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IN PURSUIT OF ENVIRONMENTAL REGULATORY COMPLIANCE: SHOULD WE FLEX THE "PUBLIC TRUST" ENHANCEMENT MUSCLE?

BRIAN HENDRICKS*

INTRODUCTION

In 1987 the U.S. Sentencing Commission adopted the United States Sentencing Guidelines ("U.S.S.G."). The guidelines contain a number of upward and downward sentencing departures based on the factual circumstances and the conduct of individual defendants. Federal courts have traditionally applied a sentencing enhancement for a violation of a public or private trust or use of a special skill (the "public trust enhancement") to criminal acts by elected officials or government employees, and to select non-governmental actors that maintain custodial relationships or positions of power.

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over vulnerable individuals.\textsuperscript{4} Recently, however, several courts ruled on the appropriateness of applying the public trust enhancement to the employees and agents of private regulated entities.\textsuperscript{5} These decisions could result in the application of an additional upward sentencing adjustment to the employees and agents of private entities that commit environmental crimes. This Note examines recent federal holdings involving the application of the public trust enhancement to criminal activity in general, and in particular to the actions of an employee or agent of a private regulated entity\textsuperscript{6} such as the employees and agents involved in \textit{United States v. Snook}.\textsuperscript{7}

Part I of this Note briefly examines ongoing efforts by the Environmental Protection Agency ("EPA") to adopt flexible regulatory regimes,\textsuperscript{8} including the measure known as the "Audit

\begin{itemize}
  \item \textsuperscript{4} U.S.S.G. Manual (2004) § 3B1.3 provides that
    \[ \text{if the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic. If this adjustment is based upon an abuse of a position of trust, it may be} \]
    \[ \text{employed in addition to an adjustment under §3B1.1 (Aggravating Role); if this adjustment is based solely on the use of a special skill, it may not be employed in addition to an adjustment under §3B1.1 (Aggravating Role).} \]
  \item \textsuperscript{5} \textit{See infra} Part III.
  \item \textsuperscript{6} The term private regulated entity refers throughout this note to the employees or agents of a private company subject to some form of state or federal environmental regulatory framework. This distinction is important because the public trust enhancement has been applied to private entities before, but as Part II of the Note suggests, that application has been almost exclusively to individuals with quasi-fiduciary duties. \textit{See infra} Part II notes 97-102 and accompanying text.
  \item \textsuperscript{7} 366 F.3d 439 (7th Cir. 2004). \textit{See infra} Part III.
\end{itemize}
Policy,"9 which became effective in January of 1996.10 The Note discusses the Audit Policy and other programs involving self-reporting and remediation of violations, focusing on particular compliance results and continuing criminal violations.11 An understanding of the current incentives and penalties associated with flexible regulatory approaches, as well as the compliance results obtained through their use, is essential to evaluating the potential value the public trust enhancement could have as a compliance-seeking tool.12

Part II of the Note examines the development of the U.S.S.G. in general, and of the public trust enhancement in particular.13 The history of how federal courts have applied the public trust enhancement provides important insight into the appropriateness of extending the enhancement to the criminal conduct of the employees and agents of private regulated entities. This discussion is necessary to provide a backdrop against which the extension of the public trust enhancement can be analyzed to determine whether the extension is a reasonable progression in the application of sentencing enhancements or a problematic over-reaching by the courts.

Part III of the Note outlines the current state of the federal Circuit Courts of Appeal concerning the application of the public trust enhancement to the employees and agents of private regulated entities.14 Part III gives way to the final portion of the Note, which discusses a number of arguments for and against the extension of the public trust enhancement in the manner contemplated by the Seventh Circuit in the SNook case.15

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9 Id.
10 See infra Part I and notes 60-66.
11 See infra Part I and notes 72 and 73.
12 See infra Part I and notes 60-74.
13 See infra Part II and notes 83-97 and 100-06.
14 See infra Part III, notes 109-64, and accompanying text.
15 See infra Part IV, notes 165-221, and accompanying text.
I. **Evolution of Sentencing Adjustments in the Prosecution of Environmental Crime**

A. *The Early Years of Environmental Prosecution*

The concept of federal environmental law is more than a hundred years old; however, the most significant statutes are of much more recent vintage.\(^\text{16}\) Beginning in 1969 with the National Environmental Policy Act,\(^\text{17}\) the federal government established a commitment to defining and controlling behavior affecting the natural environment.\(^\text{18}\) For a little over a decade, enforcement and punishment activities consisted primarily of civil and administrative fines and penalties.\(^\text{19}\) This began to change in 1980 when the Department of Justice ("DOJ") created an Environmental Enforcement Section to prosecute "egregious violations" of federal environmental law, marking the beginning of coordinated full-time investigation and enforcement.\(^\text{20}\) The EPA followed this move by creating the Office of Criminal Enforcement ("OCE") in January of 1981 and by staffing the office with twenty-three investigators two years later.\(^\text{21}\)

In the early years, the OCE lacked the staff and resources necessary to cast a wide investigative and prosecutorial net. These challenges resulted in the EPA limiting its efforts to the "most serious forms of environmental misconduct."\(^\text{22}\) The EPA continued


\(^{18}\) Jessup, supra note 16, at 726.


\(^{20}\) Id.

\(^{21}\) Jessup, supra note 16, at 726.

to toil under the strain of limited resources for almost a full decade before Senator Joe Lieberman, a Democrat from Connecticut, introduced the Pollution Prosecution Act of 1990. The Act called for a fourfold increase in the number of criminal investigators and the hiring of civil investigators to assist in the enforcement process. This appears to be something of a philosophical turning point in the commitment of resources to enforcement. Due at least in part to the limited resources available in the early years of the EPA’s enforcement program, sentences for environmental crimes were largely in the form of large fines for corporations, as opposed to meaningful prison time for offenders.

**B. Development of Sentencing Guidelines**

Throughout the early 1980s, the DOJ and the EPA were limited not only by the resources available to undertake investigations and prosecutions, but also by the limited sentencing flexibility provided in federal environmental statutes. Prior to the adoption of the U.S.S.G. in 1987, the criminal penalties for a particular environmental violation were determined by both the criminal sanctions contained in the relevant statute and by individual judicial discretion. The penalties provided under statutes were inflexible, and at least one result was the propensity for judges to sentence defendants to the statutory penalty and

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26 Id. at 1338.
27 Cf. Adler, *supra* note 22, at 797-98 (discussing recent changes to environmental statutes that increase the type and severity of penalties, which were not available in the DOJ or EPA in the early 1980s).
29 Cf. Adler, *supra* note 22, at 798-99 (discussing how the adoption of the U.S.S.G. in 1987 curtailed the judicial reduction of sentences noting, "[J]udges now cannot impose a sentence only to suspend it in favor of a period of probation" (internal quotation marks omitted)).
then order probation in lieu of jail time.\textsuperscript{30} As a result, defendants convicted for environmental crimes in the late 1970s and early 1980s did not receive harsh sentences and spent "little, if any, time in jail."\textsuperscript{31}

When implemented in 1987, the U.S.S.G. created a system of base offense levels for particular crimes and a framework for adjusting sentences upward or downward based on the particular facts of a crime and a defendant's conduct in the commission of the offense.\textsuperscript{32} The U.S.S.G. effectively eliminated the suspended sentence by taking away a large amount of judicial discretion.\textsuperscript{33} Under the guidelines, a judge could order probation only where the Sentencing Commission provided a minimum prison term of zero months for an offense.\textsuperscript{34} Because the guidelines were binding on sentencing courts,\textsuperscript{35} sentences that departed from the guideline requirements were subject to appeal by both prosecutors and defendants.

For the first time, the punishment for environmental crimes (and crimes more generally) depended more upon the conduct of the defendant, and the extent of the injury to the public or individuals caused by the criminal activity, than on the individual discretion of judges.\textsuperscript{36} This was an important development in the prosecution of environmental crimes because the ability to secure

\begin{footnotesize}
\textsuperscript{30} Id.
\textsuperscript{31} Colleen C. Murnane, Criminal Sanctions for Deterrence Are a Needed Weapon, but Self-Initiated Auditing is Even Better: Keeping the Environment Clean and Responsible Corporate Officers Out of Jail, 55 OHIO ST. L.J. 1181, 1194 (1994).
\textsuperscript{32} Id.
\textsuperscript{33} Cf. Adler, supra note 22, at 798-99.
\textsuperscript{34} Id.
\textsuperscript{35} United States Sentencing Commission, An Overview of the United States Sentencing Commission, at 2, http://www.ussc.gov/general/USSCoverview.pdf (last visited Sept. 22, 2005) (noting that "[j]udges are advised to choose a sentence from within the guideline range unless the court identifies a factor that the Sentencing Commission failed to consider that should result in a different sentence"). The Sentencing Commission updated its overview materials following the U.S. Supreme Court Decision in United States v. Booker, 125 S. Ct. 738 (2005), and now reflect that the guidelines are practically advisory.
\textsuperscript{36} Cf. Adler, supra note 22, at 797-99.
\end{footnotesize}
jail time is critical to compliance and enforcement efforts.\textsuperscript{37} Without a meaningful threat of actual jail time to deter violations, federal laws were in effect more form than substance.\textsuperscript{38} Under the U.S.S.G., as enacted and interpreted until recently,\textsuperscript{39} a judge is theoretically not permitted to depart from the sentence ranges provided within the guidelines unless “there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines[].”\textsuperscript{40}

In the first four years under the U.S.S.G., the incidence of using simple probation as a sentencing mechanism fell to half of the pre-guideline levels.\textsuperscript{41} This, combined with the limitations placed on parole, led to increased sentences and actual time served in prison by offenders committing crimes covered by the U.S.S.G.\textsuperscript{42} Indeed, under the U.S.S.G., criminals sentenced in federal court over the

\begin{itemize}
\item \textsuperscript{37} Murnane, supra note 31, at 1184-85.
\item Criminal sanctions . . . are significantly more effective deterrents than civil penalties for two major reasons: (1) civil fines can be passed on to the consumer . . . , while jail time cannot, and (2) criminal penalties ‘drive home the fact that non-compliance is often a crime rather than a business decision,’ and the stigma and adverse publicity . . . provide incentives to comply.
\item Id. (footnote omitted).
\item \textsuperscript{38} Cf. Adler, supra note 22, at 797-99.
\item \textsuperscript{39} See infra Part I and notes 48-55, discussing a recent Supreme Court decision holding that the U.S.S.G. implicate the Sixth Amendment to the U.S. Constitution when judges make findings of fact not submitted to a jury for the purpose of applying a sentencing enhancement. In United States v. Booker and United States v. Fanfan, 125 S. Ct. 738, 757 (2005) (cases consolidated), the Supreme Court also held that because of the Constitutional problems posed by the U.S.S.G. they would be treated as advisory rather than mandatory going forward.
\item \textsuperscript{40} See 18 U.S.C. § 3553(b) (2000).
\item \textsuperscript{42} Id. at 43-45.
\end{itemize}
last fifteen years received substantially more severe penalties than defendants sentenced prior to the adoption of the guidelines.  

At the time the U.S.S.G. became effective, most of the sentencing provisions relating specifically to environmental crimes that apply today were included; however, several minor amendments to the guidelines have been made since that time. Specifically, the U.S. Sentencing Commission included seven guidelines relating to environmental crimes, five of which apply to offenses under statutes within the EPA's jurisdiction. Notably, the public trust enhancement on which this Note focuses is not part of the

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43 Id. at 46.
44 The specific sections of the U.S.S.G. in effect on November 1, 1987, that relate to environmental offenses include §§ 2Q1.1-2Q1.4 and § 2Q2.1.
45 The existing criminal sanctions applicable to environmental crimes under the U.S.S.G. notably already include sentencing enhancements when certain fact situations merit such application. See, e.g., U.S.S.G. Manual (2004) § 2Q1.2:
   (1) §2Q1.2. Mishandling of Hazardous or Toxic Substances or Pesticides; Recordkeeping, Tampering, and Falsification; Unlawfully Transporting Hazardous Materials in Commerce
     (a) Base Offense Level: 8
     (b) Specific Offense Characteristics:
        (1)(A) If the offense resulted in an ongoing, continuous, or repetitive discharge, release, or emission of a hazardous or toxic substance or pesticide into the environment, increase by 6 levels; or (B) If the offense otherwise involved a discharge, release, or emission of a hazardous or toxic substance or pesticide, increase by 4 levels.
        (2) If the offense resulted in a substantial likelihood of death or serious bodily injury, increase by 9 levels.
        (3) If the offense resulted in disruption of public utilities or evacuation of a community, or if a cleanup required a substantial expenditure, increase by 4 levels.
        (4) If the offense involved transportation, treatment, storage, or disposal without a permit or in violation of a permit, increase by 4 levels.
        (5) If a recordkeeping offense reflected an effort to conceal a substantive environmental offense, use the offense level for the substantive offense.
        (6) If the offense involved a simple recordkeeping or reporting violation only, decrease by 2 levels.
46 See Brunner, supra note 24, at 1339.
seven guidelines that the U.S.S.G. labels as "offenses involving the environment."47

C. Recent Developments Relating to the U.S.S.G. and the Impact on the Future Use of Sentencing Enhancements

In January of 2005, the United States Supreme Court found that the U.S.S.G. violate the Sixth Amendment to the United States Constitution in circumstances because as binding guidelines they required judges to make factual decisions that impact prison time.48 The Supreme Court ruled that when the application of a sentencing enhancement contained within the U.S.S.G. requires a judge to consider and rule upon facts not presented to the jury, or stipulated to by the defendant, the Sixth Amendment is violated.49 The majority stated that "[i]f the guidelines . . . could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment."50 However, the Court interpreted the guidelines as mandatory and binding on all judges in clear violation of the Sixth Amendment. This holding required the Court to determine whether or not the U.S.S.G. could be made advisory, which would effectively salvage them and ensure that they can remain a consideration during sentencing, at least for judges that wish to consult the guidelines.51

In a bizarre twist, the Court effectively issued two separate opinions in this case. In the first decision, Justice Stevens declared that the U.S.S.G. are unconstitutional because they violate the

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50 Id. at 750.
51 Id. at 746.
Sixth Amendment. Justice Breyer authored the second decision in which the majority rejected the remedies suggested in the briefing stage, in particular the suggestion that sentencing juries be empaneled to hear additional evidence bearing on sentencing.

In effect, the Court's decision authored by Justice Breyer makes the guidelines advisory rather than mandatory by directing judges to consult the guidelines for advice as to what sentences to apply. Judges now have greater discretion as to whether certain factors should enhance or mitigate a sentence, but the opinion authored by Justice Breyer specifically provides that too great an exercise of discretion may be grounds for a reversal on appeal.

The Supreme Court's recent ruling, with respect to the U.S.S.G., raises a number of implications for federal sentencing in general and sentencing under § 3B1.3 of the U.S.S.G in particular. The Seventh Circuit decision in the Snook case applied this sentencing enhancement to an employee agent of a private regulated utility. One of the issues the Snook case raised is whether applying § 3B1.3 of the U.S.S.G. to the employee of a private entity is even appropriate. This issue now stands against a backdrop of sentencing guidelines that are no longer binding on judges.

The fact that the guidelines are now advisory does not detract from the underlying question of whether the public trust enhancement in § 3B1.3 properly applies to the employees or agents of private regulated entities. The fact that the guidelines are no longer binding on judges may weigh upon the willingness of some sentencing courts to extend the public trust enhancement, and indeed other adjustments within the guidelines, more broadly to new defendants and fact situations. Thus, the decision in Booker

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53 Id.
54 Id.
55 Id.; see also Booker, 125 S.Ct. at 767.
56 United States v. Snook, 366 F.3d 439, 446 (7th Cir. 2004).
57 Id. at 445-46.
58 See infra Part III notes 109-64 and accompanying text.
is an important development and consideration for Part IV of this Note where arguments for and against extending the application of the public trust enhancement are examined in greater detail.  

D. The EPA's Views and Practices Concerning the Adjustment of Sentences and Penalties Based on Conduct

Just as the U.S.S.G. encapsulates a regime of adjusting sentences upward or downward based on a variety of mitigating or aggravating circumstances, the EPA has adopted a philosophy of mitigating civil and criminal penalties based upon the cooperation of regulated entities. On July 9, 1986, the EPA promulgated its "environmental auditing policy statement." The statement itself followed months of comments submitted by interested parties. Many of the early comments expressed concern about the new approach, including concerns from the regulated community that the EPA might misuse information obtained from the self-reported audit results. Environmental activists were concerned that the policy signaled that the EPA would reduce its investigation and enforcement activities. To the latter concern, the EPA responded that it would neither forgo investigating sites belonging to entities participating in the self-auditing programs nor reduce its enforcement responses.

The initiative, which is still in effect, purports to "enhance protection of human health and the environment by encouraging regulated entities to voluntarily discover, promptly disclose, and

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59 See infra Part IV notes 165-221 and accompanying text.  
60 6 FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW § 17.03 (2005).  
61 Id. at § 17.03[1].  
62 Id. at § 17.03[2].  
63 Id. at § 17.03[2].  
64 Cf. id. § 17.03[2].  
65 See id., supra note 60, at § 17.03[2]; see also Environmental Audit Policy Statement, 51 Fed. Reg. 25,004, 25,007 (July 9, 1986) ("Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.").
expeditiously correct violations of Federal environmental requirements."66 Almost nine years after its adoption, the Audit Policy continues to provide entities the opportunity to avoid severe government sanctions by self-reporting and remediating violations.67

The Audit Policy is hardly the only policy that the EPA in particular, or the federal government more generally, adopted to promote self-policing and reporting by private regulated entities.68 Flexible and cooperative approaches are largely creatures of scholarly work taking place over the last thirty years and are thus relatively new in comparison to the concept of traditional government regulation of private markets, which has existed for far longer.69 Not only are more incentive-driven forms of regulatory policy a relatively recent development, they are not universally accepted as positive developments by commentators.70

One factor influencing the sustainability of self-policing and reporting policies will be the extent to which such policies secure reporting and remediation by regulated entities. With respect to the Audit Policy, the EPA reports substantial progress in the number of regulated entities self-reporting violations.71 Nevertheless,

70 See generally Laufler, supra note 68 (for background discussion on the desirability of tradeoffs between reduced enforcement costs and providing too much freedom to regulated utilities).
71 The EPA points to the number of companies utilizing the policy and the number of violations that some individual companies self-report as a suggestion
egregious cases involving agents of regulated entities failing to disclose or remedy violations persist. This suggests that incentives that reward compliance and disclosure, such as those offered through the Audit Policy, are insufficient to motivate some regulated entities to comply with environmental requirements of how successful the Audit Policy has become. EPA Office of Enforcement and Compliance Assurance, EPA Audit Policy Update, Mar. 1998, at 2, http://www.es.epa.gov/ocea/apolguide.html. In 1997, GTE Corporation disclosed and resolved 600 violations at more than 314 facilities. GTE paid $52,264 in penalties for these violations while the EPA agreed to waive $2.38 million in potential penalties based on GTE's good faith cooperation. Id. at 1. The EPA extended the reach of the Audit Policy to additional sectors and now includes above ground storage tanks, wetlands, nitrate compounds, grain producers, airlines, telecommunications companies, and iron and steel mini-mills. EPA Office of Enforcement and Compliance Assurance, EPA Audit Policy Update Spring 2001, at 1, http://www.epa.gov/oeca/ore/auditupd.html. More than 1,150 companies disclosed violations covering more than 5,400 facilities in the first four years of the Audit Policy. Id. at 1-2.

Jeffrey Jackson and Michael Peters each received thirty-six months in prison for concealing the discharge of benzene from an above-ground storage tank for more than two years and providing false disclosures to the EPA. Press Release #470, Department of Justice, Chemical Plant Managers Sentenced for Clean Air Act Violations (Aug. 14, 2002), http://www.usdoj.gov/opa/pr/2002/August/02_enrd_470.htm; see also Press Release #679, Department of Justice, Second Defendant Pleads Guilty in Case Charging S. Carolina Plant with Violations of Clean Air Act (Nov. 15, 2002), http://www.usdoj.gov/opa/pr/2002/November/02_enrd_679.htm (explaining that an environmental supervisor pleaded guilty to conspiracy to violate the Clean Water Act, and that Vice President of a chemical plant was charged with sending false documents to public officials in order to conceal illegal discharges of waste water containing processing chemicals into the public sewer system).

See, e.g., Press Release #233, Department of Justice, Former Company Vice President Convicted of Conspiring to Falsify Data on Millions of Gallons of Reformulated Gasoline (Apr. 11, 2003), http://www.usdoj.gov/opa/pr/2003/April/03_enrd_233.htm & Press Release #691, Department of Justice, Major N.J. Iron Pipe Manufacturer, Top Managers Charged in Eight-Year Conspiracy to Pollute, Expose Employees to Danger, Cover Up and Impede Investigations (Dec. 15, 2003), http://www.usdoj.gov/opa/pr/2003/December/03_enrd_691.htm (explaining that five management employees were charged for regularly discharging oil and paint into the Delaware River over a period of eight years, exposing employees to danger, concealing violations from investigators, and impeding investigations by providing false data and information regarding emissions and compliance).
or self-report violations of existing environmental regulations. It also suggests that existing criminal sanctions fail to induce full compliance.

The EPA's policy has encouraged many entities to come clean, but some entities continue to ignore their compliance responsibilities and engage in violations of the nation's environmental rules. For these entities that refuse to meet compliance obligations and fail to report violations, even under flexible regulatory frameworks like the Audit Policy, alternative methods to encourage their cooperation may prove necessary. Continued efforts to increase the criminal penalties associated with environmental crimes is one method. After all, it has been noted, "[t]o the businessman . . . prison is the inferno, and conventional risk-reward analysis breaks down when the risk is jail." For the purpose of directing its enforcement efforts, the EPA identifies specific types of illegal corporate activity it intends to target. Among the factors the EPA identifies as important in deciding whether to proceed with criminal prosecution are: (1) the

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74 In 1998, the EPA surveyed regulated entities that had self-reported under the policy. One of the questions on the survey asked the responding party whether they would have disclosed without the policy. Of the fifty reported responses, twenty-six claimed that they would not have disclosed or were unsure whether they would have disclosed without the policy. U.S. Environmental Protection Agency Audit Policy User's Survey Results Part I, at 4, Question 9 (Dec. 22, 1998), http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html. The responses, though limited, suggest that regulated entities are voluntarily discovering, disclosing, and remedying violations in greater numbers than before the Audit Policy. Id.

75 See supra notes 72-74.

76 See supra notes 72-74.


78 See Memorandum from Earl E. Devaney, Office of Criminal Enforcement to All EPA Employees Working in or in Support of the Criminal Enforcement Program (Jan. 12, 1994), at 3-6, http://www.epa.gov/compliance/resources/policies/criminal/exercise.pdf (noting that the EPA will be guided by two general criteria in selecting cases for criminal prosecution, significant environmental harm and culpable conduct).
gravity and extent of any health or environmental impact of the conduct, (2) the timeliness and degree of disclosure made to relevant regulatory authorities, (3) the timeliness and degree of efforts made to control the problem or mitigate the effects, (4) history of recurrent or persistent violations, and (5) evidence of intentional noncompliance. These factors, along with the willingness of the EPA to consider the efforts of regulated corporate entities to report and remediate problems, provide further evidence that the agency embraces a cooperative and more flexible regulatory approach.

A major consideration for the future of flexible regulatory regimes is the extent to which abuse of more flexible forms of regulation can be curtailed. Policymakers, legislative and administrative alike, will have limited confidence in less rigid regulatory frameworks if such abuses take place. Therefore, finding a way to enhance criminal sanctions, the "bigger stick" to accompany the "carrots" provided through approaches like the Audit Policy, becomes a more important consideration.

Part II of this Note, which follows, introduces the public trust enhancement in greater detail, including its historical application. If federal courts adopt a philosophy with respect to the public trust enhancement that is more in line with the Seventh Circuit's decision in Snook, an additional criminal penalty may be available to satisfy commentators, like Okamoto, that desire additional criminal sanctions as a means of achieving greater compliance.

II. **HISTORICAL APPLICATION OF THE PUBLIC TRUST ENHANCEMENT AT § 3B1.3 OF THE U.S.S.G.**

Part I included discussion of the evolution of the U.S.S.G. as a sentencing mechanism and the important and timely role the guidelines played in securing actual jail time for defendants

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79 *See supra* note 77 at 442.
80 *See infra* Part IV.
81 *See infra* Part IV notes 170-77 and accompanying text.
committing environmental crimes. That discussion focused largely on the “Offenses Involving the Environment” appearing at U.S.S.G. §§ 2Q1.1-2Q1.6 and § 2Q2.1. The public trust enhancement became effective at the same time that these sections were adopted, but, until very recently, courts did not apply this enhancement in the context of environmental crimes by the employees and agents of private regulated entities.

The U.S.S.G.’s Commentary and Application Notes make clear that to be considered a position of public or private trust, the position must involve “professional or managerial discretion” and generally be subject to less supervision than other employees. For the public trust enhancement itself to apply, the agent or employee’s position must “have contributed in some significant way to facilitating the commission or concealment” of the crime. According to the Commentary provided with § 3B1.3, examples include an attorney embezzling a client’s funds, a bank executive’s fraudulent loan scheme, or abuse of a patient by a doctor, but would not include the same offenses by a bank teller or hotel clerk because such positions involve more limited discretion.

Until recently, the majority of court cases involving the application of the public trust enhancement followed the expected path based on the Application Notes at § 3B1.3. Federal courts found bank presidents and managers, credit card authorization

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82 See supra Part I notes 31-38 and 41-55 and accompanying text.
83 U.S.S.G. Manual (2003) § 3B1.3 Application Notes 1-4; see also infra Part II and notes 84-97 and 100-64 (describing the historical application of the public trust enhancement).
85 Id.
86 Id.
89 See, e.g., United States v. McMillen, 917 F.2d 773 (3d Cir. 1990).
agents, accounts, teachers, and even customer service representatives to hold positions of public trust. At the same time, courts refused to apply the public trust enhancement to ordinary bank or hotel clerks, casual mail handlers and other similar positions. In differentiating between types of positions and functions that create a public or private trust, the courts traditionally considered a number of factors including (1) the defendant's freedom to commit an easily concealed wrong, (2) whether an abuse of the position can be readily detected, (3) duties of the position relative to other employees, (4) level of specialized knowledge required for the job, (5) the position's authority, and (6) the level of trust placed in the position by the public.

Of particular concern to the courts applying the public or private trust component of the public trust enhancement are (a) whether the victim of the crime was particularly vulnerable, (b) whether the crime disrupts a governmental function, and (c) the level of discretion that the individual defendant has in the position relative to other employees. Generally, (1) the more discretion the position has, particularly as it relates to the ability to use the position as a means to conceal the crime, (2) the more vulnerable the victim, and (3) the more disruptive the criminal action is to governmental functions, the more likely a court has been to find that the position is one of public or private trust. These factors and considerations are discussed in Part III as they relate to the cases involving the employees and agents of regulated entities that provide the source of the current split in the federal Circuit Courts of Appeal.

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90 See, e.g., Gibbs v. United States, 17 F.3d 1425 (2d Cir. 1994).
91 See, e.g., United States v. Hernandez, 231 F.3d 1087 (7th Cir. 2000).
92 See, e.g., United States v. Johns, 15 F.3d 740 (8th Cir. 1994).
94 See, e.g., United States v. Allen, 201 F.3d 163 (2d Cir. 2000).
96 DeLong, supra note 87, at 346.
97 Id. at 344-46.
98 See supra notes 87-95.
99 See infra Part III notes 109-64 and accompanying text.
For the special skill component of § 3B1.3 of the U.S.S.G. to apply, the individual must possess a skill not shared by the public, one which generally involves substantial education, training, or licensing. Examples provided within the commentary following § 3B1.3 include pilots, lawyers, doctors, accountants, chemists, and demolition experts. Nothing in the U.S.S.G. specifically applies the public trust or special skill standards to employees or agents of private regulated entities, although we could conclude that such individuals, trained and skilled in monitoring and reporting, reasonably fit within the outlined categories.

In applying the special skill component of the public trust enhancement found at U.S.S.G. § 3B1.3, the federal courts look at (1) whether the skill allegedly used to commit the offense truly meets the meaning of § 3B1.3, (2) whether the special skill used significantly facilitated the commission or concealment of the crime, and (3) whether the base offense level provided by the U.S.S.G. adequately takes into account the skill and characteristics of both the offense and the offender. Based on these criteria, accountants, appraisers and adjusters, bomb makers, and chemists, among others, have all been found to possess a special skill meriting the application of the special skill component of the public trust enhancement. As with the public or private trust component of the public trust enhancement, the application of the enhancement appears to depend not only on whether a trust or special skill is found, but also on the role that the trust or skill played in the commission of the offense. The more significant the role the special skill plays in the commission or concealment of the

101 Id.
103 See, e.g., United States v. Noah, 130 F.3d 490 (1st Cir. 1997).
106 See, e.g., United States v. Campbell, 61 F.3d 976 (1st Cir. 1995).
offense, the more likely it is that a defendant will receive an upward adjustment to his or her sentence under § 3B1.3.\textsuperscript{107}

A central element of the foregoing discussion is that the federal courts developed a framework and standard for the evaluation and application of the public trust enhancement over the last seventeen years. This framework and body of case law allow the courts to objectively evaluate the applicability of the public trust enhancement to any particular criminal defendant. This is a critical consideration in evaluating criticisms and concerns about the ability of the courts to apply the public trust enhancement to the agents of entities regulated under federal environmental laws. An additional point of emphasis is that many of the defendants receiving the public trust enhancement to date are agents of private employers, a point that cuts directly against the arguments of critics suggesting that application of the public trust enhancement to all agents of a private employer goes beyond the purpose or intent of U.S.S.G. § 3B1.3 as enacted.\textsuperscript{108}

III. THE STATE OF THE CIRCUITS ON THE APPLICABILITY OF THE PUBLIC TRUST ENHANCEMENT TO THE EMPLOYEES AND AGENTS OF PRIVATE REGULATED ENTITIES AND ENVIRONMENTAL CRIMES

The foregoing discussion makes plain that until very recently, courts applied the public trust enhancement primarily to non-environmental crimes.\textsuperscript{109} Specifically, courts applied the public trust enhancement to crimes involving finance; the physical abuse, neglect, or exploitation of a patient, client, or child with whom the offender had a relationship of trust, custody, or care; and other instances in which a victim was particularly vulnerable.\textsuperscript{110} Courts

\textsuperscript{107} See supra notes 102-06.
\textsuperscript{108} See infra Part IV notes 167-221 and accompanying text (discussing the arguments against extending the application of the public trust enhancement).
\textsuperscript{109} See supra Part II notes 83-97 and 100-06 and accompanying text.
\textsuperscript{110} See id.
have also applied the public trust enhancement to public officials and officers of private entities working on government contracts.\textsuperscript{111} It is hardly surprising that the federal courts have struggled with how to apply § 3B1.3 of the U.S.S.G. to a set of criminal offenses that go beyond traditional areas where the enhancement has been applied.\textsuperscript{112} After all, there is a limited supply of case law applying the public trust enhancement to environmental crimes and the public trust enhancement is not conveniently located among the sentencing enhancements for crimes against the environment.\textsuperscript{113}

One of the great stumbling blocks to a broader application of the public trust enhancement to the employees and agents of private regulated entities is that these agents are neither public officials or private agents working on government contracts, nor are they typically in custodial or care giver positions where victims might be particularly vulnerable.\textsuperscript{114} This fact places such agents outside the reach of many, if not most, of the prior federal court decisions applying the public trust enhancement.\textsuperscript{115} Arguing that an employee or agent of a regulated entity occupies a position in which the public has vested trust, regardless of how much discretion an employee has in his or her position is quite difficult. Therefore, extending the application of the public trust enhancement in this manner does not logically follow from the string of cases applying § 3B1.3 of the U.S.S.G. in the 1990s.\textsuperscript{116}

\textsuperscript{111} DeLong, supra note 87, at 350-61.
\textsuperscript{112} Snook, 366 F.3d at 450 (Coffey, J., dissenting) (noting that "no other circuit court... has extended the public trust enhancement to private individuals who work in industries that are regulated to protect the public health").
\textsuperscript{114} See supra notes 87-97 and 102-06 and accompanying text (discussing the traditional application of the public trust enhancement to certain individuals and types of relationships).
\textsuperscript{115} Id. (noting the limited application of the public trust enhancement to private agents and employees by the federal courts).
\textsuperscript{116} See, e.g., United States v. Burke, 125 F.3d 401 (7th Cir. 1997); United States v. Strang, 80 F.3d 1214 (7th Cir. 1996); and United States v. Isaacson, 155 F.3d 1083 (9th Cir. 1998).
A. The Seventh Circuit

In April of 2004, the Court of Appeals for the Seventh Circuit decided in *United States v. Snook*,\(^ {117} \) that the defendant Ronald Snook could be held responsible for an abuse of the public trust even though he worked as an environmental manager for a private Illinois petroleum refinery.\(^ {118} \) As the Environmental Reporting Manager, Snook was responsible for reporting water quality results for the refinery's discharges.\(^ {119} \) Snook's reports from 1994 to 1997 showed that the refinery met all of the applicable water quality standards.\(^ {120} \) However, the actual tests conducted by the refinery showed that the refinery had not complied with all of the standards.\(^ {121} \) In effect, the defendant deliberately misreported the refinery water quality results for a period of almost four years. The District Court found Snook guilty of violating the public trust and imposed a two-level increase in his sentence under § 3B1.3 of the U.S.S.G., the public trust enhancement.\(^ {122} \)

Snook appealed his twenty-one-month sentence to the Seventh Circuit Court of Appeals arguing that the district court erred in applying the public trust enhancement.\(^ {123} \) The Court of Appeals affirmed the district court's imposition of the sentencing enhancement, reasoning that because the Clean Water Act\(^ {124} \) is public-welfare legislation,\(^ {125} \) and the defendant occupied a position

\(^{117}\) 366 F.3d 439 (7th Cir. 2004).
\(^{118}\) *Snook*, 366 F.3d at 447.
\(^{119}\) *Id.* at 442-43.
\(^{120}\) *Id.* at 442.
\(^{121}\) Ronald Snook worked as the Environmental Manager at Clark Refining & Marketing, Inc., a petroleum refinery in Illinois. Each day, Clark discharged up to one million gallons of waste water into the Water Reclamation District of Greater Chicago. *Id.* The District required self-monitoring and reporting to ensure compliance with sewage and waste control ordinances. Snook was convicted of conspiring with Elva Causielo, an Assistant Manager, to selectively report testing results and to exclude from their reports any violations. *Id.*
\(^{122}\) *Snook*, 366 F.3d at 446.
\(^{123}\) *Id.*
\(^{125}\) The *Snook* majority refers to public welfare legislation in passing and
with responsibility and discretion, the self-reporting violations directly affect the public health and safety. Thus, according to the Court of Appeals, the district court appropriately applied the sentencing enhancement.

B. The Ninth Circuit

In 2002, the Ninth Circuit Court of Appeals took a different position in a case quite similar to Snook. In United States v. Technic Services, Inc., the Ninth Circuit found that Rick Rushing, a manager at Technic Services, Inc. (“TSI”), did not violate a position of trust when he solicited employees to lie and to sign false statements claiming TSI never dumped its waste water into navigable waters. As a result, Rushing was not subjected to the public trust enhancement available under the U.S.S.G.

In 1995, TSI successfully bid on an asbestos removal project at a pulp mill in Alaska. A year later, the EPA stopped the project because of noncompliance with asbestos removal and disposal standards. The pulp mill then hired a third-party monitor to ensure TSI’s compliance with the applicable standards. In early 1997, the third-party certified that the building

__discusses the term in the context of legislative or administrative rules that create an expectation by the public that entities subject to the rules will comply and that this compliance in effect enhances public health and safety. Snook, 366 F.3d at 447.

126 The court reasoned that Snook’s victims were the Water and Sewage District and the public at large. Further, the court held that even though the District periodically conducted its own testing, it relied to a large extent on the self-reporting mechanism. Because of his unique position and knowledge, and the direct affect of his violations on the public, Snook occupied a position of trust, which he abused. Id. at 446.

127 Id.

128 United States v. Technic Servs., Inc., 314 F.3d 1031, 1050-51 (9th Cir. 2002).

129 Id. at 1048.

130 Id. at 1036.

131 Id.

132 Id. at 1037.
was clean. Throughout the investigation of the removal project, TSI maintained that it was not washing waste water (and asbestos) into drains that flowed into a nearby bay. The company even included a statement to this effect in its correspondence with the EPA. Then, in late 1998 the EPA asked the third-party monitor to take one last look at the mill before it was demolished. That investigation produced evidence that TSI had continued to wash wastewater into the drains and had lied to investigators. The criminal prosecution followed.

The decision in Technic Services reaffirms past decisions of the Ninth Circuit, which provide that when the government or the public are the victims, the defendant holds a position of public trust only when the defendant is a government employee or exercises directly delegated public authority. Strictly construing the foregoing standard, the Ninth Circuit held that Rushing’s duties did not create a position of public trust and he could not therefore violate a public trust. It is worth noting that a defendant can theoretically fall under the public trust enhancement by violating a private trust as well. The Court sidestepped this issue, however, by suggesting the record below was not complete enough to allow such a finding.

Under the Ninth Circuit construction, the employee or agent of a private entity not working on a government contract likely falls outside the public trust requirement necessary to apply the public trust enhancement. This directly conflicts with the position taken by the Seventh Circuit, and even conflicts, as the

\(^{133}\) Id.
\(^{134}\) Technic Servs., 314 F.3d at 1038.
\(^{135}\) Id.
\(^{136}\) Id.
\(^{137}\) Id.
\(^{138}\) Id. at 1051.
\(^{139}\) Id.
\(^{141}\) Technic Servs., 314 F.3d at 1054.
\(^{142}\) Id.
Ninth Circuit concedes, with the position taken by the First Circuit in *United States v. Gonzalez-Alvarez.*

**C. Other Circuits**

The First, Fourth, and Sixth Circuits address the application of the public trust enhancement to environmental crimes to varying, though less decisive, degrees than either the Ninth or Seventh Circuits. This result creates a confusing array of disparate holdings.

1. The First Circuit

In *United States v. Gonzalez-Alvarez,* the First Circuit Court of Appeals held that a licensed dairy farmer could violate the public trust. The defendant, Victor Gonzalez-Alvarez, acted in concert with other employees and drivers to knowingly transport and insert contaminated milk into commerce. The district court did not apply the public trust enhancement; but on appeal, the Court of Appeals found that the public had an expectation that milk producers would comply with safety regulations and that this expectation imposed upon the defendant a duty or public trust.

The Court of Appeals also stated that the nature of the defendant's actions violated that trust and merited the application of the public trust enhancement. The First Circuit clearly believes that some circumstances (such as protecting public health) place a special trust or duty upon the agent of a private entity, which merits the application of the public trust sentencing enhancement when that trust is violated. In this respect, the First

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143 *Id.* at 1051.
144 *United States v. Gonzalez-Alvarez,* 277 F.3d 73, 82 (1st Cir. 2002).
145 *Id.* at 76.
146 *Id.* at 81.
147 Notably, the view that rules or regulations can create a public expectation of compliance, which in turn gives rise to a public trust, is quite similar to the public welfare standard articulated by the Seventh Circuit in *Snook.* See *supra* notes 121-22.
148 *See supra* note 141.
Circuit occupies the same end of the spectrum as the Seventh Circuit, though the Seventh Circuit's holding implies that public health and safety legislation may be essential before a public trust is created. The First Circuit's holding does not limit the creation of a public trust to instances where public welfare legislation is involved, but it fails to provide enough of a framework to determine just how far the Circuit is willing to go in imposing a trust on a private entity or its agents.

2. The Sixth Circuit

The Sixth Circuit confronted the application of the public trust enhancement to environmental crimes in United States v. White.\textsuperscript{149} John White and Carolyn Taylor were convicted of making false statements regarding a matter within the jurisdiction of the federal government.\textsuperscript{150} Specifically, White and Taylor submitted reports to the Kentucky Division of Water that contained falsified turbidity measurements.\textsuperscript{151} The government and the defendants appealed the district court's decision on a variety of grounds including the application of sentencing enhancements.\textsuperscript{152} Two of the most important issues on appeal concerned whether White held a position of public or private trust that facilitated the commission of the crime and whether the general public can be considered a victim for purposes of the analysis.\textsuperscript{153}

Ultimately, the court established that even though White's immediate responsibilities were to the EPA and the Division of Water, the general public suffered as a result of his criminal activity.\textsuperscript{154} In analyzing whether the district court should have

\textsuperscript{149} 270 F.3d 356, 370 (6th Cir. 2001).
\textsuperscript{150} Id. at 360.
\textsuperscript{151} Turbidity refers to the amount of suspended particulate matter in post treatment water. Turbidity data is one of several types of data collected and provided to the Kentucky Division of Water as part of the Division's enforcement of the federal Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-18 (1994). Id.
\textsuperscript{152} Id.
\textsuperscript{153} White, 270 F.3d at 371.
\textsuperscript{154} Id.
applied the public trust enhancement to White, the Court of Appeals rejected two extremes: one that would subject any government bureaucrat guilty of any crime to the enhancement, and the other that only elected officials enjoy the level of public trust necessary to apply the enhancement. The Court of Appeals embraced what it called the "apparent reasoning of our sister circuits" under which officers with responsibility for protecting public health and safety enjoy a special trust with the public which is breached when they commit a crime.

The Sixth Circuit's reasoning applies in the context of a government employee and not necessarily to the agent of a private entity. However, the notion that individuals with responsibility for protecting public health and safety enjoy a public trust is compatible with the Seventh Circuit's holding in Snook, which held that the defendant's compliance position, coupled with the public welfare legislation he violated, made applying the public trust enhancement appropriate.

3. The Fourth Circuit

In United States v. Ellen, the Court of Appeals held that the district court did not commit error when it refused to apply the "special skill" component of the public trust enhancement to a private contractor charged with knowingly filling in wetlands without a permit, a violation of the Clean Water Act.

The court rejected arguments by the federal government that by failing to apply the public trust or use of special skill component of U.S.S.G. § 3B1.3, the district court created an exemption that excuses defendants who commit regulatory crimes in the course of their profession from enhanced penalties because

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155 Id. at 372.
156 Id. at 373.
157 Snook, 366 F.3d at 446.
158 961 F.2d 462 (4th Cir. 1992).
159 Specifically, the defendant, William Ellen, was charged with violating 33 U.S.C. §§ 1311(a) and 1319(c)(2)(A). Ellen, 961 F.2d at 464.
FLEXING THE "PUBLIC TRUST" MUSCLE

of the use of a special skill. The Court of Appeals did not address whether the district court should have applied the public trust or use of special skill enhancement, but did find that it was within the district court's discretion to decline application of the enhancement. By extension, the district court could have applied the enhancement, though it did not. To know for certain, the Fourth Circuit must confront the actual application of the public trust or use of special skill enhancement to the agent of a private entity.

The range of holdings in the foregoing decisions raise the question of exactly when and to whom the public trust or use of special skill enhancement attaches when applying criminal sanctions to environmental crimes, and, in particular, to the employees and agents of private regulated entities. Prior to these decisions, the assumption was that the agents of a private entity were beyond the reach of U.S.S.G. § 3B1.3. Now, all that is certain is that the standard appears to lie somewhere between (1) total preclusion of the public trust enhancement's use against nongovernmental employees or private actors working on government contracts (the Ninth Circuit position), and (2) application against any agent or employee (public or private) that commits an environmental crime in violation of a public or private trust or though the use of a special skill (the Seventh Circuit position). In several Circuits, notably the Fourth and Seventh, application of the public trust or use of special skill enhancement requires that the criminal offense threaten public safety or health.

Whether the standard is a more objective one involving public safety and health legislation, or a more subjective one involving judgments about what the general public expects of agents whose crimes might threaten public safety or health remains to be seen. This is just one of the many questions that remain in the wake of Snook and the Supreme Court's decision to make the U.S.S.G. merely advisory.

160 Id. at 469.
161 Id.
162 Technic Servs., 314 F.3d at 1051.
163 See Ellen, 961 F.2d at 464 and Snook, 366 F.3d at 446.
164 See supra Part I.
IV. SHOULD THE PUBLIC TRUST ENHANCEMENT'S APPLICATION BE EXPANDED TO ALLOW ITS USE TO ENCOURAGE BETTER COMPLIANCE?

With the evolution of sentencing adjustments in criminal prosecutions and the replacement of the old "command and control" regulatory frameworks with a system of incentives and penalties to encourage compliance, allowing federal courts to apply the public trust enhancement more broadly would be consistent with the general direction of change toward incentive and penalty-based enforcement.

The availability of the public trust enhancement as a criminal sentencing factor would undoubtedly affect the EPA's enforcement and prosecution strategy and the cost-benefit analysis of would-be offenders. Before discussing whether some action by the Supreme Court or the U.S. Sentencing Commission is necessary to remedy the Circuit split, it is important to consider a number of policy implications connected to the public trust enhancement that commentators have identified since the U.S. Sentencing Commission adopted the U.S.S.G.

A. Favoring Expansion of the Public Trust Enhancement

A number of arguments exist suggesting that expanding the application of the public trust enhancement in the manner envisioned by the Seventh Circuit's decision in Snook would be an appropriate and necessary step in the evolution of environmental policy. Teresa Zhang notes that "[t]he bulk of environmental regulations in the US are characterized as 'Command and Control'. In this approach, regulators set limits to emissions from various sources by requiring the best available technology (BAT)." She also notes that "[t]he command and control paradigm was and continues to be so effective because, as its name implies, the regulations are tough. The government told firms across industries and across America were told what to do, when to do it and how to do it."

crime prosecution. The first argument concerns the need to increase penalties as a means of producing more widespread compliance and a level competitive playing field within industries.\(^{167}\) Even the EPA recognizes that compliance with environmental regulations is costly and requires a commitment of time and resources on the part of a regulated entity, a commitment that leaves the corporation disadvantaged relative to competitors that do not invest in compliance efforts.\(^{168}\) As noted in Part I, in spite of the Audit Policy, and other policies and programs under which the EPA waives or reduces penalties for self-reporting and remediation, a number of entities continue to ignore their compliance responsibilities.\(^{169}\) Proponents of preserving flexible regulatory regimes generally note that more severe criminal sanctions may be the best means to curtail this persistent noncompliance and to achieve a balanced playing field.\(^{170}\)

A second argument in favor of expanding the application of the public trust enhancement is that the success of self-auditing and reporting programs depends upon cooperation from the regulated entities. Agencies employing flexible regulatory regimes, and the general public, rely upon the honesty of the personnel involved in monitoring and reporting. When those parties fail to meet their compliance responsibilities, or where they act in a willfully dishonest manner, the confidence in alternative regulation methods is undermined.\(^{171}\) The reliance on cooperation and honesty gives rise to the suggestion that increased criminal penalties may be required, particularly when the violations involve

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\(^{168}\) *Id.*

\(^{169}\) See supra Part I notes 72-73.

\(^{170}\) Cf. Murnane, supra note 37; see generally Okamoto, supra note 77.

\(^{171}\) Cf. supra Part I notes 70 and 71 (providing examples of how the high visibility and extreme nature of willful violations precipitates public reaction and media attention).
willful misrepresentation or concealment as in both *Snook* and *Technic Services*.

Maura Okamoto writes that "[j]ail for the . . . defendant is the only real deterrent. It carries a social obloquy that brands the offender for what he is."\(^{172}\) In her experience "one jail sentence was worth 100 consent decrees and . . . fines are meaningless because the defendant in the end is always reimbursed by the proceeds of his wrongdoing or by the company down the line."\(^{173}\) For commentators like Okamoto, "[c]ompliance with environmental regulations . . . will only be successful if matched with a strong deterrent to compel compliance."\(^{174}\)

Unfortunately for individuals that hold to the belief that criminal penalties provide incentive to comply with regulatory requirements, recent history provides reason to be skeptical. The federal government’s efforts to enforce the nation’s environmental rules have ramped up steadily for more than a decade.\(^{175}\) The ramp-up in enforcement, by means of criminal prosecution, has been continuous and has involved amendments to strengthen existing environmental statutes\(^{176}\) and the assignment of sentencing enhancements under §§ 2Q1.1-2Q1.6 and § 2Q2.1 of the U.S.S.G.\(^{177}\) In spite of the increases in prosecutions and sentences, and the availability of incentives under the Audit Policy and other programs, violations continue.\(^{178}\)

At the same time, there has been a dramatic increase in the number of entities self-reporting and remediating violations under

\(^{172}\) Okamoto, *supra* note 77, at 428.

\(^{173}\) *Id.*

\(^{174}\) *Id.*


\(^{176}\) For example, in 1987 Congress amended the Clean Water Act to increase prison sentences from one to three years for violations, and in 1990 amended the Clean Air Act to upgrade penalties for existing violations and to convert penalties for other violations from misdemeanors to felonies. *Id.* at 40.

\(^{177}\) *Id.* at 41.

\(^{178}\) See *supra* notes 72-73.
the Audit Policy.\textsuperscript{179} The increased cooperation and reporting in the late 1990s under the Audit Policy occurred without significant increases in criminal sanctions, which occurred primarily in the late 1980s and early 1990s.\textsuperscript{180} That criminal violations continued during times when significant increases to criminal penalties were being enacted, and major cooperation and self-reporting has occurred under the Audit Policy, calls into question just how strong the link between increased criminal penalties and regulatory compliance really is. The public trust enhancement would increase a sentencing level by only a small amount under the U.S.S.G. even where a sentencing court decides it is applicable.\textsuperscript{181} Given the tenuous nature of the link between increased penalties and improved compliance, and the limited increase in sentencing levels the public trust enhancement would provide, additional criminal sanctions as a deterrent, standing alone, is not a persuasive reason to expand the application of the enhancement.

\textbf{B. Against Expanding the Public Trust Enhancement}

Just as there are arguments that tend to favor the extension of the public trust enhancement beyond the limits of its historical application, a number of arguments suggest that expanding the enhancement would not be wise. These include the belief that the application of the guidelines, particularly those relating to environmental crimes, has been arbitrary and inconsistent.\textsuperscript{182} Arguments against expanding the application of the public trust enhancement also include concerns about the obliteration of the traditional distinction between units of government and private employers,\textsuperscript{183} the potential for the enhancement to create "double

\begin{footnotesize}
\begin{enumerate}
\item See supra note 71.
\item Gaynor & Bartman, supra note 175, at 39-47.
\item See supra note 4.
\item Snook, 366 F.3d at 450.
\end{enumerate}
\end{footnotesize}
counting” or multiple sanctions for the same offense, and extraordinarily high sentences imposed on mid and low-level employees that are in effect “scapegoats” for higher level managers and officers.

The guidelines relating to environmental offenses reside in Part Q of the U.S.S.G. The first category of offenses is broken down into six distinct subcategories while the second part deals primarily with conservation and wildlife offenses. As with other sections of the guidelines, the U.S. Sentencing Commission chose a base offense level that reflects the severity of the least egregious offenses within the category. From these base level offenses, adjustments upward or downward apply based on the individual conduct of offenders and the overall factual circumstances. While the scheme appears at first blush to be an objective formula to achieve the Sentencing Reform Act’s goal of consistency and proportionality of sentences, critics are quick to point to the manner in which built in flexibility undercuts these goals and produces a wide range of sentences for very similar offenses. This inconsistency in sentencing results largely from the upward and downward adjustments available in the guidelines and the flexibility given to sentencing courts in the application notes that follow Part Q.

Commentator Jane Barrett examined the application of the Part Q environmental guidelines in a number of cases and found that the sentences received by individual defendants varied

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185 See Laufer, supra note 66, at 658-68.
187 Id.
188 See Barrett, supra note 182, at 1426.
189 Id. at 1427.
190 See supra note 2.
191 See supra note 1.
192 See Barrett, supra note 182, at 1427.
193 Id. at 1428.
greatly, even for similar offenses, based on which court constructed the defendant's sentence from the guidelines. One point that Barrett's analysis brings to the forefront is that sentencing under the guidelines can be unpredictable and uneven. Some might even consider sentencing to be arbitrary. Making additional adjustments, such as the public trust enhancement, applicable to a greater range of defendants would only exacerbate inconsistency and arbitrary application by sentencing courts.

Barrett's analysis was completed in a time frame when the U.S.S.G. were considered binding on courts. Now that the guidelines are only advisory, undoubtedly some sentencing courts will choose to consult them while others will not. Even among courts that continue to consult the guidelines there will be great variation in the sentences that are cobbled together from the available base offense levels and adjustments. This range of sentencing applications is precisely what many of the critics point to as a failing of the guidelines in general.

The concerns of Professor Barrett and other critics of inconsistent and varied sentences under Part Q, and the guidelines more broadly, are quite reasonable. The underlying concern, however, is with the potential for too much disparity and variation in sentencing due to the very structure of the guidelines and their application notes. The remedy for this disparity and variance is to continue amending the guidelines in order to eliminate some of the sentencing departures. Simply limiting the application of sentencing adjustments on a guideline by guideline basis would do nothing to alleviate generalized sentencing disparity under the

194 Id. at 1429-37.
195 Barrett's article appeared in 1992. The Supreme Court held in January of 2005 that the U.S.S.G. are advisory and not binding. See supra Part I, notes 45-52.
197 See infra note 233.
guidelines. The public trust enhancement itself has been applied to a range of offenses and defendants for at least seventeen years and will continue to apply to a range of offenses whether the public trust enhancement’s application is broadened or not. Thus, concern about inconsistent and varied sentences is not an independent basis to believe that the enhancement should not apply to defendants like Ronald Snook.

A second criticism of extending the public trust enhancement to private individuals working in regulated industries concerns the traditional distinction between public and private entities within the U.S.S.G. The objection centers around the notion that the public trust enhancement, particularly as applied historically, requires that the victim actually entrust the offender with discretion and judgment. The dissent in Snook and the majority in Technic Services both argue strongly that a defendant must be in a position of trust vis-a-vis the public or federal government for that trust to occur. Both also argue that government employment, capacity as an elected or appointed public official, or work on government contracts are the means through which the requisite quasi-fiduciary relationship to the public becomes established.

The majority opinion in Technic Services articulated its concern with extending the public trust enhancement rather succinctly. The opinion stated that “the public expects that people . . . will comply with health and safety regulations for which they are responsible,” but noted that this simple expectation does not create a public trust in every individual involved in a position that may impact upon the public health and safety. Allowing the decision to expand the application of the public trust enhancement to be driven by the fact that the public expects everyone to comply

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198 See supra Part II.
199 Snook, 366 F.3d at 451 (Coffey, J., dissenting).
200 Id. at 448.
201 Id. at 444; see also Technic Servs., 314 F.3d at 1049-50.
202 Id.
203 Id. at 1050.
with health and safety regulations would create "no meaningful screen with which to filter out enhancement-eligible defendants. The abuse-of-trust enhancement would become applicable to nearly any defendant."^{204}

This last point echoes the concerns expressed in the *Snook* dissent that such an expansive application of the public trust enhancement would lead to absurd results, including for example, a situation where every executive certifying a tax return could face a public trust enhancement penalty if that return is later found to be false.^{205} The *Snook* majority tried to steer a course around this problem by limiting the application of the public trust enhancement to crimes impacting public health, but as the dissent points out, there is simply no basis in the U.S.S.G. to make such a distinction.^{206} The lack of such a directive or application note in the U.S.S.G. means that sentencing courts would not be limited to criminal acts implicating public health and could enhance the sentences of any defendant holding a position of authority or supervision.

The fact that the guidelines are now advisory does little to alleviate concern that some sentencing courts may expand the new public trust enhancement adjustment application standard to absurd levels. However, in the recent *Booker* decision, the Supreme Court made clear that unreasonable applications of the U.S.S.G. criteria would be subject to reversal on appeal.^{207} The preservation of review for sentencing under the U.S.S.G. is an important consideration in deciding whether or not to expand the application of sentencing adjustments to cover broader ranges of offenses and defendants. The fact that such review does exist^{208} mutes much of

^{204} *Id.*
^{205} *Snook*, 366 F.3d at 449.
^{206} *Id.*
^{207} See supra Part I and notes 48-55.
^{208} In fact, the application of this review is not speculative. Following the Supreme Court decision in *Booker*, the case was remanded for further proceedings and the District Court imposed the same sentence. The judge carefully treated the guidelines as advisory and explained at length why the guideline sentence was consistent with the statutory sentencing factors and the
the concern about broadening the application of particular sentencing adjustments because the appellate courts, including the Supreme Court, can reign in sentencing through their subsequent opinions.209

For many years, critics have also argued that the sentencing adjustments in the U.S.S.G. represent double counting or multiple punishment for a single offense.210 The primary concern occurs where the sentencing process under the U.S.S.G. treats an offense both as an aggravating feature of one crime and also as an offense in its own right.211 Sentencing courts have frequently been asked to find the application of the public trust enhancement an impermissible double counting when applied in conjunction with other sentencing adjustments.212 Typically, the courts reject this argument.213 Arguments also get raised from time to time that applying the gravity of the offenses. The defendant again appealed, but, in an unpublished opinion, the Court of Appeals for the Seventh Circuit examined the District Court’s analysis and stated “[a] guidelines sentence is presumptively reasonable . . . and there is nothing here to rebut the presumption.” United States v. Booker, No. 05-2318, 2005 U.S. App. LEXIS 21124 (7th Cir. Sept. 28, 2005).

209 Id. The decision by the Seventh Circuit indicates both that courts will continue to consult the guidelines when constructing sentences and that appeals courts will review lower courts’ sentencing decisions, based on individual circumstances, for their reasonableness. Measured in this way, one might question whether there is any harm in expanding the scope and application of the public trust enhancement. After all, the sentencing decisions will be reviewed by higher courts, and the presumption of reasonableness granted to a sentence based on the guidelines can be rebutted by the defendant.

210 Double counting or multiple punishment connotes punishing the defendant more than one time for a single offense, or in arriving at a total sentence, using multiple sentencing factors at least some of which are redundant to other sentencing factors being considered. Cf. Ross, supra note 184, at 267-68.

211 Id. at 268.


213 Id.
public trust enhancement to a base offense level constitutes double counting for the same offense.\footnote{Id.} This criticism misses the mark, however, because the public trust enhancement section proscribes application of the enhancement when the base offense level or specific offense characteristic contemplates or involves an abuse of trust.\footnote{See supra note 4.} There is a tremendous amount of case law defining the base offense levels that already include an abuse of trust component.\footnote{See generally DeLong, supra note 87 (summarizing the case law applying the public trust enhancement).} Thus, the notion that simply expanding the application of the public trust enhancement will exacerbate the double counting problem ignores the reality that the guidelines already contain practical limits on the type of base offense levels to which the enhancement may be added.

An additional concern with expanding the application of the public trust enhancement to the employees and agents of private regulated entities is that the penalties will fall disproportionately on lower level employees who can in effect become “scapegoats” for upper management.\footnote{See Laufer, supra note 68, at 658.} William Laufer argues that upper management often displays indifference or ignorance toward employee deviance when that deviance achieves beneficial results for the corporation.\footnote{Id.} That indifference, however, usually changes to condemnation when regulators and prosecutors come calling.\footnote{Id. at 657.} Once the authorities become alerted to the wrongdoing, upper management’s new attitude and behavior can be described as “reverse whistle blowing.”\footnote{Id.}

Instances of reverse whistle blowing raise questions about unfairness to lower level employees. That unfairness is greatest when top management is complicit in employee deviance, or where, in spite of compliance programs, middle management “tacitly
encourages employees" to engage in wrongful conduct beneficial to the enterprise.221

CONCLUSION

Increasing criminal penalties raise major concerns, including the question of whether the deterrence justification, offered as a rationale for expanding the application of the public trust enhancement, really exists.222 In a universe in which the corporate entity and its most senior management can avoid criminal liability by scapegoating lower level managers, there is very little actual incentive effect upon the senior corporate decision-makers that can come from extending the application of sentencing enhancements such as the public trust enhancement.

While managers at the most senior levels can, and often do, avoid criminal liability, front line supervisors and employees will face strengthened criminal enforcement should the public trust enhancement extend to the employees and agents of private regulated entities.223 There is no doubt that many of these lower level supervisors and agents responsible for compliance and reporting know that their actions are criminal, yet they choose to commit the violations. It would be appropriate to wonder whether concern about disproportionate sentences falling on low level employees is overstated. After all, the bottom line is that they are involved in criminal conduct and there is an element of choice involved. Such a position, however, does not reflect the practical realities of the workplace.224

221 Senior management may be involved because either they knew offenses were taking place or took steps to avoid obtaining knowledge of offenses. Id. at 659.
222 See supra Part I notes 36-38, 41-44, 77, and accompanying text (noting that some think continued noncompliance can be curtailed with stronger criminal sanctions).
223 See supra Part II, notes 83-97, 100-06 (detailing the operational specifics of the public trust enhancement as a sentencing adjustment).
224 See, e.g., Laufer, supra note 68, at 658 (discussing how upper level management and officers often tacitly encourage employees to bend rules).
For the increased penalties to have a deterrent effect on even the lower level managers and supervisors, these employees must have knowledge of the increased sanctions, and the sanctions themselves must be sufficiently severe to overcome the pressures and incentives present in many workplaces. There is very little reason to believe that expanding the application of the public trust enhancement would lead to a dissemination of information to front line compliance and reporting personnel in a manner that could produce significant changes in behavior.

Neither the leveling the playing field argument nor the deterrent effect argument provides a strong independent basis for expanding the application of the public trust enhancement. The public trust enhancement would be, at most, a two level increase in a defendant's sentence, assuming that a sentencing judge even chose to apply the enhancement now that the Supreme Court ruled that the U.S.S.G. are not binding on judges. Even when applied, a two level sentencing increase is unlikely to provide much of a deterrent to continued violations. Without the deterrent effect, there is little hope that the public trust enhancement can contribute meaningfully to leveling the playing field.

The arguments that the U.S.S.G. are applied unevenly or arbitrarily and that the application of another sentencing enhancement would exacerbate the problem of “double counting” are equally unavailing. Whether expansion of the public trust enhancement includes the employees or agents of private regulated entities or not, disparities across the offenses covered by the U.S.S.G., in terms of the penalties and enhancements levied on individual defendants, will continue. The U.S.S.G. have long had the objective of limiting these disparities, but as Professor Barrett and others have pointed out, there was a tremendous amount of flexibility built into the guidelines even when they were binding, and the result is often a

225 See supra Part IV, notes 167-81 and accompanying text.
226 See supra note 4 (detailing the specific application of the enhancement).
227 See supra Part I and notes 47-55 (discussing the Supreme Court's decision in the consolidated cases of United States v. Booker and United States v. Fanfan).
228 See supra Part IV, notes 167, 181 and accompanying text.
great deal of disparity in sentencing.\textsuperscript{229} Now that they are advisory, there is no reason to believe that sentences will suddenly depart dramatically from those assigned under the guidelines, or that sentencing consistency will abruptly materialize.\textsuperscript{230}

Perhaps the strongest argument for or against extending the public trust enhancement beyond its traditional application, is the concern about scapegoating.\textsuperscript{231} The defendants most likely to face enhanced sentences under the public trust enhancement, applied to the employees and agents of private regulated entities, will be the lower level supervisors and managers directly charged with the operation of compliance programs.\textsuperscript{232} These individuals bear the primary responsibility for monitoring and reporting to regulatory authorities. Given the previously mentioned lack of deterrent effect on corporations and, in particular, high-level decision makers, it seems unreasonable to subject defendants like Ronald Snook to more significant jail time than his supervisors.

For the foregoing reasons, federal courts should not follow the reasoning the Seventh Circuit adopted in \textit{Snook}. Unfortunately, there is no case currently on appeal that would allow the Supreme Court the opportunity to determine the proper scope of the public trust enhancement. That means that the Circuit split will continue, and in light of the Supreme Court's decision making the U.S.S.G. advisory, leaves defendants unable to determine whether their conduct could subject them to a sentencing enhancement that until recently was not applicable to them. Judges are now free to either apply the public trust enhancement or ignore it, leaving defendants at the mercy of enterprising prosecutors and judges.

Resolving the current Circuit split requires either that a defendant, sentenced under the public trust enhancement's

\textsuperscript{229} See supra Part IV.

\textsuperscript{230} See supra notes 208-09 (discussing how, in the very case striking down mandatory sentencing guidelines, lower level federal courts consulted the new advisory guidelines and, on remand, applied the same sentence to the defendant that he received when the guidelines were binding).

\textsuperscript{231} See supra notes 217-21.

\textsuperscript{232} See id.
broadened application, appeal the decision up to the Supreme Court, or that the U.S. Sentencing Commission amend the U.S.S.G. at § 3B1.3 to make clear that the Commission does not view the employees or agents of a private regulated entity to occupy a position of public trust. \(^{233}\) Given the uncertainty and time involved in a case making it on appeal to the Supreme Court, the preferable method of resolving the circuit split would be a clarifying amendment by the U.S. Sentencing Commission to either endorse the Seventh Circuit construction or make clear that the public trust enhancement does not apply to the employees or agents of a private regulated entity simply because those employees or agents are in a position to impact public health.

For the reasons outlined earlier, including the concern about scapegoating of lower level employees without an accompanying deterrent effect that will enhance compliance, the U.S. Sentencing Commission should adopt an amendment making it clear that the public trust enhancement was not intended to increase the sentences of employees or agents of private regulated entities and should not be used to do so.

\(^{233}\) See supra note 35, at 2 (noting that the U.S. Sentencing Commission “has the authority to submit guideline amendments each year to Congress between the beginning of a regular congressional session and May 1”). Further, “[s]uch amendments automatically take effect 180 days after submission unless a law is enacted to the contrary.” Id.