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United States Sentencing Commission
One Columbus Circle, N.E.
Suite 2-500, South Lobby
Washington, DC 20002

Dear Commissioners:

The Association of Oil Pipelines (AOPL) has previously submitted comments, so my testimony will be brief in the hope that I can answer questions that you may have about this matter.

My name is Steven P. Solow and I am appearing on behalf of AOPL. I am a partner in the law firm of Hunton & Williams LLP, practicing in the Business Crimes Group and the Resources, Regulatory and Environmental Practice Group. Prior to joining Hunton & Williams I was a Visiting Professor at the University of Maryland School of Law. Before that I served as Chief of the Environmental Crimes Section at the Department of Justice from 1997 until 2000. Before becoming Chief of ECS I served as Assistant Chief starting in 1994. Before that I was a Professor of Law at Pace University School of Law and before that a prosecutor with the New York State Organized Crime Task Force. During my tenure at ECS I was involved in the review and development of cases involving violations of the nation's hazardous material transportation laws and as Chief I worked closely with the Department of Transportation Inspector General's Office Criminal Investigative Program.

The AOPL is deeply concerned about issues pertaining to the safety and security of the nation's hazardous material transportation infrastructure. As detailed in the written comments and the attachment provided, the pipeline industry has expended tremendous resources since 9/11 to improve the security of the pipeline infrastructure. Moreover, the industry has enhanced its environmental performance during the same time period. Per ton of materials moved per mile, pipelines are the safest mode of oil transportation in the nation. The annual number of spills and volume of oil spilled has decreased significantly over the years, even during a time when the amount of oil transported has increased dramatically.

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The industry is keenly aware that its facilities, which include over 160,000 miles of interstate transmission pipelines, are potential targets of terrorists, vandals and drug traffickers. For example, those seeking to produce the dangerous synthetic drug methamphetamine have attempted to siphon from anhydrous ammonia pipelines. Vandals have shot at the Alaska pipeline, and like all of the nation's critical private infrastructure, the looming threat of terrorist actions is a source of constant worry and attention.

Along with individual efforts, the pipeline industry has joined in significant partnerships with a host of federal agencies, to look for ways to improve security through various means, many of which are described in the attachment to my written comments. The industry is committed to supporting federal oversight of pipeline operations in cooperation with states and local communities, and to promoting cooperation among communities, public officials, employees and companies by sharing information on pipelines and pipeline safety.

One example is a partnership with the National Association of State Fire Marshals, wherein the State Fire Marshals will help train and mobilize firefighters to help prevent and, if necessary, safely respond to pipeline incidents, and will help promote informed public awareness of pipelines. In addition, the industry has undertaken a voluntary environmental performance initiative called the Pipeline Performance Tracking System looking at the causes and ramifications of spills down to five gallons - and any spill into water - in order to better understand and improve industry performance.

The pipeline industry has also worked cooperatively with the Office of Pipeline Safety and the Department of Homeland Security to modify pipeline management programs to address security issues, particularly those resulting from terrorist acts. Operators have reevaluated their programs based on new industry guidelines published after September 11, 2001. Operators have also begun using new methods, again published by the petroleum industry post-9/11, to understand and specifically address security vulnerabilities.

As reflected in greater detail in the comments submitted to the Commission, the AOPL does not object to the creation of new specific offense characteristics in Chapter 2Q1.2 that would increase the base offense level for anyone who violates the law regarding the transportation of hazardous materials when done with the purpose or intent to commit acts of terrorism or for the purpose of committing other environmental offenses (such as the illegal disposal of hazardous wastes by injection into a hazardous materials pipeline). As the submitted comment notes, all of these purposes can be achieved in a straightforward and relatively simply manner. In fact, it is noted that these concerns are addressed by existing specific offense characteristics and provisions for guided upward departures in the Guidelines.

For example, the existing Guidelines already provide significant enhancements if the illegal transportation of hazardous materials results in either a single or multiple discharge, or results in significant environmental contamination, evacuation or clean up costs, or results in the substantial likelihood of death or serious bodily injury. However, the Department has suggested that some change is needed because the enhancement for transportation without a permit or in violation of a permit, § 2Q1.2(b)(4), applies to environmental crimes but does not apply to illegal transportation of hazardous materials.

It should first be noted that § 2Q1.2(b)(4) does not apply in the case of all environmental crimes. For example, RCRA, the hazardous waste law, requires that a generator (meaning someone who creates a hazardous waste) only use a transporter who keeps a record (called a manifest) documenting that the hazardous waste was transported to an approved disposal site. There have been RCRA cases where a generator of waste turned hazardous waste over to a transporter who lacked a manifest. Such a violation, if it did not result in a release of hazardous waste to the environment, would be treated in the same fashion as a hazardous material transportation violation that did not result in a release, and no permit enhancement would apply. The risk of hazardous waste transportation is certainly in the same category as the risks posed by illegal hazardous material transportation. Similarly, violators of the rules governing asbestos removal, where no release occurred, would not face any additional enhancements under § 2Q1.2(b)(4).

There may be circumstances where violators of the hazardous material transportation laws, who are not otherwise subject to a specific offense characteristic enhancement under § 2Q1.2, should face greater sanctions. For example, the shipper of hazardous cargo by truck who routinely seeks to evade the requirements to avoid certain highway tunnels, or the shipper who intentionally and routinely fails to adequately describe or quantify shipments of hazardous materials by truck, rail or air, especially where the method used enhances risk to the public. But the guidelines already provide the means to increase the sanctions for such a violator, in § 5K2.14, which provides:

If national security, public health, or safety was significantly endangered, the court may increase the sentence above the guideline range to reflect the nature and circumstances of the offense.

AOPL would urge the Department to seek such an upward departure where the violations warrant such an increase in sanctions. However, before the Commission can develop a specific offense characteristic involving hazardous material transportation where there is no release, there should be a more significant empirical basis than that which exists at this time. The

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problem with the Department's approach is that it uses the rhetoric of attacking terrorism, but then paints with too broad a brush. The Department appears to seek enhancements of criminal sanctions against otherwise legitimate operators, even when no release occurs, if it can demonstrate that there was a failure to provide adequate training or to post all necessary signs. Such characteristics are appropriately reflected in the base level of an offense, which addresses the failure to follow the basic dictates of the substantive law.

AOPL is willing to work with the Department, as it has already worked with numerous federal agencies, and state and local governments, to address the dangers of illegal transportation of hazardous materials. AOPL members live near our pipelines, travel the same roads and fly on the same planes as everyone else. Hundreds of member employees spend most or all of their days focused entirely on issues related to safety and security. We commend any effort by the Department of Justice to severely sanction those who would seek to use our critical infrastructure either for purely criminal purposes, or who place national security at significant risk. But we ask that any effort to address these serious issues be more narrowly tailored to the task and based upon a history of enforcement efforts, so that the Commission can make a decision based on a larger record of enforcement experience.

AOPL is grateful to the Commission for the opportunity to present this testimony. I look forward to answering any questions you may have. Thank you.

Respectfully submitted,



Steven P. Solow

SPS/kmm

cc: Lisa Rich, Esq.

Staff Counsel, United States Sentencing Commission