American University Law Review

Volume 48 | Issue 4 Article 4

1999

What's Your Water Worth? Why We Need Federal Fine Guidelines for Corporate Environmental Crime

Mark H. Allenbaugh

What's Your Water Worth? Why We Need Federal Fine Guidelines for Corporate Environmental Crime

Keywords
Corporation, Corporate environmental crime, United States Sentencing Commission, Environmental Crime, Organizational Environmental Crime

COMMENT

WHAT'S YOUR WATER WORTH?: WHY WE NEED FEDERAL FINE GUIDELINES FOR CORPORATE ENVIRONMENTAL CRIME

MARK H. ALLENBAUGH*

TABLE OF CONTENTS

* Associate Articles Editor, *American University Law Review*, Volume 49; J.D. Candidate, May 2000, *Washington College of Law, American University*; 1995 M.A., *Ohio University*; 1993, B.A., *University of Southern California*. Assistant Professorial Lecturer, *George Washington University*, Department of Philosophy. During the course of writing this Comment, the author was employed as a law clerk for the United States Sentencing Commission. The views expressed herein are solely the author's and do not necessarily reflect the views or opinions of the United States Sentencing Commission or any of its staff. The author is grateful to Paula J. Desio and Amy L. Schreiber of the United States Sentencing Commission for their encouragement during the writing of this piece. The author also owes a debt of gratitude to the Honorable William W. Wilkins, Jr., of the United States Court of Appeals for the Fourth Circuit, and Justin A. Thornton, Esq., of Washington, D.C., for their suggestions on earlier drafts. This Comment is dedicated to my parents, Howard and Veronica, and my wife, Jacqueline, with appreciation for her advice and patience.

INTRODUCTION

On the night of January 7, 1994, the *Morris J. Berman*, a barge loaded with nearly 35,000 barrels of fuel oil, broke loose from its tugboat and ran aground near Puerto Rico's famous Escambron Beach.[1] Earlier that evening, the tugboat's captain had made negligent repairs to the towing cable which resulted in its ultimate failure. The grounding released approximately 750,000 gallons of oil into the ocean near the beach during the peak of the tourist season.[2] The barge had been sent adrift when its tugboat's faulty towing cable broke.[3] As a result of the enormous clean-up costs incurred by the federal government,[4] the damage caused to Puerto Rico's tourist industry,[5] and the desire to send a strong message of deterrence,[6] the United States District Court for the District of Puerto Rico imposed the largest criminal fine in history for violating a federal environmental regulation.[7] Three sister corporations[8] that owned

1. *See Three Corporations Fined $75 Million for Puerto Rico Oil Spill Largest Federal Environmental Criminal Fine in U.S. History*, D.O.J.-ENR PRESS RELEASE, Sept. 25, 1996, *available in* 1996 WL 545066, at *1 [hereinafter *Three Corporations Fined*].

2. *See id.*

3. *See id. (*reporting that the captain had made an improper emergency repair to the tugboat's cable and had plead guilty to violating the Clean Water Act negligently).

4. *See id. (*noting that government clean-up costs totaled $90 million).

5. *See id. (*reporting that the disaster occurred during the peak of the Puerto Rican tourist season, affecting one of its most popular resort beaches).

6. *See id.* at *2 *(*quoting United States Attorney Guillermo Gil: "This $75 million sentence will never repay the damage done to our environment, but we are pleased that this fine will serve to send a strong message to corporations and others that environmental offenses will be dealt with severely.").

7. *See id.* at *1.

8. *See id. (*noting that Judge Laffitte found that Bunker Group, Inc.; Bunker Group, Puerto Rico; and New England Marine Services were part of an umbrella organization of 50

both the tugboat and the barge were fined a total of $75 million.[9]

Yet, this was not the largest oil spill in United States history. The 1989 *Exxon Valdez* disaster, considered to be "the largest environmental crime in U.S. history,"[10] resulted in the release of over $11 million gallons of oil into the environment,[11] more than fourteen times the amount released by the *Morris J. Berman*. Despite the fact that the Exxon Corporation could have incurred a multibillion dollar criminal fine,[12] it was sentenced to pay only $25 million,[13] just a third

---

corporations owned by the Frank family of New York that were "organized into a complex web that allowed the family to shield its assets from criminal fines").

9. *See id.*

10. *See* Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 331 (1998).

11. *See Government Suits in Exxon Valdez Spill Settled with $1 Billion Deal*, SAN DIEGO UNION & TRIB., Oct. 9, 1991, at A3 [hereinafter *Government Suits Settled*]; *see also Historical Overview of the Exxon Valdez Oil Spill (*visited April 5, 1999) <*http://www.oilspill.state.ak.us/nwhistory.html*>. As a direct result of this environmental disaster, Congress passed the Oil Pollution Act of 1990, requiring ships transporting oil to have double hulls so as to decrease substantially the likelihood of future disasters on a similar scale. *See* Oil Pollution Act of 1990, 46 U.S.C. § 3703(a) (1994); S. REP. NO. 101-94, at 2-3 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723-24 (specifically citing the *Exxon Valdez* disaster as the impetus for passage of the Act, noting that "[a]t the present time, the costs of spilling and paying for [oil-spill] clean-up and damage is not high enough to encourage greater industry efforts to prevent spills and develop effective techniques to contain them. Sound public policy requires reversal of these relative costs").

12. *See Environmental Groups Want a Multibillion Fine for Exxon*, SEATTLE TIMES, Sept. 27, 1991, at C4 (reporting that ten national and state groups argued that Exxon could be subject to fines of several billion dollars under federal pollution law).

13. *See Judge Endorses $1 Billion Exxon Valdez Settlement*, WASH. POST, Oct. 9, 1991, at A4 [hereinafter *$1 Billion Settlement*] (reporting that the judge forgave $100 million of $125 million fine because of "Exxon's voluntary efforts to pay some civil claims and its cleanup work"). This rationale, however, confuses the remedial nature of civil litigation and clean-up with the punitive nature of criminal fines. Whereas civil actions are meant to make victims whole or otherwise remedy a harm, criminal penalties are designed to reflect society's disapprobation of the offense in question. *See, e.g.*, Richard M. Cooper, *Separate Civil and Criminal Penalties Are Now OK*, BUS. CRIMES BULL.: COMPLIANCE & LITIG., Jan. 1998, at 1, 3 (noting the distinction between criminal fines, intended to deter and punish, and civil penalties, designed to compensate and remediate). Thus, courts have even held that civil penalties do not necessarily lessen the need to impose additional criminal fines for the same offense. *See* Hudson v. United States, 522 U.S. 93, 103 (1997) (holding that payment of civil penalties and criminal fines which may arise out of the same offense do not violate double jeopardy as they are different in kind and intent); *see also* U.S. SENTENCING GUIDELINES MANUAL § 8C3.3(a) (1998) (stating that a court shall reduce an organization's otherwise valid fine "to the extent imposition of such fine would impair its ability to make restitution to victims"); David Bancroft, et al., *Some Current Issues in the Sentencing of Companies for Environmental Crimes*, *in* CRIM. ENFORCEMENT OF ENVTL. L, at 181, 186 (ALI-ABA Course of Study, 1997) (noting that the court is required to reduce a criminal fine only when enforcing the fine would jeopardize the organization's ability to pay restitution) (citing United States v. Eureka Labs., Inc., 103 F.3d 908 (9th Cir. 1996)). There is no evidence that Exxon would have been unable to make restitution had the $125 million criminal fine been imposed. It is therefore ironic that Judge Holland had initially rejected an offer by Exxon to pay a $100 million criminal fine—in addition to $900 million in civil penalties—on the grounds that such a settlement was too lenient. *See $1 Billion Settlement*, *supra*, at A4. It was only after Exxon agreed to pay an additional $25 million in criminal fines that the case settled. *See id.* But despite holding out for a greater criminal fine totaling $125 million, Judge Holland forgave $100 million of that fine. *See id.* Exxon was thus fined $75 million less than it would have been fined under the first settlement package. Was such a fine a sufficient

of the fine imposed upon the owners of the *Morris J. Berman*. Thus, for every gallon of oil spilled in the waters off Puerto Rico, a $100 fine was imposed, but for every gallon of oil spilled in the waters off Alaska, a fine of only $2.27 was imposed. Are the waters off Alaska really less valuable than the waters off Puerto Rico?

The above comparison exemplifies the problematic nature of disparate criminal sentences. Although these two incidents represented substantially similar offenses, the courts imposed remarkably different sentences without apparent justification for the discrepancy.[14] Such a situation is, of course, incompatible with a criminal justice system responsible for meting out consistent[15] and just punishment.[16]

As argued below, had federal fine guidelines for corporate[17] environmental crime existed at the time of the oil spills in Alaska and Puerto Rico, it is likely that the resultant sentences would have reflected more appropriately the relative impact those disasters had on the environment.[18] More importantly, through the imposition of

---

criminal sanction? According to Rodger Schlickeisen, President of the environmental group Defenders of Wildlife, "[g]iven Exxon's 1991 first-quarter profits of $2.2 billion, this hardly amounts to punishment that fits the crime." *See Government Suits Settled*, *supra* note 11, at A3. Additionally, in 1996, after receiving a $5 billion fine in punitive damages for causing severe damage to the local Alaskan economy, Exxon was still the most profitable corporation in America. *See* Richard Teitelbaum, *Exxon: Pumping Up Profits*, FORTUNE, Apr. 28, 1997, at 134. *See generally* Koenig & Rustad, *supra* note 10, at 333-34 (noting that the five billion dollar award nevertheless "served a social purpose by sending a message not only to Exxon, but to the entire industry, that environmental protection must be a top priority"). Given that the large civil penalties that arose from the *Exxon Valdez* disaster did not appear to affect Exxon very much, it is difficult to determine what, if any, impact the $25 million criminal fine had upon Exxon. Moreover, in a national survey of 1005 adults, 56% felt that even the $100 million fine contained in the first settlement package was insufficient. *See Gallup Poll Shows Most Want Exxon to Get Bigger Fine*, S.F. CHRON., May 3, 1991, at B16. Thus, it does not seem that Exxon—notwithstanding the fact that it paid heavy civil penalties—received its just desert.

14. One of Congress' objectives in passing the Sentencing Reform Act of 1984 was to "narrow[] the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(3).

15. *See* 18 U.S.C. § 3553(a)(6) (1994) (noting that a factor to be considered in sentencing is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

16. *See id.* § 3553 (a)(2)(A) (noting that another factor to be considered in sentencing is the need to "provide just punishment for the offense").

17. According to Chapter Eight of the *Federal Sentencing Guidelines*, entitled "Sentencing of Organizations," organizations include not only corporations, but also "partnerships, associations, joint-stock companies, unions, trusts, pension funds, unincorporated organizations, governments and political subdivisions thereof, and non-profit organizations." *See* U.S. SENTENCING GUIDELINES MANUAL § 8A1.1 cmt. n.1. The term "organization," moreover, is not limited in meaning to the entities enumerated above, but encompasses all entities other than individuals. *See id.* This Comment, therefore, will utilize the more general term "organization" rather than "corporation" when referring to guideline issues.

18. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(3). ("[T]he Commission developed these guidelines as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore effective sentencing system.").

federal fine guidelines for organizational environmental crime, not only would the problem of disparate sentencing be largely remedied,[19] but organizations convicted of environmental offenses would also be more likely to receive punishment that "reflect[s] the seriousness of the offense."[20] Furthermore, given the serious nature of such offenses, convicted organizations would be required to implement effective compliance programs,[21] thereby substantially reducing the likelihood of repeat offenses.[22] By requiring organizations to implement compliance programs as a condition of probation, courts will thus motivate the voluntary adoption of compliance programs as a preventive measure, thereby reducing the chance of violations occurring at all.[23]

Currently, no federal sentencing fine guidelines address organizational environmental crime.[24] Despite the fact that environmental crime consists of a variety of offenses, including water pollution,[25] air pollution,[26] the illegal storage and transportation of

19. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(3) (noting Congress' desire via the promulgation of sentencing guidelines to achieve reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similarly situated offenders).

20. *See* 18 U.S.C. § 3553 (a)(2)(A) (listing the need for the sentence "to reflect the seriousness of the offense" as first in a series of factors that the court must consider in imposing a sentence).

21. *See infra* note 111 and accompanying text (discussing the nature and purpose of compliance programs).

22. *See infra* note 111. For example, the Sentencing Reform Act of 1984 brought a significant change to organizational sentencing in terms of possible types of sentences. *See* Emmitt H. Miller, III, *Recent Developments: Federal Sentencing Guidelines for Organizational Defendants*, 46 VAND. L. REV. 197, 201-03 (1993). Prior to the Act, a corporation could not be sentenced to both a term of probation and a fine. *See id.* at 201. Not only may both now be imposed, but other conditions such as restitution, community service, restrictions on business activities, and regular meetings with a probation officer may also be imposed. *See id.* at 203 (citing 18 U.S.C. § 3563(b)).

23. *See infra* note 111 and accompanying text (discussing how the Proposed Guidelines for sentencing organizations that have committed environmental offenses will motivate the implementation of compliance programs so as to reduce fine exposure, but at the same time punish more severely those organizations that do not have such programs at the time of the offense).

24. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.1 cmt. n.2 & background (specifying the inapplicability of the Organizational Guidelines' fine determination provisions to organization offenders who have violated Chapter Two, Part Q entitled "Offenses Involving the Environment"). Though the fine provisions of the Organizational Guidelines do not apply to organization environmental offenders, the provisions concerning restitution and remediation do. *See* U.S. SENTENCING GUIDELINES MANUAL 8A1.1 (noting the applicability of Chapter Eight, "Sentencing of Organizations," to "the sentencing of all organizations for felony and Class A misdemeanor offenses.").

25. *See, e.g.*, Federal Water Pollution Control (Clean Water) Act, 33 U.S.C. § 1251(b) (1994) (stating that the Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters"); Marine Protection, Research, and Sanctuaries (Ocean Dumping) Act of 1972, 33 U.S.C. § 1401(b) (1994) (stating that the Act's purpose is "to regulate the dumping of all types of materials into ocean waters and to prevent or strictly limit the dumping into ocean waters of any material which would adversely affect human health, welfare, or amenities, or the marine environment"); Safe Drinking Water Act, 42 U.S.C.

hazardous material,[27] and wildlife endangerment.[28] Although in 1993 an Advisory Working Group on Environmental Sanctions[29] to the United States Sentencing Commission (hereinafter the "Advisory Group") created and proposed organizational fine guidelines for environmental crime (hereinafter the "Proposed Guidelines"),[30] those guidelines were never adopted.[31] Since then, the issue of implementing federal fine guidelines for organizational environmental crime has lain largely dormant[32] even though the frequency and severity of organizational environmental crime continue to increase.[33] Although there are currently no Commissioners at the United States Sentencing Commission,

§ 300f(1) (1994) (regulating the levels of contaminants introduced into public water systems).

26. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7401(b)(1) (1994) (stating that the purpose of the Act is "to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population").

27. *See, e.g.*, Solid Waste Disposal (Resource Conservation and Recovery) Act, 42 U.S.C. § 6901(b) (1994) (regulating the disposal of solid waste and hazardous waste in or on land to protect human health and the environment); Comprehensive Environmental Response, Compensation & Liability (CERCLA) Act, 42 U.S.C. §§ 9601-9675 (1994) (regulating hazardous substances); Federal Hazardous Material Transportation Statute, 49 U.S.C. §§ 5101-5127 (1994) (regulating transportation of hazardous materials).

28. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. § 1531(b) (1994) (stating that the purpose of the Act is "to provide a means whereby ecosystems upon which endangered species and threatened species depend may be conserved").

29. The Advisory Group consisted of government prosecutors, members of the defense bar, academics, and other professionals who developed proposals and recommendations for the Commission. *See* Ilene H. Nagel & Winthrop M. Swenson, *The Federal Sentencing Guidelines for Corporations: Their Development, Theoretical Underpinnings, and Some Thoughts About Their Future*, 71 WASH. U. L.Q. 205, 255 (1993) (noting the unique nature of the environmental Advisory Working Group members in terms of their diverse backgrounds); *see* John C. Coffee, Jr., *Environmental Crime and Punishment*, N.Y. L.J., Feb. 3, 1994, at 5 (discussing the politically and professionally balanced composition of the Advisory Working Group on Environmental Sanctions); *see also* 28 U.S.C. § 994(o) (1994) (requiring the Commission to consult with outside experts on federal criminal justice when it reviews or revises the Guidelines).

30. *See* Notice of Public Availability of Final Report of Advisory Working Group on Environmental Offenses, 58 Fed. Reg. 65,764 (1993) (reporting on the Commission's receipt of the draft of proposed sanctions for organizations convicted of environmental offenses from the Advisory Working Group on Environmental Offenses and solicitation of public comment on the draft).

31. *See* Douglas A. Berman, *Editor's Observations*, 8 FED. SENTENCING REP. 204, 204 (1996) (reporting on the Commission's initial decision to forgo extending Chapter Eight's fine provisions to environmental crimes due to the distinct nature of such crimes, subsequent assembly of an expert advisory group to develop Chapter Nine guidelines specific to organizational environmental crimes, and the eventual decision to not to implement Chapter Nine); Nagel & Swenson, *supra* note 29, at 254-258 (noting that the Commission's rationale for not extending Chapter Eight to environmental crimes was the unique nature of such crimes).

32. *See* Judson W. Starr & Gregory S. Braker, *Sentencing Guidelines for Corporate Environmental Crimes: Is it Fine Having No Fine Guidelines?* 2 (April 30-May 2, 1997) (unpublished article presented at the Sixth Annual Federal Sentencing Guidelines Seminar, Federal Bar Ass'n, Tampa Bay Chapter) (on file with *American University Law Review*) (noting that the proposed organizational guidelines for environmental crimes appear to be stalled).

33. *See infra* notes 150-51 and accompanying text (discussing both the increase in occurrence of environmental crime as well as increased enforcement efforts by the EPA).

appointments are likely within the near future.[34] These new Commissioners will undoubtedly be anxious to continue the important, though currently stalled, work of promulgating and amending sentencing guidelines. Anticipating this, the time is ripe for serious reconsideration of the adoption of federal fine guidelines for organizational environmental crime. No longer should we have to ask, "What's *your* water worth?"[35]

Part I begins with a brief review of the philosophy behind the Sentencing Reform Act of 1984,[36] the legislation which created the United States Sentencing Commission.[37] The history and rationale behind the 1991 adoption of the Organizational Sentencing Guidelines[38] ("Organizational Guidelines") is also discussed. The fine determination provisions of the Organizational Guidelines, however, specifically excluded environmental offenses.[39] Therefore, Part II examines the reasons for the exclusion of environmental crime from the fine provisions of the Organizational Guidelines. Part III introduces the Proposed Guidelines and explains how they differ from the Organizational Guidelines. Part IV then argues that although the Proposed Guidelines are incomplete and perhaps in need of modification, they nevertheless provide a workable sentencing structure upon which the Commission may devise fine guidelines for organizations convicted of environmental crime.

This Comment concludes in Part V by noting the timeliness for adopting organizational guidelines for environmental crime. A growing number of cases, coupled with substantial public support in favor of effective criminal sanctions, indicate that the Commission should no longer tolerate the lack of sentencing guidelines for organizational environmental crime. With the appointment of new Commissioners, the United States Sentencing Commission will once again have the opportunity to establish sentencing policies that provide consistent and just punishment for organizations that

---

34. *See* WILLIAM H. REHNQUIST, CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, 1998 YEAR-END REPORT OF THE FEDERAL JUDICIARY (Jan. 1, 1999) (stating that the fact that there are currently no Commissioners is "paralyzing a critical component of the federal criminal justice system," and calling on the President and the Senate to give this situation their immediate attention).

35. This question, of course, may also be addressed with regard to the earth, air, and most importantly, one's health.

36. *See* 28 U.S.C. §§ 991-998 (1994) (outlining the composition and duties of the United States Sentencing Commission).

37. *See id.*

38. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 8 (1998) (promulgating the sentencing guidelines for organizations).

39. *See id.* § 8C2.1 cmt. background (excluding environmental offenses from the application of the fine provisions of Chapter Eight).

commit environmental offenses.[40]

I. A BRIEF HISTORY OF THE UNITED STATES SENTENCING COMMISSION AND THE ORGANIZATIONAL GUIDELINES

A. The Formation of the United States Sentencing Commission

In 1984, Congress passed the Sentencing Reform Act,[41] perhaps the most revolutionary reformation of the American criminal justice system in history.[42] This Act created the United States Sentencing Commission ("Commission"),[43] an independent agency within the judicial branch of the federal government charged with promulgating mandatory Federal Sentencing Guidelines which aim to advance the basic purposes of criminal punishment, namely:

---

40. It should be understood at the outset that this Comment does not necessarily advocate adoption of the Proposed Guidelines in their current form. They are, after all, incomplete. For the reasons discussed in this Comment, however, the Proposed Guidelines do provide a better alternative sentencing structure than the fine provisions of the Organizational Guidelines, and can achieve the ends of criminal punishment better than merely leaving things as they are now. It is the author's position that the Commission ought to adopt organizational environmental sentencing guidelines, in some form or other, sooner rather than later. Thus, the scope of this Comment is limited to advocating the adoption of environmental sentencing guidelines for organizations and not some specific formalization of such guidelines. Therefore, discussions of the legitimacy of both the United States Sentencing Commission and the criminalization of corporate activity, especially environmental regulatory violations, are outside the scope of argument. Admittedly, environmental regulation, especially its corporate criminal component, is a very contentious issue. *See, e.g.*, Benjamin S. Sharp, *Environmental Enforcement Excesses: Overcriminalization and Too Severe Punishment*, C617 ALI-ABA 179, 181 (1991) (arguing that "[t]he commitment to criminalization [of environmental regulatory violations] too often sacrifices more socially desirable goals of remediation . . . and the creation of environmental benefit," and further suggesting that such "overcriminalization and excessive punishment are themselves harms to society"). Likewise, the very existence of federal sentencing guidelines is the source of enormous debate. *See, e.g.*, Michael Tonry, *The Failure of the U.S. Sentencing Commission's Guidelines*, 39 CRIME & DELINQ. 131 (1993) (arguing that the Guidelines should be substantially revised or replaced because federal judges and practitioners have not accepted them and the Guidelines have not reduced sentencing disparities). Nevertheless, the fact remains that Congress has created a federal sentencing commission to promulgate sentencing guidelines for all federal crimes. *See* 28 U.S.C. § 991(b)(1) (noting that the purpose of the United States Sentencing Commission is to "establish sentencing policies and practices for the Federal criminal justice system"). Given that Congress has criminalized violations of environmental regulations, the United States Sentencing Commission has the authority to promulgate sentencing guidelines for such offenses. In light of the above, this Comment assumes, without argument, the legitimacy of both the United States Sentencing Commission's authority to promulgate guidelines for the sentencing of federal offenses and Congress' criminalization of corporate environmental crime.

41. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837, 2017 (codified at 18 U.S.C. §§ 3551-3673, 28 U.S.C. §§ 991-998 (1994)).

42. *See* Burns v. United States, 501 U.S. 129, 132 (1991) ("The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes."); *cf.* Mistretta v. United States, 488 U.S. 361, 367-412 (1989) (reviewing the philosophy and rationale of the United States Sentencing Commission while upholding the Commission's constitutionality).

43. *See* 28 U.S.C. § 994(a) (detailing the duties of the Commission).

deterrence, incapacitation, just punishment, and rehabilitation.[44] In the pursuit of these goals, the Guidelines were to provide "certainty and fairness" in criminal sentencing.[45] After performing an exhaustive study which analyzed data from over 40,000 federal sentences and holding numerous public hearings, the Commission enacted the Guidelines on November 1, 1987.[46]

B. The Organizational Sentencing Guidelines

Initially, the Guidelines predominantly covered individuals sentenced for criminal violations of federal law.[47] On November 1, 1991, however, pursuant to its mission to amend continually the Guidelines as necessary,[48] the Commission adopted guidelines for organizational defendants ("Organizational Guidelines").[49]

Organizations, by their very nature, are able to "mobilize vast resources" for their economic ends.[50] This mobilization results in the creation of more jobs,[51] the facilitation of technological advances,[52] and the stimulation of economic growth.[53] Yet, the power that organizations wield is not always beneficial.[54] Organizations can

---

44. *See* FEDERAL SENTENCING GUIDELINES HANDBOOK 1 (Roger W. Haines, Jr. et al. eds., 1996-1997).

45. *See* 28 U.S.C. 991(b)(1)(B).

46. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(3) (1998).

47. *See* Miller, *supra* note 22, at 212 (noting that the initial Guidelines dealt "almost exclusively with individual sentencing").

48. *See* 28 U.S.C. § 994(o) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section."); *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A(5) (noting the extensive use of empirical data in the formulation of the initial guidelines as well as in the continued refinement of the Guidelines).

49. The Organizational Guidelines first appeared in November of 1991. *See* U.S. SENTENCING GUIDELINES MANUAL, *infra* app. C, amend. 422 (amending the guidelines to cover organizations); *see also supra* note 17 (providing the Guideline's definition of the term "organization").

50. *See* Miller, *supra* note 22, at 198 (noting the prominent role organizations play in American society by virtue of their ability to pool resources on a large scale).

51. *See* Ira M. Millstein, *The Responsible Board*, 52 BUS. L. 407, 407 (1997) (noting that the economy is fueled by prospering corporations that provide critical jobs and income); *see also* W. Birch Douglass, III, *Intrafamily Sales, Loans, and Guarantees, in* SOPHISTICATED EST. PLANNING TECH., at 337, 397 (ALI-ABA Course of Study, 1992) (stating that 95% of all jobs in the United States are created by corporations).

52. *See generally* Bob Violino, *Defining IT Innovation: The Informationweek 500 All Share a Bold Willingness To Take Fresh Approaches to Using IT*, INFORMATIONWEEK, Sept. 1998, at 58, *available in* 1998 WL 13852189 (discussing how organizations develop and use new technologies to benefit business).

53. *See* Mark Baker, *Privatization in the Developing World: Panacea for the Economic Ills of the Third World or Prescription Overused?*, 18 N.Y.L. SCH. J. INT'L & COMP. L. 233, 266 (1999) (discussing the widespread view among economists that privatization of industry and growth of private enterprise leads to economic growth); *see also* Miller, *supra* note 22, at 198 n.4 (discussing the enormous economic and political power of the world's largest corporations that may exceed that of most countries and every state in the Union).

54. *See id.* at 199 n.5 (noting that corporate crime far outweighs street crime in terms of its

produce dramatic economic problems[55] and on occasion, even inflict physical harm not just on the environment,[56] but on those who populate that environment.[57] As recent history has illustrated, "the social harm caused by organizations greatly exceeds the harm that individuals cause."[58] With this in mind, the Supreme Court has recognized that organizations can be held criminally liable for their actions.[59] Thus, with increasing incidences of economic and social

adverse economic effect on society).

55. *See, e.g.*, ROBERT W. HAMILTON, CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 36 (6th ed. 1998) (noting the enormous losses suffered by investors due to the numerous savings and loan failures that occurred during the 1980s); *see also* Cherif Cordahi, *Environment: Polluters Should Face Criminal Prosecution-Lawyers*, INTER PRESS SERV., May 8, 1995, *available in* 1995 WL 2260940 (reporting on an United Nations-sponsored conference paper noting the close causal relationship between poverty and environmental degradation created by corporate activity).

56. *See* Stephen L. Kass & Jean M. McCarroll, *Criminal Sanctions for Marine Pollution*, N.Y. L.J., Dec. 26, 1997, at 3 (summarizing the Exxon Valdez, Morris J. Berman, and North Cape oil pollution disasters, which together cost the American taxpayer hundreds of millions of dollars in clean-up fees).

57. *See, e.g.*, David Lauter, *First a Slew of Dead Fish, Now Sick People Environment: A Virulent Microorganism in Eastern Waters May be Linked to Human Illness—and Farms*, L.A. TIMES, Sept. 20, 1997, at A1 (reporting on the connection between massive fish-kill, human illnesses, and commercial poultry farm waste-water run off); Marilynn Marchione, *Human Waste May be Crypto Culprit Study Suggests Source of Outbreak wasn't Cattle*, MILWAUKEE J. & SENTINEL, Oct. 18, 1997, at 1A (reporting that contaminant that caused more than 100 deaths and 403,000 illnesses in Milwaukee in 1993 may have been of human origin although waste water from cattle farms was still considered the prime suspect); *Odwalla Pleads Guilty, Will Pay $1.5 Million in Juice Case*, L.A. TIMES, July 24, 1998, at D2 (reporting on Odwalla Corporation's guilty plea and $1.5 million fine, the largest criminal fine in a food injury case in history, stemming from the death of a child as well as injuries suffered by 66 others due to E. Coli contamination of the corporation's apple juice).

58. Miller, *supra* note 22, at 199. Although the United States had the highest average annual homicide rate in the developed world in 1993, hundreds of thousands of additional deaths were caused every year by industrial accidents, consumer products, and environmental pollution. *See id.* at 199. Amazingly, street crime costs society roughly 5% of what corporate crime costs. *See id.* (citing Laureen Snider, *The Regulatory Dance: Understanding Reform Processes in Corporate Crime*, 19 INT'L J. SOC. L. 209 (1991)).

59. In *New York Central & Hudson River Railroad Co. v. United States*, the Supreme Court upheld a corporation's vicarious criminal liability for the acts of its agent where the agent had violated interstate commerce regulations by offering illegal rebates to customers so that they would ship their goods through the corporation. In so holding, the Court enunciated the following principle:

> We see . . . every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has entrusted authority to act . . . and whose knowledge and purposes may well be attributed to the corporation for which the agents act. . . . [T]o give [corporations] immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495-96 (1909); *see also* HAMILTON, *supra* note 55, at 9 ("A corporation has been treated as an entity separate and distinct from its owners for centuries . . . . In the United States, . . . [corporations are even] given many of the constitutional protections available to flesh-and-blood individuals," as well as constitutional restrictions delimited by the criminal law).

harm being perpetrated by organizations,[60] coupled with the fact that each one of those incidences are generally far more detrimental to public welfare than acts committed by individuals,[61] it was natural for the Commission to adopt sentencing guidelines for organizational offenders.[62]

The Organizational Guidelines first appeared in the Commission's 1991 Annual Report.[63] Their ultimate purpose was to "provide incentives for organizations who self-police and self-report criminal conduct, but mandate high fines for organizations who have no meaningful program to prevent and detect criminal violations."[64] In addition to this "carrot-and-stick" approach[65] toward encouraging organizational compliance with federal regulations, the Organizational Guidelines were designed to reflect the seriousness of a particular crime by imposing not only criminal fines, but also requiring organizational offenders to pay restitution and remediation to victims of the offense.[66]

Under the Organizational Guidelines, after an organization is convicted of a crime, the court must determine either the pecuniary

60. *See infra* note 150 and accompanying text (discussing the increase in organizational environmental crime).

61. *See* Miller, *supra* note 22, at 199 n.5 (discussing societal costs of corporate crime).

62. *See* Nagel & Swenson, *supra* note 29, at 213-15 (stating that the Commission's rationale for adopting organizational guidelines was two-fold: first, there existed a lack of consensus in federal courts regarding corporate sentencing; second, the Commission's congressional mandate was not limited to sentencing reform to individuals but extended also to organizations); *see also* Richard S. Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 407-410 (1994) (noting that prior to the implementation of the federal sentencing guidelines, which substantially raised maximum fines for corporate offenses, the small number of organizational prosecutions was due in large part to the relatively small fines available for corporate offenses); Miller, *supra* note 22, at 201 (noting that the Sentencing Reform Act altered the availability of probation, fines, and restitution as sentencing instruments for corporate defendants).

63. *See* 1991 U.S. SENTENCING COMM'N ANN. REP. ch. 2, at 6.

64. U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (1998) (discussing how the presence of an effective program to prevent and detect violations of law can mitigate the sentence).

65. *See* Richard Gruner, *Challenges in Drafting Corporate Sentencing Guidelines for Environmental Offenses*, 8 FED. SENTENCING REP. 212, 213 (1996) (characterizing the reward and penalty structure for corporate fines as a "carrot and stick" approach).

66. The general principles of Organizational Guidelines are to: (1) "order the organization to remedy any harm caused by the offense . . . as a means of making victims whole for the harm caused;" (2) impose fines "sufficiently high to divest the organization of all its assets" if it operated primarily for criminal purposes; (3) base a fine range on "the seriousness of the offense and the culpability of the organization;" and (4) impose a period of probation "when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct." *See* U.S. SENTENCING GUIDELINES MANUAL § 8 intro. and cmt. The Guidelines listed restitution first for a reason. According to 18 U.S.C. § 3572(b), "the court shall impose a fine . . . only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution." 18 U.S.C. § 3572(b) (1994); *see also* Miller, *supra* note 22, at 201-02 (discussing the changes in the use of restitution, fines and probation under the Sentencing Reform Act of 1984).

gain[67] the organization received by committing the offense, or the pecuniary loss[68] third parties suffered as a result of the offense.[69] This determination, in turn, determines the Offense Level[70] as established by the appropriate guideline for the offense.[71] For example, if an organization is convicted under a fraud statute, the Organizational Guidelines direct the court to apply the guideline for "Offenses Involving Fraud or Deceit."[72] Depending on the amount of gain or loss, an Offense Level is extracted from a chart located in that subsection of the Guidelines.[73]

Once the Offense Level has been determined, the court then determines a "Base Fine" utilizing the Offense Level Fine Table in the Organizational Guidelines.[74] The court must then determine the culpability of the organization by considering such aggravating factors as the level and degree of management involvement,[75] and prior criminal history.[76] Conversely, the court must also consider mitigating factors such as the presence of an effective compliance program,[77] and the organization's cooperation during any investigation conducted by law enforcement officials.[78]

These aggravating and mitigating factors determine the "culpability score,"[79] which is then used to obtain minimum and maximum fine

---

67. A "pecuniary gain" is defined as "the additional before-tax profit to the defendant resulting from the relevant conduct of the offense" and "can result from either additional revenue or cost savings." U.S. SENTENCING GUIDELINES MANUAL § 8A1.2 cmt. n.3(h).

68. A "pecuniary loss" is defined as "the value of the property taken, damaged, or destroyed." *Id.* § 8A1.2 cmt. n.3(i).

69. *See id.* § 8C2.4(a) (setting the Base Fine as the amount determined under the Offense Level Fine Table based upon either the pecuniary gain to the organization or the pecuniary loss, whichever amount is greater).

70. An Offense Level is a number that, for organizations, corresponds to a fine amount. *See, e.g.*, *infra* app. A (listing the various Offense Levels and corresponding fines for the Organizational Guidelines).

71. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.3(a) (requiring application of the appropriate Chapter Two Guideline to determine the base Offense Level for the organization's offense or conviction).

72. *See id.* For the relevant subsection of the Guidelines regarding Offenses Involving Fraud or Deceit, see *id.* § 2F1.1.

73. *See id.* § 2F1.1(b)(1) (representing the Offense Level Chart for incremental amounts of pecuniary loss).

74. *See id.* § 8C2.4(d) (correlating the Offense Levels to Base Fine Amounts); *infra* app. A.

75. *See id.* § 8C2.5(b) (discussing the various factors a court must weigh in determining management involvement, including size of organization).

76. *See id.* § 8C2.5(c) (increasing the Offense Level for organizations with other criminal convictions within 10 years of offense).

77. *See id.* § 8C2.5(f) (allowing up to a three point decrease in the Offense Level "[i]f the offense occurred despite an effective program to prevent and detect violations of law").

78. *See id.* § 8C2.5(g) (allowing the organization up to a five point deduction for prompt reporting of the violation, full cooperation, and acceptance of its responsibility).

79. *See id.* § 8C2.6 (directing a court to use the number obtained from section 8C2.5 as a culpability score).

multipliers from a culpability score table.[80] By multiplying the Base Fine by the minimum and maximum multipliers, a fine range is determined within which the court may set the fine.[81] Thus, under the Organizational Guidelines, two factors are required to determine a fine for an organization: (1) the pecuniary gain or loss arising out of the offense, and (2) the organization's culpability.[82]

The Commission believed that by using these factors to determine sentences for organizations, it could achieve three main objectives: (1) define a model for good corporate citizenship; (2) make corporate sentencing fair; and (3) create incentives for organizations to control their actions by complying with the law.[83] As discussed in Part II, a theoretical problem quickly arose in those cases where neither the pecuniary gain or loss, nor the organization's culpability could be determined readily.

II. Why Environmental Crime Was Excluded from the Organizational Guidelines' Fine Provision

Although the Organizational Guidelines extend to all federal crimes, environmental crime is specifically excluded from the provision governing the determination of fines.[84] According to Ilene H. Nagel, former Commissioner and Co-Chair of the Commission's Advisory Group on Environmental Sanctions,[85] the reason why environmental crimes were excluded was that there was a "consensus

---

80. *See id.*; *infra* app. B (reproducing the Culpability Score Table from the Organizational Guidelines).

81. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.6 (1998) (listing corresponding Culpability Scores with corresponding Minimum and Maximum multipliers); *id.* § 8C2.7 (instructing the court to multiply the Base Fine by the Minimum Multiplier to determine the minimum guideline fine range and by the Maximum Multiplier to determine the maximum guideline fine range); *id.* § 8C2.8(a) (listing the various policies a court should consider such as setting the fine so as "to reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, and protect the public from further crimes of the organization").

82. For an excellent review of the sentencing process under the Organizational Guidelines, and the roles pecuniary gain, loss, and culpability play in it, see Justin A. Thornton and Harry J. Stathopoulos, *Corporate Punishment: The New Federal Sentencing Guidelines for Organizations*, S.C. L., Sept.-Oct. 1992, at 29 (including a discussion regarding the effect of the Organizational Guidelines on business operations and internal compliance programs).

83. *See* Win Swenson, *The Organizational Guidelines' "Carrot and Stick" Philosophy, and Their Focus on "Effective" Compliance*, *in* UNITED STATES SENTENCING COMMISSION, PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES, CORPORATE CRIME IN AMERICA: STRENGTHENING THE "GOOD CITIZEN" CORPORATION 34 (Sept. 7-8, 1995) (discussing the relationship between the goal of having companies undertake effective crime-controlling actions and the general goals of the Guidelines to met out fair and determinate punishment).

84. In addition to environmental offenses, food and drug, RICO, and export control violations are among the other offenses not covered by the organizational guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.1 cmt. n.2.

85. *See* Coffee, *supra* note 29, at 5 (listing the composition of the Advisory Group).

that these offenses might be sufficiently different from other kinds of crimes that organizations commit" to warrant deferment until further study and debate was possible.[86] Four "principle considerations" were offered in support of the Commission's decision to forgo including environmental crime under the fine provisions of the Organizational Guidelines: (1) the problem of determining the Base Fine; (2) the problem of determining culpability; (3) the problem of overlapping enforcement; and (4) the problem of balancing economic and environmental interests.[87] Each of these considerations will be discussed in turn.

A. The Problem of Determining Base Fines

First, unlike other organizational crime, the pecuniary gain or loss for an environmental offense either inadequately represents the seriousness of the offense or is simply indeterminable.[88] Generally, an organization that has committed an environmental offense is attempting to escape paying for either the required permit fees or for the proper disposal of its hazardous waste.[89] In terms of monetary savings, such a "gain" does not appropriately reflect the severity of the crime.[90] Additionally, there are generally no particular or identifiable victims of environmental offenses.[91] Even when property damage results, it may be difficult to estimate the monetary damage caused by the offense[92] because of the time it takes for the damage to manifest

86. *See* Nagel & Swenson, *supra* note 29, at 256.

87. *See id.* at 256-58 (reviewing the four considerations).

88. *See id.* at 256.

89. *See* Starr & Braker, *supra* note 32, at 3 (distinguishing environmental crime from other areas of white collar crime, in terms of the small economic gain to be had by not complying with environmental regulations versus the extraordinary cost associated with cleaning up a contaminated site); *see also* Angus Macbeth, *Making the Punishment Fit the Crime: Problems in Sentencing Organizations for Environmental Offenses*, 7 TOXICS L. REP. (BNA) 1313, 1315 (Apr. 7, 1993) ("Most white-collar crime aims at getting other people's money by improper means . . . . [I]n environmental law the economic motive is reversed: [o]ne [sic] is trying to avoid the cost of appropriate waste disposal."); Raymond W. Mushal, *Fines for Organizational Environmental Criminals—Two Approaches, But Still No Satisfactory Solution*, 8 FED. SENTENCING REP. 206, 206 (1996) ("[M]ost environmental crimes are economic crimes. They arise from violators . . . trying to save money by avoiding environmental protection requirements . . . .").

90. *See* Starr & Braker, *supra* note 32, at 3 (noting the lack of correlation between the high cost of cleaning up hazardous waste and the low cost of merely paying for the proper disposal of waste in first place).

91. In most pre-sentence reports that the author has reviewed, the general public is said to be the "victim" of the environmental crime. A pre-sentence report is a document produced by a probation officer for the benefit of a judge to assist her in sentencing. *See* 18 U.S.C. § 3552 (1994) (discussing the nature and use of pre-sentence reports in the sentencing process). Such a finding is nevertheless quite abstract and, furthermore, does not assist the probation officer in making a determination of actual monetary damages.

92. *See* Starr & Braker, *supra* note 32, at 3 ("[T]here is an entire class of cases in which 'clean-up' costs may be difficult, if not impossible, to calculate. For example, in cases involving air emission violations, there may be no way to measure costs because clean-up is simply not

itself.[93] Moreover, in many cases, such as a one-time release of asbestos, there are neither actual victims, nor any property damage whatsoever.[94] In those situations there simply is no pecuniary loss to calculate.[95] Because these calculations drive the determination of a Base Fine, the Organizational Guidelines simply cannot accommodate environmental crime within its sentencing structure.

B. The Problem of Determining Culpability

Second, unlike most crimes, the violation of environmental regulations is often a strict liability offense;[96] as a matter of public policy, such offenses do not require a showing of fault to convict.[97] Although a "knowing" or "negligent" standard is an element of an applicable statute, just the fact that an environmentally adverse discharge occurred may be enough to constitute a criminal violation.[98] As a result, because a determination of culpability must

possible.").

93. *See id.* at 3-4 (noting the competing theoretical methodologies for calculating loss). There is the direct and calculable method for determining loss that ties costs to the cost of remediation, but this ignores the long-term impact of environmental crime. *See, e.g.*, John G. Mitchell, *In the Wake of the Spill: Ten Years After Exxon Valdez*, NAT'L GEOGRAPHIC, Mar. 1999, at 96 (discussing the continuing adverse impact of the *Exxon Valdez* oil spill on the Alaskan environment). Yet, trying to project potential loss is also difficult, if not impossible to do. *See* Starr & Braker, *supra* note 32, at 3.

94. *See supra* note 92 and accompanying text (discussing difficulty of measuring clean-up costs, if any).

95. *See supra* note 92 and accompanying text.

96. Though there are intent elements within many environmental statutes, i.e., usually a "knowing" or "negligent" provision, Congress and the courts have held that environmental crimes are crimes against the public welfare, and therefore offenders are held strictly liable for their environmental offenses. *See* Jason M. Lemkin, Comment, *Deterring Environmental Crime Through Flexible Sentencing: A Proposal for the New Organizational Environmental Sentencing Guidelines*, 84 CAL. L. REV. 307, 337 (1996) ("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."); *see also* Starr & Braker, *supra* note 32, at 4 nn. 7-8 (citing United States v. International Minerals & Chem. Corp., 402 U.S. 558, 565 (1971) (stating that where the handling of hazardous waste is involved, it is presumed that the handler is aware of the regulations governing the handling and disposal of such waste); United States v. Weitzenhoff, 1 F.3d 1523, 1530 (9th Cir. 1993) (holding the criminal provision of the Clean Water Act to be a matter of public welfare); United States v. Heuer, 4 F.3d 723, 728 (9th Cir. 1993) (holding the Resource Conservation and Recovery Act to be a public health statute).

97. *See* GREGOR I. MCGREGOR, ENVIRONMENTAL LAW AND ENFORCEMENT 117 (1994) (noting that environmental statutes fall within a class of public welfare statutes that do not require a showing of "the criminal common law standard of intent or deliberate wrongdoing"). The standard for public welfare statutes is low "[b]ecause of the societal benefit gained from these statutes . . . ." *Id.*

98. *See* Lauren A. Lundin, *Sentencing Trends in Environmental Law: An "Informed" Public Response*, 5 FORDHAM ENVTL. L.J. 43, 52 (1993) (noting that "[c]ourts frequently interpret the statutes in a manner that lowers the level of knowledge necessary for a criminal conviction"). Lundin's article cites *United States v. Greer*, 850 F.2d 1447, 1450 (11th Cir. 1988), as an example of the tendency of courts to lower the knowing requirement to the level of strict liability. That is, "criminal liability for environmental violations may attach merely by doing an act in a manner prohibited by the regulations, *regardless of the actor's state of mind*." Star & Braker, *supra*

be made in order to calculate the fine range, the Organizational Guidelines are unable to accommodate environmental crimes.[99]

C. The Problem of Overlapping Enforcement

The third problem raised by then-Commissioner Nagel is that enforcement of environmental regulations between federal, state, and local agencies for environmental regulations overlap more than the regulations governing any other organizational crime.[100] It has been the belief of the Commission that such redundancy would, for the majority of organizational crime, entail prosecution predominately at either the state or local levels.[101] This belief may have been confirmed by the fact that during the late 1980s and early 1990s, only ten percent of all federal organizational crimes were environmental crimes.[102] Apparently, such a small group of cases did not warrant formal incorporation into the Organizational Guidelines.

D. The Problem of Balancing Economic and Environmental Interests

The fourth and most significant reason why environmental crime was excluded from the Organizational Guidelines was the difficulty of "how to balance concerns for the environment with concerns for corporate effectiveness."[103] There was also concern that the Organizational Guidelines would impose overly harsh fines on organizational offenders, especially given the fact that a "heartland"

---

note 32, at 5 (emphasis added); *see also* BENEDICT S. COHEN, NATIONAL LEGAL CTR. FOR THE PUB. INTEREST, CORPORATIONS AND THE SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIMES 15 (1993) (noting that violations of environmental regulations may result "in criminal liability even if they were accidental or otherwise unintentional, because *some environmental statutes have been construed to reduce or eliminate the scienter requirement normally found in criminal statutes*") (emphasis added). Thus, awareness of the illegality of the action that violated a regulation "is generally not an element of a federal crime." Neil S. Cartusciello, Stanley & Fisher, P.C., Application of Current Supreme Court Mens Rea Jurisprudence to Environmental Laws Conference, Sept. 17-18, 1998, on file with the *American University Law Review*).

99. For example, because determining scienter is generally irrelevant, counterintuitive scenarios become possible. For example, a good-faith transporter misled to believe a facility has the proper permits to accept waste is just as guilty of violating the Resource Conservation and Recovery Act as a transporter who negligently fails to determine whether the facility has the proper permits to accept waste. *See* Nagel & Swenson, *supra* note 29, at 257.

100. *See id.* at 258; *see also* Starr & Braker, *supra* note 32, at 6 (suggesting that overlapping enforcement schemes provide sufficient deterrence because of the increased threat of civil enforcement from state and local agencies).

101. *See* Nagel & Swenson, *supra* note 29, at 258 (observing that "[s]tate and local enforcement of environmental violations . . . can be more co-extensive with federal enforcement efforts than is the case with other frequently committed organizational offenses, such as . . . fraud, tax, or antitrust violations").

102. *See id.* at 258 n.276 (reporting that environmental crimes accounted for approximately 10% of federally prosecuted organizational crimes for the period 1988 through June 30, 1990).

103. *Id.* at 258.

of case law had yet to be developed.[104] Therefore, the Commission postponed addressing organizational environmental crime pending further study and debate.[105]

III. THE PROPOSED GUIDELINES FOR ORGANIZATIONAL ENVIRONMENTAL CRIME

Despite its exclusion from the Organizational Guidelines, the Commission still considered establishing sentencing guidelines for organizational environmental crime a primary concern. Soon after the Organizational Guidelines were adopted, the Commission enlisted the assistance of an Advisory Group to develop and propose guidelines for such crimes.[106] The Advisory Group came to the same conclusion as the Commission, that to extend the application of the Organizational Guidelines to environmental crime would either "punish the environmental offender more severely than other offenders"[107] or perhaps, not severely enough.[108] Consequently, the

104. *See* Lemikin, *supra* note 96, at 328-29 (discussing the lack of an "experience baseline" upon which the Proposed Guidelines could be based); *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A.4(b) (1998) (defining "heartland" as "a set of typical cases embodying the conduct that each guideline describes"). When it first promulgated the Guidelines, the Commission undertook a comprehensive study of 40,000 convictions and 10,000 augmented pre-sentence reports to determine what the pre-guideline sentencing practices were for particular areas of crime. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A.1. Those practices established the "heartland" for the various areas of criminal law after which the various sentencing guidelines within the *Federal Sentencing Guidelines Manual* were modeled. *See id.* ch. 1, pt. A.5. Given the fact that 107 organizations are known by the Commission to have been convicted of environmental offenses since 1991, *see infra* note 170 and accompanying text, the Commission has ample data to determine what constitutes heartland conduct for organizational environmental crime. Moreover, guidelines apply to other types of offenses for which the commission has far less data. For example, in fiscal year 1997, the Commission reported cases involving one instance each of offenses involving bribery, gambling, and immigration, *see* U.S. SENTENCING COMMISSION, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 95 (1997), all of which have applicable guidelines. *See* U.S.S.G. § 8C2.1(a) (listing bribery, gambling, and immigration offenses as subject to the organizational guidelines). Thus, while in the past there may have been an insufficient number of cases from which the Commission could reasonably draw conclusions about what constitutes the typical organizational environmental offense, there is certainly now more than enough organizational environmental cases for the Commission to review.

105. *See* Nagel & Swenson, *supra* note 29, at 256 (noting that environmental crime was sufficiently different from other organizational crime to warrant separate Guideline treatment).

106. *See* Berman, *supra* note 31, at 204 (noting the Commission's creation of an Advisory Working Group on Environmental Sanctions was composed of two Commissioners and sixteen public and private sector lawyers); *see also* 28 U.S.C. § 994 (o) (1994) (requiring the Commission to "consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system" when reviewing or revising the guidelines).

107. Paul E. Fiorelli & Cynthia J. Rooney, *The Environmental Sentencing Guidelines for Business Organizations: Are There Murky Waters in Their Future?*, 22 B.C. ENVTL. AFF. L. REV. 481, 494 (1995); *see also* Mushal, *supra* note 89, at 207 (discussing the inadequacy of the Chapter Eight Organizational Guidelines with respect to determining appropriate sentences for environmental crime). *But see* Starr & Braker, *supra* note 32, at 9 (arguing that the draft environmental guidelines for organizations would generally impose greater fines for offenses of

Advisory Group proposed an alternative methodology to determine the fines for organizational environmental offenders.

A. The Mechanics of the Proposed Guidelines

The Advisory Group developed sentencing guidelines that would be codified in an entirely new chapter of the *Federal Sentencing Guidelines*, "Chapter Nine."[109] Similar to the Organizational Guidelines, the Proposed Guidelines impose higher fine ranges for higher Offense Levels.[110] As with the fine determinations made under the Organizational Guidelines, the Proposed Guidelines provide for substantial fine mitigation for compliance programs, even more so than the Organizational Guidelines.[111] The substantive difference

---

a particular level than under the existing Chapter Eight Guidelines).

108. *See* Fiorelli & Rooney, *supra* note 107, at 494 (discussing the inadequacy of basing a corporate environmental fine upon either the pecuniary gain or loss resulting from the offense).

109. *See infra* app. C.

110. *Compare infra* app. C (Proposed Guidelines' Fine Table), *with infra* app. A (Organizational Guidelines' Fine Table).

111. *Compare* PROPOSED GUIDELINES § 9C1.2(a), *reprinted in Draft Corporate Sentencing Guidelines for Environmental Violations*, 24 ENV'T REP. (BNA) No. 30, at 1378-87 (Nov. 16, 1993) [hereinafter *Draft Corporate Sentencing Guidelines*] (allowing for up to an eight-level decrease in offense level), *with* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (allowing, at most, a three-level decrease for the presence of a qualifying compliance program). According to James T. Banks, a former member of the Advisory Group, the significant penalty mitigation that the Proposed Guidelines provides for qualifying compliance programs "breaks new ground . . . not only for sentencing policy, but for environmental enforcement in general," insofar as organizations with comprehensive compliance programs can mitigate their potential criminal liability far more than could be done via "traditional, reactive programs." *See* James T. Banks, *Substantial Penalty Mitigation for Environmental Crimes: A "Gold Standard" Proposal Worth Considering*, 8 FED. SENTENCING REP. 216, 216 (1996); *see also* Lucia Ann Silecchia & Michael J. Malinowski, *Square Pegs and Round Holes: Does Sentencing for Environmental Crimes Fit Within the Guidelines?*, 8 FED. SENTENCING REP. 230, 232 (1996) (characterizing the Proposed Guidelines as an improvement over the Organizational Guidelines insofar as they are better tailored to environmental compliance program policy).

Not only do the Proposed Guidelines offer more of an incentive to organizations that implement compliance programs than do the Organizational Guidelines, but they also outline more specifically what constitutes a qualifying compliance program. *See* Banks, *supra*, at 217. According to Banks, the Organizational Guidelines offer inadequate guidance to organizations that wish to implement environmental compliance programs since the focus of the Guidelines is on reducing the likelihood of criminal offenses. *See id.* Banks argues that such a focus is too narrow for effective environmental compliance because it does not encompass the "principal causes of most environmental violations: management inattention, sloppy practices, inadequate self-policing, ignorance in the workforce, and lack of motivation by production-oriented workers." *Id.* In comparison, the eight factors outlined in section 9D1.1 (a) of the Proposed Guidelines focus on the implementation of compliance programs which aim to "prevent [both] *civil and criminal environmental violations*." *Id.*

The eight "Minimum Factors Demonstrating a Commitment to Environmental Compliance" in qualifying compliance programs are: (1) line management attention and substantial involvement in execution of compliance program; (2) thorough integration of environmental policies throughout organization; (3) frequent auditing and continuous on-site monitoring; (4) employee training in regulatory requirements; (5) cash incentives or other types of awards to employees who have demonstrated commitment to environmental compliance;

between the Organizational and the Proposed Guidelines, however, is that the Offense Levels under the Proposed Guidelines correspond to percentages of statutory maximums rather than the predetermined amounts found in the Organizational Guidelines Fine Table.[112]

For example, an Offense Level of ten under the Organizational Guidelines requires the imposition of a fine of between $20,000 and $40,000.[113] In contrast, under the Proposed Guidelines, an Offense Level of ten sets the fine range at 25% to 35% of the applicable statutory maximum.[114] Therefore, the resulting dollar-amount fine range under the Proposed Guidelines is dependent upon the statutory maximum for that offense. Thus, if the statutory maximum for a particular offense is $500,000, then the dollar-amount fine range would be $125,000 to $175,000, whereas the fine range would be only $50,000 to $75,000 where the statutory maximum is $200,000.

B. Why the Proposed Guidelines Were Not Adopted

Probably the most profound and well-known objection to the theory of corporate criminal liability is that "corporations have neither bodies to be punished, nor souls to be condemned . . . ."[115] Thus, the fundamental problem with corporate criminal liability is that the traditional form of punishment, i.e., imprisonment, is unavailable; therefore, the only way to punish organizations is to

---

(6) consistent and visible disciplinary procedures for compliance program violations including reporting individual conduct to law enforcement; (7) organizational self-evaluation procedure to ensure progress toward environmental excellence; and, optionally, (8) incorporation of innovative approaches to environmental compliance. *See* PROPOSED GUIDELINES § 9D1.1, *reprinted in Draft Corporate Sentencing Guidelines*, *supra*, at 1382-84. Thus, the Proposed Guidelines encourage the prevention of environmental violations before they occur rather than focusing upon remedies to violations after they have occurred. *See* Banks, *supra*, at 217. Given that most environmental offenses are strict liability crimes, organizations that implement compliance programs consistent with the Proposed Guidelines will not only greatly reduce both their civil and criminal exposure, but will be rewarded with substantial fine mitigation should an offense nevertheless occur. *Compare* PROPOSED GUIDELINES § 9C1.2(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra*, at 1381-82 (deducting up to eight levels from Offense Level when an organization demonstrates the presence of a qualifying compliance program *prior* to the offense), *with id.* § 9C1.2(c), *reprinted in Draft Corporate Sentencing Guidelines*, *supra*, at 1382 (deducting only two levels for organizations that take prompt remedial action).

112. *See infra* app. A (listing base fine amounts for specialized offense levels).

113. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 8C2.4(d), 8C2.6 (1998). Under section 8C2.4(d), an Offense Level of ten sets the Base Fine at $20,000. *See id.* § 8C2.4(d). Applying the Base Fine to the Culpability Score Table at section 8C2.6 and further assuming a culpability score of five (the default score), the minimum multiplier is 1.00 and the maximum multiplier is 2.00. *See id.* § 8C2.6. Therefore, the resulting fine range is $20,000 to $40,000. *See infra* apps. A & B.

114. *See infra* app. C.

115. THE OXFORD DICTIONARY OF QUOTATIONS 550 (3d ed. 1979) (quoting Edward, First Baron Thurlow). This is usually quoted as: "Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?" *Id.*

impose a fine.[116] Because the same result may be accomplished through civil punitive damages, however, some question the necessity of holding corporations criminally liable for their acts at all.[117]

Likewise, environmental crime itself presents an anomalous issue for a traditional sentencing framework[118] insofar as it is historically associated with civil tort actions rather than with criminal sanctions.[119] Consequently, when these two areas of law are combined, the following problem arises: How ought we determine just punishment for non-traditional offenders who have committed non-traditional crimes?[120]

The Proposed Guidelines were not adopted ostensibly because they magnified the above-mentioned theoretical problems associated with both the Organizational Guidelines and environmental crime.[121] Not surprisingly, since their release, the Proposed Guidelines have been much maligned as unreasonable and unnecessary.[122] Additionally,

---

116. *See* New York Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 493 (1909) (holding that although "[a] corporation cannot be arrested and imprisoned in either civil or criminal proceedings, . . . its property may [nevertheless] be taken either as compensation for a private wrong or as punishment for a public wrong").

117. *See* Silecchia & Malinowski, *supra* note 111, at 232 (arguing that criminal prosecution of environmental offenders is redundant due to existing civil penalties); *see also* Sharp, *supra* note 40, at 191 (arguing that "punishment of environmental offenses (*even most white collar crimes*) cannot be justified on the grounds of incapacitation, rehabilitation or . . . specific deterrence" and may deter socially desirable behavior) (emphasis added).

118. *See* Freda Adler, *Offender-Specific vs. Offense-Specific Approaches to the Study of Environmental Crime, reprinted in* ENVIRONMENTAL CRIME AND CRIMINALITY 35 (Sally M. Edwards et al. eds., 1996) (noting that some criminologists argue that environmental offenses are not truly criminal, but regulatory offenses).

119. *See* Robert V. Percival et al., *Environmental Regulation: Law, Science, and Policy* (2d ed. 1996), *reprinted in* LAW AND THE ENVIRONMENT 206 (Robert V. Percival and Dorothy C. Alevizatos eds., 1997) (retracing the evolution of environmental law from nuisance law and other areas of the civil common law).

120. *See* Silecchia & Malinowski, *supra* note 111, at 230 (noting that individual environmental guidelines have been criticized because they do not give weight to scienter as do other guideline offenses, and discussing the critique of organizational guidelines insofar as organizations are non-traditional offenders). *But see* Richard J. Leon, *Environmental Criminal Enforcement: A Mushrooming Cloud*, 63 ST. JOHN'S L. REV. 679, 679 (1989) (noting that adverse public response to the Exxon-Valdez disaster as well as other environmental disasters caused by corporations indicated that "society's need for retribution and deterrence is better satisfied through criminal prosecution than civil law suits").

121. In fact, two members of the Commission's Advisory Group were ultimately dissatisfied with their own work product. *See Enforcement: Guideline Advisory Group Members Urge Sentencing Commission to Reject Draft*, DAILY ENV'T REP., Jan. 6, 1994, at D7 [hereinafter *Reject Draft*] (reporting on Lloyd S. Guerci and Meredith Hemphill Jr.'s dissent to the Proposed Guidelines on the bases that a separate sentencing structure was not justified, there was disparity between the Proposed Guidelines and the existing organizational Guidelines, and because excessive fines would be derived under the proposed sentencing structure).

122. *See* Mark A. Cohen, *Environmental Sentencing Guidelines or Environmental Management Guidelines: You can't Have Your Cake and Eat it Too!*, 8 FED. SENTENCING REP. 225, 226 (1996) ("The proposed [guideline's] fine table has little to do with the harm caused by the offense."); *see also* Patrick J. Devine, Note, *The Draft Organization Sentencing Guidelines for Environmental Crimes*, 20 COLUM. J. ENVTL. L. 249, 249-50 (1995) (noting that the immediate reaction to the

there was significant disagreement among the Advisory Group on several key issues concerning certain calculations.[123]

The ultimate reason for declining to adopt the Proposed Guidelines, however, may have had less to do with the Proposed Guidelines *per se* as with the lack of political support for their adoption, according to former-Commissioner Michael S. Gelacak, Co-Chair of the Advisory Group.[124] The issue of striking an appropriate balance between the economic interests of organizations, and the public's interest in protecting the environment had obviously remained unresolved.

IV. WHY IT IS TIME TO IMPLEMENT SENTENCING GUIDELINES FOR ORGANIZATIONAL ENVIRONMENTAL CRIME

Although the Proposed Guidelines are incomplete[125] and may need

release of an initial draft of the Proposed Guidelines was overwhelmingly negative, and criticizing the initial draft "as unduly complicated, overly severe, unjust and unnecessary"). A revised version faired no better. *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) (quoting advisory group members Lloyd S. Guerci and Meredith Hemphill, Jr. as stating that "courts should not be required to apply vastly different rules for different areas of the law unless there are compelling reasons. . . . [Yet, the advisory group] has suggested a separate and significantly different chapter in the Guidelines for environmental offenses, without a demonstrated need"); *see also* Jed S. Rakoff, *The Ideology of Environmental Sentencing Guidelines*, N.Y. L.J., Sept. 9, 1993, at 3 (criticizing the lack of any clear rationale in the Proposed Guidelines for applying the fine formula based on statutory maximums). *But see* Robert L. Kracht, Comment, *A Critical Analysis of the Proposed Sentencing Guidelines for Organizations Convicted of Environmental Crimes*, 40 VILL. L. REV. 513, 536 (1995) ("It is evident that the Proposed Guidelines borrowed extensively from the Organizational Guidelines for its definitional sections and, occasionally, its operational sections."). As a matter of fact, the Proposed Guidelines are identical in structure, wording, and Base Offense Level assignment to Chapter Two of the *Federal Sentencing Guidelines* (Offenses Involving the Environment) except for the section on Wildlife Endangerment. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2Q, *with* PROPOSED GUIDELINES § 9B2.1, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379-80.

123. *See* PROPOSED GUIDELINES § 9E1.1 n.1, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384 (noting division "over the precise percentages of the statutory maximum fine to correspond to particular offense levels"); *id.* § 9E1.2(b) n.2, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384 (noting division "over the precise percentage limitation on mitigation credit for violations other than knowing endangerment violations"); § 9F1.1(a)(5) n.4, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1385 (noting division "over the mandatory use of probation for organizations with prior civil or administrative adjudications"); *see also Reject Draft*, *supra* note 121, at D7 (reporting certain Advisory Group members' opposition to the Proposed Guidelines).

124. *See* Interview with Michael S. Gelacak, Commissioner, Vice-Chairman of the United States Sentencing Commission, in Washington, D.C. (Aug. 19, 1998) [hereinafter Interview]; BENEDICT S. COHEN, NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, CORPORATIONS AND THE SENTENCING GUIDELINES FOR ENVIRONMENTAL CRIME 8 (1993) (noting that the Advisory Group conducted its deliberations behind closed doors and imposed a vow of silence on its members).

125. For example, none of the provisions regarding sentences for violations of wildlife regulations was ever completed. *See* PROPOSED GUIDELINES § 9, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1378.

revision, they nevertheless provide sound principles to ensure that offending organizations are fined appropriately, consistently, and in proportion to the gravity of their crime. Arguments critical of the Proposed Guidelines generally focus on the technical features rather than the principles of the Proposed Guidelines.[126] As argued in this section, however, such criticisms in no way diminish the need to implement fine guidelines for organizational environmental crime.

A. Sentencing Solutions Exist

This section examines how the Proposed Guidelines resolve the four issues raised by the Commission as barriers to applying the Organizational Guidelines to environmental crime. By illustrating the *sui generis* nature of organizational environmental crime, the Proposed Guidelines show why organizational environmental crime requires separate treatment in the Guidelines from other types of organizational crime.

1. Scaling fines to the statutory maximum

As discussed above, fines for environmental offenses are difficult to determine because the pecuniary gain or loss may not adequately reflect the gravity of the offense or may be too difficult to estimate.[127] Partly due to this inadequacy, the Advisory Group adopted a materially different methodology to determine fines.[128] By basing fines upon an Offense Table tied to statutory maximums,[129] the Proposed Guidelines are able to establish appropriate fines for serious environmental crimes where the pecuniary gains or losses cannot be readily determined.[130] Though the Proposed Guidelines aim to impose significant fines on organizational offenders, they also seek to limit the disparate and unfair impact of "overcharging" or "undercharging" organizations that commit the same offense.[131]

---

126. *See* Don J. Debenedictis, *Few Like Pollution Guidelines: Business "Up in Arms" over Proposed Fines for Corporate Environmental Crimes*, A.B.A. J., June 1993, at 25 (quoting then-Commissioner Ilene Nagel as unimpressed with "canned comments" critical of proposed guidelines since guidelines were left incomplete).

127. *See supra* discussion Part II.A (discussing the difficulties in calculating Base Fines for environmental crimes).

128. *See* Mushal, *supra* note 89, at 206 (discussing the deficiencies of Chapter Eight that led to the promulgation of the Proposed Guidelines).

129. *See supra* discussion Part III.A (discussing the calculation of fines under the Proposed Guidelines); *infra* app. C.

130. *See* Mushal, *supra* note 89, at 207.

131. The Proposed Guidelines "strike a balance between possible 'over-charging' and potentially huge discounts for multiple crimes" by utilizing a formula of decreasing returns. *See id.* If, for example, a particular offense occurs repeatedly over a substantial period of time, a prosecutor may potentially bring many, perhaps hundreds, of distinct charges for violating the applicable regulation. This, of course, would expose the offender to potentially millions of

Thus, by anchoring the determination of fines to percentages of statutory maximums, the Proposed Guidelines are able to balance the need for imposing adequate fines for environmental offenses without also exposing an organizational offender to absurdly large and unjust fines.

2. Using "reactive fault" as a measure of culpability

Despite assertions to the contrary,[132] the Proposed Guidelines actually do take into account an organization's culpability albeit, in a non-traditional way. Although organization liability traditionally has focused upon acts of the corporate entity at the time of, or just prior to, the criminal conduct,[133] Professors Brent Fisse and John Braithwaite have argued that an organization's culpability can be measured by the organization's efforts to remedy its offense.[134] By imputing organizational culpability retroactively, a determination of whether an organization undertook "satisfactory preventive or *corrective* measures in response to the commission of the *actus reus* of an offence [sic]" may be used to mitigate its sentence.[135]

Such an imputation of "reactive fault" is present in the Proposed Guidelines with respect to the evaluation of compliance programs.[136]

---

dollars in criminal fines even if fined relatively lightly for each violation. *See, e.g.*, 42 U.S.C. § 6928(d)(7)(B) (1994) (stating that offenses involving the transportation of hazardous materials may bring a fine of up to $50,000 per day of violation). Assuming that the applicable statutory maximum was $500,000 and the offender was convicted of 100 counts of the offense, if the court determined that each offense warranted a fine equivalent to 10% of the statutory maximum, i.e., simple recordkeeping offenses, *see* PROPOSED GUIDELINES § 9B2.1(a)(3), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379; *infra* app. C, then each count would bring a fine of $50,000. Multiplied by 100 counts, the offender would be fined $5 million, arguably an absurd amount for relatively innocuous offenses.

To prevent such "count-stacking", the Advisory Group incorporated section 9E1.2 ("General Limitations"). *See* Devine, *supra* note 122, at 261; *see also* PROPOSED GUIDELINES § 9E1.2, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384. According to that section, "[i]f the court finds that the total fine calculated . . . would be unjust as a result of excessive repetition of counts relating to a course of offense behavior that is on going or continuous in nature," the court is to multiply the fine amount for each successive count at 1/n of its total where "n" is the number for that count of conviction. *See id.* § 9E1.2, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384. In the above example, therefore, where the first count of conviction would bring a fine of $50,000, the second would only bring a fine of $25,000 ($50,000 multiplied by 1/2), and the third just $16,667 ($50,000 multiplied by 1/3), and so on. Thus, rather than facing a $5 million fine, the offender in our example would receive a fine of just $259,368.88, or just over 5% of what could have otherwise been imposed. For repeated minor offenses, this greatly reduced fine is intuitively more just, but still high enough to reflect the seriousness of the large amount of offenses.

132. *See* Lemkin, *supra* note 96, at 338 (arguing that the Proposed Guidelines fail to account for scienter).

133. BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 47 (1993).

134. *See id.* at 48.

135. *See id.* (emphasis added).

136. *See supra* note 111 and accompanying text (discussing the nature and mitigating effect

As a result, factoring in the presence of compliance programs as a mitigating factor will motivate corporations to ensure that they have effective and comprehensive compliance programs in place prior to any possible prosecution.[137] Not only will such programs reduce an organization's risk of prosecution[138] but they can also reduce an organization's exposure to substantial criminal fines for violating an environmental regulation,[139] especially in instances where the organization lacks a compliance program of any kind.[140] Thus, the problem of determining culpability for strict liability environmental offenses may be solved via the implementation of Guidelines that evaluate the reactive fault of an organization.

3. Managing overlapping enforcement

The issue of overlapping enforcement programs is specifically

compliance programs have on sentences and their emphasis on both proactive compliance, as well as qualifying remedial measures).

137. *See* Greg Baldwin & John Campbell, *Sentencing Rules Point Way to Organizational Salvation*, 6 MONEY LAUNDERING ALERT, Jan. 1, 1995, *available in* 1995 WL 8353413 ("The guidelines provide major opportunities [to organizations] to reduce sharply their exposure to criminal fines by taking advance measures to prevent, detect and report violations of federal law.").

138. Few corporations, regardless of offense conduct, have received credit for their compliance programs under the Organizational Guidelines. *See* UNITED STATES SENTENCING COMMISSION, ORGANIZATIONAL DEFENDANTS DATAFILE, 1991-97 (noting that of the 708 organizations sentenced under the Guidelines, only 35 had compliance programs at the time of sentencing and only two received credit for having qualifying compliance programs) [hereinafter DATAFILE]; *see also* U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(f) (allowing a three-point deduction for organizations that demonstrate an effective compliance program at or before the occurrence of the offense). This phenomena, however, does not necessarily indicate that courts are unwilling to give such credit. Instead, that fact may simply indicate that the government has chosen or agreed not to prosecute criminally organizations that demonstrate the presence of an effective compliance program. *See* Interview with Amy L. Schreiber, Staff Attorney, Office of General Counsel of the United States Sentencing Commission, in Washington, D.C. (Aug. 19, 1998).

139. Under the current Organizational Guidelines, fines increase both incrementally and proportionately as the offense level increases. For example, an Offense Level Nine fine is $10,000 more than an Offense Level Six fine, whereas an Offense Level 29 fine is $4,400,000 greater than an Offense Level 26 fine. *See infra* app. A. Consequently, the greater the Offense Level, the more "valuable" the three-point deduction becomes for having an effective compliance program. For example, a three-point deduction for having a compliance program is worth $10,000 to those defendants convicted of a level nine offense, but the same deduction is worth $4,400,000 for defendants convicted of a level 29 offense.

Under the Proposed Guidelines, it is possible to receive up to an eight-level reduction for having demonstrated prior implementation and utilization of an effective compliance program. *See* PROPOSED GUIDELINES § 9C1.2(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381-82. For example, assuming a base Offense Level of 20, an eight-point reduction could reduce the sentence from 90% of a statutory maximum fine, to just 45%. *See id.* § 9E1.2(b), *supra* note 111, at 1384 (noting a 50% fine reduction basement).

140. *See* PROPOSED GUIDELINES § 9C1.1(f), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381 (increasing the Offense Level by four levels in the absence of an effective and otherwise qualifying compliance program).

addressed in section 9-2.031 of the United States Attorneys Manual.[141] Known as the *Petite* Policy,[142] it is the practice of the United States not to prosecute a case if all federal interests have been vindicated through a state prosecution.[143] This practice reflects the federal government's desire to conserve resources and minimize prosecutorial redundancy where possible.[144] Thus, it is reasonable to expect that the *Petite* Policy would ensure that federal interests are always vindicated regardless of who ultimately prosecutes an environmental offender.[145]

Nevertheless, if it was the understanding of the Commission that the bulk of organizational environmental crime would continue to be prosecuted predominately at the state level, and not at the federal level,[146] this assumption must now be reevaluated. In violation of the Environmental Protection Agency's ("EPA") voluntary disclosure policy,[147] many states are now granting immunity privileges to organizations that voluntarily disclose environmental violations during the course of self-audits.[148] Because such this actions may

141. *See* UNITED STATES ATTORNEY'S MANUAL § 9-2.031 (1998) [hereinafter USAM 1998] (noting that although there is no statutory bar to federal prosecution subsequent to state prosecution of a defendant for the same crime, "Congress expressly has provided that, as to certain offenses, a state judgment of conviction or acquittal . . . shall be a bar to any subsequent federal prosecution for the same act or acts.") (citing, *inter alia*, 18 U.S.C. §§ 659, 660, 1992, 2101, 2117 (1994)).

142. *See* USAM 1998, *supra* note 141, § 9-2.031 (citing *Petite v. United States*, 361 U.S. 529 (1960), as the common-law source of dual and successive prosecution policy).

143. *See id.* ("The purpose of this policy is to vindicate substantial federal interests through appropriate federal prosecutions, . . . to promote efficient utilization of Department resources, and to promote coordination and cooperation between federal and state prosecutors."); UNITED STATES ATTORNEYS MANUAL § 5-11.113 (1997) [hereinafter USAM 1997] (reiterating the applicability of the *Petite* Policy specifically for the federal prosecution of environmental offenses).

144. *See* USAM 1998, *supra* note 141, § 9-2.031.

145. *See EPA's and States' Efforts to Focus State Enforcement Programs on Results: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Commerce*, 105th Cong. 3-4 (1998) (statement of Michael Gryszkowiec, Director of Planning and Reporting Resources, Community, and Economic Development Division) (observing that "[a]s a condition of accepting responsibility for implementing the Clean Water Act, Clean Air Act, and other environmental statutes, delegated states must establish enforcement programs approved by EPA" to ensure proper compliance by regulated communities and noting that failure by a delegated state to ensure that regulated communities comply with pollution discharge limitations may result in EPA withdrawal of state's approved status).

146. *See supra* notes 100-02 and accompanying text.

147. Memorandum from Earl E. Devaney, Director of the Office of Criminal Enforcement Forensics and Training to All EPA Employees Working in or in Support of the Criminal Enforcement Prog. 4 (Oct. 1, 1997) <http://es.epa.gov/oeca/oceft/audpol2.html> (noting that EPA's voluntary disclosure policy does not create any rights or benefits enforceable at law in terms of EPA's discretion to prosecute in light of voluntary disclosure).

148. *See* Cheryl Hogue, *Enforcement: EPA Policy in 1997 Expected to Reflect Evolution of Reinvention Efforts*, DAILY ENV'T REP., Jan. 21, 1997, at G2 (reporting that about 20 states grant immunity for violations discovered during self-audits). Since this practice conflicts with EPA policy, *see id.*, the EPA may begin to withdraw its delegation of responsibility to enforce federal

leave federal interests unvindicated, federal proceedings may be warranted in those instances.[149]

Already it is evident that both the EPA[150] and the Environment and Natural Resources Division of the Department of Justice have stepped up their enforcement efforts.[151] This increase is reflected by the fact that organizational environmental crime currently makes up the second-largest group of organizational crime, second only to fraud.[152] Moreover, organizational environmental crime now constitutes nearly twenty percent of all organizational crime.[153] The Commission,

---

environmental regulations to states that observe such self-audit privileges and begin to prosecute those cases. *See* Hogue, *supra*, at G-2 (reporting on the possible showdown between the states and the EPA with regard to state grants of immunity to information obtained during a self-audit); *see also*, USAM 1998, *supra* note 141, § 9-2.031 (describing the *Petite* policy, which requires federal prosecution of defendants already prosecuted at the state level if there exists any unvindicated federal interest). *But see* Russell Mokhiber, *"Objective" Science at Auction*, ECOLOGIST, Mar. 13, 1998, at 57 (reporting that "[t]he US chemical industry has 'overpowered' federal *and* state efforts to protect the public health from chemical hazards" through improper "revolving door" lobbying of EPA officials by former federal officials, thus suggesting widespread interference with the prosecutorial efforts of the EPA).

149. *See* USAM 1997, *supra* note 143, § 511.113 (C).

150. According to statistics compiled by the United States Sentencing Commission and published in its Annual Report for the years 1993 to 1997, there were only 5 federal convictions for organizational environmental crime reported by the federal courts in 1993, but 14 in 1994, 20 in 1995, 22 in 1996, 44 in 1997. *See* 1993 U.S. SENTENCING COMM'N ANN. REP. 174; 1994 U.S. SENTENCING COMM'N ANN. REP. 131; 1995 U.S. SENTENCING COMM'N ANN. REP. 126-28; 1996 U.S. SENTENCING COMM'N ANN. REP. 69; 1997 U.S. SENTENCING COMM'N ANN. REP. 95. As of this writing, the data for fiscal year 1998 have not yet been published. Moreover, as the EPA becomes more active in its prosecutorial efforts, the likelihood of more federal convictions for environmental offenses certainly increases. *See* Bancroft et al., *supra* note 13, at 184 (reporting that environmental regulatory violations were the second largest federal offense committed by organizations for 1997, behind only fraud, accounting for over 20% of all environmental crime); Samuel R. Miller et al., *Sentencing for Environmental Crimes Under Federal Law*, C800 A.L.I.-A.B.A. 213, 215 (1992) (noting the dramatic increase in enforcement of environmental crimes from the mid-Eighties to early Nineties and the four-fold increase in the number of EPA prosecutors subsequent to passage of the Pollution Prosecution Act); Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs*, 25 Envtl. Rep. (BNA), at 325 (June 17, 1994) (noting that "corporations have been subject to growing numbers of criminal prosecutions under environmental statutes"); Traci Watson, *Today's EPA: You Pollute, We Prosecute*, USA TODAY, May 21, 1998, at A5 (reporting on the unprecedented activity of Environmental Protection Agency agents in investigating criminal violations of federal environmental regulation violations and on the 300% increase in the number of investigators hired just since 1990); *cf.* Judson W. Starr & Thomas J. Kelly Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come . . . and it is Hard Time*, 20 ENVTL. L. REP. (Envtl. L. Inst.) 10,096 (March 1990) (noting the increased importance of criminal prosecution for the federal government's environmental enforcement strategy); Leon, *supra* note 120, at 679 ("You do not need a weatherman to see the ominous cloud of criminal enforcement [of environmental regulations] mushrooming on the near horizon.").

151. *See Department of Justice, Envt. Div. Highlights, Accomplishments, Initiatives: Enforcing Laws Means Protecting Public Health, Promoting Economic Development*, D.O.J.-ENR PRESS RELEASE, Aug. 6, 1998 (reporting that 1997 was "one of the most successful years ever for enforcement of our nation's environmental laws").

152. See U.S. SENTENCING COMM'N, 1997 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 95 (1997) (reporting that for fiscal year 1997 there were 45 organizational environmental discharge offenses and 91 fraud offenses) [hereinafter USSC SOURCEBOOK].

153. Of the 222 organizational cases for fiscal year 1997, 44 were environmental "waste

furthermore, has seen the amount of organizational environmental crime jump from just five cases in 1993,[154] to forty-four in 1997.[155] Given the Department of Justice's increased enforcement efforts, the Commission can expect that this trend will continue and that organizational environmental crime will also continue to constitute a significant portion of organizational crime. Accordingly, it is clear that overlapping enforcement no longer serves as a buffer between state and federal prosecution. Therefore, the Commission ought to prepare for the increasing presence of organizational environmental crime within the United States district courts by implementing appropriate guidelines.

4. The limits of cost-benefit analysis in regard to public policy

Cost-benefit analyses, though "an appropriate guide to moral choice"[156] for many of our decisions, may not always be the best guide, especially when determining an appropriate sentencing structure for organizational environmental crime. The problem with utilizing a cost-benefit methodology to determine whether or not to adopt a sentencing policy for environmental regulatory offenses is that it requires "all costs and benefits to be expressed in a common metric, typically dollars."[157] This requirement creates an immediate problem: how does one place a dollar-value "on things not normally bought and sold on markets?"[158] To re-cast the examples first mentioned in this Comment, what might the dollar-value be for the public's loss of millions of fish from the Prince William Sound, or for the loss of use of a popular beach in Puerto Rico? Is the answer that such disasters are simply the price we must be willing to pay for the oil we use?

The "willingness to pay"[159] response is inadequate on at least two counts. First, it does not account for the differences in preference that people may have for a particular commodity, such as a beach.[160] Second, the response does not differentiate between the behavior of

---

discharge" offenses, thus comprising nearly 20% of all organizational offenses.

154. *See* 1993 U.S. SENTENCING COMM'N ANN. REP. 17 (reporting that organizational environmental discharge cases constituted five of 50 total organizational offenses, or 10% of all organizational cases).

155. *See* USSC SOURCEBOOK, *supra* note 152, at 95 (reporting 45 organizational environmental discharge cases, but erroneously including one organizational wildlife case).

156. Steven Kelman, *Cost-Benefit Analysis and Environmental, Safety, and Health Regulation: Ethical and Philosophical Considerations*, *in* COST-BENEFIT ANALYSIS AND ENVIRONMENTAL REGULATIONS: POLITICS, ETHICS, AND METHODS 137, 138 (Daniel Swartzman et al. eds., 1982).

157. *See id.* at 143.

158. *See id.*

159. *See id.* at 143-44 (discussing "willingness to pay" as equivalent to a cost-benefit analysis).

160. *See id.* at 143.

consumers in private markets and public policy decisions.[161] It may very well be the case that collectively, the public "give[s] certain things a higher valuation" than would be given to those same things in "private, individual activities."[162] That is, where a cost-benefit analysis model may succeed at the private level, it may not at the public level.[163] Thus, arguments against adopting the Proposed Guidelines due to potential increased costs to organizations and their consumers within a *private* market may ultimately fail as a matter of *public* policy. In fact, it appears that they do.

B. The Proposed Guidelines Offer an Equitable Sentencing Structure

The main criticism against implementing the Proposed Guidelines was that they would "over-deter" businesses or cause them to "over-comply" with environmental regulations.[164] According to such arguments, businesses would be fined too severely for environmental crimes,[165] and would, therefore, allocate far too many resources to reduce their exposure,[166] or merely "pass the costs of fines onto

161. *See id.* at 145.

162. *Id.*

163. *See id.* at 146 ("[T]he use of private behavior to impute values for public decisions violates a view of citizen behavior that is deeply engrained in our democratic tradition."). For example, the fact that individuals tend to engage in risky behavior indicates that life is not infinitely valued, and therefore public policy ought to reflect such a finite valuation of human life. *See id.* at 145. An alternative interpretation is that public policy influences private behavior by establishing an ideal. *See id.* at 146. The implementation of stricter health regulations, for example, might promote a "reverence for life" that might otherwise be lacking in an individual's private life. *See id.* Likewise, although we may not be willing to pay privately the costs of environmental regulation and enforcement, we may be so inclined from a public policy perspective where the costs are widely distributed.

164. *See* Lemkin, *supra* note 96, at 309 (arguing that the Proposed Guidelines' focus on retribution is misplaced, and that instead, the goal of sentencing should be deterrence); *see also supra* discussion Part III.B (discussing why the Proposed Guidelines were not adopted). Such an argument, however, is not germane to the Proposed Guidelines, but is rather directed against the possibility of increased fines. It is the same argument that was used against the Organizational Guidelines when they were first promulgated. *See* Martin Harrell, *Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty*, 6 VILL. ENVTL. L.J. 243, 266 n.136 (1995) ("When the Advisory Group put out its initial draft [of the Proposed Guidelines] for public comment, the same forces which had opposed the [Organizational Guidelines] as being too intrusive on business decision making and providing for overly punitive fines banded together again.").

165. *See Reject Draft*, *supra* note 121, at D7 (reporting the claim of two Advisory Group members that the Proposed Guidelines would impose excessive fines that "would be close to the statutory maximum and would be significantly higher than fines calculated using the existing [Organizational Guidelines]"); *Enforcement: Low Marks Given to Draft Guidelines for Sentencing Envtl. Violators*, DAILY ENV'T REP., May 5, 1993, at D3 (reporting widespread fear among corporate attorneys and representatives that the Proposed Guidelines would result in "excessive punishment" and "exorbitant fines that . . . were out of proportion to the nature of environmental crimes").

166. *See* Lemkin, *supra* note 96, at 344 ("Overpunishment and overdeterrence, used to control crime, can lead to gross inefficiency, . . . [may] unnecessarily harm the organization, . . .

stockholders and consumers."[167] Thus, if it turns out that courts are currently imposing adequate fines and ordering the implementation of compliance programs when warranted,[168] the Commission should leave well enough alone.[169] Still, the question remains whether the sentencing structure of the Proposed Guidelines would in fact over-deter businesses.

According to data compiled by the United States Sentencing Commission, since October 1, 1991, 107 organizations have been federally convicted of violating various environmental discharge statutes.[170] Because the Proposed Guidelines' Fine Table is driven by percentages of statutory maximums,[171] determining what percentage of a given statutory maximum courts are now imposing will give substantial insight into how the Proposed Guidelines might affect courts' sentencing practices. Of the 107 cases, 94 resulted in the imposition of fines.[172] Consequently, the following analysis is limited to those 94 cases.

The first step in assessing the potential impact the Proposed Guidelines might have on the imposition of fines is to determine what the statutory maximums were in each case. For example, in a case involving one count for a "knowing" violation of section 1319(c)(2) of the Clean Water Act ("CWA"), the statutory maximum fine would be $50,000 per day of violation.[173] According to 18 U.S.C.

---

and the economy, . . . [and may further] cause organizations to refrain from engaging in lawful behavior for fear of crossing the line.").

167. *See* Harrell, *supra* note 164, at 264 (stating that this is the "corporate reformist" theory which advocates "more frequent imposition of probation and other non-monetary sanctions" instead of fines); Lemkin, *supra* note 96, at 342 (arguing that "any punishment" of corporations for environmental violations in terms of fines inevitably "falls on consumers").

168. According to organizational case-files reviewed by the author, only 40% of all organizations sentenced for environmental violations from 1991 until 1997 have been ordered to, or otherwise implemented, compliance programs.

169. *See* Starr & Braker, *supra* note 32, at 26 ("[A]s recent corporate plea agreements and sentences show, courts currently are able to impose significant fines against corporations and are able to ensure that corporate violators literally clean up their act. The present system's successes should be considered in the continuing debate over fine guidelines for organizational environmental violators.").

170. *See* DATAFILE, *supra* note 138.

171. *See infra* app. C.

172. *See* DATAFILE, *supra* note 138. Of the thirteen cases resulting in no fine, nine were due to the organization's inability to pay the fine. *See id.* The reasons why the other four received no fine could not be determined. *See id.*

173. *See* 33 U.S.C. § 1319 (C)(2) (1994) (stating that a fine can not be lower than $5,000 for a knowing violation). Though "knowing" violations may bring up to a $500,000 fine, for most environmental offenses, if a corporation is convicted of knowingly endangering another, the statutory maximum is $1,000,000. *See id.* § 1319(c)(3)(A). According to Commission data, however, only one organization has been convicted under the "knowing endangerment" provision. *See* DATAFILE, *supra* note 138. For negligent or misdemeanor violations that do not result in death, the statutory maximum is $2,500 to $25,000 per day of violation, *see id.* § 1319(c)(1)(A) (1994), or $200,000, *see* 18 U.S.C. § 3571 (1994), whichever is greater.

§ 3571, however, the court may fine the greater of (1) the amount specified in the relevant statute, (2) twice the pecuniary gain, (3) twice the pecuniary loss, or (4) $500,000 for a felony.[174] As previously noted, because determining pecuniary gain or loss is generally too difficult to ascertain in an environmental case,[175] establishing the statutory maximum based upon such gains or losses is almost never utilized for sentencing purposes.[176] Likewise, insofar as most CWA violations are one-day occurrences,[177] the statutory provision that limits the fine to $50,000 per day is rarely used because it is not the greatest of the four possible statutory maximums.[178] Instead, the $500,000 provision, being the greatest of all the possible statutorily maximum fines, is nearly always used as the statutory maximum.[179]

The second step—based upon the fine actually imposed—is to ascertain under what Offense Level these cases would have been sentenced had the Proposed Guidelines been implemented. Of the 94 cases surveyed, the statutory maximum was determinable in 80 of those cases.[180] The average fine for those 80 cases was equivalent to 20% of the applicable statutory maximum.[181] This is equivalent to an Offense Level of seven, eight, or nine under the Proposed Guidelines' Fine Table.[182]

---

174. *See* 18 U.S.C. § 3571 (c)(1)-(3).

175. *See supra* discussion Part II.A.

176. Of the 107 corporate environmental cases, this fine provision appears to have been used only once. In *United States v. Bunker Group*, involving the grounding of a and subsequent massive oil spill from the barge *Morris J. Berman*, the companies involved were each found guilty of violating one count of the CWA under a negligence provision. *See Three Corporations Fined*, *supra* note 1, at 1 (discussing the circumstances of the Bunker Group). That provision carries a statutory maximum of only $25,000 per day. *See* 33 U.S.C. § 1319 (c) (1). Consequently, the court utilized the alternative fine provision of Title 18. *See* 18 U.S.C. § 3571 (d) (stating that "if the offense results in pecuniary loss to a [third-party], the defendant may be fined not more than. . . twice the gross loss"). It was reported that the clean-up costs reached $90 million. *See Three Corporations Fined*, *supra* note 1, at 1. Assuming the court designated that amount as the pecuniary loss, then under Title 18, the statutory maximum penalty would have been $180 million.

177. Of the 107 organizational cases, 67 resulted in one-count convictions of violating the applicable statutory regulation on a particular day. *See* DATAFILE, *supra* note 138.

178. This, of course, is because any violation occurring for a period of less than 10 days will set the fine maximum at an amount less than $500,000. *See* 33 U.S.C. § 1319 (c)(2).

179. Generally, "knowing" violations of an environmental regulation carry a fine provision providing for a $500,000 statutory maximum fine insofar as they are felonies. *See* 18 U.S.C. § 3571(c)(3) (setting the statutory maximum fine at $500,000); 33 U.S.C. § 1319(c)(2) (imposing a term of imprisonment of not more than three years for violating the applicable provisions). Of the 107 cases, all but 11 were convictions for knowing violations of environmental regulations. *See* DATAFILE, *supra* note 138.

180. *See* DATAFILE, *supra* note 138. The 14 cases excluded from the statutory maximum analysis either had no statutory maximum fine recorded, or the statutory maximum fine recorded was less than the fine required: a violation of the statute and therefore incorrect.

181. *See id.* (reflecting the average percentage of statutory maximums fined at 26.04% for 118 surveyed cases where both a non-null fine and a statutory maximum were recorded).

182. *See infra* app. C.

The third step is to determine at which Offense Level the surveyed cases would have been sentenced had the Proposed Guidelines been implemented. That is, based upon the factual nature of the offense, what offense level would have resulted? Under the Proposed Guidelines, a conviction for mishandling hazardous substances results in the assignment of a Base Offense Level of eight.[183] If there happens to be an actual discharge, a common "specific offense characteristic"[184] among the cases surveyed, the Base Offense Level increases by four.[185] Significantly, should an organization cooperate with the prosecutor during the investigation by entering a guilty plea before substantial trial preparation has taken place,[186] an action that organizations appear to undertake in the overwhelming majority of cases,[187] the corporation may qualify for a four-level decrease.[188] This would set the final Offense Level at eight, or just 15% to 25% of the statutory maximum.[189] Since the *average* fine for fiscal years 1993 through 1998 was 20% of the statutory maximum,[190] the courts appear to be fining organizations much as they would under the Proposed Guidelines.[191]

The above analysis, however, does not take into consideration various aggravating and mitigating factors that could dramatically change the ultimate Offense Level under which an organization may

183. *See* PROPOSED GUIDELINES § 9B2.1(b)(2)(A), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379.

184. Specific offense characteristics pertain to the factual nature surrounding the offense, i.e., whether there was an ongoing and continuous release of toxic waste into a stream, whether the offense substantially increased the likelihood of another person becoming injured. *See generally id.* § 9B2.1(b)(2)(B), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379 (explaining the various offense level increases and decreases associated with specific offense characteristics).

185. *See id.* § 9B2.1(b)(2)(B)(i)(b), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379.

186. *See id.* § 9C1.2(b) cmt., *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381-82 (noting that to "fully cooperate" means that the organization must provide "all pertinent information known to or ascertainable by it that would assist law enforcement personnel in identifying the nature and extent of the offense").

187. Between 1991 and 1997, 86 of 107 organizational convictions for environmental offenses were the result of plea agreements. *See* DATAFILE, *supra* note 138. Seventy of the 80 surveyed cases were also the result of plea agreements. *See id.*

188. *See* PROPOSED GUIDELINES § 9C1.2(b)(2), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1382.

189. *See infra* app. C.

190. *See* DATAFILE, *supra* note 138 (stating that the average is 20% of statutory maximum).

191. Interestingly, for fiscal years 1996 and 1997, of 36 cases that received a fine and where the statutory maximum could be readily ascertained, the average fine represented 25.62% of the statutory maximum. *See* DATAFILE, *supra* note 138. This corresponds to an Offense Level of 10. *See infra* app. C. Thus, it seems that for at least the past two years, organizations may actually have been fined *higher* than they otherwise would be under the Proposed Guidelines. *See id.*

be sentenced.[192] Unfortunately, from the data that have been collected by the Commission, it is simply impossible to determine how courts weigh various aggravating factors—such as management involvement in the offense, and mitigating factors—such as the presence of a compliance program.[193] Still, given that the Proposed Guidelines allow for a three to eight-level reduction for organizations that demonstrate the presence of compliance programs prior to the offense,[194] an Offense Level of twelve could be reduced to an Offense Level of nine or even, theoretically, to four.[195] Even assuming a finding of management involvement, which would increase the Offense Level by six[196] for a total of eighteen, the presence of a compliance program could still reduce the Offense Level to fifteen, or even ten, i.e., about the level at which courts are now sentencing.

Thus, there are no *a priori* reasons to believe that if the Proposed

192. *See generally* PROPOSED GUIDELINES § 9C1.1-.2, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381-82.

193. Under the current sentencing scheme, because the court is not required to consider formally such factors as information about how, if at all, a particular court weighed the presence of management involvement and the presence of a compliance program in determining an organization's fine, this information is not noted in the judgement-and-conviction orders or in the pre-sentence reports. Consequently, there is no way to ascertain how such factors currently influence the decision-making processes of the courts in determining fines.

194. *See* PROPOSED GUIDELINES § 9C1.2(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381-82; *see also supra* note 111 (discussing the mitigating effect of compliance programs).

195. *See generally* PROPOSED GUIDELINES § 9C1.2(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381-82 (stating that a prior compliance program can reduce the offense level by three to eight levels). To be sure, however, such a reduction is limited to 50% of the amount determined after all aggravating factors have been considered. *See id.* § 9E1.2(b), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384. If, for example, a corporation is convicted of mishandling hazardous substances, the Base Offense Level is set at eight. *See id.* § 9B2.1(b)(2)(A), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379. If it were also determined that the offense constituted an ongoing, continuous, or repetitive discharge of hazardous material, the Base Offense Level is increased by six to 14. *See id.* § 9B2.1(b)(2)(B)(i)(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1379. An Offense Level of 14 corresponds with a fine range of 40% to 60% of the statutory maximum. *See infra* app. C. Assuming that the statutory maximum is $500,000, this would give the court the discretion to fine the corporation from $200,000 to $300,000. Assuming further that the court initially set the fine at $250,000, if the court determined that the corporation had a qualifying compliance program in place prior to the offense, it could reduce the Offense Level from 14 to six. *See* PROPOSED GUIDELINES § 9C1.2(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1381-82 (allowing an Offense Level reduction of three to eight levels for organizations that demonstrate commitment to qualifying compliance program). An Offense Level of six corresponds to a fine of 10% of the statutory maximum, or $50,000. *See infra* app. C. But as noted above, the court would be prevented by section 9E1.2(b) from reducing the fine to this amount since it would constitute more than a 50% reduction. *See* PROPOSED GUIDELINES § 9E1.2(b), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384. At most, the court would be able to reduce the fine to $125,000—a *de facto* Offense Level of eight—even though it would otherwise be permitted to reduce the Offense Level to six.

196. *See* PROPOSED GUIDELINES § 9C1.1(a), *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1380.

Guidelines are implemented they would "dramatically increase the level of fines imposed upon corporations convicted of environmental crimes."[197] Instead, even allowing for various aggravating factors, it is still quite possible that the average fine for organizational environmental crime would not significantly increase under a statutory maximum-based sentencing structure *provided that organizations implement effective compliance programs.*

In light of this finding, one might still question the need for guidelines inasmuch as, according to the previous analysis, the average fine amount would likely not change. That is, if the courts are currently sentencing on average much as they would under the Proposed Guidelines, are the Proposed Guidelines even needed?[198] To answer this, it is important to understand that focusing upon an "average fine" may not reveal important information about the distribution of the fines for organizational offenses.[199] After all, the Guidelines are not so much concerned with the average fine, but ensuring that similarly situated offenders who commit substantially the same offense are fined in a like manner.[200] Consequently, inasmuch as the Guidelines are designed to take such factors into account,[201] one would expect that the resultant fines for similarly

197. Starr & Braker, *supra* note 32, at 26.

198. It is questionable how much weight the Commission should give to past sentencing practices in terms of the average fine imposed. *See* PAUL H. ROBINSON, DISSENTING VIEW OF COMMISSIONER PAUL H. ROBINSON ON THE PROMULGATION OF SENTENCING GUIDELINES BY THE UNITED STATES SENTENCING COMMISSION 4 (1987) (arguing that basing sentences on mathematical averages is "irrational" insofar as the average likely will not reflect any actual sentencing disparity that may have been the result of different, but consistent, sentencing philosophies). *But see* U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(3) (1998) (stating that the "Commission did not simply copy estimates of pre-guidelines practice as revealed by the data, even though establishing offense values on this basis *would help eliminate disparity* because the data represent averages") (emphasis added). Thus, the average fine may not necessarily be either an appropriate or an accurate basis for promulgating a sentencing guideline. As a result, adoption of the proposed guidelines ought not turn on whether or not they differ from past sentencing practices. *See, e.g., id.* (stating that the Commission departed from past sentencing practices where statutes required such departures or where, as was the case for economic crimes, past sentencing practices appeared to be too lenient when compared with other equivalent behavior).

199. For example, if on one hand two organizations are convicted of similar environmental offenses and one is fined 20% of the statutory maximum, and the other 80% of the statutory maximum, the average of the two fines would be equivalent to 50% of the statutory maximum. If, on the other hand, one organization is fined 45% of the statutory maximum and the other 55%, the average fine would still be equivalent to 50% of the statutory maximum. The latter set of fines, however, is far less dispersed than the former set. *See* MORRIS HAMBURG, BASIC STATISTICS: A MODERN APPROACH 75 (3d ed. 1985) (noting how averages do not reflect the dispersion of the data).

200. *See generally* U.S. SENTENCING GUIDELINES MANUAL, ch. 1, pt. A (discussing the Commission's goal of remedying *unwarranted* disparity in sentencing while recognizing that not all such disparity is unwarranted).

201. *See id.* ch. 1, pt. A(3), policy statement (discussing the Commission's consideration of both the offender and the offense when it formulated the Guidelines).

situated offenders convicted of similar offenses and sentenced under a guideline would approximately be of the same general amount, i.e., close to the average fine amount. If, however, there are no sentencing guidelines for a particular offense, it would not be surprising to discover an element of randomness in the amount of fines imposed upon convicted organizations. In other words, for offenses where the guidelines do not apply, one would expect the fine distribution for those offenses to be somewhat similar to the fine distribution in the pre-Guidelines era.[202]

Figure 1

As it turns out, data analyzed from the Commission's Organizational Defendants Datafile[203] lend support to the above hypothesis. The above figure notes the relative distribution of organizational fines relative to the average fine. For example, over

202. *See* Swenson, *supra* note 83, at 30 (discussing the results of the Commission's research that revealed that in the pre-Guidelines era "[c]orporate sentencing was in disarray" such that "nearly identical cases were treated differently").

203. *See* DATAFILE, *supra* note 138. The data for Figure 1 analyze only those cases wherein some non-null fine was imposed and where the Commission's datafile recorded a statutory maximum for the case. Fraud and antitrust cases were included inasmuch as they constitute the largest and third largest offense categories for organizational offenses. *See id.*

90% of all organizational fines fell within one-third of one standard deviation of the average fine.[204] Similarly, nearly all the fines for organizational antitrust, fraud, and environmental offenses fell within one-third of one standard deviation from the average. A closer look at each category, however, reveals an interesting result. For environmental offenses, only 17.02% of the fines fell within one-fifth of one standard deviation, whereas for other offenses, two to five times as many fines fell within that distribution range. Moreover, the number of organizational environmental fines that fell within one-fifth of one standard deviation turns out to be very close to the number of fines one would expect to fall in that range for a random distribution.[205]

Thus, according to data compiled by the Commission, fines for organizational environmental offenses appear to be significantly more dispersed than fines for any of the other guideline-governed offense categories and may thus indicate a degree of randomness in their distribution. Given that all the other categories are significantly less dispersed, imposing fine guidelines upon organizational environmental offenses would likely decrease the current fine distribution for organizational environmental offenses without increasingly the average amount of fines imposed.

C. The Public Perception of Organizational Environmental Crime: Substantive Punishment is Deserved

Part of the Commission's mandate in determining what categories

---

204. The standard deviation is the "measure of the spread in a set of observations." *See* HAMBURG, *supra* note 199, at 69. It is useful for "describing how far individual items in a distribution depart from the mean of the distribution." *See id.* at 72. This distance of departure from the mean can be expressed in terms of a "standard score." *See id.* The standard score is the "number of standard deviations the observation lies below or above the mean." *Id.* at 73. For example, if a set of data has 100 as its mean and 20 as its standard deviation, a value of 80 would constitute a standard score of –1; and 120 a standard score of +1. *See id.* at 72. For a particular set of data with a "normal distribution," approximately 68.3% of all data-points will fall within a standard score of ±1. *See id.* at 71-72. However, "as items are dispersed more and more widely from the mean, the standard deviation becomes larger and larger." *Id.* at 69. Likewise, if the distribution is significantly skewed, i.e., the distribution lacks the symmetry of a normal distribution, the standard deviation may be similarly affected. *See id.* at 61-62. As a result, for significantly skewed distributions, far more data-points may fall within a standard score of ±1 than in a normal distribution. In fact, the set of fines in each of the offense categories analyzed in Figure 1 is so heavily skewed that far more than 68.3% of the fines falls within a standard score of ±1. Consequently, to reveal differences in the distribution of fines among the various offense categories, one must examine the distribution of fines within smaller standard scores. Thus, Figure 1 illustrates the percentage of fines for each particular offense category that fall within a standard score of ±1/3, ±1/5, and ±1/10.

205. Data for the Random category were generated by the author using a commercial spreadsheet that randomly selected 94 data-points between $9.00 and $25,000,000 reflecting the minimum and maximum fines imposed upon organizational environmental offenders.

of offenses will be covered by the Guidelines is to take into consideration "the community view of the gravity of the offense", and "the public concern generated by the offense."[206] A recent CBS News Poll revealed that 53% of Americans believe that the environment will be in worse condition in the next century than it is now.[207] Similarly, a joint ABC News/*Washington Post* survey revealed that a majority of Americans saw environmental issues as very important in the 1998 congressional elections.[208] Thus, it is not surprising that 90% of Americans believe that Congress and the President should make the protection of the environment either an important or a top priority.[209] It is quite clear that Americans take the issue of the environment and its protection very seriously, so much so that 68% of the respondents in one survey felt that "[p]rotection of the environment should be given priority, *even at the risk of curbing economic growth*,"[210] and 69% of the respondents in another survey were willing to pay higher consumer prices if doing so would increase the efforts of businesses and industry to improve the environment.[211] Although willing to shoulder some of the economic burden, it is

206. 28 U.S.C. § 994 (c)(4)-(5) (1994). According to Professor Kathleen F. Brickey, "there is widespread public support for treating culpable environmental violations as serious crimes. Once viewed as mere economic/regulatory offenses lacking an element of moral delict, environmental crimes now provoke moral outrage and prompt demands for severe sanctions and strict enforcement." Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 488-89 (1996). In particularly chilling language, Professor Jonathan Turley embodies that outrage when he defines environmental crime as:

> [a]n especially vicious form of violent offense against society. Representing a narrow band of individuals and corporations, environmental felons have most of the characteristics of conventional violent offenders save one: environmental felons commit crimes that often continue to victimize long after the commission of the predicate offense. . . . While a robbery is committed in an instant, an environmental violation can victimize generations through birth defects, immune deficiencies and countless other physiological reactions. Finally, while some crimes are committed in the heat of passion or without premeditation, environmental crimes are committed for only one reason: cold hard cash. The only difference between an environmental felon and a racketeer is purely cosmetic.

Environmental Crimes Act of 1992: Hearings on H.R. 5305 Before the House Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary, 102d Cong. 123-24 (1992) (testimony of Jonathan Turley Professor of Law at George Washington University National Law Center).

207. *See CBS News Poll*, Question ID: USCBS.040698 R49, Apr. 6, 1998, *available in* WL POLL (reporting a national telephonic survey of 782 adults).

208. *See ABC News/Washington Post Poll*, Question ID: USABCWP.071498 22L, July, 14, 1998, *available in* WL POLL (noting that 20% of those who felt the environment was a very important issue also felt that it would be a deciding factor for them in the election).

209. *See Princeton Survey Research Associates*, Question ID: USPSRA.012398 R09NF2, Jan. 23, 1998, *available in* WL POLL (surveying 1218 adults by telephone).

210. *Gallup Poll*, Question ID: USGALLUP.98AP17 R43, Apr. 17, 1998, *available in* WL POLL (reporting a national telephonic interview of 1007 adult Americans) (emphasis added).

211. *See Cambridge Reports National Omnibus Survey*, Question ID: USCAMREP.92JUL R06, July, 1992, *available in* WL POLL (reporting the results of a national telephonic survey of 1250 adults).

nevertheless clear that the majority of Americans feel that businesses should pay for environmental clean-up.[212] What is more, most Americans feel that corporations found responsible for polluting the environment should be punished through the imposition of fines even larger than those they are currently receiving.[213]

Such sentiment exemplifies the Kantian retributivist principle of *jus talionis*,[214] commonly known as the principle of "just desert." Just desert is the ethical precept dictating that an agent should receive the punishment that it, by its act deserves, independent of other considerations.[215] Although not blind to economic consequences, the principle of just desert is concerned mainly with the moral imperative of ensuring that offenders receive their just punishment.[216] Inasmuch as criminal sanctions are supposed to attach a stigma of wrongdoing

---

212. *See Cambridge Reports National Omnibus Survey*, Question ID: USCAMREP.92JUL R11, July, 1992, *available in* WL POLL (reporting that 52% of 1250 adults surveyed felt that "[m]oney for environmental clean-up programs should come from special fees paid by business and government organizations that engage in activities perceived to harm the environment").

213. *See Great American TV Poll Survey #7*, Question ID: USPSRA.91TV07 R06, March, 1991, *available in* WL POLL (reporting that 61% of 600 adults surveyed felt that the fines and punishment corporations receive for polluting are not harsh enough while only 5% felt that they were too harsh).

214. *See* BRENT FISSE & JOHN BRAITHWAITE, CORPORATIONS, CRIME AND ACCOUNTABILITY 45 (1993) (arguing that "[t]he classic interpretation of retribution was . . . social amends for the evil done" where evil was committed through some breach of self-restraint to be remedied through punishment. "If we accept that corporations are moral agents" and bear the burden of self-restraint, "then this form of retribution applies [to them]."); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 101 (John Ladd trans., Bobbs-Merrill Co. 1965) (1797) (arguing that public legal justice adopts as its fundamental principle equality, "the principle of not treating one side more favorably than the other," while holding that "[o]nly the Law of retribution can determine exactly the kind and degree of punishment" one deserves for an offense committed).

215. This, of course, does *not* dictate that punishment must always be severe, rather only that it is adequate to reflect the seriousness of the crime and society's moral disapprobation of the activity. *See* FISSE & BRAITHWAITE, *supra* note 214, at 45. Consequently, it is absurd to state that "no fine short of complete divestiture can achieve true retribution against an organization." *See* Lemkin, *supra* note 96, at 341 (stating, without support or argument, that "just punishment" is to be equated with retribution which, if it is to be had, requires the equivalent of the corporate death penalty). With such a confused view of the principle of retribution, it is no surprise that Mr. Lemkin believes that "attempts at exacting retribution from organizations are misplaced." *Id.* at 342.

216. *See* FISSE & BRAITHWAITE, *supra* note 214, at 45 (noting that retributivist theories of punishment are centrally concerned with proportioning desert "as a measured way of expressing the community's degree of reprobation for a wrongdoer"); *see also* Kelman, *supra* note 156, at 142 (arguing for a deontological ethical approach to environmental regulation enforcement insofar as moral valuation of any regulation is not necessarily dependent upon cost-benefit analyses for its validation); H.L. Packer, *Justification for Criminal Punishment*, *in* THE LIMITS OF CRIMINAL SANCTION 35, 37 (1968) ("Retribution rests on the idea that it is right for the wicked to be punished: because man is responsible for his actions, he ought to receive his just deserts.") (cited in Sharp, *supra* note 40, at n.4). For a contemporary example of such a theory, see generally Thomas Nagel, *Justice and Nature*, 17 J. LEGAL STUD. 303 (1997) (arguing for an account of justice that allows for social arrangements that might not be optimal on the basis of cost-benefit calculations).

upon the offender that differs from civil penalties,[217] it is important that sentencing guidelines are structured in such a way that this aspect of the criminal sanction is not lost.[218] Even if the implementation of organizational fine guidelines for environmental crime is more economically costly to society than it is economically beneficial,[219] from a retributivist perspective the case for them is not diminished. What the retributivist sentiments reflect in the above public opinion polls is that the imposition of sentencing guidelines for organizational environmental crime need not kneel at the foot of economic efficiency. Organizations should be punished, and punished justly, to a degree that adequately reflects the value society places upon the environment, even if that means valuing the protection of the environment over the economic interests of organizations.

CONCLUSION

Despite the failure to adopt the Proposed Guidelines, former-Commissioner Michael Gelacak still believes that there should be fine guidelines for organizational environmental crime.[220] Moreover, many see the implementation of such guidelines as inevitable.[221] As

217. Professor Lucia Silecchia and Mr. Michael Malinowski have argued that "criminal prosecution of corporations for environmental offenses is a 'square peg' in the scheme of general criminal law" insofar as such prosecutions merely impose additional fines on offenders but do not add to the stigma or collateral consequences that may otherwise be obtained through civil punitive damages. *See* Silecchia & Malinowski, *supra* note 111, at 232. Thus, they conclude that "[c]riminal prosecution . . . duplicate[s] the civil system." *Id.*

218. *See* Cherif Cordahi, *Environment: Polluters Should Face Criminal Prosecution-Lawyers*, INTER PRESS SERV., May 8, 1995, *available in* 1995 WL 2260940 (reporting on an U.N.-sponsored environmental conference of international lawyers, some of whom argued that civil sanctions were insufficient to deter corporations from damaging the environment and that the stigma associated with criminal convictions was necessary for deterrence); *Appeals Court Judge Says Tough Monetary Penalties Needed for Environmental Crimes*, DAILY ENV'T REP., July 1, 1992, at D8 (reporting on Ninth Circuit appellate Judge Pamela Rymer's belief that corporate fines should be greater than the cost of implementing a compliance program).

219. Professors Fisse and Braithwaite note that although punishing a corporation may unfairly distribute the punishment to innocent employees, shareholders, and consumers, such a situation does not preclude punishing the corporation. They liken the situation to one wherein a family suffers when one of their kin is convicted and sentenced to prison. The suffering of the family member is different in kind from that of the offender. Even though innocent employees, shareholders, and consumers may suffer from an organization's environmental offense, they themselves are not subject to the stigma of the conviction. They assume the "risks" involved in such relationships, and they would unjustly reap the benefits of illegal activity should the corporation not be criminally punished for its crime. *See* FISSE & BRAITHWAITE, *supra* note 214, at 50.

220. *See* Interview, *supra* note 124.

221. *See* Gruner, *supra* note 65, at 212 ("[T]he Commission has stated that completion of organizational fine guidelines for environmental offenses is still a top priority.") (citing United States Sentencing Commission, *Notice of Priority Areas for Commission Research and Amendment Study*, 60 FED. REG. 49,316, 49,317 (Sept. 22, 1995)); Nagel & Swenson, *supra* note 29, at 258 ("The development of environmental guidelines will constitute an important next step in the

Professors Silecchia and Malinowiski have stated, "[r]egardless of [the] shortcomings [of the Proposed Guidelines], Congress *has* criminalized the environmental offenses of corporations. Thus, courts deserve . . . . a sentencing scheme tailored to organizational environmental offenses."[222]

It has been six years since the Proposed Guidelines were first considered for adoption.[223] In that time, little has been done to either revise or even discuss them, despite the fact that the Commission continues to receive increasingly more corporate environmental cases every year.[224] Although the Proposed Guidelines may need to be reformulated to some degree, they nevertheless offer a solid foundation upon which to build needed organizational guidelines for environmental crimes.

Though there are currently no Commissioners, it is likely that these vacancies will be filled soon.[225] In light of the arguments presented in this Comment, one of the first tasks those Commissioners should undertake is the implementation of fine guidelines for organizational environmental crime. Organizational environmental crime is simply too important an issue to be without sentencing guidelines. In the words of the British jurist Lord Hewart, "[i]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[226] Implementing fine guidelines for organizational environmental crime will show that justice is being done in the sentencing of organizations for environmental crime.

---

evolution of the corporate Sentencing Guidelines."); Coffee, *supra* note 29, at 5 (opining that the Commission will eventually adopt guidelines for organizational environmental crime). *But see* Starr & Braker, *supra* note 32, at 2 (noting that the proposed organizational guidelines for environmental crimes appear to be stalled).

222. Silecchia & Malinowski, *supra* note 111, at 232; *see also* USAM 1997, *supra* note 143, § 5-11.114(a) (recognizing Congress' intent to prosecute corporations criminally for violations of federal environmental laws) (citing, i.e., 33 U.S.C §§ 1319(c)(5), 1362(5) (1994) (setting fines specifically for corporate violations of the CWA).

223. *See supra* note 30.

224. *See supra* note 150 (discussing the increased number of federal environmental prosecutions and convictions).

225. *See* REHNQUIST, *supra* note 34 (urging the President and Congress to appoint Commissioners as soon as possible).

226. THE OXFORD DICTIONARY OF QUOTATIONS, *supra* note 115, at 250.

APPENDIX A

THE ORGANIZATIONAL GUIDELINES' OFFENSE LEVEL FINE TABLE[227]

Offense Level	*Amount*
6 or less	$5,000
7	$7,500
8	$10,000
9	$15,000
10	$20,000
11	$30,000
12	$40,000
13	$60,000
14	$85,000
15	$125,000
16	$175,000
17	$250,000
18	$350,000
19	$500,000
20	$650,000
21	$910,000
22	$1,200,000
23	$1,600,000
24	$2,100,000
25	$2,800,000
26	$3,700,000
27	$4,800,000
28	$6,300,000
29	$8,100,000
30	$10,500,000
31	$13,500,000
32	$17,500,000
33	$22,000,000
34	$28,500,000
35	$36,000,000
36	$45,500,000
37	$57,500,000
38 or more	$72,500,000

227. *See* U.S. SENTENCING GUIDELINES MANUAL § 8C2.4(d) (rejecting the Offense Level Fine Table for the Organizational Guidelines).

APPENDIX B

THE ORGANIZATIONAL GUIDELINES' CULPABILITY SCORE TABLE[228]

Culpability/MinimumMaximumScore	*Multiplier-Multiplier*
10 or more	2.00-4.00
9	1.80-3.60
8	1.60-3.20
7	1.40-2.80
6	1.20-2.40
5	1.00-2.00
4	0.80-1.60
3	0.60-1.20
2	0.40-0.80
1	0.20-0.40
0 or less	0.05-0.20

228. *See id.* § 8C2.6 (rejecting the Culpability Score Table for the Organizational Guidelines).

APPENDIX C

THE PROPOSED GUIDELINES' FINE TABLE[229]

Percentage Range Of

Offense Level	*Statutory Maximum*
0 to 6	10-10
7	10-20
8	15-25
9	20-30
10	25-35
11	30-40
12	30-50
13	35-55
14	40-60
15	45-65
16	50-70
17	55-75
18	60-80
19	65-85
20	70-90
21	75-95
22	80-100
23	85-100
24 or more	100

229. *See* PROPOSED GUIDELINES, *reprinted in Draft Corporate Sentencing Guidelines*, *supra* note 111, at 1384 (showing the Fine Table for the Proposed Guidelines).