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**SQUARE PEGS AND ROUND HOLES: DOES THE SENTENCING OF CORPORATE CITIZENS FOR ENVIRONMENTAL CRIMES FIT WITHIN THE GUIDELINES?**

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Criminalization of environmental offenses began nearly a century ago with the Refuse Act of 1899. Since then, most major environmental statutes have included provisions defining violations that warrant criminal penalties. What is novel is the tremendous expansion in criminal enforcement of environmental law. This unprecedented commitment by federal and state governments has made environmental crime "the fastest growing category of environmental law." Organisations are a prime target of this new enforcement effort. From FY 1983 to April 1995, of 1,481 defendants indicted for federal environmental crimes, 443 were corporations or organizations. To achieve uniform results in these prosecutions, the U.S. Sentencing Commission is considering standards for sentencing corporate citizens convicted of environmental crimes.

The latest proposal for such uniform standards is the set of Proposed Sentencing Guidelines for Organizations Convicted of Environmental Offenses ("Proposed Guidelines"). Written by the Commission's 18-member Advisory Working Group on Environmental Offenses, the Proposed Guidelines were released in November 1993. "The proposal has strong industry support, and approximately 12 of the members voting for it have industry ties," one source said. In spite of this support, in 1994 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 Ilene Nagel, chairman of the advisory group." Although the Commission has thus far declined to submit this particular proposal to Congress, it will undoubtedly influence future sentencing proposals.

The Proposed Guidelines draw, in part, on two sentencing schemes already in place — the guidelines governing individuals convicted of environmental crimes and the guidelines for organizations convicted of non-environmental criminal offenses. The individual environmental guidelines have been criticized on the grounds that the underlying environmental crimes are non-traditional offenses because, for example, they lack the classical scienter element and are too amorphous and difficult to evaluate. In contrast, the corporate sentencing guidelines have been critiqued as a forced application of criminal law to non-traditional offenders since organizations cannot be imprisoned or criminally sanctioned in the traditional way, nor can they have guilty minds in any literal sense. In some respects, the Proposed Guidelines combine the weaknesses of these two sets of guidelines — not because of a flaw in the proposal, but because of the difficulties inherent in prosecuting an organization for an environmental crime.

This article presents an overview of the Proposed Guidelines and assesses their potential to improve both the existing sentencing scheme and, more importantly, the environmental behavior of corporate citizens. This analysis concludes that, while the Proposed Guidelines improve current haphazard sentencing practices, it is difficult to predict their efficacy in furthering environmental policy. The fundamental problem is that traditional criminal sanctions are not easily applied to non-traditional offenders committing non-traditional offenses. Rather than expressing optimism about the Proposed Guidelines, this paper suggests that the behavior of corporations could be modified more efficiently through non-criminal incentives coupled with increased criminal prosecution of the individuals responsible for environmentally harmful decisions. While the Proposed Guidelines provide a more direct means to implement environmental policy than is currently available, they may merely streamline efforts to pound square pegs into round holes.

I. The Proposed Guidelines

The Proposed Guidelines, like the sentencing guidelines generally, attempt to standardize penalties imposed on like defendants convicted of like crimes. Offending organizations are divided into two groups: "Criminal Purpose Organizations" and "Other Organizations." Criminal Purpose Organizations ("operated primarily for a criminal purpose or by criminal means") are sanctioned by a harsh, straightforward approach: imposition of a fine that "shall be set at an amount (subject to the statutory maximum) sufficient to divest the organization of all its net assets." For the remaining organizations — most likely the majority — the Proposed Guidelines create a system that quantifies the organizational criminal conduct in a way similar to that used for individuals convicted of environmental offenses.

Administering the Proposed Guidelines is a multi-stage process. The first step evaluates the nature of the wrongful act. Specifically, the "base

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II. Criticisms of the Predecessor Guidelines and the Applicability of those Criticisms to the Proposed Guidelines

As noted earlier, the Proposed Guidelines draw upon both the guidelines for individuals convicted of environmental offenses and those for corporate offenders convicted of non-environmental offenses. Both of these underlying schemes have generated concerns applicable to the Proposed Guidelines. The guidelines for individuals attempt to impose a consistent sentencing scheme for environmental offenses which, arguably, are at least once removed from traditional criminal offenses and often appear more akin to torts. The most obvious differences between environmental offenses and traditional crimes are the amorphousness of the harm, the relative absence of a mens rea/scienter element, and the wide spectrum of environmentally harmful activities which may be criminalized. Environmental violations, unlike most crimes, are often not the result of acts by single individuals done with full knowledge of the nature, illegality and consequences of those acts. In addition, while traditional criminal law is concerned with prosecuting only those whose guilty acts are accompanied by guilty minds, environmental statutes have criminalized negligent conduct. Because of these differences, it is uncertain as to whether and how criminal prosecution of environmental offenses will achieve added deterrence. Yet, in light of the potential impact of environmental crimes on individuals and entire communities, deterrence should be a major objective of the enforcement effort.

Moreover, the concern about excessive prosecutorial discretion is particularly prevalent in environmental crimes where there are broad policies governing the choice to prosecute, but little binding guidance on which the regulated community can rely. Other considerations, such as (1) the impact of insurance on environmental behavior, (2) the fact that criminal enforcement of environmental statutes requires intervention of the Justice Department into the affairs of the Environmental Protection Agency, and (3) the reluctance of judges to enforce severe environmental sentencing guidelines add to this uncertainty. These factors make environmental offenders less able to predict the consequences of their actions and further detract from the deterrent effect of criminal enforcement. Thus, even if the Proposed Guidelines would help achieve consistency in sentencing, the effect of this achievement is undermined by the fact that it may be the only true consistency in the very subjective process of environmental prosecution.

Many of the differences between environmental offenses and traditional crimes are exacerbated because corporations are non-traditional defendants. Such defendants "have no arms, no legs, no
conscience—if you cut them, they don't bleed, you
can't put them in jail, and you can't fine them enough
to get their attention." Prosecuting organizations
reflects the reality that offenses harming the
environment the most are decisions to benefit a
business rather than an individual. Yet corporations
are legal fictions—a fact that requires reexamination
of the rationale underlying prosecution.

The criminal prosecution of corporations for
environmental offenses is a "square peg" in the
scheme of general criminal law, as shown by its end-
result—an additional fine. Corporations are already
aware of potential liability for weighty fines, but
similar fines can be imposed by the civil system. To
the extent added stigma and collateral consequences
are inflicted by criminal prosecution, they are still
imposed upon organizations and result primarily in
the same financial penalty. Criminal prosecution
may thus, to a large extent, duplicate the civil system.
Moreover, although the officials making corporate
decisions may have guilty minds, assessing the guilt
of the corporation is an unrealistic exercise.

The Proposed Guidelines embody the same
shortcomings as the existing guidelines used to
sentence individual environmental offenders. They
fail to increase deterrence because they do little to
address the fact that the underlying criminal statutes
cover such a vast spectrum of behavior—ranging
from clerical errors to intentional endangerment. The
importance of assessing the collective mind of
corporations is downplayed by the fact that the
Proposed Guidelines will result in fines rather than
prison terms. It is not difficult to spot the practical
effects of this shortcoming in applications of the
Proposed Guidelines. In the words of one commentator,
"[w]ith the exception of the top base fine tier for
knowing endangerments, the proposal wrongly starts
by treating all offenses—whether knowing, negligent,
or strict liability offenses—as the same, regardless of
the level of subjective knowledge of applicable legal
requirements and awareness of foreseeable harm." The
outcome is an application of criminal law that de-
emphasizes the importance of mens rea.

The Proposed Guidelines may also fail to
embody sound environmental policy by neglecting to
introduce meaningful incentives for good behavior.
For example, under the fine conversion tables, an
offense level score of 25 requires imposition of 100%
of the statutory maximum fine. This means that
many offenses by a corporation may result in the
maximum fine. Despite possible mitigation points for
"commitment to environmental compliance," any
such efforts must be "meaningful" to justify mitigation.
The fact that an environmental offense occurred
will enable prosecutors to argue—with some justification—that a given corporation's compliance efforts
were insufficient to warrant mitigation.

In addition, the fines under the general corporate
offender guidelines have been criticized for being
overly burdensome. Yet, they allow good corporate
citizens to reduce possible fines by 95% based upon
their conduct. In contrast, under the Proposed
Guidelines for environmental offenses, fines may be
reduced by only 50% through mitigation. It is
questionable whether this creates a sufficient incen-
tive for a corporation to be a good environmental
citizen. This is particularly doubtful when the self-
reporting and cooperation aspects of good citizenship
come with very vague protections; fear of unprotected
disclosures may prevent organizations from establish-
ing the most expansive self-reporting programs.

Regardless of these shortcomings, Congress has
criminalized the environmental offenses of corpora-
tions. Thus, courts deserve the guidance that sentenc-
guidelines will provide. They also deserve a
sentencing scheme tailored to organizational environ-
mental offenses. Creation of such guidelines provides
an opportunity to affect environmental policy
directly. Moreover, environmental offenses often
impact entire communities, destroy entire ecosystems,
and harm generations of human beings and wildlife.
In light of this, if the Proposed Guidelines improve
the behavior of corporations even a little and bring
about more self-auditing and compliance programs,
they may be worth enacting. There is some evidence
that anticipation of their enactment is inspiring
progress, and creating the impetus for reluctant
organizations to make environmental compliance a
priority.

Conclusion

The Proposed Guidelines improve the present
scheme to the extent that they are better tailored to
environmental policy than existing guidelines.
Nevertheless, it is difficult to evaluate the Proposed
Guidelines without questioning both the wisdom of
the underlying statutes that criminalize environmen-
tal offenses and the policy of shaping corporate
behavior by prosecuting corporate environmental
criminals.

An effort to standardize sentencing for such
broad groupings of behavior seems forced at best
when applied to organizational defendants. The
criminal prosecution of individuals for decisions they
control has obvious utility.

However, without change to the underlying
statutory scheme, what is to be accomplished through
enhanced criminal prosecution of corporations—other
than a division of the federal government's efforts
and resources committed to protecting the environ-
ment? Such prosecutorial efforts may, in fact, enable
the individuals responsible for environmentally
harmful decisions to escape liability by offering up an
organizational scapegoat. While the standardization
and uniformity that the Proposed Guidelines establish
are good initiatives, the policies behind criminal
prosecution of organizational defendants for environ-
mental crimes must be reexamined. Otherwise, the
Proposed Guidelines will only assist in forcing square pegs into round holes.

NOTES


4 Memorandum from Peggy Hutchins, paralegal, to Ronald A. Saranchak, Chief, Environmental Crimes Section, U.S. Department of Justice (April 5, 1995).


7 § 2Q1.

8 §2Q2.1 The general corporate sentencing guidelines became effective on Nov. 1, 1991. Environmental offenses were excluded from the corporate guidelines at the last moment "because of the perceived differences between environmental and other corporate crimes." Peter Blackman, Environmental Crimes: Proposed Guidelines Emphasize Compliance, N.Y.L.J., Dec. 23, 1993, at 5. A primary reason for the dissent to the proposed guidelines came from the belief that there was insufficient reason to create a separate sentencing structure for environmental crimes. See Dissent Filed by Advisory Group Members Urges Sentencing Commission to Reject Draft, Env. Rptr., Jan. 7, 1994, at 1994.

9 Proposed §9A1.2(a).
10 Proposed §9B1.1.
11 For detailed descriptions of the proposed sentencing scheme, see, e.g., Patrick J. Devine, The Draft Organizational Sentencing Guidelines for Environmental Crimes, 20 Colum. Env'l Rev. 249 (1995); Whitley & Speckhals, supra note 3, at C4-5.

13 Proposed §9B2.1(b)(6)(A). Intermediary offenses between these two extremes are "Misleading of Hazardous or Toxic Substances or Pesticides; Record Keeping, Tampering, and Falsification;" "Misleading of Other Environmental Pollutants; Recordkeeping, Tampering, and Falsification;" "Tampering with Public Water System;" and "Wildlife Violations." Proposed §9B2.1(d)(2)-(5).
16 Proposed §§ 9C1.1(a)-(f).
17 Proposed §§ 9C1.2(a)-(c).
18 Proposed §9E1.1. The range of percentages is broadest in the middle where judges have a 20% range in the fine they may impose. This narrows at the ends. Thus, for an offense level of 24, a judge must impose 100% of the maximum fine; for an offense level of 7, a judge's discretion is limited to a fine between 10% and 20% of the maximum.
19 Proposed §9E1.2(a) and (d).
20 Proposed §§9E1.2(b) and (c).
21 See New Draft Released, supra note 5, at 1331-32 ("[T]he new structure is much simpler than the one previously proposed and would cut the number of calculations needed to determine the penalty for a corporate crime by one-fifth.").

22 The guidelines for individuals divide environmental offenses into three major categories, each of which is assigned a base offense level. Knowing endangerment is the most serious category of offenses, carrying a base offense level of 24, which corresponds to a prison term of 51-63 months. See §2Q1.1. The next category is mishandling of hazardous or toxic substances and falsification, offenses which carry a base offense level of 8. §2Q1.2 The final category, with a base offense level of 6, involves similar mishandling and falsification, but of environmental pollutants that are not hazardous or toxic. §2Q1.3.

24 See, e.g., Block & Braker, supra note 3, at 6 ("[T]he mens rea requirement for proving environmental crimes has been consistently held by courts to be one of general intent — that is to say, the government does not have to prove that the accused acted in bad faith."). Even when sentencing individuals, environmental statutes have difficulty defining the requisite criminal intent. The range of theories for criminal liability includes knowing violations (e.g., the Clean Water Act, 33 U.S.C. §§ 309(c)(3), 1319(c)(1)), criminal negligence (e.g., Clean Air Act, 42 U.S.C. §7413(C)(4)), and strict liability (e.g., the Refuse Act, 33 U.S.C. § 407). See also Turley, supra note 3, 5-8.
25 For discussion of the difficulty in predicting whether a given offense will be punished criminally or civilly, see Kevin A. Gaynor & Thomas R. Bartman, Specific Intent Standard for Environmental Crimes: An Idea Whose Time Has Come, 25 BNA 2206 (Mar. 10, 1995).
26 John E. Osborn, Officers' Liability Exposed, Nat. L.J., Nov. 22, 1993, at 25; see also Jane Barrett, Sentencing


29 Although beyond the scope of this discussion, the availability of insurance reimbursement, tax deductibility, and indemnification for penalties—civil and criminal, individual and corporate—also must be reviewed to ensure that the goals of the enforcement schemes are not being undercut by methods of shifting the actual loss to those other than the guilty parties.


31 See, e.g., Fiorelli & Rooney, *supra* note 6, at 494-96 (discussing skepticism of drafters concerning so-called compliance plans by organizations).


33 This fear may be more theoretical than real. As a practical matter, "[g]iven that the [EPA’s] resources for criminal prosecution are scarce, a violation that is voluntarily revealed and fully and promptly remediated as part of a corporation’s systematic and comprehensive self-evaluation program generally will not be a candidate for prosecution." Whitley & Speckhals, *supra* note 3, at C4. Nevertheless, without a guarantee, an organizational actor still runs a risk. See Block & Braker, *supra* note 3, at 6.

34 See Turley, *supra* note 3, at 11: "Many environmental crimes are especially vicious because they can affect whole communities and multiple generations. These crimes are often committed in highly regulated areas by professionals who are aware of the dangerous propensities and potentials of their work.”

35 "A growing number of corporations, in a move considered to be both legally prudent and good for business, are establishing compliance or ethics programs, often under the supervision of their in-house legal departments. . . . Additional programs are anticipated, as even more strict Environmental Sentencing Guidelines from the U.S. Sentencing Commission are expected to be implemented." *’91 Guidelines Spur Growth in Ethics Programs*, N.Y. L.J., Mar. 23, 1995, at 5.