

PRACTITIONER’S NOTE

Why Eight Plus Six Means Prison for Environmental Criminals

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I. INTRODUCTION

Eight plus six equals fourteen. It’s simple math. However, that equation is much more significant to a first-time offender convicted of an environmental felony.¹ Under the United States Sentencing Guidelines (Guidelines), such a criminal faces between fifteen and twenty-one months in prison.² Thus, while the math may be simple, the stakes are high.

This Article briefly explains why recent appellate decisions have made it easier for the United States to prove the applicability of a

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1. Some environmental crimes, such as those dealing with water and hazardous waste violations, are felonies punishable by jail terms of greater than one year. *See* 33 U.S.C. § 1319(c)(1) (dealing with water); 42 U.S.C. § 6928(d) (dealing with hazardous waste). Others are misdemeanors with a maximum jail term of one year. *See* 7 U.S.C. § 136/(b) (dealing with pesticides); 15 U.S.C. § 2615(b) (dealing with toxic substances); 33 U.S.C. § 1319(c)(2) (dealing with water). For the most part, the Guidelines’ offense calculation process is the same for environmental felonies and misdemeanors. Thus, while the Guidelines’ calculation might call for a higher sentence, a misdemeanor conviction would limit the maximum jail term to one year.

2. For example, under the Guidelines, an environmental crime with a “base offense level” or rating of eight may be increased by six points upon application of a “specific offense characteristic,” making the “final offense level” fourteen. A final offense level of fourteen means that even a first-time offender convicted of an environmental felony faces from fifteen to twenty-one months in prison.

“specific offense characteristic” during sentencing of environmental criminals, thereby increasing defendants’ likelihood of going to prison. This Article first sketches the framework of the Guidelines, then describes the potential sentencing enhancement that courts now frequently apply in environmental criminal prosecutions. Third, this Article summarizes federal appellate decisions adopting the U.S. government’s arguments concerning when and how this sentencing enhancement should apply.

II. THE SENTENCING GUIDELINES

The United States Sentencing Guidelines apply to individuals convicted of federal crimes.³ The Guidelines attempt to ensure, among other things, that defendants with similar criminal histories convicted of similar offenses receive comparable sentences.⁴ The Guidelines seek to accomplish this goal by calculating a defendant’s potential prison sentence based on two numbers: the final offense level for the specific crime, and a certain number of points based on the defendant’s criminal history.⁵ Potential prison sentences are determined by consulting a sentencing table in the Guidelines.⁶ The left side of the table is divided into offense levels from one to forty-three.⁷ The columns in the table are labeled across the top from category I to category VI.⁸ The categories are based on the number of criminal history points the defendant has “earned.”⁹ The range of numbers listed at the intersection of any given offense level and category represent the potential number of months to which the defendant should be sentenced.¹⁰ Absent extraordinary circumstances, a judge is supposed to sentence a defendant within the range set forth in the table.¹¹ In the white-collar crime area, which generally includes environmental offenses, many defendants have very little or no criminal history.¹²

3. U.S. SENTENCING GUIDELINES MANUAL § 1A1 (1999) [hereinafter GUIDELINES]. The Guidelines apply to both individuals and organizations convicted of federal offenses. *Id.* § 1A2. This Article deals with guidelines for individuals that apply to offenses committed after November 1, 1987. *Id.* Organizational guidelines apply for offenses committed after November 1, 1991. *Id.* ch. 8 introductory cmt.

4. *Id.* § 1A3.

5. *Id.* §§ 1B1.1, 5A.

6. *Id.* § 5A.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* For example, the lowest ranges on the table are zero to six months, while at category VI, offense level forty-three, the sentence is life. *Id.*

11. *See id.* § 1A2.

12. *See generally* Martin Harrell, *Criminal Prosecution at POTWs and the Environmental Regulatory Partnership: Effective Deterrence But at a Cost*, 14 NAT’L ENVTL. ENFORCEMENT J. 3, 6 (2000) (“As is the case with most white-collar crime, wastewater treatment

Consequently, the final offense level is often the determining factor in whether an environmental defendant faces prison time.¹³

The values in the Guidelines' sentencing table fall into four irregular zones labeled A to D.¹⁴ Zone A encompasses the least severe penalty ranges and zone D, the most severe.¹⁵ The lower the offense level and criminal history, the lower the zone and the more discretion the judge has in imposing a sentence.¹⁶ Conversely, higher numbers result in less judicial discretion.¹⁷ For example, a defendant with a category I criminal history (the lowest) and a final offense level of thirteen or higher receives a sentence that falls within zone D.¹⁸ Therefore, the judge must sentence that defendant to at least the minimum amount of jail time called for in the table.¹⁹ In comparison, if the same defendant's final offense level is only one or two levels lower, at eleven or twelve, the sentence falls in zone C and the court may impose a "split sentence."²⁰ A split sentence requires that the judge order a defendant to serve at least half of the minimum jail time in prison confinement, and the balance on some sort of supervised release.²¹ If the defendant's final offense level is ten or less, falling in zone A or B, the judge has discretion to impose straight probation, some type of home or community confinement, or prison time.²²

Specific Sentencing Guidelines exist for most types of federal crimes.²³ First, each Guideline sets out a "base offense level" that a defendant receives upon conviction.²⁴ Then, the base offense level may be increased if the crime involved facts that trigger specific offense characteristics.²⁵ The offense level may also rise due to other factors, such as the nature of a defendant's role in the offense.²⁶ These

plant operators and managers often do not have extensive criminal histories."); Thomas Bak, *Does the Offense Charged Predict the Type and Frequency of Pretrial Violations?* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 65, 74-75 (1998) (The "low rate of detention and the modest penalties given to white collar offenders reflect . . . the lower likelihood of a prior criminal history.").

13. See GUIDELINES, *supra* note 3, § 5E1.2. Judges may also use the final offense level to determine the amount of any fine imposed on the defendant.

14. *Id.* §§ 5A, B1.1.

15. *Id.*

16. *Id.* § 5B1.1, cmt. n.1-2.

17. *Id.* §§ 5A, B1.1.

18. *Id.*

19. *Id.*

20. *Id.* § 1A4(d).

21. *Id.*

22. *Id.* §§ 5A, B1.1, cmt. n.1(b).

23. *Id.* § 1A1.

24. *Id.* § 1A2.

25. *Id.*

26. *Id.* § 3B1.1.

adjustments to the base level apply to all offenses that fall within the scope of the Sentencing Guidelines.²⁷

III. THE SENTENCING ISSUE—WAS THERE AN ONGOING, CONTINUOUS, OR REPETITIVE DISCHARGE, RELEASE, OR EMISSION INTO THE ENVIRONMENT?

Part 2Q of the Guidelines applies to various environmental offenses.²⁸ Sections 2Q1.2 and 2Q1.3 are the guidelines most often used in cases involving violations of statutes administered by the United States Environmental Protection Agency. These two guidelines are very similar, differing principally in the type of substance or pollutant involved in the underlying offense.²⁹ Section 2Q1.2 deals with crimes involving mishandling of hazardous or toxic substances and pesticides and has a base offense level of eight. Section 2Q1.3 applies to mishandling of other pollutants and carries a base offense level of six.³⁰ Both sections contain very similar specific offense characteristics, including a provision requiring that a defendant receive a six-level increase if the offense resulted in an ongoing, continuous or repetitive³¹ discharge, release, or emission into the environment.³² As a result, a defendant with a base offense level of

27. *Id.* §§ 3A-C.

28. *Id.* §§ 2Q1.1-1.6.

29. *See id.* §§ 2Q1.2, 1.3.

30. *Id.*

31. What constitutes “ongoing, continuous, or repetitive” conduct is outside the scope of this Article, but numerous appellate opinions have dealt with aspects of the subject. *See* United States v. Cunningham, 194 F.3d 1186, 1201 (11th Cir. 1999), *cert. denied*, 121 S. Ct. 84 (2000); United States v. Eidson, 108 F.3d 1336, 1344 (11th Cir. 1997); United States v. W. Indies Transp., Inc., 127 F.3d 299, 315 (3d Cir. 1997), *cert. denied*, 522 U.S. 1052 (1998); United States v. Gist, 101 F.3d 32, 34 (5th Cir. 1996); United States v. Catucci, 55 F.3d 14, 18 (1st Cir. 1995); United States v. Liebman, 40 F.3d 544, 550 (2d Cir. 1994); United States v. Strandquist, 993 F.2d 395, 401 (4th Cir. 1993); United States v. Ellen, 961 F.2d 462, 468 (4th Cir. 1992).

32. GUIDELINES, *supra* note 3, §§ 2Q1.2(b)(1)(A), 2Q1.3(b)(1)(A). The Guidelines provide for an increase of four offense levels for a single discharge, release or emission. *Id.* §§ 2Q1.2(b)(1)(B), 2Q1.3(b)(1)(B). Because the overwhelming majority of criminal prosecutions involve repetitive conduct, this Article focuses on the six-level enhancement. The arguments raised by defense counsel and the United States, and discussed *infra* in text accompanying notes 37-44, regarding whether there has been a discharge, release, or emission into the environment sufficient to trigger the Guidelines apply to both the four- and six-level increases.

The wording of sections 2Q1.2b1 and 2Q1.3(b)(1) demonstrates how the Guidelines incorporate environmental law concepts into federal criminal law on sentencing. For example, the definition of “release” under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) covers a wide range of conduct, including the placement of containerized or drummed hazardous substances into the environment. 42 U.S.C. § 9601(22) (1994). Similarly, the definition of “disposal” under the Resource Conservation and Recovery Act, which regulates hazardous waste, applies to many of the same activities. *Id.* § 6903(3). The Clean Water Act defines “discharge” to include a discharge of a pollutant or pollutants. 33 U.S.C.

eight under Section 2Q1.2 will find the level increased to fourteen if his offense conduct triggers this specific offense characteristic.³³ Assuming little or no criminal history, this makes the defendant eligible for a jail term of fifteen to twenty-one months.³⁴

Defense attorneys aggressively dispute the applicability of this sentence enhancement to keep their clients' final offense levels as low as possible.³⁵ To support their arguments they often rely on the wording in the application notes found in the commentary to both sections 2Q1.2(b)(1) and 2Q1.3(b)(1), which states that the enhancement "assumes a discharge or release or emission into the environment resulting in actual environmental contamination."³⁶ Defense counsel generally make two arguments regarding the application notes. First, they argue that their clients' discharge, release, or emission did not actually enter the environment (land, air, or water).³⁷ Second, they argue that the government must affirmatively prove at sentencing that the conduct actually polluted the environment in some measurable way to trigger the sentence enhancement.³⁸

IV. APPELLATE DECISIONS

Two cases from the United States Court of Appeals for the Ninth Circuit demonstrate how factual differences can produce different results when the dispute centers on whether the offender made an actual release

§ 1362(16) (1994). "Discharge of a pollutant" includes the addition of a pollutant to navigable waters of the United States from a point source. *Id.* § 1362(12). CERCLA defines "environment" as, among other things, the navigable waters and "any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within . . . or under the jurisdiction of the United States." 42 U.S.C. § 9601(8) (1994). Thus, in determining the applicability of Part 2Q of the Guidelines to criminal conduct, familiarity with environmental law is helpful.

33. GUIDELINES, *supra* note 3, § 2Q1.2.

34. *Id.* § 5A.

35. Part 2Q of the Sentencing Guidelines provides for upward or downward "guided departures" from the suggested enhancement in a variety of circumstances, including a two-level increase or reduction depending on the facts of the case, for a discharge, release, or emission into the environment. GUIDELINES, *supra* note 3, §§ 2Q1.2, cmt. n.5, 2Q1.3, cmt. n.4, 1A4(b). As a result, defense attorneys seek to reduce the impact of application of this specific offense characteristic by asking the government to agree to a sentence reduction during plea negotiations, or by asking the court to impose a reduced enhancement if it finds that the specific offense characteristic applies.

36. *Id.* §§ 2Q1.2, cmt. n.5, 2Q1.3, cmt. n.4.

37. See *United States v. Ferrin*, 994 F.2d 658, 664 (9th Cir. 1993).

38. Harm is not the same as contamination. *United States v. Shurelds*, No. 97-6265, 1999 WL 137636, at *5 (6th Cir. Mar. 2, 1999), *cert. denied*, 526 U.S. 1150 (1999) (concluding that the Sixth Circuit "does not require actual environmental harm; it only requires that hazardous material has entered the environment").

into the environment. In *United States v. Ferrin*, the defendant was charged with illegal disposal of hazardous waste.³⁹ Ferrin pled guilty to one count of aiding and abetting illegal disposal stemming from his directing subordinates to dispose of hazardous waste in a trash dumpster.⁴⁰ The dumpster's contents would have been taken to a landfill and buried but for the intervention of authorities, who had Ferrin under surveillance.⁴¹ The Ninth Circuit affirmed the district court's finding that placing the waste in the dumpster did not constitute a release into the environment since the waste was never buried in the landfill.⁴² While the court did not apply the specific offense characteristic because of this finding, it noted that contamination could ordinarily be proven from a release and enhancement would be justified.⁴³ The court remanded the case for fact-finding regarding other actions which might have resulted in contamination, such as the emission of gases into the air that occurred when Ferrin's employees mixed wastes together prior to disposal.⁴⁴

The Ninth Circuit reached a different result in a 1999 Clean Water Act pretreatment case. In *United States v. Van Loben Sels*, the defendant illegally introduced wastes into a sewer system and the sewage treatment plant processed those wastes along with normal sewage, discharging the resulting wastewater into a waterway.⁴⁵ The defense argued that the defendant had not contaminated the environment because the illegal discharges had been "treated" by the sewage treatment plant, and subsequently could not be measured in the wastewater leaving the plant.⁴⁶ The district court found no contamination occurred and did not apply the enhancement.⁴⁷ The Ninth Circuit disagreed, and concluded that the defendant had discharged pollutants into the environment when he put them into the sewer leading to the plant.⁴⁸ The court remanded for resentencing with sentence enhancement.⁴⁹

As for the second argument, at least four appellate courts have rejected the contention that the government must prove measurable contamination in addition to the facts constituting the illegal conduct when the offense involves a discharge, release, or emission into the

39. 994 F.2d at 660.

40. *Id.*

41. *Id.* at 664.

42. *Id.* at 663.

43. *Id.* at 663-64.

44. *Id.* at 664.

45. 198 F.3d 1161, 1162 (9th Cir. 1999), *amended by* 207 F.3d 1192 (9th Cir. 2000).

46. *Id.* at 1164.

47. *Id.* at 1162.

48. *Id.* at 1166.

49. *Id.*

environment.⁵⁰ These courts have accepted that the application notes to the Guidelines indicate that the government proves contamination once it shows a discharge, release, or emission into the environment, and that no further proof is necessary.⁵¹ Of course, the government may choose to present evidence of actual contamination, such as sampling results or eyewitness testimony.⁵² It can also argue that the court may find contamination from the nature of the illegal act, such as dumping sewage sludge on land, storing leaking drums of hazardous waste, or burying hazardous waste.⁵³

V. CONCLUSION

These appellate decisions have given the government the upper hand in arguing that a defendant's conduct resulted in a discharge, release or emission into the environment. As a result, defendants convicted of many environmental offenses face the very real prospect of serving jail time under the Federal Sentencing Guidelines. While the math may be simple, the issues are complex and it is clear that whether a defendant goes to jail is all a matter of numbers.

50. See *United States v. Hoffman*, No. 99-4515, 2000 WL 309001, at *1 (4th Cir. Mar. 27, 2000) (per curiam) (assuming contamination from discharges to sewer system from electroplater); *Van Loben Sels*, 198 F.3d at 1166 (evaluating question of contamination in terms of discharge into the sewer system instead of discharge from the sewage treatment plant after treatment); *United States v. Cunningham*, 194 F.3d 1186, 1202 (11th Cir. 1999), *cert. denied*, 121 S. Ct. 84 (2000) ("The government does not have to prove actual environmental contamination in order for the enhancement to apply."); *United States v. Liebman*, 40 F.3d 544, 550 (2d Cir. 1994) (concluding that guideline commentary to section 2Q1.2(b)(1) assumes contamination from discharge, release, or emission); *United States v. Strandquist*, 993 F.2d 395, 400 (4th Cir. 1993) (deciding court may infer environmental contamination from discharges of sewage); *United States v. Goldfaden*, 959 F.2d 1324, 1331 (5th Cir. 1992) (deciding actual proof of contamination was not necessary where the defendant was convicted of industrial discharges to a sewer system).

51. See GUIDELINES, *supra* note 3, § 2Q1.2, cmt. n.5. The court may apply the specific offense characteristic more easily because the government does not have to prove that the conduct actually polluted the environment. See *United States v. Cunningham*, 194 F.3d 1186, 1202 (11th Cir. 1999), *cert. denied*, 121 S. Ct. 84 (2000).

52. GUIDELINES, *supra* note 3, § 5K2.0.

53. See *United States v. Cooper*, 173 F.3d 1192, 1205 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 526 (1999) (deciding that disposal of ten thousand tons of sewage sludge on a farm shows actual contamination); *United States v. Freeman*, 30 F.3d 1040, 1042 (8th Cir. 1994) (enhancing sentence of defendant convicted of illegal storage of hazardous waste when the evidence showed that drums containing volatile hazardous waste had leaked inside a building with a storm drain leading to a creek, even though the defendant had been acquitted of illegal disposal of hazardous waste); *United States v. Irby*, No. 90-5113, 1991 WL 179110, at *4 (4th Cir. 1991) (finding contamination from discharge of 500,000 gallons of sewage sludge twice a week for two years); *United States v. Sellers*, 926 F.2d 410, 418 (5th Cir. 1991) (concluding district court could infer contamination when sixteen fifty-five gallon drums were dumped, including one leaking hazardous waste, and discovery was made the next day); *United States v. Bogas*, 920 F.2d 363, 368 (6th Cir. 1990) (deciding visual soil contamination and likely water contamination resulted from burying drums of hazardous waste).