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# THE ENVIRONMENTAL SENTENCING GUIDELINES FOR BUSINESS ORGANIZATIONS: ARE THERE MURKY WATERS IN THEIR FUTURE?†

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## I. INTRODUCTION

Changes in how the federal courts deal with environmental violations are imminent. The only questions are when will the changes occur and what will the changes look like?

The workings of change will come about through amendments to the Federal Sentencing Guidelines. The amendment process begins when the United States Sentencing Commission (Sentencing Commission) makes recommendations to Congress for amendments to the Federal Sentencing Guidelines (Guidelines) on or before May 1 of any given year.<sup>1</sup> If Congress does not amend these recommendations be-

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<sup>1</sup> 28 U.S.C. § 994(p) (1988).

The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent the effective date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

*Id.*

fore November 1 of that same year, the recommendations are incorporated into the Federal Sentencing Guidelines Manual<sup>2</sup> (Guidelines Manual), which federal judges are bound to follow in determining criminal sanctions.<sup>3</sup>

The Sentencing Commission has specifically excluded environmental violations by business organizations from the fining provisions of Chapter 8 of the Guidelines Manual, the Organizational Sentencing Guidelines.<sup>4</sup> The Sentencing Commission excluded such violations under the belief that the formula used to determine organizational fines did not reflect the potential damages caused by environmental mishaps.<sup>5</sup> In 1992, however, the Sentencing Commission empaneled a sixteen-member Advisory Work Group (AWG) comprised of environmentalists, prosecutors, defense attorneys, and academics to examine the issue of environmental sentencing guidelines for business organizations.<sup>6</sup> The AWG released draft recommendations dealing with environmental sentencing guidelines for business organizations to the Sentencing Commission on November 17, 1993.<sup>7</sup> On December 8, 1993, two members of the AWG issued a strongly worded dissent to the draft proposal.<sup>8</sup> On February 24, 1994, the AWG formally presented its draft proposal to the Sentencing Commission for consideration.<sup>9</sup> The Sentencing Commission, however, chose not to send this proposal to Congress. Nevertheless, even though the Sentencing Commission did not adopt the AWG's proposal, there is a strong possibility that significant portions of the proposal will form the basis of the Sentencing Commission's future recommendations for environmental sentencing guidelines for business organizations. As one commentator has noted:

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<sup>2</sup> *Id.*

<sup>3</sup> 18 U.S.C. § 3553(b) (1988).

<sup>4</sup> See United States Sentencing Commission, *Guidelines Manual*, § 8C2.1 (Nov. 1994) [hereinafter *Guidelines Manual*].

<sup>5</sup> See *id.* (Background). For further information about why environmental violations were excluded from Chapter 8's fining provisions, see generally RAKOFF ET AL., CORPORATE SENTENCING GUIDELINES: COMPLIANCE AND MITIGATION §§ 8.01[1] and 8.01[2] (1994).

<sup>6</sup> See Joe D. Whitley & Trent B. Speckhals, *Increased Prosecution Is Predicted: New Sentencing Guidelines for Organizations May Lead to More Frequent Charges Against Corporations for Environmental Crimes*, NAT'L L.J. (Environmental Law Section C), Dec. 5, 1994, at C1.

<sup>7</sup> *Id.*

<sup>8</sup> Report on Advisory Work Group on Sentencing Guidelines for Organizations Convicted of Environmental Crimes, Dissenting Views by Lloyd S. Guerci and Meredith Hemphill, Jr. (Dec. 8, 1993) (copy on file with the editor of the Boston College Environmental Affairs Law Review) [hereinafter *Dissent*].

<sup>9</sup> Marianne LaVelle & Harvey Berkman, *Rules Proposed on Environmental Sentencing*, NAT'L L.J., Mar. 14, 1994, at A7.

The commission elected not to adopt the proposed guidelines, motivated in part by strong dissension among members of the advisory group as to the necessity of a separate chapter strictly for corporate crimes, as well as by the expiration of the term of Commissioner Ilene Nagel, chairman of the advisory group. . . .

Despite the decision, many of the features of corporate environmental compliance programs embraced by the proposed guidelines could become part of future amendments to the U.S. Sentencing Guidelines. Therefore, companies should be aware of the substance of the proposed guidelines and should consider becoming involved in the development of future guidelines for sentencing corporate environmental offenders.<sup>10</sup>

In October of 1994, the Senate approved President Clinton's recommendations for four new Sentencing Commission members.<sup>11</sup> The new commissioners, Richard P. Conaboy (the new chairman of the Sentencing Commission), Wayne A. Budd, Michael Goldsmith, and Judge Deanel R. Tacha, provide a "full complement of seven [Sentencing Commission] members for the first time in nearly three years."<sup>12</sup> The new Sentencing Commission will have to address environmental violations and will have to make its proposals to a new Republican Congress. In order for business organizations to deal proactively with concerns surrounding the AWG's Guidelines proposal regarding environmental violations by business organizations, they need to understand the proposal as well as the dissenters' concerns. This Article will analyze the proposed Chapter 9 Environmental Sentencing Guidelines (ESG) and the dissent to the proposed ESG. Specifically, this Article will compare the proposed ESG and the dissent to the proposed ESG with the existing Individual Sentencing Guidelines—Chapter 1 to Chapter 7—and the Organizational Sentencing Guidelines—Chapter 8.

## II. HISTORICAL DEVELOPMENT

### A. *Individual Guidelines*

In 1984, Congress enacted the Comprehensive Crime Control Act.<sup>13</sup> Included within this legislation was a plan to drastically reform exist-

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<sup>10</sup> Kenneth D. Woodrow, *The Proposed Federal Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs*, 25 Env't Rep. (BNA) 325, 327 (June 17, 1994).

<sup>11</sup> *U.S. Judge Heads Sentencing Panel*, N.Y. L.J., Oct. 24, 1994, at 2.

<sup>12</sup> *Id.*

<sup>13</sup> Pub. L. No. 98-473, 98 Stat. 1988 (codified at 18 U.S.C. §§ 3551-3742 (Supp. IV 1986), 28 U.S.C. §§ 991-998 (Supp. IV 1986)).

ing federal sentencing practices.<sup>14</sup> One of Congress's major complaints with the existing criminal law was the lack of uniformity in sentencing.<sup>15</sup> As Congress noted, "[t]he shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform."<sup>16</sup> The problem was exemplified by situations in which some federal judges sentenced convicted offenders to probation while other judges, under similar circumstances, imposed maximum prison terms.<sup>17</sup> Congress feared that this lack of sentencing uniformity bred contempt and failed to deter crime effectively.<sup>18</sup> Congress's concern was expressed in a Senate committee report, which stated that "[s]entences that are disproportionate to the seriousness of the offense create a disrespect for the law. Sentences that are too severe create unnecessary tensions among inmates and add to disciplinary problems in the prisons."<sup>19</sup>

To remedy this situation, Congress created the Sentencing Commission, composed of seven voting and two ex-officio members.<sup>20</sup> Out of the seven voting members, three must be sitting federal judges, and not more than four members can be of the same political party.<sup>21</sup> The President possesses the power to appoint or remove Commissioners,<sup>22</sup> and Congress can amend or revoke any of the guidelines promulgated by the Sentencing Commission.<sup>23</sup>

Congress instructed the Sentencing Commission to create sentencing guidelines which all federal judges would have to follow unless the judges stated in open court the reasons for their departure.<sup>24</sup> One way that the Sentencing Commission encouraged judges to stay within the guidelines was to give both defendants and prosecutors the ability to appeal a judge's departure from the guidelines.<sup>25</sup> "If the appellate court finds that a sentence outside the guidelines is unreasonable, the

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<sup>14</sup> *Id.*

<sup>15</sup> S. REP. NO. 225, 98th Cong., 2d Sess. 37 (1984), reprinted in 1984 U.S.C.C.A.N. 3220, 3248.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 3227.

<sup>18</sup> *Id.* at 3229.

<sup>19</sup> *Id.*

<sup>20</sup> 28 U.S.C. § 991(a) (1988). From 1984 until 1989, two ex-officio members sat on the Sentencing Commission. Since 1989, only one ex-officio member has sat on the Sentencing Commission.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 28 U.S.C. § 994(p) (1988).

<sup>24</sup> S. REP. NO. 225, *supra* note 15, at 3262.

<sup>25</sup> *Id.* at 3263. Also see 18 U.S.C. § 3742 (a) and (b) (1988), which allow either the defendant or the government to appeal a district court judge's sentence if the judge sentences a defendant outside of the applicable Guidelines range.

case may be remanded to the trial court for resentencing or the sentence may be amended by the appellate court."<sup>26</sup>

The Sentencing Commission first addressed the problem of sentencing individual defendants, and in May of 1987 presented Congress with the Individual Sentencing Guidelines (ISG).<sup>27</sup> The ISG became law on November 1, 1987, and were codified at Chapter 1 through Chapter 7 of the Guidelines Manual.<sup>28</sup> The formula for consistent sentencing under the ISG analyzed both the seriousness of the particular offense and the culpability of the particular defendant. These components were then plotted on a 258 cell (43 x 6) matrix which would determine the appropriate sentencing range.<sup>29</sup> (See Table 1). The horizontal axis (rows) of the matrix is comprised of forty-three offense levels.<sup>30</sup> Chapter 2 of the Guidelines specifically states the base offense level for a significant portion of federal criminal violations.<sup>31</sup>

The vertical axis (columns) of the matrix is comprised of six categories based on the defendant's criminal history.<sup>32</sup> The judge determines the appropriate category by calculating "points," which are a function of the number and the severity of the defendant's prior convictions.<sup>33</sup> The total number of points determines the relevant criminal history and, when combined with the total offense level, produce a sentencing range. While judges have discretion within the given range, judges are limited in their ability to go outside the given range.<sup>34</sup>

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<sup>26</sup> *Id.*

<sup>27</sup> *Guidelines Manual*, *supra* note 4, at Chapters 1-7.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at Chapter 5, Part A—Sentencing Table.

<sup>30</sup> Each increased level carries with it a correspondingly higher sentencing range. *Id.* For example, a level 10 offense has a 6-12 months sentencing range, and a level 11 offense has an 8-14 months sentencing range. *Id.*

<sup>31</sup> *Id.* at Chapters 2-6. Appendix A of the Guidelines Manual provides cross-references for where specific sections of the Guidelines appear in the United States Code. *See id.*

<sup>32</sup> *Guidelines Manual*, *supra* note 4, at Chapter 5, Part A—Sentencing Table.

<sup>33</sup> *Id.* § 4A1.1(a)-(f). Three points are added for each prison sentence exceeding 13 months. Two points are added for a term of imprisonment between 2 and 13 months. One point is added—up to a maximum of four points—for each prior sentence of less than two months. There are also adjustments for when the instant offense was committed while the offender was under a criminal justice sentence (in which case two points are added) and for when the instant offense was committed less than two years after the offender's release from prison (in which case two points are added). *Id.*

<sup>34</sup> *See* S. REP. NO. 225, *supra* note 15, at 3234-36. Even though this appears to be a mechanical application of a mathematical formula, Congress did not want judges to lose all sentencing discretion:

The Committee does not intend that the guidelines be imposed in a mechanistic fashion. It believes that the sentencing judge has an obligation to consider all the relevant factors in a case and to impose a sentence outside the guidelines in an appropriate case.

Table 1 (sentences in months)<sup>35</sup>

Offense Level	I 0 or 1	II 2 or 3	III 4,5,6	IV 7,8,9	V 10,11,12	VI 13 or more
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	1-7
3	0-6	0-6	0-6	0-6	2-8	3-9
4	0-6	0-6	0-6	2-8	4-10	6-12
5	0-6	0-6	1-7	4-10	6-12	9-15
6	0-6	1-7	2-8	6-12	9-15	12-18
7	0-6	2-8	4-10	8-14	12-18	15-21
8	0-6	4-10	6-12	10-16	15-21	18-24
9	4-10	6-12	8-14	12-18	18-24	21-27
10	6-12	8-14	10-16	15-21	21-27	24-30
11	8-14	10-16	12-18	18-24	24-30	27-33
12	10-16	12-18	15-21	21-27	27-33	30-37
13	12-18	15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150
27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

The purpose of the sentencing guideline is to provide a structure for evaluating the fairness and appropriateness of the sentence for an individual offender, not to eliminate the thoughtful imposition of individualized sentences.

*Id.*

<sup>35</sup> See *Guidelines Manual*, *supra* note 4, at Chapter 5, Part A—Sentencing Table.

Part Q, Section 2 of the Guidelines deals specifically with environmental violations.<sup>36</sup> An example of a criminal sanction against an individual environmental offender appears in Section 2Q1.1, "Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants." The Guidelines designate such an offense a base offense level of 24. Assuming that the offender has been convicted previously of two fifteen-month environmental violations, the offender's criminal history point total would be 6, or a Category III offense.<sup>37</sup> Viewing Table 1, the offender would face a minimum of sixty-three months imprisonment and a maximum of seventy-eight months imprisonment. While the Sentencing Commission addressed individual offenders of both environmental and nonenvironmental crimes in the ISG, the Sentencing Commission chose to address only nonenvironmental offenses in the fining provisions of Chapter 8 of the Guidelines—the Organizational Sentencing Guidelines (OSG).

### B. *Organizational Sentencing Guidelines*

In 1988, the Sentencing Commission began to develop guidelines to deal with organizational crimes.<sup>38</sup> It appeared that the Sentencing Commission would be ready to present proposals to Congress before the May 1, 1990 deadline, but the Sentencing Commission decided to wait another year in order to fill three membership vacancies.<sup>39</sup> After the vacancies were filled during 1990, the full Sentencing Commission continued to address the issue of corporate fines by preparing drafts, holding public hearings, and soliciting comments from the business community, academics, probation officers, and attorneys.<sup>40</sup> On May 1, 1991, the Sentencing Commission sent to Congress its proposed amendments for the sentencing of corporate and individual defendants for nonenvironmental crimes.<sup>41</sup> The Sentencing Commission's proposed amendments were enacted as amendments to the Guidelines on November 1, 1991, and became Chapter 8 of the Guidelines Manual.<sup>42</sup>

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<sup>36</sup> See *id.* at Chapter 2, Part Q—Offenses Involving the Environment. This section, which deals with sanctions against individuals, has also provided the framework for the AWG's proposal for fines against organizations for environmental offenses.

<sup>37</sup> See *id.* § 4A1.1(a)–(f). Three points are added to the criminal history category for every violation exceeding 13 months. See *id.*

<sup>38</sup> See Fred Strasser, *Lighter Corporate Sentencing*, NAT'L L.J., Apr. 9, 1990, at 3.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.*

<sup>41</sup> See U.S. Sentencing Commission Guidelines, 56 Fed. Reg. 22,786, 22,787 (1991).

<sup>42</sup> See *Guidelines Manual*, *supra* note 4, at Chapter 8.



### C. Goals of the Organizational Sentencing Guidelines

The stated goals of the Sentencing Commission's OSG are to "provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct."<sup>43</sup> The OSG attempt to accomplish these goals through the following means: (1) providing victim restitution;<sup>44</sup> (2) divesting the crime-infested organization of its assets;<sup>45</sup> and (3) determining an appropriate, additional fine based on the seriousness of the offense and the culpability of the organization.<sup>46</sup>

The seriousness of the offense is determined by establishing a base fine, which is the greatest of the following: (1) the pecuniary loss suffered by the victim;<sup>47</sup> (2) the pecuniary gain received by the defendant;<sup>48</sup> or (3) a penalty determined by analyzing the Offense Level Fine Table.<sup>49</sup> (See Table 2). These table amounts are calculated by using the base offense level, with any adjustments, as established in Chapter 2 of the Guidelines.<sup>50</sup> The fine range from the Table, before any multiplier or reducer is applied, is \$5,000 to \$72,500,000.<sup>51</sup>

Regardless of whether the base fine is calculated by the greater of the defendant's pecuniary gain, the victim's pecuniary loss, or the Offense Level Fine Table penalty, this amount can be either increased

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<sup>43</sup> See *id.* (Introductory Commentary).

<sup>44</sup> *Id.* § 8C3.3(a). One of the most important goals is providing restitution to victims. This goal is apparent in the Guidelines provisions that allow a fine to be reduced or deferred if such a reduction or deferral would limit the ability of a defendant to repay victims.

<sup>45</sup> *Id.* § 8C1.1. Organizations with a primary purpose to engage in criminal activity were dealt the harshest blow. The guidelines permit the sentencing judge to construct a fine large enough to disgorge the criminal organization of all of its assets. See *id.*

<sup>46</sup> See *id.* (Introductory Commentary).

<sup>47</sup> *Guidelines Manual*, *supra* note 4, § 8C2.4(a)(3).

<sup>48</sup> *Id.* § 8C2.4(a)(2).

<sup>49</sup> *Id.* § 8C2.4(a)(1).

<sup>50</sup> *Id.* § 8C2.3(a).

<sup>51</sup> *Id.* § 8C2.4(d). With maximum and minimum multipliers of 5% to 400%, this Table range is effectively extended from \$250 (\$5,000 x 0.05) to \$290,000,000 (\$72,500,000 x 4.0). See *infra* notes 53-58 and accompanying text.

Table 2 *Offense Level Fine Table*<sup>52</sup>

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

<sup>52</sup> See *Guidelines Manual*, *supra* note 4, § 8C2.4(d).

or decreased based upon the organization's culpability score.<sup>53</sup> For any given culpability score, the judge has the discretion to impose a fine within a minimum and maximum range.<sup>54</sup> (See Table 3). A higher culpability score establishes a higher minimum and maximum range of multipliers.<sup>55</sup> The maximum multiplier is four times the fine, which has the mathematic effect of multiplying a fine by 400%.<sup>56</sup> A lower culpability score decreases the minimum and maximum multipliers, which can dramatically reduce a fine.<sup>57</sup> The minimum multiplier is 0.05 times the fine, which has the mathematic effect of dividing the fine by twenty.<sup>58</sup>

Table 3<sup>59</sup>

CULPABILITY SCORE	MINIMUM MULTIPLIER	MAXIMUM 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

An organization's culpability score begins with five points,<sup>60</sup> and may be either increased or decreased depending upon certain factors. The culpability score will be increased based upon the judge's determination of the following factors: (1) the size of the organization;<sup>61</sup> (2) the involvement of top officials in the organization;<sup>62</sup> (3) any prior violations by the organization;<sup>63</sup> and (4) any obstruction of justice by the organization.<sup>64</sup> The culpability score will be decreased based upon the judge's determination of the following factors: (1) whether the organi-

<sup>53</sup> *Id.* § 8C2.5.

<sup>54</sup> *Id.* § 8C2.6.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Guidelines Manual, supra* note 4, § 8C2.6.

<sup>58</sup> *Id.*

<sup>59</sup> *See id.* § 8C2.6.

<sup>60</sup> *Id.* § 8C2.5(a).

<sup>61</sup> *Id.* § 8C2.5(b)(1)-(5).

<sup>62</sup> *Guidelines Manual, supra* note 4, § 8C2.5(b)(1)(A)(i).

<sup>63</sup> *Id.* § 8C2.5(c).

<sup>64</sup> *Id.* § 8C2.5(e).

zation possessed an effective program to prevent and detect violations;<sup>65</sup> (2) whether the organization voluntarily disclosed its violations to the appropriate authority;<sup>66</sup> (3) whether the organization cooperated with an investigation conducted by the appropriate authority;<sup>67</sup> and (4) whether the organization accepted responsibility for its improper conduct.<sup>68</sup> The potential impact of the OSG are demonstrated by the following example:

. . . two companies of comparable size, convicted for similar violations, that have each been fined \$20,000,000. Company A has an effective program to prevent and detect violations. It voluntarily reported the violation to the appropriate governmental authority, cooperated in the investigation, and accepted responsibility afterwards. Company B's top managers either knew, or should have known, about the violations, but did nothing to prevent them. It did not cooperate with the subsequent government investigation, and denied culpability even after the conviction. Company A could have its fine reduced from \$20,000,000 to \$1,000,000 ( $\$20,000,000 \times 5\% = \$1,000,000$ ). Company B could have its fine increased to \$80,000,000 ( $\$20,000,000 \times 400\% = \$80,000,000$ ). Thus a company with no ethics [compliance] programs may be forced to pay a fine eighty times that paid by a company with an acceptable ethics [compliance] program, despite similar misconduct. With potential fines ranging up to, and possibly exceeding \$290,000,000 ( $\$72,500,000 \times 400\%$ ) the slogan, "Good Ethics is Good Business" has gained new meaning and importance.<sup>69</sup>

Even though the OSG have existed since November 1, 1991, there have been few cases to provide insight as to the actual impact the OSG have had on organizations. This lack of insight reflects the imperfect environment in which the AWG developed its proposal for the Chapter 9 Environmental Sentencing Guidelines.

### III. ADVISORY WORK GROUP PROPOSALS

This section discusses how the AWG's proposal differs from the OSG's established procedures. The following are the four most important departures of the AWG's proposal: (1) the method of calculating fines; (2) the impact of corporate compliance programs on sentencing;

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<sup>65</sup> *Id.* § 8C2.5(f). See generally, Paul E. Fiorelli, *Fine Reductions Through Effective Ethics Programs*, 56 ALB. L. REV. 403 (1992) (explaining steps organizations can take to develop compliance programs that should qualify for fine reductions).

<sup>66</sup> *Guidelines Manual*, *supra* note 4, § 8C2.5(g)(1).

<sup>67</sup> *Id.* § 8C2.5(g)(2).

<sup>68</sup> *Id.* § 8C2.5(g)(3).

<sup>69</sup> Fiorelli, *supra* note 65, at 407-08. This example assumes that the fine does not exceed the statutory maximum.

- (3) a “collar” provision, limiting the impact of mitigating factors; and  
 (4) “count stacking” for multiple or continuous violations.

#### A. *Fine Calculations*

One of the fundamental changes made in the AWG’s proposal was the method of fine calculation. The proposal calls for an organization to be fined based upon a range of percentages of the statutory maximum fine—usually \$500,000 per environmental violation.<sup>70</sup> (See Table 4). The mandatory range would be determined by assigning offense levels for six different environmental offense characteristics.<sup>71</sup> This offense level would then be increased or decreased by either aggravating or mitigating factors.<sup>72</sup> This would ultimately result in a level with a corresponding range of percentages which would be used to define what portion of the statutory maximum fine would be awarded against the violator.

For example, an organization convicted of mishandling hazardous waste would have a base offense level of 8, with a corresponding percentage range of 15–25% (\$75,000–\$125,000 out of \$500,000). If the mishandling involves a continuous, ongoing, or repetitive discharge, the base level is increased by six levels to 14, with a percentage range of 35–55% (\$175,000–\$275,000 out of \$500,000).<sup>73</sup> Because judicial discretion is limited to what percentage to assign within any given range,

<sup>70</sup> ADVISORY WORKING GROUP, PROPOSED GUIDELINES, reprinted in RAKOFF ET AL., *supra* note 5, at Appendix M-1, M-24, § 9.1 [hereinafter PROPOSED GUIDELINES].

<sup>71</sup> *Id.* § 9B2.1(b)(1)–(6). The following are the four most important offense characteristics and their corresponding base offense levels:

Section 9B2.1(b)(1) - Knowing Endangerment Resulting From Mishandling Hazardous or Toxic Substances, Pesticides or Other Pollutants - Base offense level: 24

Section 9B2.1(b)(2) - Mishandling of Hazardous or Toxic Substances, or Pesticides: Recordkeeping, Tampering and Falsification - Base offense level: 8

Section 9B2.1(b)(3) - Mishandling of Other Environmental Pollutants: Recordkeeping, Tampering and Falsification - Base offense level: 6

Section 9B2.1(b)(6) - Simple Recordkeeping and Reporting - Base offense level: 5

*Id.* § 9B2.1(b), reprinted in RAKOFF ET AL., *supra* note 5, at Appendix M-5 to M-9.

<sup>72</sup> *Id.* §§ 9C1.1–1.2. Section 9C1.1 lists the following aggravating factors and the corresponding addition to the base offense level: (1) involvement by substantial authority personnel (increase by one to four levels); (2) prior criminal compliance history (increase by two to five levels); (3) prior civil compliance history (increase by one to two levels); (4) violation of a court order (increase by one to three levels); (5) concealment (increase by three to five levels); and (6) absence of a compliance program (increase by four levels). *Id.* § 9C1.1(a)–(f).

Section 9C1.2 addresses the following mitigating circumstances and the corresponding reduction to the base offense level: (1) commitment to environmental compliance (reduce by three to eight levels); (2) cooperation and self-reporting (reduce by two to six levels); and (3) remedial assistance (reduce by two levels). *Id.* § 9C1.2(a)–(c).

<sup>73</sup> *Id.* § 9B2.2(b)(2)(B)(i)(a).

corporate counsel on the advisory panel argued for broad ranges while prosecutors on the advisory panel argued for narrow ranges.<sup>74</sup> A compromise was reached resulting in narrower ranges in levels 0 to 11 (a ten percent difference between the high and low ranges) and wider ranges after level 11 (a twenty percent difference between the high and low ranges).

Table 4<sup>75</sup>

Offense Level	Percentage of Maximum Statutory Fine
0-6	10
7	10-20
8	15-25
9	20-30
10	25-35
11	30-40
12	30-50
13	30-50
14	35-55
15	40-60
16	45-65
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

The two dissenters<sup>76</sup> strongly disagreed with this new method of calculation. The dissenters stated that the new calculation method was an unjustified departure from the Chapter 8 philosophy of basing sentencing on the seriousness of the offense and the culpability of the offender:

Simply put, it is far too narrowly drawn on the issue of seriousness and totally misses the mark on the issue of culpability. . . . [One example would be to] assume that there is a discharge or emission of a substance. The release could amount to a large volume of a highly concentrated, highly toxic pollutant. Alternatively, the release could involve a small volume of dilute and marginally toxic

<sup>74</sup> See John C. Coffee, Jr., *Environmental Crime and Punishment*, N.Y. L.J., Feb. 3, 1994, at 5.

<sup>75</sup> See PROPOSED GUIDELINES, *supra* note 70, § 9E1.1, reprinted in RAKOFF ET AL., *supra* note 5, at Appendix M-24.

<sup>76</sup> See *Dissent*, *supra* note 8.

material. Moreover, the circumstances of the release in terms of its likelihood to cause harm could be very different. . . . The first violation is far more serious than the second. However, section 9E1.1 . . . allows for only a minuscule range in the fine for the particular categories of violation.<sup>77</sup>

This concern was reiterated in the dissent's section entitled, "The Adoption of a Separate Sentencing Structure for Environmental Crimes Is Ill Advised Because There are No Compelling Grounds for It."<sup>78</sup> Two possible reasons as to why the AWG would propose such sweeping changes are that the Chapter 8 provisions are inadequate for environmental violations, or that the Chapter 8 provisions are simply inadequate, even for nonenvironmental violations.

### B. *Compliance Credit*

The fact that the AWG chose to change radically the structure of fine calculations for environmental purposes strongly suggests its general dissatisfaction with the existing Chapter 8 structure. This point was specifically made by John Coffee, one of the members of the AWG:

At least implicitly, the proposed environmental guidelines represent a severe critique of the existing organizational guidelines, particularly with regard to the current guidelines' easily manipulated credit for corporate compliance plans. Although there is today a virtual cottage industry of law firms cranking out compliance plans for their corporate clients (often with the mechanical uniformity of a cookie cutter), most of the Advisory Panel that drafted the new guidelines was skeptical of both the organizational premises upon which the existing guidelines rest and the likelihood that adoption of such compliance plans would have significant beneficial effect upon corporate behavior.<sup>79</sup>

The prosecutors on the AWG believed that they would not be able to distinguish "good" programs from "bad" programs and would effec-

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<sup>77</sup> *Id.* at 7-9.

<sup>78</sup> *Id.* at 4. One commentator representing an ad hoc coalition of manufacturers wrote to the advisory panel:

We have yet to see evidence that the handling in Chapter 8 of various organizational sentencing issues has been unsuccessful or that treating environmental offenses like other offenses is inappropriate. Nonetheless, Chapter 8's phrasing and treatment are replaced in many instances with formulations that punish the environmental offender more severely than other federal offenders.

Letter from Benjamin S. Sharp, of Perkins Coie, a Law Partnership Including Professional Corporations (May 5, 1993) to the Advisory Working Group on Environmental Sanctions, reprinted in RAKOFF ET AL., *supra* note 5, at Appendix L-2.

<sup>79</sup> Coffee, *supra* note 74, at 5.

tively be giving organizations free credits for paper compliance programs.<sup>80</sup> This belief caused the AWG to devise a new reward and punishment system dealing with environmental compliance programs.

Under the OSG, "effective programs to prevent and detect violations" (also known as "compliance programs") would result in a three point downward departure in the culpability score.<sup>81</sup> This, coupled with either voluntary disclosure to the responsible governmental authority, cooperation with a governmental investigation, or acceptance of responsibility could result in the decrease of an organization's fine by up to ninety-five percent.<sup>82</sup> Even without an effective compliance program, organizations without any additional aggravating circumstances that self-reported, cooperated with the investigation, and accepted responsibility could still qualify for the ninety-five percent reduction.<sup>83</sup> Maximum credit to organizations without "an effective program to prevent and detect violations" has the potential impact of marginalizing the compliance concept.<sup>84</sup>

This scenario could not happen under the AWG's proposal. The AWG created a "sweeter" carrot and a "larger" stick regarding compliance programs. Organizations that do not possess compliance programs will have their base offense level increased by four levels,<sup>85</sup> while organizations that possess a commitment to environmental compliance will have their offense level reduced by three to eight levels.<sup>86</sup> The AWG was also skeptical that Chapter 8 compliance programs could be satisfied without true organizational commitment. Even corporate counsel on the AWG believed that compliance programs should not originate and end in an organization's legal department, only to be used at sentencing time.<sup>87</sup> The AWG attempted to correct this perception by requiring environmental compliance to be integrated into the daily lives of an organization's employees.<sup>88</sup>

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<sup>80</sup> *Id.* at 10.

<sup>81</sup> *Guidelines Manual*, *supra* note 4, § 8C2.5(f).

<sup>82</sup> *Id.* § 8C2.5(g).

<sup>83</sup> *Id.* Because the presumptive level of every fine begins at a culpability score of five, if there were no aggravating factors (for example, if the organization was not a large company or if the organization did not have a high ranking member involved in the illegal scheme), the organization could qualify for a five point reduction for disclosure, cooperation, and acceptance of responsibility. *See id.*

<sup>84</sup> *See id.*

<sup>85</sup> *See* PROPOSED GUIDELINES, *supra* note 70, § 9C1.1(f).

<sup>86</sup> *Id.* § 9C1.2(a).

<sup>87</sup> *See* Coffee, *supra* note 74, at 29.

<sup>88</sup> This is demonstrated in Section 9D1.1(a), Minimum Factors Demonstrating a Commitment to Environmental Compliance:

*Line Management Attention to Compliance.* In the day-to-day operation of the organization, line managers, including the executive and operation officers at all levels,



The OSG describes seven minimum requirements for an effective program to prevent and detect violations.<sup>89</sup> The AWG proposal describes a seven-step process which uses the OSG as a starting point, but ultimately both focuses and heightens the OSG's seven minimum requirements. Each of the following requirements must be "substantially satisfied" in order to qualify for any mitigation:

- (1) line management attention to compliance,
- (2) integration of environmental policies, standards and procedures,
- (3) auditing, monitoring, reporting and tracking systems,
- (4) regulatory expertise, training and evaluation,
- (5) incentives for compliance,
- (6) disciplinary procedures,
- (7) continuing evaluation and improvement, and
- (8) additional innovative approaches.<sup>90</sup>

The dissent disagreed with this proposal, stating that:

The proposed compliance program is excessive. Within the work group, this program was described as a "Cadillac" program or one with a "gold" standard. To receive any credit, the organization must substantially satisfy each of many requirements. There are seven factors; within the seven factors, there are numerous sub-factors. Some have high thresholds for any credit—substantial satisfaction of *each* subpart—simply is too high. Some mitigation, at a reduced level, should be available for good faith compliance efforts that meet most but not all of the factors, including subfactors. Good faith compliance efforts reflect a lack of organizational culpability that should be recognized and rewarded.

The program also contains too many command and control requirements. This runs contrary to recognized management ap-

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direct their attention, through the management mechanisms utilized throughout the organization to measuring, maintaining and improving the organization's compliance with environmental laws and regulation. Line managers routinely review environmental monitoring and auditing reports, direct the resolution of identified compliance issues, and ensure application of the resources and mechanism necessary to carry out a substantial commitment.

PROPOSED GUIDELINES, *supra* note 70, § 9D1.1(a).

<sup>89</sup> Section 8A1.2 lists these minimum standards as the following: (1) the use of standard operating procedures designed to prevent violations from occurring; (2) high level personnel to oversee the program; (3) the use of care in not delegating substantial authority to those with a tendency to violate laws; (4) the use of codes of conduct or training programs; (5) the use of internal controls and monitoring; (6) the consistent enforcement of discipline; and (7) the modification of problems in the compliance program. *Guidelines Manual*, *supra* note 4, § 8A1.2 (Commentary, Application Notes: 3(k)).

<sup>90</sup> PROPOSED GUIDELINES, *supra* note 70, § 9D1.1(a). Item 8, dealing with additional innovative approaches, is considered separately from the first seven items. For an in-depth analysis of how to develop environmental compliance programs, see generally Woodrow, *supra* note 10, at 328-30.

proaches that establish objectives and leave it to the entity to fashion a program that efficiently achieves those objectives.<sup>91</sup>

Due to the lack of case law dealing with Chapter 8 violations, organizations are uncertain about the actual sentencing impact of compliance programs. This knowledge vacuum is the battleground for the debate between the AWG majority and the dissent. Prosecutors on the AWG believed that organizations would receive credit for "paper" compliance programs, which they would be unable to challenge. The dissent believed that the Guidelines' Chapter 8 process should remain until there existed empirical evidence that would justify a change. Absent empirical evidence or case law, it becomes more difficult to defend the AWG's rationale.

### C. *The Collar Provision*

The "collar" provision limits the extent to which mitigating circumstances can reduce a fine. Proposed Section 9E1.2(b) provides that mitigating factors may not reduce a fine below fifty percent of the offense level calculated without regard to such factors.<sup>92</sup> However, because the percentage ranges found in the offense tables vary in width (see Table 4), the fifty percent range reduction may produce a fine reduction that exceeds fifty percent.<sup>93</sup> A special provision of Section 9E1.2(b) provides that in no event shall a fine for a "knowing endangerment violation" be reduced below fifty percent of the fine.<sup>94</sup> This is a dramatic change from the OSG, which permits mitigating factors to reduce a fine by as much as ninety-five percent.

The concept of establishing a "floor" on mitigation credits was controversial. Some members of the AWG expressed concern about the deterrent value of sanctions if violators received substantial credit for compliance programs.<sup>95</sup> Those who expressed concern argued for limits to the amount of reductions allowed.<sup>96</sup> However, others argued that organizations required large incentives to create and maintain

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<sup>91</sup> *Dissent*, *supra* note 8, at 16-17.

<sup>92</sup> PROPOSED GUIDELINES, *supra* note 70, § 9E1.2(b).

<sup>93</sup> Coffee provides an example to illustrate that, in percentage terms, the actual fine reduction permitted under this provision is greater than 50 percent. Coffee, *supra* note 74, at 10. For example, if an offense level were 16 before consideration of mitigating factors, then the offense level could not fall below level 8 after application of the mitigating factors. However, since the Guidelines range for level 16 is 50 percent to 70 percent of the statutory maximum, while the Guidelines range for level 8 is 15 percent to 25 percent, the real decrease permitted because of mitigating factors could be from 50 percent to 15 percent (or greater than 2/3 reduction). *Id.*

<sup>94</sup> PROPOSED GUIDELINES, *supra* note 70, § 9E.1.2(b).

<sup>95</sup> Coffee, *supra* note 74, at 10.

<sup>96</sup> *Id.*

effective compliance programs.<sup>97</sup> The fifty percent collar provision represents a compromise that still punishes violators, but that also gives violators some incentive to establish compliance programs.

#### D. The "Count Stacking" Provision

Under the OSG, the Sentencing Commission took multiple violations into account by using a circuitous sentencing route.<sup>98</sup> The OSG's Offense Fine Level Table utilized the Fine Table from Chapter 2 and Chapter 3 of the ISG as a starting point;<sup>99</sup> and, like Chapter 3, awarded stiffer sanctions against multiple violations.<sup>100</sup> "Where there is more than one such count, apply Chapter Three, Part D (Multiple Counts) to determine the combined offense level."<sup>101</sup> Section 3D1.4 calculated the offense level by using the offense with the highest level and increasing this level based upon the severity of the additional violations.<sup>102</sup> (See Table 5).

Table 5<sup>103</sup>

Number of Units	Increase in Offense Level
1	none
1 1/2	add 1 level
2	add 2 levels
2 1/2 - 3	add 3 levels
3 1/2 - 5	add 4 levels
more than 5	add 5 levels

Although the AWG's proposal also provides harsher sanctions for multiple violations, the proposal uses a totally different method of calculation.<sup>104</sup> How these sanctions are determined is important be-

<sup>97</sup> *Id.*

<sup>98</sup> See *Guidelines Manual*, *supra* note 4, at Chapter 8.

<sup>99</sup> "For each count covered by § 8C2.1 (Applicability of Fine Guidelines), use the applicable Chapter Two guideline to determine the base offense level and apply, in the order listed, any appropriate adjustments contained in that guideline." *Id.* § 8C2.3(a).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* § 8C2.3(b). Violations which were within one to four levels of the original violation would be counted as "one unit." *Id.* § 3D1.4(a). Offenses which were within five to eight levels of the original violation would be counted as one-half unit. *Id.* § 3D1.4(b). Offenses which were more than nine levels from the original violation would not be counted. *Id.* § 3D1.4(c). The judge would then add all of the whole and half units together in order to reach the additional number of levels to add to the original offense level. *Id.* § 3D1.5.

<sup>102</sup> *Id.* § 3D1.4.

<sup>103</sup> See *id.*

<sup>104</sup> PROPOSED GUIDELINES, *supra* note 70, § 9E1.2(a).

cause multiple violations are common within the environmental arena. The multiple counts are either due to several independent violations, or are the result of ongoing or continuous offense behavior, such as barrels of hazardous waste left open for months. Prior to the sentencing guidelines, courts would look more to the overall offense behavior rather than to the number of counts when determining fines. However, with the sentencing guidelines, organizations can be sentenced up to an additional \$500,000 for each additional count.<sup>105</sup> Thus, prosecutors now have an incentive to maximize the number of counts ("count stacking") to secure potentially higher penalties.<sup>106</sup>

When determining the fine for multiple counts, the ESG allows a court to reduce the fine if the court determines that there is an excessive repetition of counts related to an ongoing or continuous offense behavior.<sup>107</sup> Such a reduction, however, is unavailable when the repetition of counts is related to independent, volitional acts.<sup>108</sup> Section 9E1.2(a) does provide a "floor," or minimum fine, which limits a court's possible fine reduction.<sup>109</sup> The floor is determined as the sum of the maximum fines for each count after each count is multiplied by its reciprocal.<sup>110</sup> Table 6 illustrates a violation with ten counts, with the original violation being worth \$500,000. The first count would receive a fine equal to the statutory maximum of \$500,000, the second count would be multiplied by its reciprocal (1/2) and given the value of \$250,000, and, eventually, the tenth count would be multiplied by its reciprocal (1/10) and given the value of \$50,000. The \$1,464,484 sum of these numbers would not equal the fine, but would equal the floor beneath which a court could not lower the fine on the grounds that the indictment contained unnecessary count proliferation.

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<sup>105</sup> 18 U.S.C. § 3571(c) (1988); see *Coffee*, *supra* note 74, at 10. This statement is subject to the following further qualifications: (1) § 3571(e) provides that if the law setting forth the offense specifies a fine that is lower than \$500,000 and exempts its fine level from the applicability of § 3571(c), then that lesser fine controls; and (2) under many sentencing guidelines systems, related counts are "grouped," and only the most serious charge in the group is counted. Thus, if 100 mailings are sent to the same victim or victims and if each mailing violates the mail fraud statute, the sentencing guidelines will group these counts together and punish them as a single count. The AWG decided against grouping related environmental counts in this fashion, because the AWG found that each additional release or emission does create additional social injury.

<sup>106</sup> *Coffee*, *supra* note 74, at 10. According to *Coffee*, some prosecutors denied that they ever engaged in overcharging counts. *Id.* Other prosecutors frankly conceded that they did seek to charge the maximum number of counts, but did so only to cause defendants to plead guilty to what they considered to be an "appropriate" level of counts. *Id.*

<sup>107</sup> PROPOSED GUIDELINES, *supra* note 70, § 9E1.2.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

Table 6<sup>111</sup>

Number of Counts	Calculation	Count Stacking Amount
1	1/1 of \$500,000	\$500,000
2	1/2 of \$500,000	250,000
3	1/3 of \$500,000	166,666
4	1/4 of \$500,000	125,000
5	1/5 of \$500,000	100,000
6	1/6 of \$500,000	83,333
7	1/7 of \$500,000	71,429
8	1/8 of \$500,000	62,500
9	1/9 of \$500,000	55,556
10	1/10 of \$500,000	50,000
TOTAL FLOOR		\$1,464,484

The issue of possible excessive counting and the resulting compromise provision in the Guidelines has been described as an issue that “consumed much of the panel’s time and produced the most divisive debates.”<sup>112</sup> To illustrate, one of the first proposals simply allowed a court to disregard counts which the court considered to be excessively repetitive.<sup>113</sup> This amount of discretion, however, was inconsistent with the Guidelines’ basic philosophy of structuring judicial decisions.<sup>114</sup> Although a ceiling on the maximum number of counts was considered, the AWG feared that if an organization discovered that, because of a continuing release, it had already exceeded the maximum number of counts, there would be no incentive to cease its violation.<sup>115</sup> To avoid this “moral hazard,” the AWG determined that “there should never be a point at which additional counts or days of violation were costless to the [organization].”<sup>116</sup> Several formulas were considered<sup>117</sup> before the final decision was made that the minimum fine, after allowance for excessive repetitious counts, must at least equal the sum of the maximum fines for each count after each such count has been multiplied by its reciprocal.<sup>118</sup> The net effect of this compromise was that, although there was always some additional cost for failing to correct a discovered violation, the cost became increasingly smaller the further out from the original violation.

<sup>111</sup> *See id.*

<sup>112</sup> *Coffee, supra* note 74, at 10.

<sup>113</sup> *Id.*

<sup>114</sup> *See supra* notes 24–26 and accompanying text.

<sup>115</sup> *Coffee, supra* note 74, at 10.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *See supra* notes 107–10 and accompanying text.

The dissent believed this formula for count stacking was wrong because the formula always assumed that multiple offenses were worse than single violations.

However it is clear that in at least some circumstances multiple violations are not worse than single violations. Consider two examples, with two variations in each. First, suppose that a company fills in 5 acres of wetland in one day. Alternatively, assume that the company fills in one-half acre of wetland over ten separate days. There is no environmental difference, yet the guidelines would require the sentencing court to impose a fine in the second example for ten "volitional" acts that is ten times that in the first example. Secondly, assume that a company illegally discharges 500 gallons of wastewater into a river on one day. Alternatively, suppose that the company discharges 50 gallons of the same wastewater per day for ten days. If there is any environmental difference, it is that the first "high dose" situation is worse, yet the guidelines would require the sentencing court to impose a fine in the second hypothetical that is greater than the first.<sup>119</sup>

The dissent's logic and examples are difficult to argue with and caused the Sentencing Commission to question the AWG's proposal.

#### IV. CONCLUSION

The strength of the dissent, plus the desire to have a full Sentencing Commission address environmental concerns, were sufficient to persuade the Sentencing Commission to table the AWG's proposal for 1994. Even with this temporary set-back, the AWG's work provides fertile grounds for the next round of proposals which will undoubtedly give some credit to compliance programs.<sup>120</sup> The question will become, "How much credit for what kind of program?" These new environmental sentencing guidelines will be influenced by a new Sentencing Commission and a new Republican Congress. Arguably, this Congress may favor organizational concerns over environmental concerns and accordingly may adopt less sweeping changes than those proposed by the AWG. The AWG's proposal represented a stark comparison to the established Guidelines. Two possible outcomes would be either to

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<sup>119</sup> *Dissent, supra* note 8, at 15-16.

<sup>120</sup> Whitley & Speckhals, *supra* note 7, at C4.

Although the sentencing commission in April of this year [1994], decided not to adopt the proposed guidelines in the form that the advisory group had recommended, it still is likely that mandatory sentencing guidelines for organizations convicted of environmental crimes will be in place by the end of 1996, and will retain at least some of the advisory group's focus on compliance programs.

*Id.*

have future environmental proposals more closely follow established Chapter 8 guidelines or to re-evaluate Chapter 8 to more closely follow the AWG's proposal—for example, to increase what constitutes an effective compliance program and to decrease the available credit.<sup>121</sup>

Both the process and the product of the AWG and its dissenters have posed as many questions as they have answered. It is remarkable that the AWG was able to hammer out a compromise acceptable to fourteen of its sixteen members. Irrespective of whether the AWG's proposal was adopted in 1994, this process represents a model that future regulatory negotiations should emulate.

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<sup>121</sup> See Coffee, *supra* note 74, at 29.