or contribution to, the extended or widespread impairment of the condition or usage of a natural resource.

(h) "Natural resource" includes land (whether surface or subsurface), fish, wildlife, biota, air water, and drinking water supplies.

(i) "Organization" means "a person other than an individual." 18 U.S.C. § 18. The term includes corporations, partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations.

(j) "Similar misconduct" includes similar actions or omissions at the same or a different location or facility whether or not such prior misconduct was adjudged a violation of the same statutory provision as the instant offense.

(k) "Substantial authority personnel" means individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization. The term includes high-level personnel, individuals who exercise substantial authority (e.g., a plant manager, a sales manager), and any other individuals who, although not a part of an organization's management, nevertheless exercise substantial discretion when acting within the scope of their authority (e.g., an individual with authority in an organization to negotiate or set price levels or an individual authorized to negotiate or approve significant contracts). Whether an individual falls within this category must be determined on a case-by-case basis.

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PART B - FINES

1. DETERMINING THE FINE - CRIMINAL PURPOSE ORGANIZATIONS

§9B1.1 Determining the Fine - Criminal Purpose Organizations

If, upon consideration of the nature and circumstances of the offense and the history and characteristics of the organization, the court determines that the organization operated primarily for a criminal purpose of primarily by criminal means, the fine shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets.

Commentary

Application Note:

1. *"Net Assets," as used in this section, means the assets remaining after payments of all legitimate claims against assets by known innocent bona fide creditors.*

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2. DETERMINING THE FINE - OTHER ORGANIZATIONS

§9B2.1 Primary Offense Level

(a) The Primary Offense Level is determined by the type of environmental offense and the specific offense characteristics under subsection (b).

(b) The Primary Offense Level for each count covered by Chapter Nine is determined under the following categories:

(1) Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants

(A) Base Offense Level: **24**

(2) Mishandling of Hazardous or Toxic Substances or Pesticides: Recordkeeping, Tampering, and Falsification

(A) Base Offense Level: **8**

(B) Specific Offense Characteristics

(i) (a) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by **6** levels; or

(b) if the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by **4** levels.

(ii) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **9** levels.

(iii) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(iv) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by **4** levels.

(v) If a recordkeeping offense reflected an effort to conceal

a substantive environmental offense, use the offense level for the substantive offense.

(vi) If the offense involved a simple recordkeeping or reporting violation only, decrease by **2** levels.

(3) Mishandling of Other Environmental Pollutants: Recordkeeping, Tampering and Falsification

(A) Base Offense Level: **6**

(B) Specific Offense Characteristics

(i) (a) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a pollutant into the environment, increase by **6** levels; or

(b) if the offense otherwise involved a discharge, release, or emission of a pollutant, increase by **4** levels.

(ii) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by **11** levels.

(iii) If the offense resulted in disruption of public utilities or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(iv) If the offense involved a discharge without a permit or in violation of a permit, increase by **4** levels.

(v) If a recordkeeping offense

reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.

(4) Tampering with Public Water System

(A) Basic Offense Level: **18**

(B) Specific Offense Characteristics

(i) If a risk of death or serious bodily injury was created, increase by **6** levels.

(ii) If the offense resulted in disruption of a public water system or evacuation of a community, or if cleanup required a substantial expenditure, increase by **4** levels.

(iii) If the offense resulted in an ongoing, continuous, or repetitive release of a contaminant into a public water system or lasted for a substantial period of time, increase by **2** levels.

(iv) If the purpose of the offense was to influence government action or to extort money, increase by **6** levels.

(v) If the offense involved a threatened tampering or attempted tampering that resulted in disruption of a public water system or evacuation of a community or a substantial public expenditure, use the offense level for the substantive offense.

(a) Cross Reference

(1) If the purpose of the offense was to influence government action or to extort money, apply §2B3.2 (Extortion by Force or Threat of Injury or Serious Damage).

(5) Wildlife Violations

(A) Base Offense Level: _____

(B) Specific Offense Characteristics

(i) If the offense (a) was committed for pecuniary gain or otherwise involved a commercial purpose; or (b) involved a pattern of similar violations, increase by **2** levels.

(ii) If the offense (a) involved fish, wildlife, or plants that were not quarantined as required by law; or (b) involved a pattern of similar violations, increase by **2** levels.

(iii) If more than one applies, use the greater:

(a) If the market value of the fish, wildlife, or plants exceeds $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 (Fraud and Deceit); or

(b) if the offense involved (i) marine mammal that are listed as depleted under the Marine Mammal Protection Act (as set

forth in 50 C.F.R. §216.15); (ii) fish, wildlife, or plants that are listed as endangered or threatened by the Endangered Species Act (as set forth in 50 C.F.R. Part 17); or (iii) fish, wildlife, or plants that are listed in Appendix I to the Convention on International Trade in Endangered Species of Wild Fauna or Flora (as set forth in 50 C.F.R. Part 23), increased by **4** levels.

(6) Simple Recordkeeping and Reporting

(A) Basic Offense Level: **5**

Commentary

Statutory Provisions: *7 U.S.C. §§ 136-1361; 15 U.S.C. §§ 2614 and 2615; 33 U.S.C. §§ 403, 406, 407, 411; 1319, 1907, 1908, 1321(b)(5), 1415(b), 1517; 42 U.S.C. §§ 300(h)-2, 6928(d) and (e), 7413(c), 9603(b), (c), and (d), 11045(4) and (d)(2), 43 U.S.C. §§ 1350, 1816(a), 1822(b), 49 U.S.C. §§ 1804, and 1809. For additional statutory provisions, see Appendix A (Statutory Index), United States Sentencing Commission Guideline Manual (November 1, 1992).*

Application Notes:

1. *Fine calculations under this Chapter are to be based on the provisions of the guidelines in this Chapter unless otherwise indicated. When provisions refer to other chapters for determinations of some component of a fine, the standards set forth in those chapters are incorporated into Chapter Nine. Also incorporated by reference in this Chapter are guidelines §§ 1B1.1 (application notes b and j), 1B1.2, 1B1.4, 1B1.5, 1B1.7, 1B1.8, 1B1.9, 1B1.11, § 5E1.3, §§ 6A1.1, 6A1.2, 6A1.3, 6B1.1, 6B1.2, 6B1.3, 6B1.4, Application Note 3(a)-(j) inclusive to §§ 8A1.2, 8B1.1, 8B1.2, 8B1.3.*

2. In calculating fines under this Chapter in cases with multiple counts, the court shall calculate the fine for each individual count of conviction.

Where the offenses of conviction include counts governed by this Chapter as well as counts governed by other chapters, determine the fines for environmental offenses and non-environmental offense separately. Where the offenses are closely interrelated as defined in §3D1.2, whether or not they involve the same act or transaction, then the fine should be based on the greater of the environmental or the non-environmental offense fine and adjusted to take into account the specific offense or offender characteristics of the lesser-fined offense. For example, when the non-environmental count embodies conduct properly treated as a specific offense characteristic or adjustment to the guidelines determination for the environmental offense and is connected by a common criminal objective or common scheme or plan, treat the offenses as "closely interrelated." Where the environmental and non-environmental offenses are not closely interrelated the fines should be cumulative.

3. A violation presents a material threat of a release if it creates circumstances where a release is more than a remote or hypothetical possibility.

4. "Simple recordkeeping or reporting violations" under subsection (b)(6) are limited to situation where the defendant neither knew nor had reason to believe that the recordkeeping or reporting offense would significantly increase the likelihood of any substantive environmental harm.

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PART C - CULPABILITY FACTORS

§9C1.1 Aggravating Factors in Sentencing

(a) Management Involvement

If one or more members of the substantial authority personnel of the organization participated in, condoned, solicited, or concealed the criminal conduct, or recklessly tolerated conditions or circumstances that created or perpetuated a significant risk that criminal behavior of the same general type or kind would occur or continue, increase by **6** levels. If a corporate manager lacking the authority or responsibility to be classified as a member of the organization's substantial authority personnel, but having supervisory responsibility to detect, prevent, or abate the violation, engaged in the criminal conduct, increase by **1** to **4** levels.

Commentary

Comment: "Substantial authority personnel" is defined in the Commentary to §9A1.2 (Application Instructions - Organizations). The determination of an individual employee's status within the organization should be made on a case-by-case basis. However, for the purposes of environmental sanctions, plant managers and senior environmental compliance personnel will almost invariably be deemed "substantial authority personnel." In determining the extent to apply this factor under this provision, the court should look to the extent, duration and pervasiveness of any managerial involvement and the level of the specific employee involved. The determination of an employee's status within the organization must be done on a case-by-case basis.

(b) Prior Criminal Compliance History

If the organization committed any part of the instant offense less than 5 years after a criminal adjudication of a violation of federal or state environmental law, increase by **2** to **4** levels; however if the prior adjudication is for similar misconduct at the same facility, increase by **5** levels.

Commentary

Comment 1*: A prior criminal adjudication includes an adjudication of an offense which occurs at the same or a different location or facility, and includes convictions under Title 18 where the underlying behavior involves noncompliance with environmental statutes or regulations, e.g., 371, 1001, 1341. "Similar misconduct" includes similar actions or omissions at the same or a different location or facility and without regard to whether such prior misconduct was adjudged a violation of the same statutory provision as the instant offense.*

Comment 2*: In determining the appropriate point in the range for criminal compliance history, when similar misconduct did not occur at the facility that is the subject of the instant offense, the court should consider the following factors: the egregiousness or severity of the prior conduct (e.g., felony or misdemeanor); whether the prior offense(s) occurred at locations under common or different operating management; how recently within the last five years the prior conviction occurred; and whether the prior misconduct occurred under the management of the predecessor company before being acquired by the present organization and the management of the acquired company has been substantially changed.*

Comment 3*: For purposes of subsections (e) and (f), the term organization includes subsidiaries (including subsidiaries where the ownership is less than 100%) where the subsidiary is not "separately managed" by independent management.*

(c) Prior Civil Compliance History

If the number, severity, or pattern of the organization's prior civil or administrative adjudications within the five years prior to the date of the instant conviction, when considered in light of the size, scope and character of the organization and its operations, reveals a disregard by the organization of its environmental regulatory responsibilities, increase by **1** level. If the number, severity, or pattern of the organization's prior civil or administrative adjudications reveals similar misconduct, increase by **2** levels.

Commentary

Comment 1: *In applying this provision, the court should undertake a qualitative assessment of the organization's prior environmental regulatory history under federal or state law over the five years prior to the instant conviction. Because organizations differ materially in the size and scope of their operations, a simple mechanical counting rule for past adjudications has been rejected. For some organizations, because of their scale or constant involvement with environmental regulation, a prior history of civil or administrative adjudications may neither show special culpability nor merit any significant enhancement of the Base Offense Level under this provision. Conversely, a prior serious violation or a pattern of less serious adjudications (even by a very large organization) may show inattention to the organization's regulatory responsibilities or even a willingness to accept fines as a cost of doing business. In either case, this would indicate the need for enhancement of the penalty. An organization's prior history may also indicate types of offenses that it should have taken special care to prevent. The recurrence of similar misconduct can be highly probative evidence of an organization's disregard of its corporate responsibility and its failure to take all necessary steps to prevent continued misconduct.*

***Comment 2**: In applying this provision, the court shall not include judicial orders for which aggravators have been applied under subsection (d). However, an organization may be subject to both the aggravators under subsections (c) and (d) when the conduct involves different judicial orders or injunctions.*

***Comment 3**: A prior administrative or civil adjudication includes an adjudication of an offense which occurs at the same or different location or facility. "Similar misconduct" includes similar actions or omissions at the same or different location or facility and without regard to whether such prior misconduct was adjudged a violation of the same statutory provision as the instant offense.*

(d) Violation of an Order

If the commission of the instant offense violated a judicial order, an administrative order, a condition of probation, a cease and desist order, or occurs following a notice of violation for the same offense conduct, increase by **1** to **3** levels.

Commentary

***Comment**: The violation of an administrative order would normally result in a 1 level increase; the violation of a judicial order would normally result in a 2 level increase; and a violation that evidences contempt by the defendant in violating several prior orders would normally result in a 3 level increase.*

(e) Concealment

If, knowingly, any employee or agent of the organization sought to conceal the violation or to obstruct administrative, civil, or criminal investigation of the violation, by furnishing inaccurate material information or by omitting

material information, increase by **3** levels. However, if the employee or agent is a member of substantial authority personnel, increase by **5** levels.

Commentary

Comment: *This aggravator would not apply to offenses treated under subsection (b) where the predicate offense involves the same concealment conduct.*

This aggravating factor relates to non-privileged information that is either required by law to be furnished or given voluntarily by any employee or agent of an organization to a federal, state or local official or agency. It includes information furnished in either written or oral form. The provision is not to be construed as a disclosure requirement where none otherwise exists; however, if disclosure is either legally required or voluntarily made, knowing efforts to mislead regulatory authorities by furnishing inaccurate material information or omitting material information shall be a basis for increasing the offense level.

(f) Absence of Compliance Program or Other Organized Effort

If, prior to the offense, the organization either had no program or other organized effort to achieve and maintain compliance with environmental requirements, or it had such a program in form only and had substantially failed to implement such a program, increase by **4** levels.

Commentary

Comment 1: *To establish a basis for avoiding aggravation of the Base Offense Level under this provision, the organization must document the existence of some form of program or other organized effort to achieve and maintain compliance. The organization's program or other organized effort need not include all of the factors required to demonstrate a commitment to environmental compliance pursuant to Part D, but its design and implementation must evidence, at a minimum, a genuine organized effort to monitor,*

verify and bring about compliance with environmental requirements. To establish a basis for aggravation of the Base Offense Level under this subsection, the prosecution must carry the burden of demonstrating that the organization substantially failed to implement a program or other organized effort to achieve and maintain compliance.

***Comment 2**: "Environmental requirements" include all legally enforceable environmental compliance obligations imposed by federal, state or local statute, regulation, permit, judicial or administrative decree, order and agreement, or other similar means.*

***Comment 3**: In order to evaluate an organization's environmental compliance program or other organized effort, the court may utilize experts as specified in Comment 4 to Part D.*

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§9C1.2 Mitigating Factors in Sentencing

(a) Commitment to Environmental Compliance

If the organization demonstrates that, prior to the offenses, it had committed the resources and the management processes that were reasonably determined to be sufficient, given its size and the nature of its business, to achieve and maintain compliance with environmental requirements, including detection and deterrence of criminal conduct by its employees or agents, reduce by **3** to **8** levels. If an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the offense, there shall be a rebuttable presumption that the organization had not made a commitment sufficient to achieve and maintain compliance with environmental requirements as described in Part D. In order to grant any mitigation under this provision, the court must conclude that all of the factors described in Part D were substantially satisfied. If this threshold test is met, the degree of mitigation shall be based on the court's evaluation of the organization's commitment to implementing each of these factors. The discussion accompanying each factor should provide a framework

for the court's analysis.

Commentary

***Comment**: "High-level personnel of the organization" is defined in the Commentary to §8A1.2 (Application Instructions - Organizations).*

(b) Cooperation and Self-Reporting

(1) If the organization (a) prior to an imminent threat of disclosure or government investigation, and (b) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation and clearly demonstrated recognition of its responsibility and took all reasonable steps to assess responsibility within the organization and prevent recurrence, reduce by **3** to **6** levels; provided, however, that no credit shall be given for mere compliance with an applicable federal reporting requirement.

(2) If the organization pleaded guilty before the government was put to substantial effort or expense in preparing for trial, fully cooperated with the prosecution, and took all reasonable steps to assess responsibility within the organization and prevent recurrence, reduce by **4** levels.

(3) If the organization pleaded guilty before the prosecution was put to substantial effort or expense in preparing for trial and cooperated with the prosecution in all relevant respects except by failing to disclose the names and identities of responsible individuals known to it (or names and identities that it could have reasonably ascertained), reduce by **2** levels.

Commentary

***Comment**: Before applying a 3 - 6 level mitigation under subsection (b), the court must determine that the organization has fully*

cooperated with the exception of supplying the names of individuals or privileged information. To "fully cooperate," the organization must also provide all pertinent information known to or ascertainable by it that would assist law enforcement personnel in identifying the nature and extent of the offense. See Comment 12 to Application Notes to §8C2.5. If the organization's cooperation meets the standards described in more than one provision of this subsection, apply the provision with the largest offense level reduction.

(c) Remedial Assistance

If the organization takes prompt action to provide assistance (in addition to any legally required restitution or remediation) to the victims of its crime to mitigate their losses, reduce by **2** levels.

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Part D - COMMITMENT TO ENVIRONMENTAL COMPLIANCE

§9D1.1 Factors for Environmental Compliance

In determining whether to grant mitigation under §9C1.2(a) the court must first conclude that each of the following seven factors were substantially satisfied. In evaluating the extent of the organization's commitment, and thereby determining the degree of mitigation, if any, that may be justified, the court should examine, for each of the factors described below, the pervasiveness and consistency with which resources and management processes are applied throughout the organization, and the rigor with which processes and systems are designed and applied.

(a) Minimum Factors Demonstrating a Commitment to Environmental Compliance.

(1) **Line Management Attention to Compliance**. In the day-to-day operation of the organization, line managers, including the executive and operating officers at all levels, direct their attention, through the management mechanisms utilized throughout the organization (e.g. objective setting, progress reports, operating performance reviews, departmental meetings), to measuring, maintaining and improving the organization's compliance with environmental laws and regulation. Line managers routinely review environmental monitoring and auditing reports, direct the resolution of identified compliance issues, and ensure application of the resources and mechanisms necessary to carry out a substantial commitment.

(2) **Integration of Environmental Policies, Standards and Procedures**. The organization has adopted, and communicated to its employees and agents, policies, standards and procedures necessary to achieve environmental compliance, including a requirement that employees report any suspected violation to appropriate officials within the organization, and that a record will be kept by the organization of any such reports. To the maximum extent possible given the nature of its business, the

organization has analyzed and designed the work function (e.g. through standard operating procedures) assigned to its employees and agents so that compliance will be achieved, verified and documented in the course of performing the routine work of the organization.

(3) **Auditing, Monitoring, Reporting and Tracking Systems**. The organization has designed and implemented, with sufficient authority, personnel and other resources, the systems and programs that are necessary for:

(i) frequent auditing (with appropriate independence from line management) and inspection (including random, and when necessary, surprise audits and inspections) of its principal operations and all pollution control facilities to assess, in detail, their compliance with all applicable environmental requirements and the organization's internal policies, standards and procedures, as well as internal investigations and implementation of appropriate, follow-up countermeasures with respect to all significant incidents of non-compliance;

(ii) continuous on-site monitoring, by specifically trained compliance personnel and by other means, of key operations and pollution control facilities that are either subject to significant environmental regulation, or where the nature or history of such operations or facilities suggests a significant potential for non-compliance;

iii) internal reporting (e.g. hotlines) without fear of retribution, of potential non-compliance to those responsible for investigating and correcting such incidents;

(iv) tracking the status of responses to identified compliance issues to enable expeditious, effective and documented resolution of environmental compliance

issues by line management; and

(v) redundant, independent checks on the status of compliance, particularly in those operations, facilities or processes where the organization knows, or has reason to believe, that employees or agents may have, in the past, concealed non-compliance through falsification or other means, and in the those operations, facilities or processes where the organization reasonably believes such potential exists.

(4) **Regulatory Expertise, Training and Evaluation.** The organization has developed and implemented, consistent with the size and nature of its business, systems or programs that are adequate to:

(i) maintain up-to-date, sufficiently detailed understanding of all applicable environmental requirements by those employees and agents whose responsibilities require such knowledge;

(ii) train, evaluate, and document the training and evaluation, of all employees and agents of the organization, both upon entry into a new position in the organization and on a refresher basis, as to the applicable environmental requirements, policies and standards; and (including ethical standards) and procedures necessary to carry out their responsibilities in compliance with those requirements, policies and standards; and

(iii) evaluate employees and agents sufficiently to avoid delegating significant discretionary authority of unsupervised responsibility to persons with a propensity to engage in illegal activities.

(5) **Incentives for Compliance.** The organization has implemented a system of incentives, appropriate to its size and

the nature of its business, to provide rewards (including, as appropriate, financial rewards) and recognition to employees and agents for their contributions to environmental excellence. In designing and implementing sales or production programs, the organization has insured that these programs are not inconsistent with the environmental compliance programs.

(6) **Disciplinary Procedures**. In response to infractions, the organization has consistently and visibly enforced the organization's environmental policies, standards and procedures through appropriate disciplinary mechanisms, including, as appropriate, termination, demotion, suspension, reassignment, retraining, probation, and reporting individuals' conduct to law enforcement authorities.

(7) **Continuing Evaluation and Improvement**. The organization has implemented a process for measuring the status and trends of its effort to achieve environmental excellence, and for making improvements or adjustments, as appropriate, in response to those measures and to any incidents of non-compliance. If appropriate to the size and nature of the organization, this should include a periodic, external evaluation of the organization's overall programmatic compliance effort, as reflected in these factors.

(8) **Additional Innovative Approaches**. An organization that substantially satisfies each of the factors listed in (a)(1) through (7), above, any also endeavor to demonstrate that additional mitigation, up to the allowable __ levels, is justified due to its implementation of additional programs or components that it

can show are effective and important to carrying out its overall commitment to environmental compliance. The organization shall have a very heavy burden of persuading the court that its additional program or component contributes substantially to achieving the fundamental objectives of environmental compliance represented by the pertinent factor(s) identified in Part D.

Commentary

Comment 1*: The organization must carry the burden of demonstrating that it has made the substantial commitment necessary to be entitled to mitigation of the offense level. Under §9C1.2(a) the demonstration should be made primarily by providing documentation, as of the time of the offense, pertaining to the factors described in this commentary.*

Comment 2*: For the definition of "environmental requirements," see Comment 2 to §9C1.1(f).*

Comment 3*: It should be emphasized that in assessing the extent of an organization's commitment, both the size and the nature of the organization are very important. Ordinarily, organizations with larger numbers of operating facilities or pollution control activities and obligations should have more extensive and sophisticated environmental management systems, programs and resources of the nature described in the Part D factors than would be expected of similar, but smaller organizations. Similarly, organizations whose business activities may pose significant risks of harm to human health or the environment from non-compliance with environmental requirements (e.g. manufacture, use or management of hazardous products, materials or wastes) should have more extensive and sophisticated systems, programs and resources than would be expected of comparably sized organizations in less risky types of business.*

Small organizations should demonstrate the same degree of commitment to environmental compliance as larger ones, although generally with less formality and less dedicated resources (if any) than would be expected of larger organizations. While each of the functions and objectives described in Part D should be substantially satisfied by all organizations, the small organization typically will rely on management personnel,

operations personnel or others to assume compliance support responsibilities in addition to their routine duties, and will have less sophisticated systems for establishing compliance procedures, auditing and tracking compliance issues, training employees and carrying out the other programmatic components of their compliance effort. For example, in a very small business, the manager or proprietor, as opposed to independent compliance personnel, might perform routine audits with a simple checklist, train employees through informal staff meetings, and perform compliance monitoring through daily "walk-arounds" or continuous observation while managing the business. In appropriate circumstances, this reliance on existing resources and simple systems can demonstrate the same degree of commitment that, for a much larger organization, would require, for example, a full-time audit department, a training staff, an active compliance monitoring staff, and computer systems for tracking the resolution of compliance issues.

The essential requirement is that each organization must demonstrate, through appropriate documentation, that the resources and management processes it utilized were reasonably determined to be sufficient to perform the basic functions described in Part D. If, prior to the conviction, the organization had a reasonable basis to believe that its commitment of resources and processes would be sufficient, given its size and the nature of its business, then an appropriate mitigation value should be applied even though that commitment proved insufficient to prevent the offense of conviction.

***Comment 4**: In order to evaluate the demonstration of an organization's environmental compliance commitment, the documentation of its program or other organized effort, and the prosecution's challenges thereto, the court may engage such experts as it finds necessary, and the cost of such experts shall be paid by the organization. In its selection of such experts the court shall consider the recommendations of the prosecution and the defense. Any experts engaged by the court shall be given access to all information provided by the organization in support of its demonstration or its documentation, and to such other information as the court deems necessary for the expert to make an effective evaluation, taking into account any claims of privilege by the organization.*

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PART E - FINE CALCULATION AND GENERAL LIMITATION

§9E1.1 Fine Calculation

The organizational fine for each count under this Chapte r is determined by applying the offense level from Parts A through D to the Offense Level Fine Table below.

Offense Level Fine Table[1]

Offense Level	Percentage Max. Stat. Fine
0-6	10
7	10-20
8	15-25
9	20-30
10	25-35
11	30-40
12	30-50
13	35-55
14	40-60
15	45-65
16	50-70
17	55-75
18	60-80
19	65-85
20	70-90
21	75-95
22	80-100

[1]The Advisory Group was divided over the precise percentages of the statutory maximum fine to correspond to particular offense levels.

23	**85-100**
24 or more	**100**

§9E1.2 General Limitations

(a) If the court finds that the total fine calculated under this Chapter would be unjust as a result of excessive repetition of counts relating to a course of offense behavior that is on going or continuous in nature and does not involve independent volitional acts, the court may, in the interest of justice, reduce the fine imposed on such counts, provided that the total fine imposed shall not be less than required under the table below. In so doing, the court should insure that the total fine adequately reflects the seriousness of the offense, the culpability of the defendant and each of the distinct types of criminal violations involved. When the court deems a reduction appropriate under this subsection, the minimum fine to be imposed shall be the sum of the related counts with the applicable fine for each count weighted as follows:

Count	Fraction of Applicable Fine
1	1
2	1/2
3	1/3
...	...
...	...
n	1/n

(b) Except as provided in subsection (d) below, in no event shall a fine determined under this Chapter be reduced as the result of mitigating factors to a level below fifty percent [50%] of the Offense Level calculated in Part B and C;

provided further that in no event shall a fine for a knowing endangerment violation be reduced below fifty percent [50%] of the final fine calculated in 9E1.1." [2]

(c) Except as provided in subsection (d) below, in no event shall a fine determined under this Chapter be less than the economic gain [plus costs directly attributable to the offense]. [3]

(d) The court shall reduce the fine below that otherwise required under §9E1.1 or 9E1.2(b) or (c) to the extent that imposition of such fine would impair the defendant's ability to make restitution to the victim. The court may impose a fine below that otherwise required by this Chapter if the court finds that:

(1) imposition of the required fine would result in the liquidation or cessation of all or a significant part of the business operations of the defendant due to the defendant's inability to pay the fine even with the use of a reasonable installment schedule;

(2) the defendant is not a "Criminal Purpose Organization," as described in §8C1.1 of the Guidelines; and

(3) the defendant has not engaged

[2]The Advisory Group was divided over the precise percentage limitation on mitigation credit for violations other than knowing endangerment violations.

[3]The Advisory Group was divided over whether the bracketed language should be included as part of the general limitations.

in a sustained pattern of serious environmental violations.

The reduction allowed under subsection (d) shall not be more than necessary to avert the threatened liquidation or cessation of business operations.

Commentary

Application Notes:

1. *"Cost," "counts," "economic gain," "material degradation," and "natural resource" are defined in the Commentary to §9A1.2 (Application Instructions - Organizations).*

2. *In determining fines, each percentage figure is multiplied by the statutory maximum fine for that count according to 18 U.S.C. § 3571(c) without giving effect to 18 U.S.C. § 3571(d).*

3. *To assure an adequate deterrent sufficient to deter third parties, the above provision specifies a floor below which the fine cannot be further reduced as the result of mitigating factors.*

Comment 1: *Part B of Chapter Nine does not follow the procedures for grouping multiple counts set forth in Chapter 3D, which in the case of "closely interrelated" offenses bases the sentences on the offense level for the most serious offense in that group. See §3D1.3(a). Applied to environmental offenses, this approach could understate the harm that environmental crimes can cause. This is particularly a concern under §9E1.2(2) which provides that in any event the criminal fine may be no less than the economic gain and environmental costs of a violation. Thus, Part B does not group environmental offenses, and instead requires the court to consider each offense of conviction in determining an aggregate fine. However, because this alternative approach may create the possibility of inappropriate count proliferation to increase the fine, subsection (a) authorizes the court to reduce repetitious or excessive counts to prevent a disproportionate fine calculation. For example, if an organization committed a storage offense by failing to segregate certain toxic materials or wastes that it did not realize required such special storage and this conduct*

continued over a year or more, the Primary Offense Level would be disproportionate to the organization's culpability if each day during this period were charged as a separate offense. Similarly, the negligent discharge of a non-toxic pollutant into a river over a period of several months as the result of a leaky pipe valve (where no responsible corporate manager was aware of this continuing discharge) should not normally be punished as a separate offense for each day during this period. Rather, in each case, the court should reduce the fine in accordance with subsection #(a).

***Comment 2**: No reduction in the fine is authorized under subsection (a) where the conduct involved "independent volitional acts." Thus, it would be inappropriate to reduce the fine for sentencing purposes in a case where an organization intentionally discharged pollutants into a river over a sustained period (for example, as the result of knowingly using a hidden bypass valve). The failure to rectify the problem, once known to the organization, should be viewed as committing "independent" volitional acts. In addition, if the organization has been clearly negligent in failing to detect the continuing discharge, this factor should also be considered by the court in determing whether, and to what extent, it should reduce the fine.*

***Comment 3**: The authority conferred by subsection (a) should be used sparingly. Any reduction under subsection (a) should not be below the level deemed by the court as necessary to adequately reflect the seriousness of the total offense conduct and each of the various types of misbehavior.*

*** * * ***

PART F - PROBATION - ORGANIZATIONS

§9F1.1 Imposition of Probation for Environmental Crimes - Organizations.

(a) The court shall order a term of probation if the court finds that:

(1) such sentence is advisable to secure payment of restitution (§8B1.1), enforce a remedial order (§8B1.2), or ensure completion of community service (§8B1.3); or

(2) the organization is sentenced to pay a monetary penalty (*e.g.*, restitution, fine, or special assessment), the penalty is not paid in full at the time of sentencing, and restrictions are necessary to safeguard the organization's ability to make payments; or

(3) at the time of sentencing, the organization does not have an effective program to prevent and detect violations of law; or

(4) such sentence is advisable to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; or

(5) the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal, (civil, or administrative adjudication) [4] under federal or state law, and any part of the misconduct underlying the instant offense occurred after that adjudication; or

(6) any officer, manager, or supervisor within the a organization, or within the unit of the organization within which the instant offense was committed (a) participated in, (b) ordered, directed, or controlled the conduct

[4]The Advisory Group was divided over the mandatory use of probation for organizations with prior civil or administrative adjudications.

of others in the commission of, or (c) consented to the misconduct underlying th e instant offense and that individual withi n five years prior to sentencing engaged i n similar misconduct, as determined by a prio r criminal, civil, or administrativ e adjudication under federal or state law, an d any part of the misconduct underlying th e instant offense occurred after tha t adjudication; or

(7) the sentence imposed upon the organizatio n does not include a fine; or

(8) such sentence is advisable to accomplish on e or more of the purposes of sentencing se t forth in 18 U.S.C. § 3553(a)(2).

§9F1.2 Term of Probation - Organizations

When a sentence of probation is imposed:

(1) In the case of a felony, the term of probatio n shall be at least one year but not more than fiv e years.

(2) In any other case, the term of probation shall b e not more than five years.

Commentary

***Application Notes*:**

Within the limits set by the guidelines, the term of probation should be sufficient, but not more than necessary, to accomplish the court's specific objectives in imposing the term of probation.

§9F1.3 Conditions of Probation - Organizations

(a) Pursuant to 18 U.S.C. § 3563(a) (1), any sentence of probation shall include the condition that the organization shall not commit another federal, state, or local crime during the term of probation.

(b) Pursuant to 18 U.S.C. § 3563(a) (2), if a sentence of probation is imposed for a felony, the court shall impose as a condition of probation at least one of the following: a fine, restitution, or community service, unless the court finds on the record that extraordinary circumstances exist that would make such condition plainly unreasonable, in which even the court shall impose one or more other conditions set forth in 18 U.S.C. § 3563(b).

(c) The court may impose other conditions that (1) are reasonably related to the nature and circumstances of the offense or the history and characteristics of the organization; and (2) involve only such deprivations of liberty or property as are necessary to effect the purposes of sentencing.

(d) If probation is ordered under §9F1.1(a)(3) or (4), the court shall impose the conditions set forth in this paragraph. If probation is ordered under §9F1.1(a)(5) or (6), the court shall impose any of the following conditions it deems necessary in order to achieve and maintain compliance with applicable environmental law. The determination of necessity shall be made in writing after the parties have had the opportunity to present relevant information to the court.

(1) The organization shall develop and submit to the Court a program to identify and correct any conditions that gave rise to the conviction and to prevent and detect any future violations,

including (i) an effective program to detect and prevent future violations of law and (ii) a schedule of implementation of any such program.

(2) Any such proposed program shall be made available for review by the government.

(3) If the organization fails to submit a satisfactory program, the court shall engage such experts as it finds necessary to prepare such a program, and the cost of such experts shall be paid by the organization. Any experts engaged by the court shall be given access to such information in the possession of the organization as the court deems necessary to the effective accomplishment of the experts' task.

(4) No program shall be approved that is less stringent than any applicable statutory or regulatory requirement.

(5) Upon approval by the court of a program to identify and correct any conditions that gave rise to the conviction and to prevent and detect violations of law, the organization shall notify its employees as the court deems appropriate and shall notify shareholders and the public of its criminal behavior and of the terms of the approved program. Such notice shall be in a form prescribed by the court.

(6) The organization shall make periodic reports to the court, to the probation officer, or to any person or entity designated by the court, at intervals and in a form specified by the court, regarding the organization's progress in implementing the approved program. Among other things, such reports shall disclose any additional criminal prosecution, civil litigation involving its environmental responsibilities or environmental administration proceedings commenced against the organization or any investigation or formal inquiry by governmental authorities relating to federal, state or local environmental health or safety matters of which the organization learned since its last report. Copies of any such periodic reports shall be furnished to the government.

(7) In order to monitor the organization's compliance with the approved program, the court may order the organization to submit to such examination of its books and records, inspections of its facilities, testing and monitoring of its operation and regular or unannounced examinations of its employees as the court deems necessary. Compensation to and costs of any experts engaged by the court shall be paid by the organization. Reports on any such monitoring activities shall be filed with the court and copies shall be furnished to the government and the organization.

(e) If probation is imposed under §9F1.1(a), the following conditions may be appropriate to the extent they appear necessary to safeguard the organization's ability to pay any deferred portion of an order of restitution, fine, or assessment.

(1) The organization shall make periodic submissions to the court or probation officer, at intervals specified by the court, reporting on the organization's financial condition and results of business operations, and accounting for the disposition of all funds received.

(2) The organization shall submit to: (a) a reasonable number of regular or unannounced examination of its financial or appropriate corporate books and records at appropriate business premises by the probation officer or experts engaged by the court; and (b) interrogation of knowledgeable individuals within the organization. Compensation to, and costs of, any experts engaged by the court shall be paid by the organization.

(3) The organization shall be required to notify the court or probation officer immediately upon learning of (a) any material adverse change in its business or financial condition or prospects, or (b) the commencement of any bankruptcy proceeding, major civil litigation, criminal prosecution, or administrative proceeding against the organization, or any investigation or formal inquiry by governmental authorities regarding the organization.

(4) The organization shall be required to make periodic payments, as specified by the court, in

the following priority: (1) restituti on; (2) fine; and (3) any other monetary sanction.

§9F1.4 Additional Conditions of Probation (Policy Statement)

The court may order the organization, at its expense and i n the format and media specified by the court, to publicize the nature of the offe nse committed, the fact of conviction, the nature of the puni shment imposed, and the steps that will be taken to prevent the recurrence of similar offenses.

Commentary

Application Notes:

1. *In fashioning the conditions of probation, the court shall place particular emphasis on provisions requiring the organization to identify and correct the violations.*

2. *When probation is imposed under §9F1.1(a)(5) or (6), it may not be necessary to include certain provisions of §9F1.3. For example, certain provisions under §9F1.3 would be unnecessary if the organization has a satisfactory compliance program in place, the offense is attributable to the actions of a particular employee, and that employee has been fired or severely disciplined.*

3. *In engaging any expert under §9F1.3 (d)(3) or (7), the court shall submit to the organization and the government the identity and qualifications of any such expert who may be considered.*

4. *In order to assess the efficacy of a program submitted by the organization under §9F1.3(d)(1) or to permit an expert to prepare such a program under §9F1.3(d)(1), the court shall order access to such material possessed by the organization as is necessary to a comprehensive evaluation of the proposed program.*

5. *In connection with the organization's submission of a report to the government regarding the existence and nature of any investigations or formal inquiries by governmental authorities, it may be appropriate for the organization to seek, and the court to grant, a protective order that preserves the confidentiality of such information.*

§9F1.5 Violations of Conditions of Probation - Organizations (Policy Statement)

Upon a finding of a violation of a condition of probation, the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization.

Commentary

Application Note:

1. In the event of repeated, serious violations of conditions of probation, the appointment of a master or trustee may be appropriate to ensure compliance with court orders.

* * * *

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