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https://doi.org/10.15779/Z388T6C

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Deterring Environmental Crime Through Flexible Sentencing:
A Proposal for the New Organizational Environmental Sentencing Guidelines

Jason M. Lemkin†

The United States Sentencing Commission is currently considering guidelines for criminal sentences in environmental crimes committed by organizations (such as corporations). Proposed guidelines submitted in 1993 by the Commission's Advisory Group on Environmental Sanctions would subject organizations convicted of environmental crimes to penalties harsher than those imposed for other organizational crimes, and would strictly limit the extent to which those penalties could be reduced for organizations with environmental compliance programs in place. This Comment argues that the Advisory Group's proposals are excessively punitive, going beyond the level of severity at which deterrence would be optimally efficient. This Comment therefore advocates for organizational environmental sentencing that provide for wider penalty ranges and afford greater opportunity for convicted organizations to mitigate their fines by maintaining strong compliance programs.

INTRODUCTION

Organizational environmental crimes—environmental crimes committed by corporations—merit serious attention. As the Exxon Valdez tragedy illustrates,1 environmental crimes are perhaps the most repug-

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nant of all white-collar crimes. Companies of all sizes continue to violate environmental laws: a 1989 General Accounting Office report found that at least forty-one percent of industries that discharge toxic wastes into public sewer systems violated their discharge requirements. Another report surveying four Environmental Protection Agency (EPA) regions found that regulated industries failed to comply with laws and regulations designed to prevent inland oil spills up to ninety-four percent of the time.

Corporations must be deterred from violating environmental laws. Sentencing guidelines could play a major role in deterring noncompliance with these laws by establishing consistently severe punishments for environmental crimes. Congress has approved guidelines for organizational crime in general, and in the near future the United States Sentencing Commission (the "Commission") will adopt and submit sentencing guidelines for organizational environmental crimes. In the area of non-environmental organizational crimes, guidelines have in fact led many businesses to revisit, or even consider for the first time, their policies on white-collar law violations.

The debate over what these environmental crime-sentencing guidelines should be has been distorted: rather than focusing on preventing environmental crime through deterrence, many academics, as well as the Commission's Advisory Group on Environmental Sanctions (the


4. Id. (citing GENERAL ACCOUNTING OFFICE, INLAND OIL SPILLS, STRONGER REGULATION AND ENFORCEMENT NEEDED TO AVOID FUTURE INCIDENTS (GAO/RCED-89-65) (1989)).

5. U.S. SENTENCING COMMISSION, SUPPLEMENTARY REPORT ON SENTENCING GUIDELINES FOR ORGANIZATIONS [Aug. 30, 1991] [hereinafter "Organizational Guidelines"]. These guidelines specifically excluded organizational environmental crimes from their scope. See infra note 48 and accompanying text.

6. Hereinafter "Environmental Guidelines." As of July 1994, the Commission considered these guidelines a "priority," development of which was to proceed "deliberately" upon the appointment of a full slate of Commissioners. Notice of Priority Areas for Commission Research and Amendment Study; Request for Public Comment, 59 Fed. Reg. 35780, 35781-82 (United States Sentencing Commission July 13, 1994).

7. Nagel & Swenson, supra note 2, at 209.
"Advisory Group"), seem to have targeted retribution for harm to the environment as their objective.

The Advisory Group expressed its retributive focus in 1993 by proposing sentencing guidelines specifically tailored for organizational environmental crime that are stricter than the sentencing guidelines for organizational crime in general. This Comment argues that the Commission's focus is misplaced, and that the goal of any sentencing scheme should be deterrence, not retribution. It will further argue that the rigid provisions of the Commission's Proposed Guidelines cannot achieve effective deterrence of organizational environmental crime. This Comment proposes, in place of the current Proposed Guidelines, flexible guidelines that will allow courts to set penalties to achieve the required level of deterrence in each case.

On the whole, this Comment maintains that organizational environmental crime should be treated like other forms of white-collar crime. Of course, corporate defendants should be punished as the law requires. However, they should not be "overdeterred" by a retributive desire to lash out at environmental polluters who are viewed by some as the "Mafia" of the economic world.

On the other hand, due to the variety of types and perpetrators of environmental crime, the lack of sentencing precedents for environmental crimes, the substantial penalties already existing under federal environmental statutes, and the fact that scienter and culpability are significant in the environmental realm, the new Environmental Guidelines should take a flexible approach toward fine calculation. They should also allow greater judicial discretion in the determination of the size of the criminal fine and the standards for mitigation.

The Proposed Guidelines, if they had been enacted, would have done just the opposite. By imposing excessively rigid and inflexible requirements on compliance programs, the Proposed Guidelines would have created unpredictability and discouraged compliance programs. By combining excessively harsh fines with extremely limited mitigation opportunities, the Proposed Guidelines also would have discouraged good-faith efforts to avoid environmental crimes. They would have imposed fines for environmental crimes higher than those imposed for most other federal crimes, and would in many cases have provided little fine mitigation for crimes committed without criminal intent. The Proposed Guidelines also would have capped aggregate fine mitigation at

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fifty-percent of the calculated fine level regardless of the circumstances,\textsuperscript{10} which would dramatically reduce the incentive for companies to invest in effective compliance programs.

A new Sentencing Commission is now in place. Therefore, it is time to revisit the issue of organizational environmental sentencing guidelines with a fuller perspective. The Commission is currently considering adopting Environmental Guidelines that incorporate many of the flaws of the earlier Proposed Guidelines. This Comment will argue that the Proposed Guidelines' approach should be substantially modified and replaced with more flexible regulations that will encourage compliance and achieve effective environmental protection.

Part I of this Comment describes what environmental crime is. Part II details the history of the Federal Sentencing Guidelines and the political battles surrounding the Proposed Guidelines. This history will aid understanding of the current state of sentencing guidelines and will demonstrate the strong likelihood that Environmental Guidelines will be adopted in some form soon. Part III surveys the provisions of the Proposed Guidelines that appear likely to resurface in the final Environmental Guidelines. Part IV critiques these provisions. Part V proposes a more flexible set of guidelines for organizational environmental crimes based on an economic deterrence model. Appendix A provides a practical look at how corporations should prepare for the adoption of the Environmental Guidelines. Appendix B examines how environmental crimes would be sentenced under both the Proposed Guidelines and the Organizational Guidelines.

\section{Environmental Crime as Codified in Federal Statutes}

Environmental crime is generally defined by seven federal environmental statutes.\textsuperscript{11} Each of the following statutes contains provisions for criminal sanctions: the Clean Water Act (CWA)\textsuperscript{12} safeguards surface and groundwater quality; the Clean Air Act (CAA)\textsuperscript{13} regulates airborne emissions; the Resources Conservation and Recovery Act (RCRA)\textsuperscript{14} pe-

\begin{itemize}
\item \textsuperscript{10} Proposed Guidelines, \textit{supra} note 8, § 9E1.2(b), at 1384.
\item \textsuperscript{12} 33 U.S.C. §§ 1251-1387 (1994).
\end{itemize}
nalizes “persons who improperly transport, store or treat hazardous wastes”; the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund) requires “the cleanup of hazardous substances at contaminated sites”; the Toxic Substances Control Act (TSCA) “addresses the manufacture, processing and distribution or disposal of chemicals that pose an unreasonable risk of injury to the public or environment”; and the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) regulates “the manufacture, registration, transportation, sale and use of toxic pesticides.”

In addition to the above statutes, there are criminal penalties in the National Forest Conservation Act; the Safe Drinking Water Act (SDWA); the Marine Mammal Protection Act (MMPA); the Rivers and Harbors Appropriations Act (the “Refuse Act”); the Hazardous Materials Transportation Act; the Marine Protection, Research, and Sanctuaries Act (the “Ocean Dumping Act” or MPRSA); the Endangered Species Act (ESA); the Outer Continental Shelf Lands Act (OCSLA); the Act to Prevent Pollution from Ships (APPS); the Deepwater Ports Act; and the Migratory Bird Treaty Act (MBTA).

The category of “environmental crime” therefore encompasses a wide and disparate group of crimes committed in differing forums, industries, and geographical regions and under many different circum-

15. Heyat et al., supra note 11, at 476.
17. Heyat et al., supra note 11, at 476.
19. Heyat et al., supra note 11, at 476.
21. Heyat et al., supra note 11, at 476.
23. 42 U.S.C. §§ 300h-1(b), 300i-l(a),(b) (1988).
26. 49 U.S.C. § 1809(b) (1988) (repealed July 5, 1994). Even though the Act was repealed in 1994, it is likely that companies will be prosecuted under its provisions for years to come, given the lengthy gestation period of many environmental crimes.
30. 33 U.S.C. § 1908(a) (1994). In a recent case, a district court ordered Regency Cruises to pay a $250,000 APPS criminal fine “for dumping plastic garbage into the Gulf of Mexico.” Cheryl Hogue, Florida: Regency Cruise Line Ordered to Pay $250,000 Dumping Fine, 3/17/95 STATE ENV'T DAILY (BNA) d7, available in WESTLAW, BNA-SED database (citing United States v. Regency Cruises, Inc., No. 94-245-CR-T-21(c) (M.D. Fla. Mar. 8, 1995)).
stances. For a fuller treatment of environmental crime, see Appendix B of this Comment.

II
THE HISTORY OF SENTENCING GUIDELINES
FOR ORGANIZATIONAL ENVIRONMENTAL CRIMES

In 1984 Congress created the Federal Sentencing Commission, a permanent body of seven individuals authorized to promulgate sentencing guidelines. Congress created the Commission to address the unpredictability and excessive judicial discretion Congress saw plaguing federal sentencing. As President Clinton recently put it, "the federal government adopted these sentencing guidelines to [address] the feeling a lot of Americans had that the sentence a person got and the time a person did was totally arbitrary, that it varied so dramatically from judge to judge and state to state that it was hard to believe justice was ever being done."

To make its guidelines law, the Sentencing Commission must first approve a draft of its proposed guidelines and forward the draft to Congress. Congress then has six months to review the Commission's proposal. Absent any action by Congress, the proposed guidelines take effect automatically once the review period expires.

33. The Sentencing Commission is an independent agency of the federal judiciary charged with developing guidelines for sentencing individuals and organizations convicted of federal crimes. 28 U.S.C. § 994 (1994).

34. 28 U.S.C. § 991 (1994); Jed S. Rakoff, An Overview of the Organizational Sentencing Guidelines, in CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION §§ 1.01, at 1-1, 1.03[1], at 1-10 (Jed S. Rakoff et al. eds., 1993). The Sentencing Commission was created as part of the Sentencing Reform Act, 18 U.S.C. §§ 3551-3742 (1994). At least three of the commissioners must be federal judges. 28 U.S.C. § 991(a) (1994). There is no sunset provision limiting the Commission's tenure. Id. Commissioners are subject to removal only for good cause. Id.

35. Rakoff, supra note 34, § 1.03[2], at 1-10.

36. President Bill Clinton, KTVQ Town Hall Meeting, reprinted in U.S. Newswire, Transcript of Remarks by President Clinton to June 1 Town Hall Meeting in Montana (June 2, 1995), available in LEXIS, NEWS Library, CURNWS File. Before the adoption of the Guidelines, "[t]he exercise of [judicial discretion] was largely unreviewable, since appeals were permitted in only limited circumstances and were rarely successful when taken." Rakoff, supra note 34, § 1.03[2], at 1-10.

The evidence is still unclear regarding the success or failure of the guidelines at reducing sentencing disparity. Two reports on the guidelines for individuals, one by the GAO and the other by the Sentencing Commission, yielded inconclusive results that indicate only that disparity may have been reduced under the guidelines. See UNITED STATES GENERAL ACCOUNTING OFFICE, SENTENCING GUIDELINES: CENTRAL QUESTIONS REMAIN UNANSWERED (REPORT TO CONGRESSIONAL COMMITTEES) 10-13, 40-61 (Aug. 1992); UNITED STATES SENTENCING COMMISSION, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING (EXECUTIVE SUMMARY) 31-54 (Dec. 1991). But see Jose A. Cabranes, A Failed Utopian Experiment, NAT'L L.J., July 27, 1992, at 17 (criticizing the Guidelines as a failed Utopian experiment). No comparable studies have been done with regard to the more recent Organizational Guidelines.

In 1987, the Commission promulgated its first set of sentencing guidelines, applicable only to individual defendants. These guidelines increased the prison time served by federal defendants.

After years of debate, the Sentencing Commission forwarded the sentencing guidelines for organizations to Congress in November 1991. To obtain feedback, the Commission published and requested comment on three major drafts of the Organizational Guidelines before adopting them in their current form. The Commission admitted that, among its members, "there was no consensus as to a single theory of organizational sentencing." One shared goal, however, was punitive deterrence.

The Organizational Guidelines in many instances overrode the more limited penalties imposed by pre-existing federal organizational criminal laws. They left judges with substantially more sentencing discretion than the guidelines for individuals did, but they also greatly increased the potential sanctions for corporate crimes. Under the Organizational Guidelines, a judge may impose penalties such as fines in the tens of millions of dollars, mandatory restitution and corporate probation, and even a sentence of "death"—that is, fines high enough to divest the company of all assets.

The Organizational Guidelines’ four guiding principles are to require a corporation to make restitution for the damage caused by its

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39. Id.
40. In most civil law countries, organizational sentencing is not an issue because corporations are legally incapable of violating criminal laws. Leonard Orland, Corporate Punishment by the U.S. Sentencing Commission, 4 Fed. Sent. Rep. 50, 50 (1991). By contrast, corporate criminal liability has been the rule in the U.S. since at least 1909, when the Supreme Court declared that “[w]e see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction...shall be held punishable...” N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 495 (1909). In New York Central, the Court established the applicability of the respondeat superior doctrine to criminal liability. Id. at 494. In theory, a court can hold an organization criminally liable whenever its employee or agent commits a crime in the course of performing her or his job. Corporate crime is “crime undertaken in corporate business activities.” Richard S. Gruner, Corporate Crime and Sentencing § 1.2, at 4 (1994).
41. Organizational Guidelines, supra note 5, at 3. The Organizational Guidelines apply to the sentencing of any organization convicted of a felony or a class A misdemeanor (i.e., one for which the authorized term of imprisonment is greater than six months). United States Sentencing Commission, Federal Sentencing Guidelines Manual § 8A1.1, at 338 (1994-95 ed.) [hereinafter "U.S.S.G."]
42. Rakoff, supra note 34, § 1.04, at 1-14 (citing Organizational Guidelines, supra note 5, at 17).
43. U.S.S.G., supra note 41, § 1A, at 1-10; Rakoff, supra note 38, at 3.
44. Rakoff, supra note 38, at 3.
45. Rakoff, supra note 34, § 1.04, at 1-14.
46. U.S.S.G., supra note 41, § 8C2.4, at 348; see also infra notes 179-229 and accompanying text.
criminal activity, to impose a "corporate death sentence" for criminal organizations, to levy fines based upon the seriousness of the crime and the culpability of the organization, and to deter corporate recidivism.47

Because of perceived differences between environmental crimes and all other crimes, and because environmental crime is politically controversial, the Sentencing Commission excluded environmental crimes from the scope of the Organizational Guidelines.48 Without sentencing guidelines for organizational environmental crimes, federal courts currently impose sentences for such crimes under the broad discretion of the Sentencing Reform Act of 1984.49

The Commission created an eighteen-member advisory group made up of attorneys from private practice, corporate legal departments, environmental organizations, the EPA, and the Department of Justice.
(DOJ) to prepare proposed guidelines for environmental crimes.50 The Advisory Group further limited the scope of its work by dropping from consideration environmental crimes committed by individuals.51 Thus, the Proposed Guidelines pertain only to organizations.

In March of 1993, the Advisory Group published an initial set of proposed sentencing guidelines. The March guidelines were widely criticized, especially by businesses and corporate attorneys, mostly because of their complexity.52 At a public hearing regarding the March draft, many commentators suggested simply expanding the scope of the general Organizational Guidelines to include environmental crimes.53 After receiving these and other comments, the Advisory Group revised its proposal and forwarded its final draft to the Commission on November 16, 1993.54 The Advisory Group’s vote was officially reported to be seventeen in favor of the revised scheme with one abstention.55 Al-

50. The Advisory Group was composed of members of the defense bar, corporations, enforcement agencies, academia, and public interest groups. The membership consisted of Frederick R. Anderson, Counsel at Cadwalder, Wickersham & Taft; Stephen M. Axinn, Partner at Skadden, Arps, Slate, Meagher & Flom; Jim Banks, Vice President and General Counsel of Chemical Waste Management, Inc.; Jane Barrett, Assistant U.S. Attorney for the District of Maryland; Professor John C. Coffee, Jr. of Columbia University School of Law; Douglas J. Foy, Executive Director of the Conservation Law Foundation; Commissioner Michael S. Gelacak of the U.S. Sentencing Commission; Lloyd Guerci, Partner at Mayer, Brown & Platt; David Hawkins, Staff Attorney at the Natural Resources Defense Council; Meredith Hemphill, Deputy General Counsel of Bethlehem Steel; Andrew E. Lauterback, Regional Counsel and Criminal Enforcement Counsel at EPA; Ray Mushal, Senior Counsel in Environmental Crimes Section of the U.S. Department of Justice; Commissioner Illene H. Nagel of the U.S. Sentencing Commission; Judson W. Starr, Partner at Venable, Baetjer, Howard & Civiletti; John T. Subek, Group Vice President and General Counsel of Rohm & Hass Company; Professor Jonathan Turley, Director of the Environmental Crimes Project at The George Washington University; Larry Wallace, Partner at Hazel & Thomas; and J. Bryan Whitworth, Vice President, Corporate Relations & Services, Phillips Petroleum Company. Meredith Hemphill replaced original advisory group member Curtis H. Barnette, Chairman of Bethlehem Steel. Proposed Guidelines, supra note 8, at 1387.

51. Low Marks, supra note 48, at 5.


53. Lloyd S. Guerci & Meredith Hemphill, Jr., Report of Advisory Work Group on Sentencing Guidelines for Organizations Convicted of Environmental Crimes: Dissenting Views 2 (December 8, 1993). Note that despite the supposed public nature of these meetings, the Commission and the Advisory Group tried "to keep outside experts at arm’s length. No transcripts [were] made of these public meetings and audio tapes [were] destroyed." David Yellen, Beyond Guidelines: The Commission as Sentencing Clearinghouse, 6 Fed. Sent. Rep. 13, 14 (1993). On October 25, 1994, Judge Charles Richey of the U.S. District Court for the District of Columbia ruled that documents from the meetings of the Advisory Group are not part of the public record and do not have to be publicly disclosed under the common-law right of access to public records. Eva M. Rodriguez, Federal Court Watch: FDA Caught in Legal Crossfire, LEGAL TIMES, Nov. 28, 1994, at 6.

54. Guerci & Hemphill, supra note 53, at 1-2 (noting that "most of the deficiencies in the [March draft] were not corrected.").

55. New Draft, supra note 52, at 1331.
though the Advisory Group announced that all members of the panel backed these Proposed Guidelines,\textsuperscript{56} two members of the Advisory Group published a dissent in January 1994.\textsuperscript{57}

In April 1994, the Commission considered whether to recommend that Congress amend the Sentencing Guidelines to include its Advisory Group’s Proposed Guidelines.\textsuperscript{58} At that time four of the Commission’s seven seats were unfilled, which limited the Commission’s ability to adopt with credibility any new guidelines.\textsuperscript{59} The Commission elected not to forward the Proposed Guidelines to Congress.\textsuperscript{60}

President Clinton inherited two of the Commission’s vacancies that stretched back to November 1991.\textsuperscript{61} Two more vacancies were created when two Advisory Group members’ terms expired in November of 1993.\textsuperscript{62} These two members continued to serve through 1994, although they lacked any explicit legal authority to do so.\textsuperscript{63} Skirmishes and politicking among the Clinton administration and Senators Biden, Hatch, Dole, and Kennedy held up the Senate confirmations of the four new members of the Commission until October of 1994.\textsuperscript{64} These four appointments marked the first time a Democratic president had the opportunity to appoint Commissioners. President Clinton’s ability to appoint partisan appointees was substantially restricted, however, for the


\textsuperscript{57} See GUERCi & HEMPHELL, supra note 53.

\textsuperscript{58} Woodrow, supra note 49, at 325. The Commission has the authority to submit guideline amendments each year to Congress between the beginning of a regular Congressional session and May 1. Such amendments automatically take effect 180 days after a submission unless a law is enacted to the contrary. 28 U.S.C. § 994(p) (1994).


\textsuperscript{60} Woodrow, supra note 49, at 325. The Commission postponed its decision because it felt that environmental crimes might be unique for four reasons: (1) the potential difficulty in measuring losses; (2) the scienter issue; (3) the fact that environmental violations are subject to such a large number of overlapping enforcement schemes and criminal sanctions; and (4) division of opinion over how to balance concerns for the environment with concerns for corporate effectiveness. Nagel & Swenson, supra note 2, at 256-58.

\textsuperscript{61} Bendavid, supra note 59, at 13.

\textsuperscript{62} Id.

\textsuperscript{63} Id.

\textsuperscript{64} Executive Confirmations, Court Decisions/Agency Rulings, 63 U.S.L.W. 2244 (1994) (confirming Conaboy, Budd, Goldsmith and Tacha); Judge Conaboy Chairs United States Sentencing Commission, Three New Commissioners Named, 7 FED. SENT. REP. 107 (1994) [hereinafter Judge Conaboy]; Naftali Bendavid, Charting a New Sentencing Course, N.J. LJ., Sept. 26, 1994, at 7. The new commissioners join the continuing members, Judge Julie E. Carnes of Atlanta, Commissioner Michael S. Gelacek of Centreville, Virginia, and Judge A. David Mazzone of Boston. Conaboy serves as U.S. District Judge for the Middle District of Pennsylvania; Budd is the ex-U.S. Attorney for the District of Massachusetts and a former Associate Attorney General of the United States; Goldsmith is a Professor of Law at Brigham Young University; and Tacha was previously chair of the Judicial Conference Committee on the Judicial Branch. Judge Conaboy, supra, at 107.
DETERRING ENVIRONMENTAL CRIME

law grants the minority party at least three of the seven Commission seats. The new Sentencing Commission has the opportunity to craft carefully the Federal Sentencing Guidelines for Organizational Environmental Crimes. In July of 1994, the Commission considered the Environmental Guidelines a "priority," development of which was to proceed "deliberately" pending the appointment of a full slate of Commissioners. Nevertheless, the new Commission did not list the Environmental Guidelines among its top priorities in October 1994.

Although the Commission chose not to adopt the Proposed Guidelines in 1994, Commissioners continue to refer to them in their discussions of proposals for new Environmental Guidelines. Some form of Environmental Guidelines will very likely be adopted in November of 1996 or in November of 1997, and the Commission will publish a draft of the Environmental Guidelines in advance of those dates to allow for public comment.

In theory, the Commission could adopt a set of Environmental Guidelines radically different from both the Proposed Guidelines and the Organizational Guidelines. It is more likely, however, that the Sentencing Commission will adopt Environmental Guidelines based on a modified version of the Organizational Guidelines for nonenvironmental crimes set out in Chapter Eight of the federal sentencing guidelines. At least two of the Commissioners want to craft the Environmental Guidelines out of Chapter Eight.

65. No more than four members of the Commission "shall be members of the same political party." 28 U.S.C. § 991(a) (1994); see also Barbara Rabinovitz, A Presidential Appointment to the U.S. Sentencing Commission Keeps This Private Practitioner Active in the Public Area, MASS. L.A.W. WKLY., Oct. 24, 1994, at 33.


67. The Commission focused at that time on examination and implementation of the Federal Omnibus Crime Bill of 1994, evaluation of four special reports, include ones addressing fraud against the elderly and sex offenses, and crimes committed by HIV-positive offenders. Judge Conaboy, supra note 64, at 107.


69. Telephone Interview with Jane Barrett, Assistant U.S. Attorney for the District of Maryland and a member of the Advisory Group (July 7, 1995). All opinions expressed by Ms. Barrett are her own and do not represent the opinions of the United States Attorney's office, the Department of Justice, or the Sentencing Commission.

70. Id.
judges already know how to work with Chapter Eight, modifying the Organizational Guidelines would be the best approach. The U.S. Department of Justice is also preparing its own proposed guidelines based on Chapter Eight. Ultimately, the modifications to the Organizational Guidelines will probably include the addition of strict compliance criteria and the crafting of a new fine table. At least one Commissioner wants the Environmental Guidelines to include a compliance program better suited to environmental crime than the program already present in the Organizational Guidelines. The debates and battles will likely center over just how Chapter Eight should be modified for Environmental Crimes.

Although the Commission has not rejected the Proposed Guidelines, it is extremely unlikely to adopt the Proposed Guidelines in their current form, since neither prosecutors nor corporate counsels support them. Prosecutors see them as too cumbersome and complicated, and industry sees them as too favorable to prosecutors. However, the Commission is likely to adopt Environmental Guidelines containing key provisions very similar to some of those set out in the Proposed Guidelines. The Environmental Guidelines are likely to retain three particular features of the Proposed Guidelines: a strict, detailed compliance program, a fine table that radically increases the fines for environmental crimes, and a “collar” provision that caps mitigation credit.

This Comment takes a two-pronged approach in evaluating the Environmental Guidelines. First, it critiques the three features of the Proposed Guidelines that will probably resurface in similar form in the final Environmental Guidelines. Second, it sets out discrete policy proposals detailing how and where the existing Organizational Guidelines should be modified to take into account the unique characteristics and heterogeneity of environmental crimes. This Comment’s proposed modifications to Chapter Eight move away from the Proposed Guidelines’ focus on retribution and overdeterrence and emphasize instead rational economic deterrence.

71. Id.
72. Id.
73. Id.
74. Id.
75. Id.
76. Id.
77. Id.
78. See Coffee, supra note 48, at 10; see also infra note 97 and accompanying text.
III
AN OUTLINE OF THE PROPOSED GUIDELINES

The Proposed Guidelines, which if adopted would become the new Chapter Nine of the federal sentencing guidelines, consist of six sections. The first section, Part A, defines key terms and the chapter's applicability to organizations for environmental criminal violations. The Proposed Guidelines define criminal "counts" as "any punishable instances of violation, including days of violation." Thus, each day of a violation increases the criminal fine imposed upon an organization. "Organization" is defined broadly to include corporations, partnerships, unions, trusts, pension funds, governments, and non-profit organizations.

Part B is used to determine the initial size of the criminal fine. Section 9B1.1, which mirrors the so-called "Death Penalty" in section 8C1.1 of the general Organizational Guidelines, provides that a court shall set a fine at an amount "sufficient to divest the organization of all its net assets" if the organization operated primarily for a criminal purpose or primarily by criminal means. Such a fine may not be greater than the statutory maximum, however.

Part B then sets out how the Primary Offense Level of one to twenty-four (or higher) is calculated for organizations other than "criminal purpose organizations." The fine in a particular case is based on a sliding scale percentage of the maximum statutory fine. The higher the offense level, the greater the percentage. An offense level of fourteen, for example, leads to a fine that is forty to sixty percent of the statutory maximum; an offense level of twenty-four or more...
demands the imposition of 100% of the maximum statutory fine.\textsuperscript{86} The Proposed Guidelines set out base offense levels as follows:

<table>
<thead>
<tr>
<th>Base Offense Level</th>
<th>Environmental Crime Conviction</th>
</tr>
</thead>
<tbody>
<tr>
<td>24</td>
<td>knowing endangerment from mishandling toxic or hazardous substances</td>
</tr>
<tr>
<td>18</td>
<td>tampering with a public water system</td>
</tr>
<tr>
<td>8</td>
<td>recordkeeping, tampering, or falsification violations with respect to mishandling hazardous or toxic substances</td>
</tr>
<tr>
<td>6</td>
<td>recordkeeping, tampering, or falsification violations with respect to mishandling other environmental pollutants</td>
</tr>
<tr>
<td>5</td>
<td>simple recordkeeping and reporting violations</td>
</tr>
<tr>
<td>(undecided)</td>
<td>wildlife violations\textsuperscript{87}</td>
</tr>
</tbody>
</table>

In the frequently-occurring case of multiple criminal counts, the Proposed Guidelines direct the court to calculate the fine for each individual count of conviction and to aggregate them in most cases.\textsuperscript{88}

The first half of Part C sets out aggravating factors which add to the base penalty.\textsuperscript{89} First, if any members of the organization with "substantial authority" "participated in, condoned, solicited, or concealed the criminal conduct, or recklessly tolerated conditions or circumstances that created or perpetuated a significant risk" of criminal behavior, the base offense level is increased by six levels.\textsuperscript{90} Second, the base penalty is increased if the organization has a past history of violation.\textsuperscript{91} Third, if the organization has no bona fide compliance program or other organized effort to achieve and maintain compliance with environmental requirements, the penalty is further increased by four levels.\textsuperscript{92}

The second half of Part C sets out three possible mitigating factors: "Commitment to Environmental Compliance," "Cooperation and Self-reporting," and "Remedial Assistance."\textsuperscript{93} Commitment to envi-

\textsuperscript{86} Proposed Guidelines, \textit{supra} note 8, § 9E1.1, at 1384.
\textsuperscript{87} Id. § 9E2.1(b)(1)-(5), at 1379-80. The Advisory Group could not agree on a Primary Offense Level for "wildlife violations." \textit{See id.}
\textsuperscript{88} Id. § 9B2.1, Application Note 2, at 1380, § 9E1.2, Cmt. 1, at 1384-85.
\textsuperscript{89} Id. § 9C1.1, at 1380-81.
\textsuperscript{90} Id. § 9C1.1(a), at 1380. The commentary to § 9A1.2 defines substantial authority personnel as "individuals who within the scope of their authority exercise a substantial measure of discretion in acting on behalf of an organization,... Whether an individual falls within this category must be determined on a case-by-case basis." Id. § 9A1.2, Application Note 2(k), at 1379.
\textsuperscript{91} Id. § 9C1.1(b), at 1380.
\textsuperscript{92} Id. § 9C1.1(f), at 1381. To avoid the four level penalty, the corporate program must "evidence, at a minimum, a genuine organized effort to monitor, verify and bring about compliance with environmental requirements." Id. § 9C1.1(f), Cmt. 1, at 1381. The Proposed Guidelines place the burden on the prosecution to "demonstrat[e] that the organization substantially failed to implement a program or other organized effort to achieve and maintain compliance." Id.
\textsuperscript{93} Id. § 9C1.2, at 1381-1382.
Environmental compliance is itself determined according to seven factors which must all be "substantially satisfied" to receive fine mitigation. These factors, which are laid out in Part D, present a "model" corporate compliance program. Section 9C1.2(a) states that if the court concludes that "all of the factors described in Part D were substantially satisfied," the offense can be reduced by three to eight levels "based on the court's evaluation of the organization's commitment" to implementing all of the factors. However, section 9E1.2(b)—the so-called "collar" provision—states that an offense level cannot be reduced below fifty-percent of the offense level originally calculated in Parts B and C, with one narrow exception. The Proposed Guidelines place the burden on the organization to prove it has made the "substantial commitment necessary to be entitled to mitigation of the offense level." The seven factors are perhaps the most crucial part of the Proposed Guidelines, for they determine how organizations will be encouraged to comply with environmental laws, and how they will be discouraged from violating them:

Factor 1: "Line Management Attention to Compliance." To qualify for mitigation under the Proposed Guidelines, line managers "in the day-to-day operation of the organization" must have "measur[ed], maintain[ed] and improv[ed] the organization's compliance" with environmental laws and regulations through "management mechanisms" such as "objective setting, progress reports, operating performance reviews, [and] departmental meetings." Line managers are to "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."

Factor 2: "Integration of Environmental Policies, Standards and Procedures." To meet this factor, the organization must have "adopted, and communicated to its employees and agents, policies, standards and

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94. Id. §§ 9C1.2(a), at 1381-82, 9D1.1, at 1382-83. Had the Proposed Guidelines been enacted, "substantially satisfied" would likely have been a much litigated phrase.
95. See Woodrow, supra note 49, at 327.
96. Proposed Guidelines, supra note 8, § 9C1.2(a), at 1381-82.
97. The limited exception holds that an organization can qualify for greater than fifty percent offense level mitigation if the fine would result in liquidation or cessation of a significant part of the organization's operations, if the defendant is not a "Criminal Purpose Organization," if the defendant has "not engaged in a sustained pattern of serious environmental violations," and if the fine did not involve a "knowing endangerment" violation. Id. §§ 9E1.2(b), (d), at 1384.
98. Id. § 9D1.1, Cmt. 1, at 1383.
99. Id. § 9D1.1(a)(1), at 1382.
100. Id.
101. Id.
102. Id. § 9D1.1(a)(2), at 1382.
procedures necessary to achieve environmental compliance..."\(^{103}\)
One measure that the organization must specifically have had in place is
a requirement that “employees report any suspected violation to appro-
priate officials within the organization, and that a record... be kept by
the organization of any such reports.”\(^{104}\) “To the maximum extent
possible,” the organization must have “analyzed and designed the work
functions... assigned to its employees and agents so that compliance
[would] be achieved, verified, and documented in the course of” the
organization’s routine work.\(^{105}\)

Factor 3: “Auditing, Monitoring, Reporting and Tracking Systems.”\(^{106}\)
To satisfy this criterion, the organization must have “designed and im-
plemented... systems and programs that are necessary for: frequent
auditing... of its principal operations and all pollution control facili-
ties” independent from line management and inspection, including
random and surprise audits; “continuous on-site monitoring” by
trained compliance personnel; “internal reporting... of potential non-
compliance,” via mechanisms such as hotlines “to those responsible for
investigating and correcting such incidents;” “tracking the status of
responses to identified compliance issues”; and “redundant, independent
checks on the status of compliance.”\(^{107}\) Any such auditing system
must be supported “with sufficient authority, personnel and other re-
sources.”\(^{108}\)

Factor 4: “Regulatory Expertise, Training and Evaluation.”\(^{109}\) Factor
four requires that an organization have “developed and imple-
mented... systems or programs” that are adequate to: “maintain [an]
up-to-date, sufficiently detailed understanding of all applicable envi-
ronmental requirements”; train and evaluate all employees and agents
of the organization “as to the applicable environmental requirements,
policies, standards (including ethical standards), and procedures neces-
sary to carry out their responsibilities”; and “evaluate employees and
agents... to avoid delegating significant discretionary authority... to
persons with a propensity to engage in illegal activities.”\(^{110}\)

Factor 5: “Incentives for Compliance.”\(^{111}\) To receive credit under
factor five, the organization must have “implemented a system of in-

\(^{103}\) Id.
\(^{104}\) Id.
\(^{105}\) Id.
\(^{106}\) Id. \(\S\) 9D1.1(a)(3), at 1382.
\(^{107}\) Id. at 1382-83.
\(^{108}\) Id. at 1382.
\(^{109}\) Id. \(\S\) 9D1.1(a)(4), at 1383.
\(^{110}\) Id.
\(^{111}\) Id. \(\S\) 9D1.1(a)(5), at 1383.
centives [that] provides rewards... and recognition to employees and agents for their contributions to environmental excellence.”

Factor 6: “Disciplinary Procedures.” Under factor six, an organization must have “consistently and visibly enforced [its] environmental policies, standards and procedures through appropriate disciplinary mechanisms...” Such mechanisms may include “termination, demotion, suspension, reassignment, retraining, probation, and reporting of individuals’ conduct to law enforcement authorities.”

Factor 7: “Continuing Evaluation and Improvement.” Factor seven requires an organization to have “implemented a process for measuring the status and trends of its effort to achieve environmental excellence...” The organization must also have implemented a process “for making improvements... in response to those measures and to incidents of non-compliance.” “If appropriate to the size and nature of the organization,” continuing evaluation “should include a periodic, external evaluation of the organization’s overall programmatic compliance effort...”

In order to qualify for a three- to eight-level mitigation for “commitment to environmental compliance,” the Proposed Guidelines require an organization to “substantially satisfy” all seven of the above factors. If an organization meets all of these criteria, the Proposed Guidelines allow additional mitigation if the organization implemented “additional programs or components that it can show are effective and important to carrying out its overall commitment to environmental compliance.” Total mitigation is capped at fifty-percent of the initially determined offense level.

Part E sets out the method for calculating fines as well as limitations on fines. The Advisory Group, though “divided over the precise percentages of the statutory maximum fine [that should] correspond to particular offense levels,” proposed the following offense level fine table:

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112. Id.
113. Id. § 9D1.1(a)(6), at 1383.
114. Id.
115. Id.
116. Id. § 9D1.1(a)(7), at 1383.
117. Id.
118. Id.
119. Id.
120. Id. §§ 9C1.2(a), at 1381-82, 9D1.1, at 1382-83.
121. Id. § 9D1.1(a)(8), at 1383.
122. Id. § 9E1.2(b), at 1384.
123. Id. § 9E1.1 n.*, at 1384.
<table>
<thead>
<tr>
<th>Offense Level</th>
<th>Percentage of Maximum Statutory Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-6</td>
<td>10</td>
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<tr>
<td>7</td>
<td>10-20</td>
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<td>8</td>
<td>15-25</td>
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<td>75-95</td>
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<td>22</td>
<td>80-100</td>
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<tr>
<td>23</td>
<td>85-100</td>
</tr>
<tr>
<td>24 or more</td>
<td>100</td>
</tr>
</tbody>
</table>

Calculation of fines according to this table is subject to four "[g]eneral [l]imitations." First, if the court determines that the calculated fine would be unjust (e.g., where the fine results from excessive repetition of counts relating to ongoing behavior not involving independent volitional acts), the court may reduce the fine. The total fine, however, may not be less than 1/n of the fine originally computed from the table, where "n" is the number of counts. Furthermore, no reduction is allowed where the ongoing conduct involved "independent volitional acts," which include an organization's failure to rectify a known environmental problem. Finally, the Proposed Guidelines indicate that the authority conferred under this section should be used "sparingly."

The second limitation is the fifty-percent mitigation cap discussed above, the so-called "collar" provision. Per the third limitation, the fine shall not be less than the economic gain derived by the organization in violating the criminal provisions, except as discussed in the fourth limitation. The members of the advisory group disagreed over whether to offset all costs directly attributable to the offense in calcu-

124. Id. § 9E1.1, at 1384.
125. Id. § 9E1.2, at 1384.
126. Id. § 9E1.2(a), at 1384.
127. Id. In other words, the scheme in § 9E1.2(a) allows the court, in the case of multiple counts for a single ongoing offense, to reduce the fine as low as the average fine for one count, subject to the fifty-percent cap on fine reductions discussed in § 9E1.2(b).
128. Id. § 9E1.2, Cmt. 2, at 1385.
129. Id. § 9E1.2, Cmt. 3, at 1385.
130. Id. § 9E1.2(b), at 1384.
131. Id. § 9E1.2(c), at 1384.
lating economic gain.\textsuperscript{122} The fourth limitation requires the court to reduce the fine to the extent that the originally imposed fine would impair the defendant's ability to make restitution to the victim.\textsuperscript{133}

Part F sets out the terms for probation of organizational environmental criminals.\textsuperscript{134} The Proposed Guidelines mimic the terms of mandatory organizational probation set out in the Organizational Guidelines.\textsuperscript{135}

It is likely that in many cases, organizations criminally fined for environmental crimes would be placed on probation.\textsuperscript{136} To most organizational defendants, a fine would be preferable to probation, because probation inevitably involves federal court supervision.\textsuperscript{137} Under the Proposed Guidelines, such supervision would be significant: "the term of probation [is] at least one year but not more than five years" for a felony and not more than five years for misdemeanors.\textsuperscript{138}

If the court orders probation under section 9F1.1, the court "shall" impose seven conditions (or, in some cases, as many of the

\begin{itemize}
  \item Pursuant to \S 9F1.1(a) of the Proposed Guidelines, courts are directed to order probation under a variety of circumstances:
    \begin{enumerate}
    \item Where probation would "secure payment of restitution..., enforce a remedial order..., or ensure completion of community service";
    \item Where probation would protect the organization's ability to make payments on a fine that it could not pay in full at the time of sentencing;
    \item Where an organization "does not have an effective program to prevent and detect violations of law" at the time of sentencing;
    \item Where probation would "ensure that changes are made within the organization to reduce the likelihood of future criminal conduct";
    \item Where "the organization within five years prior to sentencing engaged in similar misconduct, as determined by a prior criminal, [civil or administrative adjudication] under federal or state law, and any part of the misconduct occurred after that adjudication";
    \item Where "any officer, manager, or supervisor within the organization, or within the unit of the organization within which the... offense was committed (a) participated in, (b) ordered, directed, or controlled the conduct of others in the communication of, or (c) consented to the misconduct underlying the... offense"; and where such an individual "within five years prior to sentencing engaged in similar misconduct"; "and any part of the misconduct underlying the... offense occurred after that adjudication";
    \item If "the sentence imposed upon the organization does not include a fine"; or
    \item If probation would help "accomplish one or more of the purposes of sentencing set forth in 18 U.S.C. \S 3553(a)(2)."
    \end{enumerate}
  \textsuperscript{136} \textit{Thomas W. Hutchison et al., Federal Sentencing Law and Practice} 733 (2d ed. 1994).
  \textsuperscript{137} \textit{See Orland, supra note 40, at 50.}
  \textsuperscript{138} Proposed Guidelines, \textit{supra} note 8, \S 9F1.2, at 1385.
\end{itemize}
seven as the court thinks necessary) on the organization. The seven conditions are as follows:

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 . . . ."

2. "Any 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 . . . experts," paid for by the organization, to prepare a satisfactory program.

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

5. Upon court approval of a program, the organization must notify its employees, shareholders, and the public "of its criminal behavior and of the terms of the approved program."

6. "The organization shall make periodic reports to the court" disclosing "additional criminal prosecution," civil environmental litigation, and "environmental administrative proceedings."

7. The court "may order the organization to submit to [an] examination of its books and records, inspections of its facilities," and "unannounced examinations of its employees."

Section F ends with two non-binding policy statements. Section 9F1.4 states that the court may order the organization to publicize at its expense "the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps" that the organization will take to prevent future occurrences of similar offenses. Section 9F1.5 provides that if the court finds an organization has violated a condition of its probation, "the court may extend the term of probation, impose more restrictive conditions of probation, or revoke probation and resentence the organization." In the event of repeated violations of probation, the court can appoint a master or trustee "to ensure compliance with court orders." Thus, under the Proposed Guidelines an organization can be forced to relinquish control of its operations if it violates the terms of its probation.

139. Id. § 9F1.3(d), at 1385-86.
140. Id. § 9F1.3(d)(1)-(7), at 1386.
142. Proposed Guidelines, supra note 8, § 9F1.4, at 1386.
143. Id. § 9F1.5, at 1386.
144. Id. § 9F1.5, Application Note 1, at 1386.
IV
A CRITIQUE OF THE PROPOSED GUIDELINES:
WHAT NOT TO DO NEXT TIME

Though they are not binding on the Commission, the criminal justice sentencing standards of the American Bar Association ("ABA")\(^{145}\) provide a useful starting point for discussing sentencing discretion. The ABA's General Principles of Sentencing Discretion state that

> [t]he sentence imposed should be no more severe than necessary to achieve the societal purpose or purposes for which it is authorized. The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender's criminal history, and [his] personal characteristics . . . .\(^{146}\)

This Comment argues below that the Proposed Guidelines are more severe than necessary to achieve environmental regulatory compliance, and that they set out punishments that often exceed the minimum sanction consistent with the gravity of the offense. This Comment also demonstrates that the Proposed Guidelines are too inflexible to account for the heterogeneity of environmental crimes, ignore the culpability of the defendant, and slight organizational actions that should lead to substantial fine mitigation.

The introductory Commentary to Chapter Eight—the chapter that covers sentencing of organizations for all non-environmental felonies and class A misdemeanors—sets out four guiding principles for organizational criminal punishment:\(^{147}\)

- First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense. . . . Second, if the organization operated primarily for a criminal purpose . . . the fine should be set sufficiently high to divest the organization of all its assets. Third, the fine range . . . should be based on the seriousness of the offense and the culpability of the organization . . . .\(^{148}\) Fourth, probation is an appropriate sentence for an organizational defendant [if it will] ensure that another sanction will be fully implemented [or] that steps will be

\(^{145}\) See AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING (3d. ed. 1994).

\(^{146}\) Id. Standard 18-6.1, at 219.

\(^{147}\) Though not explicitly incorporated into the Proposed Guidelines, these principles purport to apply to all criminal organizational punishment. See U.S.S.G., supra note 41, § 8, at 337 ("Introductory Comment").

\(^{148}\) Culpability is generally determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, by the level and extent of involvement in or tolerance of the offense by certain personnel, and by the organization's actions after the offense has been committed. HUTCHISON ET AL., supra note 136, at 697.
taken within the organization to reduce the likelihood of future criminal conduct.149

Points two and four are adequately addressed in the Proposed Guidelines. The respective sections on Criminal Purpose Organizations150 and Probation151 are essentially the same in both the Proposed Guidelines and the Organizational Guidelines. The Proposed Guidelines fail to heed the Organizational Guidelines’ guiding principles, however, by setting out fine ranges that are incommensurate with the gravity of many offenses and the culpability of many organizational defendants. The Proposed Guidelines fail to meet the sentencing standards of both the ABA and Chapter Eight by imposing excessive penalties, unnecessarily restricting mitigation credit, not addressing important issues of scienter and culpability, and ignoring substantial differences among organizations and among the environmental crimes they commit.

A. The Flawed Rationale for Higher Fines

The Sentencing Guidelines were intended only to limit the number of subcategories of offenses, and not to create new and greater punishments.152 However, the Proposed Guidelines’ fine ranges would do just that in many cases. The Sentencing Guidelines’ goal of reducing sentencing disparity hinges on the notion that a past history of sentences will reveal a generally acceptable sentencing range.153 Punishment for environmental crimes, however, is relatively new. According to DOJ, only forty defendants were indicted for environmental crimes in 1983.154 Thus, environmental crimes, especially organizational ones, lack the “experience baseline” found in other crimes to which sentencing guidelines have been applied.155

149. U.S.S.G., supra note 41, § 8, at 337 (“Introductory Comment”).
150. Id. § 8C1.1, at 345; Proposed Guidelines, supra note 8, § 9B1.1, at 1379.
151. U.S.S.G., supra note 41, § 8D1, at 367; Proposed Guidelines, supra note 8, § 9D1.1, at 1382-83. An argument about the suitability of organizational probation in general is beyond the scope of this Comment. This Comment agrees that some form of organizational probation is a desirable or at least inevitable part of the Environmental Guidelines. This Comment focuses, however, on the flaws in how the Proposed Guidelines mete out probation for organizational environmental crimes. For a discussion critical of organizational probation, see Note, Corporate Probation Under the New Organizational Sentencing Guidelines, 101 YALE L.J. 2017 (1992).
152. See U.S.S.G., supra note 41, § 1A(3), at 2 (“Policy Statement”).
155. Benjamin S. Sharp & Leonard H. Shen, The (Mis)Application of the Sentencing Guidelines to Environmental Crimes, C496 ALI-ABA *291, *294 (Apr. 19, 1990), available in WESTLAW, ALI-ABA database. Prosecutors did not indict defendants for environmental crimes in significant numbers until the late 1970s, when Congress substantially strengthened the criminal provisions of
The guidelines direct the Commission to “treat each guideline as carving out a ‘heartland,’” a set of typical cases embodying the conduct that each guideline describes. The work group never delineated or defined what the “heartland” is for organizational environmental offenses, perhaps because doing so would be nearly impossible, given the small number of prosecutions and convictions in the area of organizational environmental crime. Rather than setting out a “heartland,” the Proposed Guidelines simply set out rules that would substantially increase sentences without referring to any precedential baseline.

This is not to say that the task of crafting Environmental Guidelines is impossible. However, if the Commission cannot base its sentencing ranges on a “heartland” (which does not yet exist), it must choose some other justification for its adoption of sentencing ranges that lead to fines greater than those meted out for most other corporate crimes.

The Proposed Guidelines advocate fines that are often close to the statutory maximum and that are generally higher than those calculated using the existing organizational sentencing guidelines. One commentator has noted that “the proposal’s provisions on multiple offenses are clearly harsher than [those] for individual and corporate sentencing.” Consider the example of a two-week-long, negligent, unpermitted pollutant discharge under section 301 of the Clean Water Act. The Proposed Guidelines set out a minimum offense level of fourteen for such a crime. The fine under Chapter Eight for a level fourteen

156. U.S.S.G., supra note 41, § 1A(4)(b), at 5.
158. See, Enforcement: Dissent Filed by Advisory Group Members Urges Sentencing Commission to Reject Draft, 24 ENV'T REP. (BNA) No. 36, at 1594 (Jan. 7, 1994) [hereinafter Dissent Filed]; Proposed Guidelines, supra note 8, § 9E1.1, at 1384. The dissenting Advisory Group members provide the following useful example of an instance in which the Proposed Guidelines would yield higher fines than the Organizational Guidelines:

[C]onsider the “common” environmental offense, which would involve an unpermitted release of a pollutant or a hazardous substance... and have an offense level of 14 to 16. Under Section 8C2.4(d), the base fine is $85,000 to $175,000. Under Section 9E1.1 of the work group proposal, it is 40 to 70 percent of the statutory maximum, or $200,000 to $350,000 for a felony, without consideration of aggravators.

GUERCI & HEMPHILL, supra note 53, at 19.
crime is $85,000. The fine under the Proposed Guidelines, by contrast, would be forty to sixty percent of the maximum statutory fine of $25,000 per day per violation, or $140,000-$210,000.

Consider also the example of a hazardous waste transporter who, without a manifest intent, transports hazardous waste to a permitted facility twice daily for one week. The maximum fine under the RCRA is $50,000 per day per violation. The Proposed Guidelines set out a base level of fourteen for such an offense. Under Chapter Eight, the fine again would be $85,000. Under the Proposed Guidelines, the fine for level fourteen violations would be forty to sixty percent of $700,000, or $280,000 to $420,000.

There are valid reasons to punish environmental crimes differently from non-environmental ones. Environmental crimes are distinctive in that harm often increases with the duration of the crime’s perpetration. In such cases, the criminal fine arguably should be increased incrementally with the increase in harm. This aspect of environmental crime points towards allowing a prudent amount of count-stacking in the Environmental Guidelines. For this reason, the Proposed Guidelines state that in cases involving multiple counts—the usual case with environmental violations—the fines computed for each count will be added to determine a firm’s total fine.

The tendency of environmental harm to escalate with each environmental violation is not, however, a sufficient reason to base the daily per count fine on the statutory maximum. Doing so would destroy the wide latitude Congress granted the courts in the criminal-fine provisions of environmental statutes. In section 301 of the Clean Water Act, for example, Congress explicitly endorses count-stacking by fining defendants on a per-day-per-violation basis, but counters the possible excessive effects of compounding counts by setting out a fine range that stretches from $2,500 per-day-per-violation all the way up to $25,000 per-day-per-violation. By basing fines at or near the maximum statutory levels, the Proposed Guidelines would have required courts to impose fines up to ten times as high as the lowest levels the statute gave.

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162. This calculation of the fine assumes that the levels under the Proposed Guidelines and the Organizational Guidelines are comparable. Given that the Proposed Guidelines have not been adopted, however, it is impossible to say whether the levels would in fact be comparable.


166. "Count-stacking" refers to the process by which prosecutors maximize the number of criminal counts by charging defendants with separate counts for separate individual violations of the law, rather than aggregating the violations and charging defendants with one or a few offenses. See Coffee, supra note 48, at 10.

167. Id. § 9B2.1, Application Note 2, at 1380.

them discretion to levy. Such count-stacking concerns were the issue
that, according to one Advisory Group member, "consumed much of
the panel's time and probably produced the most divisive debates."

Concededly, not all fines would be higher under the Proposed
Guidelines. Simple, one-count, one-day violations of high-base-level
offenses could be fined a somewhat higher amount under the Organiza-
tional Guidelines. It is most likely a rare environmental criminal who
commits a one-count, one-day offense, however.

Real world, multiple-count, multiple-day environmental crimes
would be punished far more severely under the Proposed Guidelines
than under the existing Organizational Guidelines in Chapter Eight.
Such a result would be acceptable if the statutes called for such a harsh
approach, if the Commission's mandate included increasing the severity
of criminal punishment, or if an experience baseline indicated that
judges on average handed down higher sentencing than would be cal-
culated under Chapter Eight. However, none of these circumstances
exists. As its dissenting members note, the Advisory Group has articu-
lated "no basis for predicating the fine on the statutory maximum and
no basis for this difference." The Advisory Group provided no em-
pirical basis for its determination of percentages of maximum statutory
fines, despite the fact that the law establishing the Commission requires
the Commission to consider historical information when setting guide-
lines. Congress certainly intended environmental crimes to be pun-
ished on a per-day, per-violation basis. There is no indication, however,
that Congress intended that such an approach to punishment be com-
bined with rigid, strict guidelines that would produce substantially
higher fines than are meted out for all other organizational crimes. In-
deed, according to one Advisory Group member, the Proposed Guide-
lines were never supposed to create harsher fines for environmental
crimes than other corporate crimes.

This is not to say that environmental criminal fines should be re-
duced from their current levels. As one Advisory Group member notes,
the Sentencing Commission would be sending the wrong message to
potential offenders if it allowed organizations convicted of felonies to
escape serious sanction. Furthermore, given that there is no baseline
for dealing with environmental sanctions, basing the Environmental
Guidelines on, say, the statutory minimum fines would be just as
groundless and arbitrary as the Proposed Guidelines' approach.

170. GUERCi & HEMPHILL, supra note 53, at 19-20.
171. Id. at 7, 19; see 28 U.S.C. § 994(m) (1994).
172. Telephone Interview with Barrett, supra note 69.
The Environmental Guidelines should not arbitrarily favor either end of the fine spectra set out in environmental statutes and should instead provide additional flexibility in the breadth of the fine ranges that judges are required to use. Since a “heartland” has not yet been established for organizational environmental crime, judges must be afforded the latitude to find it. This Comment argues that this latitude can best be achieved by doubling the size of the fine ranges set out in the Proposed Guidelines. This doubling would not be inconsistent with the Guidelines’ goal of reducing disparities among sentences, because that goal was never intended to eliminate all judicial discretion from the sentencing process.174

Even the Proposed Guidelines, rigid as they are, provide for some discretion in setting fines.175 Congress recognized the need for flexibility when it provided broad fine ranges in environmental statutes and when it provided for significant prosecutorial discretion for environmental crimes.176 Because environmental crime encompasses a vast array of offenses and perpetrators, more discretion both up and down the fine ranges is necessary. This is not to say that a “heartland” can never be located for environmental crimes. Rather, this Comment suggests that the only way a “heartland” will be located is by allowing courts enough discretion to find it. Under the Proposed Guidelines’ approach, courts would be forced to impose fines that are arbitrarily based on maximum sentences, rather than on the precedential background of sentences already imposed.

B. The Proposed Guidelines’ Misguided Restrictions on Mitigation

The Proposed Guidelines’ greatest flaw—which, according to one member of the Advisory Group, appears likely to be replicated in the Environmental Guidelines177—is the restriction of mitigation to fifty-percent of the statutory offense level.178 This rigid cap stands in stark contrast to the Organization Guidelines, where a ninety-five percent re-

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174. Sentencing guidelines were only designed to address unjustified disparity, which is “the differential treatment of similarly situated offenders convicted of similar crimes.” Heumann, supra note 153, at 15.

175. See, e.g., Proposed Guidelines, supra note 8, § 9E1.1, at 1384, which allow a judge to punish a crime with an offense level of fourteen at anywhere from forty to sixty percent of the statutory maximum.


177. Telephone Interview with Barrett, supra note 69.

178. Proposed Guidelines, supra note 8, § 9E1.2(b), at 1384.
duction of a fine is possible for qualifying organizations. To qualify for any fine mitigation under the Proposed Guidelines, a defendant would have to prove the existence of all seven of the mitigating factors laid out above. The Advisory Group’s goal in crafting such strict requirements was to assure adequate deterrence. This goal is buttressed by the collar provision, which specifies “a floor below which the fine cannot be further reduced as the result of mitigating factors.”

Setting out explicit requirements for compliance programs is desirable. Organizations should be encouraged to strive for a model program. Loosely defined compliance criteria are nothing more than a series of loopholes for lawyers to take advantage of. In that respect, criteria without teeth can be worse than no criteria at all.

However, the Proposed Guidelines’ approach is far too rigid. The combination of the fifty-percent mitigation cap and the burden of proving the existence of all seven factors may lead corporations to question whether a qualifying compliance program is more costly than the risk of a fine. Stephen Ramsey, Vice President in charge of corporate environmental programs at General Electric, argues that the fifty-percent floor would “make environmental managers feel that nothing they could ever do would be enough.” One Advisory Committee member has conceded that the fifty-percent cap would necessarily limit incentives to comply with environmental laws. Limiting incentives to comply promotes punishment at the expense of deterrence. If the guidelines ultimately adopted fail to promote compliance, they will eviscerate the primary goal of having organizational environmental sentencing guidelines in the first place.

The rigidity of the seven-factor mitigation test is also troublesome. Under the Proposed Guidelines, for instance, if high-level personnel in the organization “participated in, condoned, or [were] willfully ignorant of the offense,” there exists a rebuttable presumption that the organization has not sufficiently committed itself to achieving and maintaining compliance. As the former chief of the Environmental Crimes Section of the DOJ’s Environment and Natural Resources Division has

179. Under the Organizational Guidelines, if an organization is found to have a “culpability score” of zero or less, the fine can be reduced by up to ninety-five percent. U.S.S.G., supra note 41, § 8C2.6, at 356. An organization that has implemented an effective compliance program and fully cooperated in its own criminal investigation can achieve a culpability score of zero. Id. § 8C2.5, at 350.

180. See supra notes 94-119 and accompanying text.


184. Proposed Guidelines, supra note 8, § 9C1.2(a), at 1381-82.
noted, this test is "an all-or-nothing proposition"—a company either qualifies or does not. \(^{185}\) By contrast, the Organizational Guidelines allow mitigation based on much broader criteria, reducing fines at least to some extent if there is an "effective program to prevent and detect violations of the law" and if there is self-reporting, cooperation, and "affirmative acceptance of responsibility." \(^{186}\)

The Organizational Guidelines' approach, while perhaps overly lenient, is more sensible than that of the Proposed Guidelines. It permits companies to achieve compliance via means alternate or superior to those specified in the Proposed Guidelines, while simultaneously checking these programs through a court's discretion in determining whether a given program is sufficiently diligent. A sensible sentencing scheme for environmental crimes would preserve the flexibility of the Organizational Guidelines' approach and address the leniency of that approach by mandating effective in-house attention to compliance.

C. The Proposed Guidelines' Failure to Account for the Size of Convicted Organizations

Commentators criticized the March draft of the Proposed Guidelines for not taking into account the varying sizes of corporate environmental defendants. \(^{187}\) Some expressed concern that big companies would be able to shrug off fines more easily than smaller companies. \(^{188}\) Other commentators—the "optimal penalty" proponents—argued that since the loss caused by environmental crime is the same regardless of the size of the corporate defendant, the punishment should be uniform for companies of all sizes. The optimal penalty approach makes sense from a restitutionary standpoint. However, since the principal goal of the Environmental Guidelines should be deterrence, fines should be crafted that can effectively deter both large and small organizations.

Such deterrence can only be achieved by varying fines and standards for compliance based on the organization's size and resources. Environmental statutes for the most part do not explicitly take account of an organization's size and resources, \(^{189}\) although their vast fine ranges implicitly call for consideration of such factors. However, Con-

\(^{185}\) Corporate Sentencing Guidelines Attacked, supra note 182, at 28.

\(^{186}\) U.S.S.G., supra note 41, § 8C2.5(f)-(g), at 353.

\(^{187}\) For example, see the comments of W. Martin Harrell, regional EPA Criminal Enforcement Counsel in Philadelphia, in Corporate Sentencing Guidelines Attacked supra note 182 at 27, 29.

\(^{188}\) Congress explicitly requires courts to consider "whether the defendant can pass on to consumers or other persons the expense of the fine" and "the size of the organization" when sentencing organizational defendants. 18 U.S.C. § 3572(a)(7)-(8) (1994).

\(^{189}\) For example, neither the RCRA (42 U.S.C. § 6928(d) (1988)) nor the Clean Air Act (42 U.S.C. § 7413(c) (Supp. 1993)) requires courts to consider the size of the organizational defendant in determining criminal fines.
gress has indicated that the size of an organization is a relevant factor in sentencing determinations generally.\textsuperscript{190} The Proposed Guidelines do address size in the seven mitigation factors, but they do so in a way that improperly discriminates against smaller organizations and discourages their efforts at compliance.

The Organizational Guidelines address the problem of disparate impact on small companies by not requiring compliance programs to adhere to any rigid formula. As will be discussed below, they set out seven general indicia of an adequate program, but allow organizations that create adequate alternative programs to qualify for fine mitigation of up to 95 percent.\textsuperscript{191} Modifying the Proposed Guidelines to be more like the Organizational Guidelines in this respect would diminish the disparate impact that sentencing guidelines can have on smaller companies, and help them to achieve meaningful compliance.

The Advisory Committee maintains that “[s]mall 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.”\textsuperscript{192} Despite this gesture towards flexibility, the Proposed Guidelines require small corporations to meet all seven of the mitigation criteria. Though the Proposed Guidelines’ comments suggest that “in a very small business, the manager or proprietor... 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,”\textsuperscript{193} small businesses in many cases will not be able to afford the costs of implementing such a rigid program. Moreover, as an initial matter, small, unsophisticated organizations would probably be ignorant of the Proposed Guidelines’ extensive, complex mitigation criteria.

It is also unrealistic to expect that small businesses would be able to “provide[] documentation, as of the time of the offense, pertaining to the [mitigating] factors”\textsuperscript{194} or to “document the training and evaluation, of all employees... as to the applicable environmental requirements, policies, standards... and procedures.”\textsuperscript{195} Small organizations are more likely to enact small-scale compliance programs (which are no less well-intentioned for being modest) which, due to the company’s igno-

\textsuperscript{191} U.S.S.G., supra note 41, § 8C2.5-2.6, at 350-56.
\textsuperscript{192} Proposed Guidelines, supra note 8, § 9D1.1., Cmt. 3, at 1383.
\textsuperscript{193} Id.
\textsuperscript{194} Id. § 9D1.1, Cmt. 1, at 1383.
\textsuperscript{195} Id. § 9D1.1(a)(4)(ii), at 1383.
rance or lack of resources, fail to address all seven criteria. These companies should be held responsible for implementing proactive and effective compliance programs. However, if better compliance is to be obtained, small businesses need to be granted more flexibility in the types of compliance programs they can adopt and still be eligible for mitigation.

This flexibility is especially important given the lower standards of scienter in many environmental crimes. Under the Proposed Guidelines, small companies often would be unable to qualify for compliance credit because company officials are frequently involved in the offenses smaller organizations commit. Due to the lack of sophistication of many small companies, however, management often may not know it is committing an offense. Because environmental crime can involve people who are "innocent" in terms of mens rea, smaller companies should be encouraged to engage in environmental compliance. Slapping them with large fines intended for large corporations will either discourage their compliance or put them out of business altogether. Neither result prevents environmental harm.

The Organizational Guidelines mandate probation for organizations lacking effective compliance programs only where the organization has fifty or more employees. The Proposed Guidelines, by contrast, require probation for all organizations without effective programs, regardless of their size. Compliance is especially important in the environmental realm. The fact that a small, start-up organization lacks a fully effective compliance program, however, should not be viewed as a de facto indication of such wanton criminal intent that the organization merits mandatory probation under all circumstances. Smaller organizations need more flexibility. The Environmental Guidelines should specify that probation is generally, but not necessarily, appropriate for organizations of fifty employees or less that lack effective compliance programs. Such organizations should be allowed to avoid probation where they can demonstrate that their size and lack of resources make implementing a compliance program impossible.

196. See William E. Callahan, Jr., The Best Intentions, Small Bus. Rep., July 1994, at 9 (discussing how difficult it is for small companies to carry out compliance efforts); Low Marks, supra note 48, at 5 (noting that the DOJ opposed the first draft of the Proposed Guidelines because of a perceived bias in favor of large corporations over small ones); Nagel & Swenson, supra note 2, at 250 ("One can expect highly informal compliance programs in smaller organizations . . . "). However, Nagel & Swenson go on to opine that small companies' failure to qualify for compliance credit "is not . . . because they cannot meet the definition's criteria, but because top management will typically be involved in the offenses . . . a factual occurrence that negates any credit for the compliance program." Id. at 251.
197. Nagel & Swenson, supra note 2, at 251.
It is important to accommodate the needs of smaller organizations because, at least in the early stages of implementing the Environmental Guidelines, they will make up the bulk of the defendants sentenced under the Environmental Guidelines. Ninety-seven percent of the first 280 firms sentenced under the general Organizational Guidelines were privately-held or controlled by only a small group of shareholders.200 "Most . . . had fewer than 50 workers or pretax profits of less than $1 million annually."201 In part, this statistic reflects the fact that larger crimes at larger corporations often have a longer "gestation period" and therefore have not come to fruition since the enactment of Organizational Guidelines.202 This statistic indicates, nonetheless, that the Environmental Guidelines must address the concerns of smaller organizations in order to be effective.

D. The Proposed Guidelines’ Failure to Account for Scienter

In contrast to most other areas of criminal law, an organization can be convicted under many environmental statutes on a showing of negligence, or even on a strict liability theory.203 Under the Refuse Act,204 for example, it is a crime to discharge refuse into navigable waters without a permit, regardless of the perpetrator’s intent.205 Under the Clean Water Act, it is a crime to discharge a pollutant negligently from a point source without a permit.206 Under the RCRA,207 it is a crime to "transport hazardous waste to an unpermitted treatment facility," "regardless of the transporter’s mental state with respect to the treatment facility’s permit status."208

Strict liability sentencing for environmental crimes is justified by analogy to the harm caused by public welfare offenses.209 Even though this analogy makes sense for determining guilt, scienter should never-

201. Id.
202. Id. The guidelines do not apply to crimes that started before the guidelines took effect.
203. Nagel & Swenson, supra note 2, at 256; see also United States v. FMC Corp., 572 F.2d 902, 908 (2nd Cir. 1978) (imposing strict criminal liability upon a corporate defendant under the Migratory Bird Treaty Act).
209. Nagel & Swenson, supra note 2, at 256-57.
theless be considered at the sentencing stage. While the base fine scheme in the Proposed Guidelines imposes the heaviest base offense level for knowing endangerment resulting from mishandling hazardous or toxic substances, pesticides, or other pollutants, the scheme does not otherwise account for gradations in scienter.

Concededly, prosecutors may take into account the presence or lack of scienter when they decide on which counts to indict an organization. Even if they do, however, it is neither fair nor efficient in terms of deterrence to punish in the same way an organization that did not intend to commit a crime as one that did. Providing broader fine ranges would promote deterrence, as would an explicit policy statement allowing fine mitigation for organizations lacking criminal intent.

The Proposed Guidelines also fail to differentiate between cases where an employee has broken the law in spite of an adequate company compliance policy, and cases where management implicitly or explicitly endorses commission of an environmental offense. The Organizational Guidelines, by contrast, state that “[i]f no individual within substantial authority personnel participated in, condoned, or was willfully ignorant of the offense; the organization at the time of the offense had an effective program to prevent and detect violations of law; and the base fine is [not determined by computing ‘the pecuniary gain to the organization from the offense’], a downward departure may be warranted.” A similar policy statement should be included in the Environmental Guidelines.

The Organizational Guidelines deny culpability deductions where high-level personnel condone or participate in the offense, but grant such deductions where senior personnel have not been involved. They set out a series of aggravating factors based on scienter, which

211. The March 1993 proposal did include consideration of scienter as both a potential aggravator and mitigator, but the November proposal deleted such consideration. GUERCY & HEMPHILL, supra note 53, at 9.
212. In June 1992, the United States Attorney for the Southern District of New York, Mary Jo White, announced that her office would not prosecute Sequa Corporation for criminal fraud due to Sequa’s “cooperation with the Government’s investigation” and “policy changes” at Sequa’s subsidiary. David M. Zornow, Should Companies Turn Themselves In? Programs to Address Corporate Criminal Liability, N.Y. L.J., Oct. 13, 1994, at S3, S14 (citing United States Attorney, Southern District of New York Press Release (June 24, 1993)).
213. U.S.S.G., supra note 41, § 8C4.11, at 365. Under common law, a corporation incurs criminal liability for the acts of its corporate officers and agents. “Courts generally impute criminal liability to the corporation when an employee acts within the scope of his or her employment and for the benefit of the corporation.” Nagel & Swenson, supra note 2, at 235. A number of commentators have argued persuasively for alternative bases of corporate liability, including one based on an organization’s “ethos.” See, e.g., Pamela H. Bucy, Organizational Sentencing Guidelines: The Cart Before the Horse, 71 WASH. U. LQ. 329, 338-49 (1993).
214. U.S.S.G., supra note 41, § 8C2.5(b), at 353.
range from one to five points based on the size of the organization.\footnote{215} The Proposed Guidelines delete references to ranges of scienter without indicating why. With regard to the Organizational Guidelines, the Commission concluded that an organization’s culpability should significantly impact its sentence.\footnote{216} The Environmental Guidelines should, like the Organizational Guidelines, allow for fine reduction where an organization does not exhibit criminal intent and for fine escalation in cases of reckless or intentional misconduct. Mitigation should generally be permitted for negligent and strict liability defendants that made diligent efforts towards compliance prior to committing their offenses.

\section*{E. The Commission’s Mistaken Interpretation of its Congressional Mandate}

The Proposed Guidelines not only fail to promote efficient deterrence and fairness, but if enacted they would exceed the Commission’s Congressional mandate. Congress has only conferred on the Commission a general duty to “establish sentencing policies and practices for the Federal criminal justice system.”\footnote{217} The original Sentencing Guidelines for individuals were an outgrowth of the Congressional mandate to eliminate unwarranted disparities in jail terms for similarly situated convicts. The Organizational Guidelines depart from this mandate: they only address disparities in fine determination, not in jail terms, and they are not based on empirical data regarding patterns of corporate convictions and sentences.\footnote{218} Such empirical data are not yet available—a gap which led one commentator to call the Proposed Guidelines a “solution in search of a problem.”\footnote{219}

Congress did not ask the Commission to retool the laws of environmental enforcement.\footnote{220} With this in mind, the Commission must look

\footnote{215} Id. § 8C2.5, at 350.
\footnote{216} According to Chapter Eight, “[c]ulpability generally will be determined by the steps taken by the organization prior to the offense to prevent and detect criminal conduct, the level and extent of involvement in or tolerance of the offense by certain personnel, and the organizations’ actions after an offense has been committed.” U.S.S.G., supra note 41, § 8, at 337 (“Introductory Commentary”).
\footnote{218} Orland, supra note 40, at 51.
\footnote{219} \textit{Corporate Sentencing Guidelines Attacked}, supra note 182, at 28 (quoting Thomas B. Leary of Hogan & Hartson).
\footnote{220} As a policy matter it is troubling that the Advisory Group transformed environmental crimes into mandatory minimum violations without any charge from Congress to the Commission to rewrite
beyond its ideology and focus on encouraging deterrence and narrowing inequitable sentencing disparity. The Commission should not set the guidelines based on maximum fines. To do so without evidence of disparity from a sentencing "heartland" would be arbitrary and would exceed the Commission's mandate.

V
AN ALTERNATIVE PROPOSAL: MODIFY THE ORGANIZATIONAL GUIDELINES TO FOCUS ON DETERRENCE AND PROVIDE NEEDED FLEXIBILITY

Having examined the failings of the Proposed Guidelines, this Comment will now suggest a more flexible set of guidelines that would more effectively deter environmental crime.221

A. Basing the Environmental Guidelines on the Organizational Guidelines will Minimize Complexity and Confusion

The same rationales that underlie the Organizational Guidelines should inform the Environmental Guidelines. The complexity of the Proposed Guidelines impairs their effectiveness. The Environmental Guidelines should not repeat this problem.

One observer notes that unnecessary complexity will result from the promulgation of competing guidelines for environmental and non-environmental violations arising out of the same factual circumstances.222 Guidelines issues already dominate the Ninth Circuit's docket.223 Judge Noonan indicates that "any lawyer of ability is able to raise a doubt, point to an ambiguity, or discover a new problem [in the existing guidelines]."224 Adding new guidelines to the mix could only worsen the inefficiency of the current ones.

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221. Indeed, this is precisely the approach endorsed in February of 1996 by President Clinton's Council on Sustainable Development, a panel made up of representatives from both industry and environmental groups. The panel calls for a regulatory framework that would give businesses more flexibility in preventing pollution if the net result led to better performance than under the current system. John H. Cushman Jr., Industry Joins Rare Consensus on Environment, S.F. CHRONICLE, Feb. 12, 1996, at A1.


Thus, for the sake of administrability, the Environmental Guidelines should parallel the Organizational Guidelines. Members of the Sentencing Commission recognize the value in terms of administrability of basing the Environmental Guidelines on the Chapter Eight Organizational Guidelines. To avoid added complexities, the Environmental Guidelines should depart from the Organizational Guidelines only where a compelling argument exists to do so.

However, the approach set out in Chapter Eight cannot adequately deal with the diversity of environmental crime. To encourage compliance with environmental laws, and to promote the goal of deterrence (rather than retribution), the Environmental Guidelines must be more flexible than Organizational Guidelines.

B. Deterrence Must be the Goal of the Environmental Guidelines

The introduction to the Sentencing Guidelines lists four principles that guide criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. Incapacitation is not relevant with regard to organizational crime: corporations cannot be incarcerated. Rehabilitation is relevant, as shown by the probation provisions in the Proposed Guidelines, but rehabilitation falls outside the scope of this Comment.

"Just punishment," which this Comment equates with retribution, is the theory that undergirds the Advisory Group's rigid and strict guidelines for organizational environmental crimes. However, no fine short of complete divestiture can achieve true retribution against an organization. Organizations can be destroyed, which the Federal District Court for the Eastern District of Pennsylvania demonstrated when it handed down the "corporate death penalty" provided for in the Organizational Guidelines. The "death penalty" is a fit punishment for criminal purpose organizations; such organizations should be punished similarly under the Environmental Guidelines.

n.240 (1992) (calculating that 5400 guideline sentences were appealed in 1991, while only a negligible number of sentences were appealed before the guidelines were implemented).

225. Telephone Interview with Barrett, supra note 69.


228. Proposed Guidelines, supra note 8, §§ 9F1.1-1.4, at 1385-86.

Large fines can substantially affect the management of an organization. Shareholders or directors may choose to terminate management on whose watch fines are imposed. Board members themselves, however, will generally not have to pay the fines unless they are prosecuted as individuals. If retribution against corporate directors is the goal, these individuals already can be, and often are, prosecuted as individuals.\textsuperscript{230} Retributive fines against the corporation itself would be superfluous and wasteful. To the extent that the market will bear it, any punishment (aside from jail time or the "death penalty") falls on consumers.\textsuperscript{231} Any fine that allows a corporation to stay in business will ultimately be paid for by stockholders and customers, not by the fictional corporate personality.\textsuperscript{232}

On the whole, attempts at exacting retribution from organizations are misplaced. Punishing organizations can effectively deter organizational environmental crime through its impact on those responsible for the organization. Retribution, however, can only be achieved against individuals: corporations, as "legal fictions," are incapable of understanding revenge. A fine should be set high enough to deter violations and no higher.

Some commentators argue that environmental crimes are especially repugnant and therefore worthy of retributive punishment. As one commentator put it, "[e]nvironmental crimes that cause serious environmental disruption warrant stricter environmental penalties from a purely ethical perspective."\textsuperscript{233} It is possible that the harsh fines set out in the Proposed Guidelines would reduce violations by instilling fear in the marginal offender. It is also possible, however, that many well-meaning companies would refrain from lawful conduct for fear of triggering the retributive wrath contained in the guidelines. Such fears have in fact led many states to enact environmental audit privileges that protect companies' internal environmental audits.\textsuperscript{234}

The question ultimately is: Can a desire for retribution justify inefficient Environmental Guidelines? The answer is no. Environmental crimes are emotion-laden transgressions, but it is important to remember, as some critics have argued, that the entire notion of corporate cul-

\textsuperscript{230} Indeed, indictments against individuals are far more common than those against corporations. Of the 569 defendants indicted by Department of Justice for environmental crimes from 1983 to 1989, 165 were corporations and 404 were individuals. Of the 432 convictions, 127 were corporations and 305 were individuals. Dinkins, supra note 11, at *26 (citing Department of Justice Gets Tough on Environmental Crimes, Press Release, Dec. 27, 1989.).


\textsuperscript{232} Id.

\textsuperscript{233} Adler & Lerd, supra note 3, at 821.

\textsuperscript{234} See infra note 342 and accompanying text.
pability is "an untenable abstraction and an anthropomorphic imagination." A company cannot have a criminal "intent" in any meaningful sense of the word, though commentators have persuasively argued that organizations can have an "ethos" that is conducive to crime. Corporate mental states can only be determined by proxy, through an analysis of the reasonableness of judgments made by the individuals in charge. While corporations are easy targets for our pain and anger over environmental harm, this does not justify punishing them beyond the level necessary to deter them from committing crimes.

C. An Economic Argument for Flexible Environmental Guidelines

In case after case, environmental crime has paid. One Advisory Group member has opined that "[e]nvironmental crime remains an excellent market opportunity for the enterprising felon." The new Environmental Guidelines must therefore eliminate this opportunity through unflinching economic deterrence.

As Professors Robert Cooter and Thomas Ulen note, one cannot view the law solely as a provider of justice, for it in fact allocates legal rights according to economic rationality. Economic rationality is useful here to sort out the aggregate effect of environmental harm. Further, economic rationality can assist in the determination of what is and should be "criminal," which is revealed by the debate over whether certain environmental violations should be considered "crimes" given the positive economic effects they engender. Finally, economics is relevant in corporate crime, for it is often shareholders and consumers, and not the corporations themselves, who will ultimately pay the fines for the corporate crime.

Cooter and Ulen argue that there is an optimal level of punishment that will achieve deterrence. The Sentencing Guidelines acknowledge that "the ultimate aim of the law itself, and of punishment in particular,

236. See, e.g., Bucy, supra note 213, at 341-49.
237. See Laufer, supra note 235, at 654. But see Bucy, supra note 213, at 349 (arguing that "inability to prove directly an individual's intent does not cause us to reject the entire concept," and "[s]o it is with corporate ethos").
240. See Nagel & Swenson, supra note 2, at 258; see also supra note 48 and accompanying text. Although economics alone cannot fully define criminality, "violations" that have positive economic effects are generally not viewed as serious crimes under the law. COOTER & ULEN, supra note 239, at 13-14.
241. Concededly, this argument loses strength in smaller and more closely-held organizations, where the stakeholders are often synonymous with management.
242. COOTER & ULEN, supra note 239, at 536.
is the control of crime. Overpunishment and overdeterrence, used to control crime, can lead to gross inefficiency. Once a fine is assessed that optimally deters an organization from breaking the law, any additional sanction will unnecessarily harm the organization, its shareholders and employees, and the economy in general. Further, excessive fines will cause organizations to refrain from engaging in lawful behavior for fear of crossing the line.

Three of Professor Cooter's charts demonstrate efficient deterrence. Deterrence is achieved by reaching the optimal combination of certainty and severity of punishment:

\[ \text{The Efficient Combination of Certainty and Severity of Punishment} \]

Once the authorities have chosen the optimal level of deterrence, ... how should they allocate resources between certainty and severity of punishment? Efficiency requires that the criminal justice system find the point on the deterrence isoquant that involves the least cost. The straight line \( D_0 \) is the deterrence isoquant that corresponds to the socially optimal amount of deterrence. The curved lines represent combinations of certainty and severity of punishment that can be achieved by a given expenditure. For example, the curve labeled "high" indicates the combinations of certainty and severity of punishment that the authorities can achieve by spending, say, $10 million per year on deterrence. The curve labeled "low" indicates the combinations that the authorities can achieve by spending a low amount on deterrence, say, $5 million per year. The combination \((x_1, y_1)\) is the intersection of the high cost curve and \(D_0\); the combination \((x^*, y^*)\) is the intersection if the low cost curve and \(D_0\). Both points are on the same deterrence isoquant and so achieve the same amount of deterrence. Efficiency requires policy-makers to choose the combination \((x^*, y^*)\) on the low cost curve. In general, the efficient combination of severity and certainty of punishment is found at the point where the lowest cost curve is tangent to the deterrence isoquant.

243. U.S.S.G., supra note 41, § 1A(3), at 3 (“The Basic Approach”) (emphasis added). The Commission claimed, however, that either a “just deserts” approach, which scales punishment to culpability and harm caused, or a “practical ‘crime control’” approach would accomplish this goal. Id.

Allocating Resources to Deterrence When Certainty of Punishment is Expensive

Assume the certainty of punishment can be achieved by spending resources on police, prosecutors and the like, which are very expensive, and the severity is achieved by a system of fines, which is a very inexpensive system to administer. Thus, the cost of severity is low relative to certainty. The cost curve in the figure indicates this. When certainty is costly and severity is cheap, efficient deterrence requires severe punishment administered with a low probability of apprehension and conviction. This is represented in the figure by the tangency of the cost curve and deterrence line at the combination \((y^*, x^*)\), where the probability of apprehension and conviction, \(y^*\), is small relative to the fine \(x^*\).

In contrast to the assumptions of the previous figure, assume that certainty of punishment is now relatively less costly than severity of punishment because, say, the contemplated punishment is imprisonment, which is very expensive. The cost curve in the figure indicates this. When certainty is cheap and severity is costly, efficient deterrence requires a relatively light punishment but a high probability of apprehension and conviction. This is represented in the figure by the tangency of the cost curve and the deterrence line at the combination \((y^*, x^*)\), where the probability of apprehension and conviction, \(y^*\), is high relative to the severity of punishment (say, length of imprisonment) \(x^*\).
Corporations cannot be jailed, only fined or destroyed. Thus, severity of punishment is inexpensive in the case of organizations: the cost of assessing a fine on an organization is quite small compared to the cost of imprisoning a person. Certainty has historically been costly in environmental prosecutions, however, because there have been so many violations and so few resources with which to prosecute. Indeed, no large corporation was criminally prosecuted under federal environmental legislation until 1984. Moreover, environmental crimes are especially labor intensive—and therefore costly—for investigators and attorneys.

Such a combination of low-cost severity and expensive certainty would initially seem to lead to the conclusion that efficient deterrence requires severe punishment because of the low probability of apprehension and conviction. Increasing certainty in general requires two resources that are often lacking in enforcement: the political will to punish offenders, and the money to pay the enforcement officials. The Advisory Group apparently adopted this logic when it decided that environmental crimes require stricter guidelines than those for other organizational crimes. In fact, however, resources allocated to certainty have increased geometrically in recent years, reducing the need for extremely high severity in punishment.

In the area of environmental crime, federal and state governments have in recent years committed substantial amounts of funding and firepower towards increasing certainty of punishment. Despite the fact that Congress is reviewing EPA and many environmental statutes, environmental enforcement is on the rise. Increased enforcement should decrease the pressure to levy artificially high fines designed to set examples and deter others with excessive severity. The number of criminal investigators and prosecutors employed by EPA and DOJ has increased almost 400% since 1986. According to a June 16, 1995 report, EPA brought a record number of enforcement actions in fiscal

245. See discussion supra notes 227-229 and accompanying text.
248. COOTER & ULEN, supra note 239, at 543.
249. Group Member Turley opines that the Group did intend to enact stricter guidelines for environmental crimes than for other corporate crimes, though member Barrett holds the Group had no such intention. Telephone Interview with Barrett, supra note 69; Enforcement: Definition of Corporate Compliance Called Major Strength of Draft Guidelines, 24 ENV'T REP. (BNA) No. 30, at 1356 (Nov. 26, 1993); see also infra note 272 and accompanying text.
year 1994. As of 1995, EPA now refers as many criminal cases to DOJ for prosecution as it does for civil enforcement. Under the Polluter Prosecution Act of 1990, the number of criminal enforcement officials at EPA has increased to 160 in the last five years and is slated to reach at least 200 by 1996. The number of FBI agents investigating environmental crimes full-time has skyrocketed from two in 1982 to seventy-five in 1993.

In early 1995, Attorney General Janet Reno removed DOJ’s veto power over U.S. Attorney Offices’ environmental prosecutions, increasing the efficiency and certainty of federal indictment.

State enforcement is also on the rise. Both Colorado and Washington, for example, have formed joint state and federal environmental crimes task forces.

Prosecutions of environmental crimes recently have become not only more frequent, but also substantially more effective. EPA more...
than doubled its criminal investigations in the period from 1990 to 1993. Criminal indictments of businesses and individuals for environmental crimes increased fifty-percent in the first months of 1994. In EPA Region 10 alone, grand juries indicted twenty-six defendants for felony environmental crimes in the first eight months of 1995. Twenty-two were convicted. According to Barry Hartman, the ex-chief of environmental enforcement at DOJ, "98 percent of the federal indictments for environmental crimes result in convictions." EPA and DOJ's recent effectiveness in prosecuting environmental organizations (and individuals) supports the notion that effective enforcement of existing laws—rather than the crafting of harsher guidelines for environmental crimes—is the most effective method of deterring environmental crime.

Today, the most efficient and productive way to deter organizations from environmental crimes is to increase the certainty factor rather than the severity factor. This is precisely the direction in which EPA, DOJ, FBI, and Congress have been moving. The new Republican Congress has not made broadly supported efforts toward undoing these gains in prosecutorial resources despite its myriad of efforts to reverse, reform, and eliminate many environmental laws and regulations. The FBI continues to investigate environmental crimes, and at least some regional FBI chiefs plan to step up environmental enforcement. Acting CIA director William Studeman views environmental crime as a

262. The proposed bill H.R. 29, 104th Cong., 1st Sess. (1995), which significantly impacts resource allocation for environmental regulatory programs, contains no language that would cut back environmental criminal enforcement. Some recent GOP budget proposals have attempted to cut funding for the prosecution of environmental crime. However, no such budget has yet been passed by Congress. Gary Lee, GOP Environmental Tactics Scored, WASHINGTON POST, Feb. 27, 1996, at A17.
"hotspot" in the CIA's overall concerns with transnational issues.\footnote{265} Finally, in the Spring/Summer session of 1995, the Environment and Natural Resources Division of the DOJ planned hearings to consider the enforcement record, new priorities, and authorization requests of the Division.\footnote{266}

These increased efforts led one former federal environmental prosecutor to assert, "The question [now] is, have we gone too far?"\footnote{267} The answer is no, but the time has now come to halt efforts toward exemplary levels of severity in environmental punishment. The more certain the punishment, the less the need for severity to achieve the optimal level of deterrence.\footnote{268}

At some point, increasing the severity of punishment achieves no additional deterrence. Increasing certainty, by contrast, is always effective. If the current convictions are already efficiently severe—and, as demonstrated in the American Precision case,\footnote{269} they can be severe enough to destroy a corporation by divestiture—the best way to achieve optimal deterrence of corporations is to encourage and continue the recent steps that have dramatically increased certainty of punishment for environmental crimes.

Increasing certainty is more fair than increasing severity. When certainty is increased, prosecutors can tailor the number of counts in their indictments to fit the crimes actually committed, rather than seeking catastrophic fines to overdeter potential violators. Defendants can be sentenced and prosecuted when they commit crime, not just when scant prosecutorial resources are available. The Environmental Guidelines should not impose inflexible fine ranges that rob prosecutors and judges of the ability to tailor sentences to reflect the heterogeneity of environmental crime. Only flexibility can guarantee effective deterrence.

There are limits to the effectiveness of deterrence, however. A body of literature suggests that large, complex organizations often do not respond rationally.\footnote{270} Some argue that rules such as the Proposed


\footnote{266. Congressional Press Releases, Feb. 7, 1995. "With respect to environmental crimes, the subcommittee plans to examine criminal prosecution of violations of regulations where there is no evidence of adverse impact to the environment and where there is no evidence of criminal intent to violate the regulation." Id.}

\footnote{267. Allen, supra note 258, at 20.}

\footnote{268. COOTER & ULEN, supra note 239, at 539-41.}

\footnote{269. Zornow, supra note 212, at 83 (citing United States v. American Precision Components Inc., No. 93-450 (E.D. Pa. 1994)).}

\footnote{270. See, e.g., Christian Joerges, Relational Contract Theory in a Comparative Perspective: Tensions Between Contract and Antitrust Law Principles in the Assessment of Contract Relations...}
Guidelines emerge in order to control the mistakes made by such "boundedly rational" decisionmakers, whose rational behavior only extends so far.\textsuperscript{271} While the topic of "bounded rationality" is beyond the scope of this Comment, it offers an important conclusion: namely, that to the extent that organizations are "boundedly rational," firmer guidelines may be needed to deter corporations from committing environmental violations.

\textbf{D. Environmental Crimes Have Special Characteristics, But Are Not Unique}

One Advisory Group member has commented that "[e]nvironmental crimes are unique and should not be included with sentencing guidelines for other crimes . . . . Environmental crimes often involve a clear and present danger to third parties and violators often have a history of past environmental crimes."\textsuperscript{272} By contrast, the Advisory Group members who dissented from the Proposed Guidelines argue that

\begin{quote}
[S]entencing courts should not be required to apply vastly different rules for different areas of the law unless there are compelling reasons . . . . The work group has done just what it should not have done: It has suggested a separate and significantly different chapter in the Guidelines for environmental offenses, without a demonstrated need.\textsuperscript{273}
\end{quote}

Both arguments are correct: to the extent that environmental crimes are distinct from other organizational crimes, the Environmental Guidelines should vary from those set out in Chapter Eight; but where they are not, the existing Organizational Guidelines are adequate.


\textsuperscript{272}Draft Sentencing Guidelines Issued, supra note 56, at d3.

\textsuperscript{273}Dissent Filed, supra note 158, at 1594 (quoting Lloyd S. Guerci and Meredith Hemphill, Jr.).
Because environmental crime is more heterogeneous than other organizational crime, the Environmental Guidelines must be more flexible than the Organizational Guidelines. In other respects, the punitive goals are the same for environmental and nonenvironmental crimes. Therefore, the Environmental Guidelines should parallel the existing Organizational Guidelines and deviate from them only when necessary.

1. Far-Reaching Harm and Recidivism are not Unique to Environmental Crimes

Environmental crimes differ from other federal crimes in their capacity to affect a broad array of people and ecosystems. The potential for causing widespread harm, however, is not unique to environmental crime. The Advisory Group did not explain why environmental crime merits stricter sentencing guidelines than those covering crimes such as insider trading and narcotics trafficking, which can also have very diffuse effects. Piffering of a corporate treasury can harm thousands of shareholders, just as the emission of a pollutant in violation of a permit can decrease the quality of the air thousands breathe. The former crime is covered by the guidelines of Chapter Eight; why should the latter not be treated the same way?

It is frequently said that environmental crimes are unique because of their extended latency periods. Granted, some environmental crimes do not manifest themselves for many years, but the effects of others are immediate. Much of the impact of the Valdez tragedy, for example, "quickly became apparent."

Many prosecutors and environmentalists argue that environmental crime is unique in its impact on communities. United States v. Baumann, a recent criminal case against two individuals convicted of disposing chemicals in a housing project's dumpsters, highlighted the concern with community impact. In response to Baumann, an EPA assistant administrator stated that "[t]he government will not tolerate any community being used as an illegal waste dump . . . . We certainly

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274. W. Martin Harrell, regional EPA criminal enforcement counsel, has stated that "[e]nvironmental crimes are not so different from other crimes as to require an entirely different set of sentencing guidelines." Draft of Corporate Sentencing Guidelines Attacked, supra note 182, at 29.

275. Scott MacLeod, The Biggest Spill in U.S. History; A Tanker Hits an Alaskan Reef, Leaving an Eight-Mile Oil Slick, Time, Apr. 3, 1989, at 63. MacLeod writes:

The [Valdez's] side split open and thick North Slope crude spewed into one of the most pristine bodies of water in the U.S.

... Oil gushed out at the rate of 20,000 gal. an hour . . . . By the time the leak had slowed to a dribble a day later, an estimated 270,000 bbl. of oil had escaped, producing a slick 8 miles long and 4 miles wide.

Id.

276. No. 95-0137 (D.D.C. June 12, 1995); cited in Cheryl Hogue, Company President, Worker Plead Guilty to Dumping Chemicals at Housing, 6/14/95 STATE ENV'T DAILY (BNA) d4, available in WESTLAW, BNA-SED database.
will throw the book at those who dump hazardous wastes." The government was particularly concerned that the dumping could have led to the emission of harmful vapors that might have endangered the entire surrounding populace.

There is no doubt that environmental crimes can severely harm communities. Congress' enactment of the Emergency Planning and Community Right-to-Know Act reflects the government's concern with this impact. If this element were present in all environmental crimes, separate, strict, and inflexible guidelines would be warranted. However, while crimes such as those in Baumann can affect entire communities, others are isolated events. Criminal transport of hazardous waste under the RCRA may involve a permit violation that, while meriting criminal punishment, harms no one. Some environmental crimes have effects that fall somewhere between massive impact and no impact; for example, a geographically remote violation of the Clean Air Act might affect only a small handful of individuals. Thus, it is the heterogeneity of environmental crimes, and not their potentially widespread impact, that makes them unique.

Many commentators argue that recidivism is a special concern with environmental crime. Not long ago, many environmental "crimes" were in fact implicitly or explicitly condoned by Congress, the Executive Branch, and the public. The Advisory Group feels that organizations are more inclined to view environmental crimes as a cost of transacting business than as conduct morally stigmatized by society. This attitude suggests that businesses will be repeat offenders of environmental laws. However, recidivism is not unique to environmental crimes. Corporations have been deceiving shareholders for centuries. Again, organizations are only boundedly rational: they sometimes do not respond to sanctions the way logic indicates they should. This "bounded rationality" applies to sanctions for all varieties of criminal behavior, environmentally related or not.

Moreover, the Organizational Guidelines and the environmental statutes already sufficiently address recidivism. Under both the Clean Water Act and the Clean Air Act, for example, the penalties of post-conviction repeat offenders are doubled if the violator knowingly violates the Acts or their permit limitations. Any additional sanction against recidivism that the Environmental Guidelines might propose would be overkill.

278. Id.
280. See Coffee, supra note 48, at 5, 10.
2. The Lack of a Precedential Background Favors More Flexible Guidelines

Environmental crimes are unique in their recent vintage.282 Though some environmental crimes have been on the books since the turn of the century, prosecutors did not prosecute violations to any real extent until the Clean Air Act and the Clean Water Act were amended in 1977.283 The Advisory Group felt that this was one justification for imposing a different sentencing structure on environmental crime.284 Because relatively few environmental crimes had reached the sentencing phase before the Proposed Guidelines were released, the Proposed Guidelines were not based on an experience baseline of past sentencing precedents,285 but were based rather on percentages of maximum fines.

Lack of sentencing precedent does not justify the promulgation of stricter guidelines for environmental organizational crimes than for all others. As noted above, the lack of an experience baseline should militate in favor of more flexible sentencing guidelines, so that the median "heartland" can be established.286 Judges must be given the opportunity to feel out the relatively new criminal provisions of environmental statutes, and not be forced by guidelines to levy stiff fines against organizational defendants. Moreover, if Congress had desired strict sentencing for environmental crimes in all cases, it would not have provided such wide latitude in the statutory fine ranges.287

This Comment proposes that the Commission adopt fine ranges at least double those of the Proposed Guidelines. For example, the Proposed Guidelines provide that a crime of offense level eighteen should be punished at sixty- to eighty-percent of the statutory maximum. This Comment proposes increasing that range to fifty- to ninety-percent, or

282. "Federal environmental laws are of relatively recent origin. Although federal statutes date back to the Refuse Act and the Rivers and Harbors Acts of 1899, modern comprehensive regulatory programs began with the enactment of the 1970 Clean Air Act," the same year in which the EPA was created. Garrett & Bruce, supra note 205, at 12-3.

283. Id. at 12-4. "In the 1970s, only 25 criminal environmental cases were prosecuted." Id. "Further enhancements of criminal penalties in existing environmental statutes occurred . . . with passage of the Clean Air Act Amendments of 1990, Oil Pollution Act of 1990, and amendments to the Hazardous Materials Transportation Act." Id. (footnotes omitted).


287. The range of many environmental criminal fines varies by a factor of ten or more. For example, some of CWA's criminal fines range from $2,500 to $25,000 per day per violation. 33 U.S.C. §§ 1319(o)(1), 1321(b) (1994). The RCRA punishes those who illegally transport waste up to $50,000 per day per violation. 42 U.S.C. § 6928(d) (1988).
even to forty- to one-hundred percent in order to account for the heterogeneity of environmental crime and the lack of an experience baseline.

E. The Heterogeneity of Environmental Crime Requires that Judges Have More Discretion, Not Less

The Guidelines are supposed to address unjustified sentencing disparity—the different treatment of similarly situated offenders—and are not supposed to eliminate all judicial discretion. Unjustified sentencing disparity sometimes occurs in environmental crime due to its heterogeneity: differently situated environmental offenders can be convicted of dissimilar crimes under the same statute.

For example, the negligent dumping of a small amount of toxic waste by a small corporation is not the same crime as the intentional dumping of a large amount of waste by a large corporation with the resources for an extensive, proactive compliance program. However, both crimes would violate the same provisions of the RCRA. As a matter of fairness, the former crime should not be punished at the same percentage of the statutory maximum as the latter. Congress would agree, as indicated by the broad fine ranges in many environmental statutes. The Proposed Guidelines, however, would fine both corporations at or near 100% of the statutory maximum fine. The disparate impact of environmental crimes requires more sentencing discretion in order to avoid such unjust results.

Egregiously committed environmental crimes causing wide-ranging harm should be severely punished. “However, governmental representatives on the [Advisory Group] observed that demonstrable harm was present in substantially less than ten percent” of environmental crimes. Though the harm in many environmental crimes may be difficult to measure, it follows from this statistic that many criminal cases involve mere violations of “legal and technical requirements” of environmental statutes. Technical violations should not be punished at the same fine level as seriously damaging criminal acts.

Furthermore, many corporate environmental crimes are not so clearly harmful or immoral as to give notice of their likely prohibited character. For example, a small organization might well be unaware that it is a crime to discharge an industrial pollutant without an Army

288. Heumann, supra note 153, at 15.
289. See supra note 287.
290. For an explanation of how the Proposed Guidelines would calculate fines, see app. B infra.
291. GUERCI & HEMPHILL, supra note 53, at 5.
292. Id.
293. GRUNER, supra note 40, § 1.7.3., at 41-42.
Corps of Engineers permit. Many corporate environmental crimes are *malum prohibitum* rather than *malum in se*. Finally, the line between a civil and a criminal penalty can often involve a close question of law and fact. This characteristic of environmental crime indicates the need for more, and not less, flexibility in sentencing.

Flexibility is needed in organizational environmental sentencing because multiple environmental violations are often *not* worse than single violations. Multiple counts of insider trading, discrimination, or bribery may be more worthy of punishment and deterrence than single counts. Businesspeople who repeatedly engage in insider trading may as a rule merit longer sentences than those who have only broken the law once. In the case of many environmental crimes, however, the impact of one large violation on air, water, or other aspects of the environment may be much more substantial than numerous small violations.

For example, a transporter who hauls a thousand pounds of hazardous waste and dumps the waste illegally will likely harm the environment more than a transporter who ships a small amount of unpermitted waste once a week for two months (or eight weeks). The RCRA by its own terms can take into account these discrepancies, for such a violation is punished "up to" $50,000 per-day-per-violation. This provision allows a judge to fine the first defendant at or close to the statutory maximum, and the second closer to the floor. But the Proposed Guidelines would destroy this flexibility by presumptively punishing both transporters at 100% of the maximum statutory $50,000 per-day-per-violation. Under the Proposed Guidelines, absent mitigation, the second transporter could be fined a total of $400,000, while the former would only be assessed a $50,000 fine.

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296. Guerci and Hemphill give two useful examples:
   - First suppose a company fills in 5 acres of wetlands in one day. Alternatively, assume that the company fills in one-half acre of wetlands over ten separate days. There is no environmental difference, yet the [proposed] guidelines would require the sentencing court to impose a fine in the second example for ten 'volitional' acts that is ten times that in the first example. Secondly, assume that a company illegally discharges 500 gallons of wastewater into a river on one day. Alternatively, suppose that the company discharges 50 gallons of the same wastewater per day for ten days. If there is any environmental difference, it is that the first "high dose" situation is worse, yet the guidelines would require the sentencing court to impose a fine in the second hypothetical that is greater than the first.
   - **GUERCi & HEMPHILL, supra note 53, at 15-16.**
298. See Proposed Guidelines, *supra* note 8, §§ 9B2.1, at 1379-80, 9E1.1, at 1384, 9E1.2, at 1384; see also *supra* notes 158-165 and accompanying text.
“Aggregation—the treatment of many cases all at once—is often appropriate” where the cases are similar.299 The more dissimilar the cases are, however, the more flexibility is needed. Because of the exceptionally broad scope of environmental statutes and environmental crimes, the guidelines for these crimes must be more flexible than those for nonenvironmental crimes. Certain corporations need to be punished extensively for their injuries to the environment. Others, who make more proactive efforts to meet their obligations to the environment, or whose crimes have a minimal impact on the environment, merit a lesser fine.300

Congress itself recognized the heterogeneity of environmental crime and conduct by providing environmental enforcers broad discretion under most criminal environmental statutes. Congress understood that it could not feasibly micromanage such a heterogeneous area. The Environmental Guidelines should not negate this discretion by imposing inflexible provisions.

The inflexibility of the Proposed Guidelines would create an incentive for prosecutors to engage in count-stacking—maximizing the counts in indictments in order to secure potentially higher penalties and greater leverage in plea bargaining.301 In practice, prosecutorial plea

300. According to Guerci and Hemphill, two federal judges who appeared before the work group expressed the view that given the broad range of facts in environmental cases, there should be more discretion in sentencing for environmental crimes than other crimes. GUERCi & HEMPHILL, supra note 53, at 12-13.
301. See Coffee, supra note 48, at 10. In a recent case, the Eastern District of New York held that where the federal government and a defendant had agreed, in a plea negotiation, to a sentence less than that required by the Sentencing Guidelines, the court could accept the plea agreement and sentence the defendant “outside the Guidelines.” United States v. Aguilar, 884 F. Supp. 88, 89-92 (E.D.N.Y. 1995).

bargaining under a system similar to the Proposed Guidelines would become "fact bargaining," with adversaries bargaining less over the offenses themselves and more over the offense characteristics. Keeping the fine table but broadening the fine ranges will reduce the incentive to stack counts and increase the ability of judges to account for the vast heterogeneity of environmental crime, while still reducing unjust sentencing disparity.

F. The Guidelines Must Contain More Flexible Compliance Criteria

A compliance program with no teeth is worthless and wasteful. The prosecutors on the Advisory Group believed that unless a very rigid compliance program was put into place, they would be unable to distinguish "good" programs from "bad" ones, thus creating the risk of giving organizations free credits for paper compliance programs. This argument is a compelling one, and the Environmental Guidelines must encourage effective, meaningful compliance with environmental laws. But the seven criteria that the Proposed Guidelines require a corporation to meet to qualify for fine mitigation are too difficult with which to comply. Requiring a state-of-the-art, "Cadillac" program may make sense for civil fines, which are meted out merely for not adhering to standards of desirable conduct (and which do not lead to corporate probation), but mitigation of criminal liability should not be based on top-shelf compliance programs.

A good-faith program that effectively deals with environmental regulatory compliance, but nonetheless fails to meet guideline requirements, should entitle an organization to some mitigation of criminal fines. Companies like 3M, which has been at the forefront in establishing proactive compliance programs, argue that organizations that devote significant resources toward reducing their impact on the environment should be rewarded with flexible treatment.

1. The Guidelines Must Encourage Organizations to Set Up Compliance Programs

Any compliance program criteria the Commission adopts must address the following question: why should organizations bother attempting to comply? If the compliance criteria required for fine

"prosecutors are now free to ignore . . . the sentencing guidelines . . . . It is now the policy of the Department that prosecutors are free to substitute their own view of what degree of punishment is fair and what is not."). It is likely this percentage will increase if stricter, narrower guidelines are implemented. For an argument that such plea bargaining impairs effective punishment of crime, see generally Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L. J. 1979 (1992).

302. See Coffee, supra note 48, at 10.
303. Id.
304. Leyla Boulton, Right Wing Revenge, FIN. TIMES, June 21, 1995, at IV.
mitigation are too difficult to satisfy, organizations will be discouraged from making efforts to craft effective compliance programs. As Rockwell International queried in a sentencing memorandum, if a company that invests heavily in a compliance program "is then rewarded with the wrath the Government normally reserves for the recalcitrant, is such effort warranted?" 305

The need to provide incentives for compliance is heightened by the low risk of prosecution for environmental crimes. While prosecution of organizational environmental crimes is increasing geometrically, an organization's risk of incurring criminal sanctions remains low. From 1984-87, for example, only one percent of all federal criminal actions were filed against organizations. 306 Because today the risk of prosecution is still statistically low (despite the increase in certainty of punishment), the Environmental Guidelines cannot depend solely on deterrence to achieve compliance. Rather, the guidelines must provide carrots as well as sticks. They must encourage compliance by making it easy to accomplish.

Some members of the Advisory Group seemed skeptical of the benefit of very rigid compliance programs. 307 They were in part concerned over whether it is proper to punish severely defendant corporations who fail to meet rigid compliance criteria despite efforts at compliance. No doubt, extremely high punishments would deter crime. Again, though, excessive deterrence is counterproductive because it deters legitimate, desirable activity along with crime. 308 Further, the combination of unnecessarily strict and rigid compliance criteria with the fifty-percent collar may well lead organizations to abandon efforts at crafting effective compliance programs. Such a result would not only be economically inefficient, but, more importantly, would cause more environmental harm because organizations on the margin of compliance would cease their efforts to comply.

2. Five Steps the Sentencing Commission Should Take

The Sentencing Commission should take five steps to encourage meaningful compliance. First, rather than adopting the strict compliance program requirements set out in the Proposed Guidelines, the Commission should adopt a modified version of the more flexible crite-
ria set out in the Organizational Guidelines. Because courts and organizations are already somewhat familiar with the Organizational Guidelines, the more closely the Environmental Guidelines resemble them, the more needless confusion will be avoided.

The Organizational Guidelines require that an organization must have taken "at a minimum" the following seven types of steps towards compliance in order to qualify for fine mitigation:

1. The organization must have established compliance standards...that are reasonably capable of reducing the prospect of criminal conduct.
2. Specific individual(s) [in the organization's upper management] must have been assigned overall responsibility to oversee compliance with [the compliance standards].
3. The organization must have used due care not to delegate...authority to individuals whom the organization knew, or should have known...had a propensity to engage in illegal activities.
4. The organization must have taken steps to communicate effectively its standards to all employees and other agents, e.g., by requiring participation in training programs or by disseminating publications that explain in a practical manner what is required.
5. The organization must have taken reasonable steps to achieve compliance with its standards, e.g., by monitoring...its employees and other agents and by [implementing] a reporting system whereby employees and other agents could report criminal conduct...without fear of retribution.
6. The standards must have been consistently enforced through appropriate disciplinary mechanisms, including...discipline...for the failure to detect an offense. [Appropriate discipline must be determined in a case specific manner].
7. After an offense has been detected, the organization must have taken all reasonable steps to respond appropriately to the offense and to prevent further similar offenses—including any necessary modifications to its [compliance program].

The Organizational Guidelines also state that "the larger the corporation, the more formal the program typically should be." These seven criteria alone would probably not be enough to bring about effective compliance in the environmental realm, because they fail

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310. Id. Application Note 3(k)(7)(i), at 342.
to address at least one important issue: management involvement.\textsuperscript{311} It is crucial that the Environmental Guidelines encourage management itself, rather than compliance attorneys, to craft and implement compliance programs. Isolated attorneys in downtown law offices cannot adequately manage a company’s day-to-day environmental compliance. Therefore, this Comment proposes adding an eighth criterion to the seven set out in the Organizational Guidelines:

(8) Management must be involved in crafting, executing, supervising, and implementing the organization’s compliance program and must oversee its day-to-day administration.

Adopting this eighth factor would move compliance off lawyers’ desks and into the hands of line managers.

The Organizational Guidelines do not present ideal compliance criteria. However, if expanded to contain the key “eighth” criterion, they would substantially encourage compliance. Further, basing the Environmental Guidelines’ mitigation test on an expanded version of the existing seven-factor test would reduce the confusion that comes with new rules.

The second step the Commission should take is to craft Environmental Guidelines that are especially flexible for smaller organizations. In a small organization, the stakeholders are often also the managers. Thus, there is little incentive to develop a compliance program because these manager-shareholders often can be prosecuted as individuals.\textsuperscript{312} In a closely-held corporation, it may not matter to the president and owner of the outstanding stock whether it is he or his corporation that is criminally fined. By contrast, a large organization is more capable of insulating itself from its employees’ illegal conduct.\textsuperscript{313} Therefore, small organizations need more of an incentive than large ones to set up effective compliance programs. While a large organization may have the resources to pay for a compliance program as a cost of doing business, smaller companies’ resources are more limited. Small organizations end up squeezed: they derive fewer legal and economic benefits from implementing compliance programs, and must expend a higher percentage of their resources to implement them.\textsuperscript{314}

\textsuperscript{311} See Coffee, supra note 48, at 29 (describing the Advisory Group’s rejection of the Organizational Guidelines’ test, partly because corporate counsel felt it did not adequately encourage managerial involvement in environmental compliance).

\textsuperscript{312} See Kezsbom & Goldman, supra note 48, at 8-12 to 8-13.

\textsuperscript{313} Id. at 8-13.

\textsuperscript{314} The Sentencing Commission’s review of past practice data revealed that while judges did seem to consider the size of the offending corporation in sentencing organizations, they did not do so in a systematic way. Nagel & Swenson, supra note 2, at 248.
To encourage small businesses to comply, this Comment proposes that the following be added to the Commentary on the Environmental Guidelines' section on compliance criteria:

Small organizations should demonstrate the same overall degree of commitment to environmental compliance as larger ones. However, small organizations need not enact programs as formal as large organizations; nor need they necessarily expend the same amount of resources as would be expected of large organizations.315

Maximum mitigation should only be awarded when the organization has met all eight compliance criteria. In the case of small organizations, however, the court should award some mitigation credit for compliance programs that take substantial steps toward environmental compliance but do not satisfy all eight criteria. Courts should look to the resources of the organization in determining if creditable steps were taken toward compliance.

Adopting the eight criteria for environmental compliance programs, along with the above comment, would provide the flexibility required for sentencing small organizations. With more flexible guidelines, smaller organizations are more likely to find compliance efforts feasible and beneficial.

The Commission's third step should be to eliminate or substantially reduce the fifty-percent "collar" on offense level mitigation. Of course, liability for an organizational crime should not be wiped out just because a company has a compliance program. However, the Proposed Guidelines' cap on mitigation would unnecessarily deter compliance. Especially for a large corporation with the resources to absorb a fine, a fifty-percent reduction may not be enough to justify, in terms of the bottom line, the resources required to create an effective compliance program.

Some fine floor may be necessary to achieve adequate general deterrence, but a fifty-percent cap dampens incentives to implement effective compliance programs. This Comment proposes instead a ten-percent floor. This floor will still ensure that organizations get the message that environmental crime will not be tolerated—ten-percent of RCRA's $50,000 per-day-per-violation fine can still add up to a steep fine. At the same time, keeping the floor relatively low will ensure that efforts to implement compliance programs will be respected. This, in turn, will encourage organizations that do not have such programs to implement them.

315. The first two sentences of this proposed Commentary are reworked versions of the language presented in the Proposed Guidelines. See supra text accompanying note 192; Proposed Guidelines, supra note 8, § 9D1.1, Cmt. 3, at 1383.
As a fourth step, the Commission should recognize that the fact that a compliance program does not meet specific mitigation criteria should not preclude it from mitigation credit. The Organizational Guidelines state that only a presumption exists that a program not meeting its seven criteria is inadequate. Similar language should be adopted in the Environmental Guidelines. By creating a presumption against finding nonconforming programs effective, the guidelines can encourage programs that meet their criteria, and define the parameters of which programs qualify, while at the same time giving good-faith programs that fail to qualify some mitigation credit. The guidelines should allow maximum mitigation for a program meeting the statutory criteria, and reduced mitigation for noncomplying but diligent programs.

Fifth, the Commission should implement the Environmental Guidelines' compliance factors as a series of policy statements rather than as mandatory guidelines. Some commentators have argued that discretionary policy statements do not ensure the definite results necessary to establish effective deterrence. However, while mandatory guidelines may arguably be more effective in some instances, flexible policy statements would afford judges the freedom and flexibility necessary to account for the heterogeneity of environmental crime. Since neither Congress's nor the Commission's enabling statute requires mandatory guidelines, policy statements are a permissible approach. The Commission is entitled to issue nonbinding policy statements which sentencing courts must "consider." The Commission used both mandatory guidelines and policy statements in the Organizational Guidelines, employing mandatory guidelines for the key provisions but allowing non-binding policy statements to cover less crucial provisions. The Commission should expand upon this approach for the Environmental Guidelines and increase the proportion of policy statements to account for the wide-ranging differences among environmental crimes.

The danger with nonbinding policy statements is that courts, although required to "consider" them, could ignore them. However, concern over the great variety of environmental crime led the Commis-

316. "An organization's failure to incorporate and follow applicable industry practice or the standards called for by any applicable governmental regulation weighs against a finding of an effective program to prevent and detect violations of law." U.S.S.G., supra note 41, § 8A1.2., Application Note 3(k), at 342 (emphasis added).
317. See, e.g., Nagel & Swenson, supra note 2, at 243-44.
320. Such provisions included remedial orders, conditions of probation, and precise fine selection. Nagel & Swenson, supra note 2, at 241-42.
sion to exclude such crimes from the Organizational Guidelines in the first place.\textsuperscript{321} Environmental sentencing cries out for flexibility, and policy statements can provide that flexibility while at the same time reducing sentencing disparities. As the Supreme Court has noted, "a consistency produced by ignoring individual differences is a false consistency."\textsuperscript{322} Policy statements would eliminate false and draconian consistency while promoting fair, rational consistency.

Policy statements that are specific and strict should adequately deter organizations. Concededly, it is possible that discretionary policy statements would not deter environmental crime as well as mandatory guidelines. However, under the approach proposed in this Comment, fixed fine ranges will still be in place to warn organizations of the consequences of environmental crime. The discretionary policy statements will merely allow courts flexibility in determining whether an organization's compliance program merits fine mitigation and in considering an offending organization's resources.

Finally, in conjunction with the policy statement approach, the Commission should expand upon the approach already taken in the Organizational Guidelines and not require governmental motions for guidelines departures in the case of environmental crimes.\textsuperscript{323} At least one federal judge endorses dispensing with such a requirement.\textsuperscript{324} Such an approach would allow courts more freedom to take into account the widely differing circumstances of environmental crimes and would discourage count-stacking.

G. Consideration Should be Given to Good-Faith Efforts to Cooperate and Comply

Offender cooperation is crucial to the mitigation of environmental harm. The harm in nonenvironmental crimes is often relatively easy to identify and evaluate. A dollar figure can generally be put on insider trading, for example, and the injured parties can usually be identified. Environmental crimes, however, often affect large numbers of unidentified individuals and can take years to make their effects apparent. Offender cooperation is thus essential to dealing with this type of crime.

Further, quick remedial action is often required to stem environmental damage. Environmental harm can be reduced exponentially when spills are quickly attended to or dumping is quickly rectified. Again, offender cooperation often determines the extent and rapidity of

\textsuperscript{321} See supra note 48 and accompanying text.
\textsuperscript{323} See U.S.S.G., supra note 41, §§ 8C4.2 - 8C4.11, at 363-66 (allowing departures on various bases; not specifying that government motion is required). \textit{But see id.} § 8C4.1, at 363 (requiring government motion for departure based on substantial assistance to the government).
such remedial action. Thus, the Environmental Guidelines should encourage cooperation to a greater extent than the Organizational Guidelines do, and to a much greater extent than the restrictive Proposed Guidelines would have.

The Proposed Guidelines state that "no [mitigating] credit shall be given for mere compliance with an applicable federal reporting requirement."325 Granted, defendants as a rule should not have their sentences reduced merely because they have complied with laws everyone must follow. Reporting environmental crime should be an exception, however, because early notification can be especially helpful.

The Proposed Guidelines’ approach would deter reporting. Some mitigation credit should be given to encourage reporting, even though federal law already mandates it.326 The Environmental Guidelines should promote offender compliance and cooperation wherever possible, and especially in the area of reporting.327

The Organizational Guidelines’ approach to reporting is more flexible than the Proposed Guidelines’: it allows a two-point reduction in culpability score if the organization fully cooperated with authorities and clearly demonstrated affirmative acceptance of responsibility for its criminal conduct.328 The Organizational Guidelines also allow a one-point reduction for meeting the latter requirement.329

No analogous provisions exist in the Proposed Guidelines, but they should be adopted in the Environmental Guidelines. In fact, the Environmental Guidelines should allow greater cooperation deductions than the Organizational Guidelines do—this Comment suggests at least double the deductions—because reporting and the immediate taking of responsibility are particularly important in the environmental realm.

325. Proposed Guidelines, supra note 8, § 9C1.2(b)(1), at 1382. This provision, however, does allow mitigation credit when it is accompanied by full cooperation and steps to prevent recurrence. Id.


327. See American Bar Association, supra note 145, Standard 18-3.14(c)(i), at 102 (stating that compliance programs imposed on violators should encourage future compliance with the law).

328. U.S.S.G., supra note 41, § 8C2.5(g)(2), at 353.

329. Id. § 8C2.5(g)(3), at 353. A five point reduction is also allowed in certain circumstances. Id. § 8C2.5(g)(1), at 353.
H. The Sentencing Commission has the Right to Allow Greater Discretion in the Sentencing of Environmental Crimes

This Comment endorses a more discretionary approach than that set out in the Proposed Guidelines in order to account for the heterogeneity of environmental crime. Such an approach is not contrary to the goals of sentencing guidelines. Granted, the Sentencing Guidelines were enacted to reduce judicial discretion in favor of consistency and increased deterrence value. However, they were not intended to eliminate all judicial discretion. Even the strict Proposed Guidelines allow for some judicial discretion, but not enough to account for the diversity of environmental crime and the disparate impact fines have on small organizations. This Comment suggests that the Commission increase the discretion set out in the Proposed Guidelines by increasing the size of the fine ranges, broadening the types of compliance programs that can qualify for fine mitigation, expanding the ability of courts to account for the size of organizations, giving credit for cooperation with enforcement authorities, and lowering the mitigation cap in the collar provision.

Even if the Commission were to adopt all five suggestions listed above, the Environmental Guidelines would still provide for less judicial discretion than the Organizational Guidelines already do. Thus, the proposals would marry sentencing flexibility with an effective reduction of unjust sentencing disparity. In sum, the proposals set out in this Comment are not only prudent—for a flexible set of criteria will best encourage effective compliance with environmental laws—but are also fully consistent with the purpose of having sentencing guidelines.

CONCLUSION

The Sentencing Commission should craft Environmental Guidelines that both parallel and expand upon the Organizational Guidelines. Mimicking the Organizational Guidelines will reduce the inefficient confusion that comes with new, unfamiliar regulations. Expanding upon them will allow courts to address areas peculiar to environmental crime: the need for flexibility to account for the heterogeneity of environmental violations, the appropriateness of deterrence as a foundation

330. See 28 U.S.C. § 991(b)(1)(B) (1994) (stating that the purposes of the Sentencing Commission include the avoidance of unwarranted disparities between similar defendants and the provision of "certainty and fairness in meeting the purposes of sentencing").

331. This Comment's suggestions would, in contrast to the Organizational Guidelines, retain a rigid fine table, see supra text following note 271, and require much more management involvement, see supra note 311 and accompanying text, both of which requirements would reduce judicial discretion.
for the sentencing scheme, and the diversity of small and large organizational offenders.

The goal of the Environmental Guidelines must be deterrence, not retribution. Properly modified, the Organizational Guidelines can accomplish optimal deterrence by tailoring sentences in light of the circumstances of the offense and the resources of the offender. The Organizational Guidelines, as modified by the proposals of this Comment, would achieve deterrence while maintaining flexibility and diminishing sentencing disparity. They should therefore provide the basis for the new Chapter Nine of the sentencing guidelines.

APPENDIX A
PRACTICAL RAMIFICATIONS: HOW ORGANIZATIONS WILL BE AFFECTED IN THE FUTURE

The best way for organizations to protect themselves from criminal prosecution is through comprehensive compliance programs. Commentators fiercely debate the utility of such programs and their efficacy in protecting the environment, but under the current climate, compliance programs are the norm. The Organizational Guidelines, the ABA, and the DOJ all encourage compliance programs. The Sentencing Commission will almost certainly adopt some form of detailed compliance program in the Environmental Guidelines. The presence of an effective compliance program may also persuade a prosecutor not to indict in the first place. Furthermore, both the Proposed Guidelines and the Organizational Guidelines authorize probation for organizations that have no effective program in place to detect and


334. See AMERICAN BAR ASSOCIATION, supra note 145, Standard 18-3.14, at 102 (authorizing sentencing of offending organizations to submit to compliance programs).


336. Telephone Interview with Barrett, supra note 69; see also EPA, DOJ Hear Debate, supra note 68, at d34 (citing statement by Commissioner William Wilkins Jr. that the Commission still believes in vigorous compliance programs).

337. See DOJ Factors, supra note 335, at 35,399; see also supra note 212 and accompanying text.
prevent violations of the law. Compliance programs appear to be here to stay.

At least for larger organizations, compliance programs often make economic sense. An organization is better off proactively trying to prevent liability than having to deal with remediation in the future. Thus, to protect themselves and the environment, corporations should expand their existing programs, no matter how comprehensive they already are.

Corporate codes, adopted with the hope that they can later be invoked for legal protection, are commonplace. However, companies can expect that their programs will fail to meet the strict criteria of any Environmental Guidelines adopted in the future. Organizations must therefore make existing programs more diligent, even if they already meet the standards set out in the Organizational Guidelines.

At a minimum, organizational compliance programs should do the following:

1. **Create An Independent Audit Committee.** EPA, DOJ, and the Proposed Guidelines all call for frequent auditing. These audits can create problems for organizations. First, if the audit does uncover deficiencies in the organization's compliance program, those deficiencies must be corrected in a timely fashion. Second, under federal law, there is currently no statutory privilege for communications relating to environmental audits. Both of these factors can act as an incentive for or-

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338. Proposed Guidelines, supra note 8, § 9F1.1(a)(3), at 1385 (mandating probation for all organizations that lack effective compliance programs); U.S.S.G., supra note 41, § 8D1.1(a)(3), at 367 (requiring probation for organizations of fifty or more employees that do not have compliance programs).


340. See Dan K. Webb et al., Understanding and Avoiding Corporate and Executive Criminal Liability, 49 Bus. Law. 617, 656 (1994) (citing a 1990 Ethics Resource Center study that showed eighty-five percent of 711 respondents had adopted a code of conduct, policy statement, or other written ethical guidelines to avoid various types of criminal liability); Groskaufmanis, supra note 305, at 5-19 to 5-21; see also Christen Plumb, Corporate Capital Punishment, Fin. Post, Nov. 19, 1994, at 62 (Nat'l Ed.) (noting that membership in the Ethics Officer Association soared from thirty-seven in 1993 to 120 in 1994 in reaction to the implementation of the Organizational Guidelines).

341. Proposed Guidelines, supra note 8, § 9D1.1(a)(3), at 1382, calls for “frequent auditing” and “continuous on-site monitoring.”

342. Congress has recently made efforts toward enacting such a privilege, however. In February of 1995, Rep. Joel Hefley (R-Colo.) introduced H.R. 1047, 104th Cong., 1st Sess. (1995), a bill that would offer both privilege and immunity to companies that conduct environmental self-evaluations and remedy any violations they discover. Senators Hank Brown (R-Colo.) and Mark Hatfield (R-Ore.) introduced an audit privilege bill to the Senate in March 1995, S. 582, 104th Cong., 1st Sess. (1995). The EPA aims to encourage internal auditing but does not intend to shield those who violate the law. See EPA, DOJ Hear Debate, supra note 68, at d34; Restatement of Policies Related
organizations not to audit themselves. Audits are a necessary part of an effective compliance program, however, and are good evidence of such a program.

To address the problems arising from audits, corporations should limit the circulation of any internal environmental audits so as not to destroy any potential claims of attorney-client or work-product privilege that may protect such documents. (Note that the actual facts discovered by an audit—e.g., the existence of toxic waste—are not protected under these privileges. Only discussions and analyses of facts are so protected.) Of course, such a strategy will increase the ethical burdens on attorneys. As one commentator noted: "[t]he sentencing guidelines give the in-house corporate attorney a mandate to be the corporation's ethical conscience."

Outside audits may also prove useful, as their independence lends an air of credibility to compliance programs. The Proposed Guidelines state that external evaluations should be implemented periodically "if appropriate to the size and nature of the corporation." Organizations have a conflicting incentive not to use outside audits, however, because...
the presence of outside consultants may attract the attention of environmental authorities, like "hang[ing] a neon sign in front of the facility saying, 'EPA please check.'" As a compromise, each organization's board of directors should create an independent auditing committee that can take responsibility for regular, in-house auditing and call for outside audits where necessary. To preserve any possible attorney-client privilege, it may be best to chair this committee with an attorney.

2. Craft In-depth Training Programs. The Commentary to the Organizational Guidelines suggests, and the Proposed Guidelines require, employee and agent participation in training programs in order for the corporation's fine to be mitigated. The definition of the word "agent" is unclear, but it would be prudent to extend these training programs to contractors over which the organization exercises some control.

Training programs should be as formal and detailed as possible to ensure that they meaningfully add to compliance efforts. In the case of all but very small organizations, management should create a written manual describing the organization's environmental compliance program and setting out specific employee duties under the program. Management should also conduct seminars instructing employees on how to stay in compliance with environmental laws, and explain to employees in detail all environmental regulations. A general "code of conduct" will probably be inadequate under future Environmental Guidelines.

3. Disseminate the Compliance Program to all Employees and Agents. Many organizations distribute their codes of conduct to a limited cross-section of employees (typically management). The Organizational Guidelines, however, require communication to "all employees and other agents." The Proposed Guidelines have no directly analogous requirement, but they do require a defendant organization to have implemented training programs that are adequate to "maintain up-to-date, sufficiently detailed understanding of all applicable environmental

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347. Rubenstein, supra note 343, at 1 (citing David S. Machlowitz, general counsel of Siemens Medical Systems, Inc.).
349. Groskaufmanis, supra note 305, § 5.06, at 5-34 (citing Ethics Research Center, Ethics Policies and Programs in American Business 6 (1990), which reports that only about half the respondents to a study distributed codes of conduct to all employees).
requirements by those employees and agents whose responsibilities re-

quire such knowledge. 351

Organizations should make a concerted effort to distribute the
terms of their programs to all employees and agents in a reader-friendly
format. Employees and agents should also be required to acknowledge
in writing that they have read and understood the terms of their compli-
ance programs. 352

4. Set Up an Internal, Anonymous Reporting System. The Organi-
zational Guidelines suggest "having in place and publicizing a report-
ing system whereby employees and other agents could report criminal
conduct... without fear of retribution." 353 The Proposed Guidelines
have a similar requirement and suggest using hotlines. 354 A hotline at-
tached to a voice-mail service or an answering machine is a prudent and
inexpensive method of creating an anonymous reporting system. Or-
ganizations with limited resources can use a suggestion box instead.
Note that any report developed from such a hotline will generally not be
protected from disclosure by the attorney-client privilege or the work
product doctrine. 355 To address this concern, organizations may wish to
request the minimum amount of information necessary for management
to investigate the complaint.

5. Include Enforcement Mechanisms and Sanctions for Environ-
mental Violations. The Organizational Guidelines require that an or-
ganization’s standards be "consistently enforced through appropriate
disciplinary mechanisms, including, as appropriate, discipline of indi-
viduals responsible for the failure to detect an offense." 356 The Pro-
posed Guidelines would have required consistent and visible
enforcement of the organization’s environmental policies, as well as a
system of incentives to reward employees and agents for "contributions
to environmental excellence." 357 A program without teeth is unlikely to
meet the Environmental Guidelines’ standards. Therefore, a mechanism
specifically tailored to environmental violations should be disseminated
in the compliance manual and enforced, and incentives should be put in
place to encourage employees and agents to comply with environmental
laws and to report violations. Employees should be punished for any
and all violations of the organization’s compliance program.

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352. Richard Liskov, Fending off the Feds: Complying with Federal Omnibus Crime Bill of 1994,
Best’s REVIEW—PROPERTY—CASUALTY INSURANCE EDITION, January 1995, at 55, available in
WESTLAW, BREVPC database.
355. Webb & Molo, supra note 350, at 393.
357. Proposed Guidelines, supra note 8, § 9D1.1(a)(5)-(6), at 1383.
6. Leave a Paper Trail. The Proposed Guidelines specifically state that a defendant organization must carry the burden of demonstrating that it made the substantial commitment necessary for mitigation, and that the demonstration should be made “primarily by providing documentation.”\textsuperscript{358} The Organizational Guidelines are more vague, and do not directly discuss the general burden of proof or documentation issues. Any version of the Environmental Guidelines is likely to place this burden on the organization, however. Organizations should therefore make sure all programs, incentives, enforcement efforts, and anonymous reports are documented.

7. Surpass Your Peers. Under the Organizational Guidelines, the sentencing court gives favorable treatment to compliance programs that are more advanced than those of other comparable organizations.\textsuperscript{359} The Proposed Guidelines allow mitigation for “additional innovative approaches” that are “effective and important” to carrying out the organization’s commitment to environmental compliance.\textsuperscript{360} Having an advanced program will thus be helpful in achieving mitigation of any sentences for environmental violations.

8. No Matter How Scant Your Resources, Do What You Can. The Proposed Guidelines, as discussed above, make minimal accommodations for small businesses. It is thus important for small businesses to implement the most comprehensive programs they can muster in order to demonstrate their commitment to proactive compliance. Smaller organizations must recognize that their efforts may be held to extremely high standards, despite their lack of sophistication and resources. Fair or not, small organizations must make even greater efforts at enacting effective compliance programs than their larger brethren, given that the consequences of unmitigated fines are proportionately greater for them.

APPENDIX B

HOW ENVIRONMENTAL CRIME WOULD BE SENTENCED UNDER THE PROPOSED GUIDELINES

The Proposed Guidelines break environmental crimes up into six sentencing categories: \textsuperscript{361}

1. “Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants.” The base offense level for such crimes under the Proposed Guidelines is

\textsuperscript{358} Id. § 9D1.1, cmt. 1, at 1383.
\textsuperscript{359} Webb & Molo, supra note 350, at 381.
\textsuperscript{360} Proposed Guidelines, supra note 8, § 9D1.1(a)(8), at 1383.
\textsuperscript{361} Proposed Guidelines, supra note 8, § 9B2.1(b)(1), at 1379.
which translates to a penalty of one hundred percent of the maximum statutory fine. The CWA, CAA, and RCRA all contain “knowing endangerment” provisions. All three “prohibit persons from knowingly violating a permit . . . or knowingly releasing a hazardous pollutant when the violator ‘knows at the time that he thereby places another person in imminent danger of death or serious bodily injury.’” The CWA and RCRA fine a first offender up to $250,000. The CAA fines an organization not more than $1,000,000 per violation. These penalties are doubled for post-conviction second offenders under the CWA and the CAA.

2. “Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification.”

   a. The Base Level. The Proposed Guidelines assign to these crimes a base offense level of eight, which corresponds to fifteen to twenty-five percent of the statutory maximum fine. Under the Proposed Guidelines, “[i]f the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission,” the fine is increased by six levels, or if it “otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide,” the fine is increased by four levels.

   b. The Fines. Mishandling is a broad term and could relate to violations of most environmental statutes. FIFRA sets out a fine of up to $50,000 for pesticide registrants and producers who knowingly violate any FIFRA provision, and fines of $2,500 for commercial applicators who knowingly violate any FIFRA provisions. Under TSCA, a corporation can be punished up to $25,000 per day for each day of a viola-

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363. Id. § 9B2.1(b)(1)(A), at 1379.
364. Id. § 9E1.1, at 1384.
368. See Garrett & Bruce, supra note 205, at 12-9. All of these penalties, when applied to individuals, can also include jail time. Id. Because an organization cannot be jailed, this Comment will not discuss the criminal incarceration provisions.
371. Garrett & Bruce, supra note 205, at 12-10.
373. Id. § 9B2.1(b)(2)(A), at 1379.
374. Id. § 9E1.1, at 1384.
375. Id. § 9B2.1(b)(2)(A)(i), at 1379.
377. Id. § 9B2.1(b)(2)(B)(i)(l), at 1379. Other characteristics may increase the base offense level, and thus the percentage of the maximum statutory fine applied to each count. See id. § 9B2.1(b)(2)(B)(i)(l)-(iv), at 1379.
tion of 15 U.S.C. §§ 2614 and 2689. These violations include failing to comply with rules promulgated under the Act; using for commercial purposes a substance the user had reason to know was manufactured, processed, or distributed in violation of the Act; failing or refusing to maintain records, reports, or notices required under the Act; and failing to comply with code provisions designed to reduce lead exposure.  

The CWA imposes a minimum fine of $2,500 and a maximum fine of $25,000 per day per violation for negligently violating the Act's pretreatment standards, permit effluent limitations, or other requirements.  

If a violator "knowingly" violates the Act or permit effluent limitations, or introduces pollutants to a sewer system or municipal treatment system, the CWA provides for a mandatory criminal fine of $5,000 to $50,000 per-day-per-violation. The CWA doubles the maximum amount of these penalties in the case of post-conviction repeat offenders.  

Under CERCLA, an organization has committed a felony if it fails to notify the government of unlawful releases of hazardous substances or knowingly destroys or falsifies certain records, and it can be fined in accordance with Title 18. Further, it is a misdemeanor finable up to $10,000 for an owner or operator not to notify EPA of the existence of a hazardous waste disposal facility on her or his property.  

Under RCRA, knowingly treating, storing, or disposing of hazardous waste without a permit or in violation of a permit, illegally transporting waste, or unlawfully exporting hazardous substances can lead to a criminal fine of up to $50,000 per day per violation.  

Under the CAA, it is a felony knowingly to violate any state implementation plan (SIP) requirements, any of the federal standards of performance for new stationary sources, any of the hazardous air pollutant standards, or other miscellaneous provisions. Violators are fined under Title 18, and repeat offenders face double penalties. The CAA also makes it a felony knowingly to make any false statement in a CAA document, to fail to make a required report, or to falsify or tamper with any monitoring device. Again, violations are punishable by fines under Title 18.

381. 33 U.S.C. § 1319(c)(1) (1994); see Garrett & Bruce, supra note 205, at 12-13 to 12-14.
390. Id.
Under OCSLA, if an organization "knowingly and willfully" violates any provision of OCSLA or any lease or permit, makes false statements in any OCSLA report or document, tampers with monitoring devices, or reveals confidential information, the organization can be fined up to $100,000.391

Under the Deepwater Ports Act, "[a]n individual in charge of a vessel or a deepwater port... [who] has knowledge of a discharge of oil" and fails to notify the government immediately of such a discharge can be punished with a fine of up to $10,000.392

3. "Mishandling of Other Environmental Pollutants: Recordkeeping, Tampering, and Falsification."393

a. The Offense Level. Under the Proposed Guidelines, the base level penalty for mishandling nontoxic pollutants is somewhat lower than those for the mishandling of toxic or hazardous pollutants. The base offense level is six,394 or ten percent of the maximum statutory fine.395 "If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission," the fine is increased by six levels.396 If it "otherwise involved a discharge, release, or emission of a pollutant," the fine is increased by four levels.397

b. The Fines. The CWA provisions discussed above dealing with negligent and knowing violations of the Act are applicable here in the case of nontoxic and nonhazardous pollutants.398 Similarly, a CAA, SIP, or EPA standard violation for a nonhazardous or nontoxic substance would presumably be punished under this heading.399

The Refuse Act makes it a misdemeanor punishable up to $25,000 if an organization obstructs, modifies, builds, constructs, excavates, or fills on any navigable United States waters without express approval of the Army Corps of Engineers.400 Under the Refuse Act, industrial dischargers of pollutants who fail to obtain permits from the Army Corps before discharging into the environment can be fined up to $2,500.401 And under the Act to Prevent Pollution from Ships, it is a class D felony to violate knowingly the MARPOL Protocol or the Act.402

394. Id. § 9B2.1(b)(3)(A), at 1379.
395. Id. § 9E1.1, at 1384.

   a. The Offense Level. Under the Proposed Guidelines, the base offense level for tampering with a public water system is eighteen,\footnote{ Id. § 9B2.1(b)(4)(A), at 1379.} or sixty to eighty percent of the maximum statutory fine.\footnote{ Id. § 9B2.1(b)(4)(A), at 1379.} There is no analogous sentencing category in the Organizational Guidelines. 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, the fine is increased by two levels.\footnote{ Id. § 9B2.1(b)(5)(B)(i), at 1379.} Thus crimes relating to tampering with the public water system will in most cases be fined at or close to the maximum statutory fine.

   b. The Fines. As there is no analogous provision in the Organizational Guidelines, there is no case law indicating precisely which environmental statutes would in practice be sentenced under this section. It is likely that the above described offenses under the CWA and the SDWA could also be sentenced under this heading if they involved a public water system. Under the CWA, there is a minimum $2,500 and maximum $25,000 per-day-per-violation criminal fine if a defendant negligently introduced pollutants to a sewer system or municipal treatment system\footnote{ 33 U.S.C. § 1319(c)(2) (1994).}, the minimum and maximum amounts are doubled for knowingly introducing pollutants.\footnote{ Proposed Guidelines, supra note 8, § 9B2.1(b)(5), at 1379.}

5. "Wildlife Violations."\footnote{ Proposed Guidelines, supra note 8, § 9B2.1(b)(5), at 1379.}

   a. The Offense Level. The Proposed Guidelines do not set a base offense level for wildlife violations.\footnote{ See id. § 9B2.1(b)(5)(A), at 1379.} The Advisory Committee members were unable to agree on what level to ascribe to such violations. However, the Proposed Guidelines do set out characteristics that would have added to the base offense level. If the offense (a) was committed for pecuniary gain or otherwise involved a commercial purpose; or (b) involved a pattern of similar violations, the fine was to be increased by two levels.\footnote{ Id. § 9B2.1(b)(5)(B)(i), at 1379.} 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, the fine was to be increased by two levels.\footnote{ Id. § 9B2.1(b)(5)(B)(ii), at 1379-80.} Further, the Proposed Guidelines instruct the judge to use the greater of (a) the increase in number of levels from the table in section

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404. Id. § 9B2.1(b)(4)(A), at 1379.
405. Id. § 9B1.1, at 1384.
410. See id. § 9B2.1(b)(5)(A), at 1379.
411. Id. § 9B2.1(b)(5)(B)(i), at 1379.
2F1.1 (Fraud and Deceit) "[i]f the market value of the fish, wildlife, or plants exceeds $2,000";\(^{413}\) or (b) an increase of four levels if the offense involved (i) marine mammals 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).\(^{414}\)

6. "Simple Recordkeeping and Reporting."\(^{415}\) For simple recordkeeping and reporting violations the Proposed Guidelines set a base offense level of five, or ten percent of the maximum statutory fine.\(^{416}\) No special characteristics increase this fine calculation. The scope of this provision is narrow. According to the Application Notes to section 9B2.1, "'[s]imple recordkeeping or reporting violations' ... are limited to situations 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."\(^{417}\) Note that "[i]f a recordkeeping offense reflected an effort to conceal a substantive environmental offense," the Proposed Guidelines mandate using the offense level for the substantive offense.\(^{418}\)

\(^{413}\) Id. § 9B2.1(b)(5)(B)(iii)(a), at 1380.

\(^{414}\) Id. § 9B2.1(b)(5)(B)(iii)(b), at 1380.

\(^{415}\) Id. § 9B2.1(b)(6), at 1380.

\(^{416}\) Id. § 9E1.1, at 1384.

\(^{417}\) Id. § 9B2.1, Application Note 4, at 1380.

\(^{418}\) Id. §§ 9B2.1(b)(2)(v), (3)(v), at 1379.