January 16, 2009

MEMORANDUM

To:	Environmental Crimes Section Attorneys
From:	Ronald J. Tenpas Assistant Attorney General
Re:	Guidance on Restitution, Community Service, and Other Sentencing Measures Imposed in Environmental Crimes Cases

INTRODUCTION

Environmental crimes can result in widespread detrimental effects upon the environment and threaten the health and safety of both individuals and entire communities.[1] Those circumstances cannot be remedied by the traditional criminal sanctions of imprisonment or fines. However, in some instances it may be possible to address these effects through other[2] forms of sentencing, including restitution or community service.

Restitution focuses upon reimbursing defined losses sustained by specifically identifiable victims of particular crimes, while community service often is aimed at circumstances, such as general environmental degradation, in which individual victims cannot be identified. Community service and other forms of sentencing (such as remedial orders and required publication of information on a crime) may provide additional deterrence against criminal behavior, encourage better compliance with environmental laws, and advance important priorities such as pollution prevention, promoting more efficient environmental technologies and improved corporate management practices.

This guidance sets out the policies and practices of the Environmental Crimes Section of the Environment and Natural Resources Division (ECS) with respect to restitution, community service, and other elements of a criminal sanction other than fines and imprisonment. It is intended to guide ECS prosecutors and to assist other federal prosecutors in environmental criminal cases to craft sentences which include these measures when appropriate. This guidance is designed to ensure that these sentencing measures are effective, fairly applied, have a sound legal basis and are consistent with Department and Division policies.

This guidance focuses primarily upon corporations and other organizational defendants, although it also may apply to individual defendants in appropriate circumstances. Regardless of the nature of the offender, in all cases, restitution, community service, and the other elements of sentencing considered and discussed should be applied *in addition to and not in lieu of* the fundamental criminal sanctions of fines and terms of incarceration.

This guidance is broken down into three parts: (1) a discussion of the legal authorities for restitution and community service; (2) guidance on the application of restitution and community service obligations in environmental criminal cases; and (3) a discussion of other possible sentencing provisions.

For further information or guidance in crafting restitution and community service, prosecutors should contact the Environmental Crimes Section at 202-305-0321.

I. LEGAL AUTHORITIES FOR RESTITUTION AND COMMUNITY SERVICE

Because restitution and community service often are significant factors in sentencing in environmental crimes cases, it is important for prosecutors to know and understand the legal bases which authorize and limit their use. Those authorities are found in the Title 18 provisions that apply to federal crimes, generally, and in the Federal Sentencing Guidelines. They are creatures of statute; they are not matters of inherent judicial authority.[3]

A. Restitution

Three provisions in Title 18 specifically provide courts with the authority to impose restitution. Only one of these provisions, however, applies to offenses under the environmental statutes. First, 18 U.S.C. § 3663 provides that courts have discretion to order that a defendant provide restitution to victims of Title 18 crimes and for certain other listed federal offenses (which do not include offenses under environmental statutes). Second, restitution, under certain circumstances for certain listed types of crimes, is mandatory under 18 U.S.C. § 3663A (also not including offenses under environmental statutes). To the extent that a defendant in an environmental criminal case is convicted of a Title 18 offense, the provisions of these two sections may apply.

Restitution, however, is authorized in criminal cases involving violations of environmental statutes by a third provision, 18 U.S.C. § 3563. That section establishes the authority of the courts to set conditions of probation. Sub-section (b)(2) of that provision states that the court has the discretion to order a defendant to "make restitution to a victim of the offense under section 3556 (but not subject to the limitation of section 3663(a) or 3663A(c)(1)(A))." This provision, therefore, makes restitution available for crimes other than those specified in those two sub-sections; however, it must be as a condition of probation and it is discretionary, not mandatory.[4]

Restitution is to be paid to the victim of a crime, and 18 U.S.C. § 3663(a)(2) defines a victim as "a person directly and proximately harmed" as a result of the offense.[5] It may be difficult in some environmental cases to identify victims "directly and proximately harmed" by the violation.[6]

Courts generally have concluded that the government may be defined as a "victim" for purposes of restitution when it has suffered harm, including monetary loss, directly from the offense.[7] For example, federal, state, or local governments may be defined as victims and claim restitution in situations where environmental, public health, emergency response, or regulatory agencies expend resources to respond to contamination resulting from criminal environmental violations.[8] However, courts also have held that the government is not a victim of an offense when it voluntarily incurs costs that result from the violation, such as investigation and prosecution costs.[9]

B. Community Service

The statutory authority for community service as part of a criminal sentence is 18 U.S.C. § 3563(b)(12), which allows the discretionary imposition of "work in community service as directed by the court."[10] However, that provision offers no specific guidance on community service beyond that clause, including, for example, what kinds of activities constitute "community service" or a definition of the term.

The Sentencing Guidelines do provide some guidance on the use of community service for organizations in a non-binding policy statement in U.S.S.G. § 8B1.3.[11] First, community service is to be "reasonably designed to repair the harm caused by the offense." Second, according to the guideline commentary, "[a]n organization can perform community service only by employing its resources or paying its employees or others to do so. * * * However, where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused." Thus, the Commission's focus is on using community service to remedy the harmful effects of the crime of conviction itself, not effects that may be indirectly related to the type of crime committed. While the commentary speaks of the violator's taking a direct hand in the work involved, it also contemplates the defendant's paying others to do the work.

The Commission's limitation of community service to the damage caused by the offense is not supported by the wording of 18 U.S.C. § 3563(b)(12) and it does not take into account the unique characteristics of environmental crimes and those who commit them. On the other hand, the guideline's general direction – using community service to correct harm related to an offense – is sound. It also reflects a valid concern that conditions imposed as community service retain a discernible connection to the crimes actually committed by defendants.

As to those unique characteristics, first, environmental offenses often involve harm

that cannot be directly remedied. For example, the actual pollutants unlawfully emitted into the air cannot be recaptured through community service several years after their dispersion. Similarly, pollutants unlawfully discharged into a river cannot be cleaned up long after the current has swept them downstream. Second, individual victims – those who actually may have inhaled the contaminated air or been in contact with the polluted river – often cannot be identified.

According to 18 U.S.C. § 3563(b), conditions of probation must be "reasonably related" to the factors set forth in 18 U.S.C. § 3553(a)(1), which requires the sentencing court to consider the "nature and circumstances of the offense." *See also* 18 U.S.C. § 3583(d) (similar requirements for conditions of supervised release). The commentary under U.S.S.G. § 8B1.3 underscores this, noting that, in the past, some community service orders have not been related to the purposes of sentencing. For example, according to that commentary, a community service order requiring a defendant to endow a chair at a university or contribute to a local charity would be inconsistent with the guidelines unless it furthered a "preventative or corrective action directly related to the offense" and, therefore, served one the purposes of sentencing set out in 18 U.S.C. § 3553(a). *See also United States v. Missouri Valley Construction Company*, 741 F.2d 1542, 1549 (8th Cir. 1984) (donation to foundation to endow university chair for ethics struck down as violation of the Federal Probation Act).

The U.S.S.G. § 8B1.3 commentary reflects a concern over community service requirements that are "not related to the purposes of sentencing." Its wording suggests, though, that community service of other than the nature described in that guideline could be acceptable if "such community service provided a means for protective or corrective action directly related to the offense and therefore served one of the purposes of sentencing set forth in 18 U.S.C. § 3553." That statutory provision says, "A court in determining the particular sentence to be imposed, shall consider . . . the nature and circumstances of the offense . . . [and] the need for the sentence imposed . . . to promote respect for the law . . . to afford adequate deterrence to criminal conduct . . . [and] to protect the public from further crimes of the defendant . . .." Those thoughts taken together (and with the discretionary authority of a court under 18 U.S.C. § 3563(b)(22) to require a defendant to "satisfy such other conditions as the court may impose") should provide sufficient authority for the types of community service that are consistent with this guidance.

II. POLICY AND GUIDANCE ON RESTITUTION AND COMMUNITY SERVICE FOR SENTENCING IN ENVIRONMENTAL CRIMES CASES

This section provides guidance on restitution and community service as applied to environmental crimes cases. It is based upon both prosecutorial experience and the legal authorities discussed in Part I, above, and it is intended to assure compliance with those authorities and with the policies of the Department.[12]

A. General Sentencing Guidance; Absent Unusual Circumstances, Restitution to Identifiable Victims and Criminal Fines Always Should Be Sought

For purposes of monetary sanctions in an environmental crimes case, the order of priority is restitution, fine, and community service. Prosecutors first should be certain that restitution is paid to any identifiable victim(s) of the offense and then seek the payment of fines commensurate with the severity of the offense in order to maintain an effective deterrent and insure appropriate punishment**.** Community service involving monetary payments should neither replace an appropriate criminal fine nor be accepted in exchange for a reduction of such a fine.

According to 18 U.S.C. § 3572(b), if the defendant is required to pay restitution to the victim(s) of the offense, a court shall impose a fine or penalty "only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution." The federal organizational sentencing guidelines, U.S.S.G. § 8B1.1(c), mirror this precedence of restitution over fine by stating, "If a defendant is ordered to make restitution to an identifiable victim and to pay a fine, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution."[13] Therefore, in crafting a plea agreement, prosecutors first should make sure that full restitution is made to any identifiable victim(s) of the offense. This may include (1) persons who are physically harmed by the environmental violation; (2) persons (including governments or other artificial entities) whose property is damaged by the violation; or (3) the government for emergency response or remedial costs to control or cleanup the environmental contamination.

After restitution, if any, has been resolved, prosecutors then should seek the payment of fines in accordance with Part 8C of the Sentencing Guidelines (if the fine provisions apply to the particular crime) and/or the Alternative Fines Act, 18 U.S.C. § 3571. Only after restitution and the fine have been addressed should the prosecutor consider the possibility of community service.[14]

B. Community Service

Community service imposed as a part of sentencing in an environmental crimes case must take into account both the unique characteristics of environmental crimes and the pertinent statutory and guideline authorities. Therefore, based upon the foregoing legal authorities, it is the policy of the Environment and Natural Resources Division that community service must have a "nexus," that is, a relationship, to both the geographic area of the crime and the environmental medium affected by the crime. Thus, in the air pollution example above, a community service requirement would have to be undertaken in the geographic area where the offense occurred and it would have to deal with improving air quality in that area. Similarly in the water pollution example, community service would have to be directed to improving water quality relating to the water body involved in the crime. Even several years after the crime has been committed the general nature of the harm or risk of harm from the offense conduct still can be identified and projects can be selected to reasonably offset that harm to the affected medium in the same ecosystem or general geographic area impacted by the violation. Thus, although individual victims may not be identifiable, those living in the area affected by the crime are benefited by the service.

Furthermore, because the offender itself may not be equipped to implement the

community service, the offender may provide the funds for another party with expertise specifically in the necessary remedial work to carry out valuable service that has the required "nexus" to the offense of conviction. That is consistent with the U.S.S.G. § 8B1.3 commentary that one option for an organization's performing community service is by "paying . . . others to do so."

In sum, the practice of environmental crimes prosecutors allowing defendants to pay for remedial work that has a geographical and medium nexus to the crime at issue is consistent with the purpose of 18 U.S.C. § 3563(b)(12). That provision (alone or in conjunction 18 U.S.C. § 3563(b)(22)) does not appear to preclude a somewhat broader interpretation than the Sentencing Commission's focus only upon the harm caused by the crime of conviction.

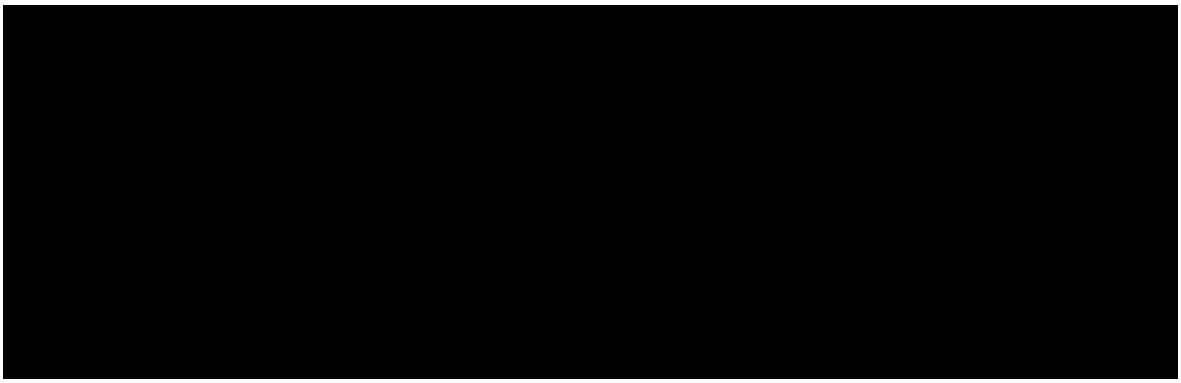
Community service as a sentencing option may or may not be appropriate in a given case. The general sentencing provision, 18 U.S.C. § 3553(a)(1), requires the court to consider the "history and characteristics of the defendant" in establishing the conditions of probation. Those are among the factors that prosecutors should consider in deciding whether community service is appropriate. If the defendant's enforcement history shows chronic violations, a serious analysis should be undertaken to determine whether the defendant can be trusted to comply with the terms of a community service probationary or supervised release condition.

Decisions regarding appropriate community service as a condition of probation or supervised release should be guided by the statutory limitations and policy considerations addressed below.

1. The Miscellaneous Receipts Act

The Miscellaneous Receipts Act (MRA)[15] requires that any money received "for the Government" from any source be deposited into the United States Treasury. Because criminal fines are miscellaneous receipts, they must be deposited into a special account of the Treasury known as the Crime Victims Fund for use in funding state-run crime victims compensation programs, among other things.[16]

Consistent with earlier guidance, the inclusion of a term of community service in a plea agreement must satisfy the constraints of the MRA.[17] If used appropriately, though, community service is a sentencing option that does not constitute a diversion of funds that should be deposited in the Treasury.



2. Separation of Community Service from a Fine

As noted above, community service should be considered apart from the issue of a criminal fine and should not be offered in exchange for a reduction in the appropriate fine. Accordingly, the provision in a plea agreement for community service should avoid any suggestion of a trade-off between the fine and the agreement to perform community service. From the beginning of a negotiation a prosecutor should consider a fine and community service independently of one another, not as one number later to be sub-divided between the two.

3. Specific Guidance for Sentencing That Includes Community Service

The following guidance addresses issues that often may arise in the context of sentencing involving community service.

Except Under Extraordinary Circumstances, Community Service Should Amount To No More Than 25 Percent of the Total Value of Any Sanction Package [18]

Community service can yield valuable results. However, for reasons including those discussed below, except in limited circumstances[19] monetary value of a community service requirement should not exceed 25 percent of the total dollar value of the entire criminal sanction package.[20]

1. In the commentary to the policy statement in U.S.S.G. § 8B1.3, the Sentencing Commission expressed its view that community service is less desirable than a fine. Community service constituting an inordinately large percentage of the total package may convey a contrary message, that is, that community service is being treated as *more* desirable than a fine.

2. Congress has made the decision that most federal fines shall go to a fund to benefit the victims of a wide variety of crimes, not to the general fund.[21] Thus, some of the money collected as fines in environmental crimes cases should come back through the Crime Victims Fund to the affected community by a different channel. Community service, of course, also is Congressionally authorized in 18 U.S.C. § 3563(b)(12). Judicious use of the latter authority should avoid any conflict between it and the congressional mandate in 42 U.S.C. § 10601.

3. Community service can send a mixed message that must be borne in mind. Specifically, it tends to blur the line between criminal and non-criminal behavior, softening the stigma that attaches to egregious anti-social conduct. The traditional criminal penalties of fines and imprisonment make it clear to the public – and to the offender – that the individual or organization has committed a serious violation of the law to which attaches a moral opprobrium. Other types of sanctions, though, can

make the behavior seem less than criminal to both the public and the offender. They can raise the issue of why a violator should be criminally prosecuted at all – and perhaps in a larger sense play into arguments that environmental crimes really are not crimes at all – if the result is not readily distinguishable from what could result from a civil or administrative enforcement action.

4. Large community service payments combined with comparatively small fines can give the appearance that a wealthy defendant can buy its way out of the criminality and the attendant social stigma of a fine.[22] The total sentencing package should leave no question but that the behavior was criminal.

5. Disproportionately large community service payments in comparison to fines can create inappropriate appearances. To some it may seem that the criminal process is being used as a screen for the prosecutor's efforts to provide funding that has not been authorized by Congress, thereby usurping the role of Congress.

Community Service Must Not Be Inconsistent With the Law

Depending upon the activity contemplated by the community service, it could relate to a number of statutes, regulations, and permits at federal, state, and local levels. It is essential that all such requirements be reviewed in advance of any agreement and that there be no inconsistency between those requirements and the community service. The prosecutor may have to coordinate with state and local officials in order to avoid legal conflicts.

Nexus Required Between Community Service and Violation

There must be a clear nexus,[23] discussed above, between any community service imposed and the criminal violation. Regarding the harm caused by the offense and the remedy proposed by the community service, both a geographical and an environmental medium nexus must be present.

In other words, if the effect of the violation is upon air or water quality or wildlife, for example, the community service should be aimed at that specific medium.[24] Geographic nexus, on the other hand, may present a somewhat more complex situation.

When the effect of the violation is limited to one site and it is feasible to tailor community service to that site, that is where the effort should be focused. On the other hand, when the effect is general, such as a crime involving an air or water pollutant dispersed into a general area or the depletion of a fish species in a large water body, the general nature of the harm or risk of harm still can be identified and projects can be selected to reasonably offset that harm in the same ecosystem or general geographic area impacted by the violation. This approach is consistent with the purposes of U.S.S.G. § 8B1.3.

Community Service Should Not Augment Resources for an Activity Otherwise Required of a Federal Agency

Prosecutors should make sure that community service does not impinge on the appropriations process by funding a federal program or performing an agency function. When community service is required as a part of sentencing, it cannot be of such a nature that it satisfies an obligation imposed by statute upon a federal agency, provides additional resources for the performance of an activity for which Congress specifically has appropriated funds, or provides additional resources for activities by federal employees.[25]

Appropriate Regulatory and Technical Assistance Should Be Obtained During Development of a Community Service Requirement

Community service may require the defendant to perform or fund cleanups and/or other actions that are highly technical and take several years to accomplish. In those instances, at the time of negotiating a plea and at sentencing prosecutors should take steps up front to help insure effective compliance and enforcement of community service.

First, before agreeing on a community service project, the prosecutor should obtain technical or regulatory assistance from an agency with the necessary expertise.[26] Involving the agency can compensate for any lack of expertise at the Probation Office, the court, or the prosecutor's office. Early agency assistance can insure that the community service will be feasible and practical and also may help persuade the court to impose the community service. When agency experts will be needed to perform an oversight role, arrangements must be made in advance to insure that the agency is committed to the task and will devote any necessary personnel and resources.

Second, as noted earlier, 18 U.S.C. § 3553(a)(1) requires consideration of the "history and characteristics of the defendant" in establishing the conditions of probation. Those are factors on which regulatory personnel may be able to shed light. Regulatory personnel should know the defendant's enforcement history. If it is one of chronic violations, then community service may be inappropriate.

Consultations between prosecutors and regulators also should address the relationship between community service and agency programs in order to avoid either duplication of effort or conflicting activities and to assure that the community service is not improperly funding what is a federally budgeted program.

Oversight Provisions Should be Included

Although the government cannot retain any control over funds for a community service project, there should be clear monitoring and enforcement provisions to assure that it is properly carried out. A mechanism should be established to insure that any party receiving the funds spends them in a manner consistent with intent of the community service requirement. Given the complexities that may attend an environmental case, the Probation Office may not be well-equipped to evaluate compliance with the community service aspect of a sentence.

There are a number of methods of providing the necessary oversight. One is to have the organization charged with implementing the environmental project provide an accounting, perhaps on an annual or quarterly basis, of how it has spent the funds. Reports should be provided to the Probation Office, the investigating agency, and the prosecutor's office. While such self-reporting does have some inherent weaknesses, it is at least a check on the spending of the funds. Moreover, any false statements in reports could be considered violations under 18 U.S.C. § 1001. If the organization has an audit done of its books and records, that too should be provided.

For larger community service requirements involving environmental projects, the employment of an outside auditor or consultant to insure the implementation of the sentence may be appropriate. For example, if the project involves the commitment of over one million dollars, a relatively small proportion of those funds could be devoted to hiring an outside firm to ascertain how those funds were spent and report to the Probation Office, the investigating agency, and the prosecutor's office.

Finally, although reports are useful in monitoring any community service requirement, they have their limitations. Therefore, among the conditions of probation should be provisions allowing right of entry, including unannounced entry, onto the site of the community service project by whoever is monitoring it for purposes of inspecting physical conditions, taking samples as necessary, interviewing employees, and reviewing relevant documents.

Any Trust Fund Involved with Community Service Must be Managed by a Non-Federal Entity Chosen Without Favoritism

As with any entity that may be involved in carrying out community service, if the vehicle for that service is a trust fund, no federal agency personnel should control or manage that trust fund.[27] Trust funds should be managed by neutral third parties, such as local government officials or financial institutions, or the money involved may be deposited in an escrow account and distributed at regular intervals until the community service is completed. Federal officials, however, may provide technical oversight to insure that any projects performed are implemented in accordance with the community service requirement of the plea agreement and may report any non-compliance to the Probation Office, the court, and the prosecutors.

Additionally, the choice during a plea negotiation of an entity to manage a trust fund established for community service must reflect neither any favoritism nor any appearance of favoritism on the part of the government in that selection process.[28]

The Terms of a Community Service Should Be Evaluated to Insure That No Unintended Benefits Accrue to the Defendant

The defendant should not receive any unintended or inappropriate advantages from the community service. Thus, the defendant should not receive credit for capital improvements or other changes already planned or already required to comply with civil consent decrees, permits, or regulations, obtain tax relief,[29] or hold out

activities performed under a sentence in order to gain favorable publicity. Allowing the defendant to reap these types of collateral benefits from sentencing requirements undermines the seriousness of the defendant's criminal environmental violations and the purposes of criminal sentencing. Therefore, if a case is resolved by a plea, prosecutors should require specific language in the plea agreement prohibiting the defendant from obtaining any tax benefits or seeking to gain any advantageous publicity from its environmental projects or payments.[30]

Funds Directed to a Third Party Shall Not Be Used for Political or Litigation Activities

When funds are directed to a third party to carry out a community service (or any other) condition of probation, there should be a clear requirement that no part of those funds shall be used for either political or litigation activities. This limitation does not apply to community service directed at activities that support government enforcement efforts.

Congressionally Chartered Entities that are Statutorily Authorized to Accept Donations

In Appendix 1 at the end of this document is a list of Congressionally chartered foundations, funds, organizations, and/or corporations that are statutorily authorized to accept donations. In environmental crimes cases entities from this list often have been designated to receive funds and carry out community service. However, they are not the only organizations that can be designated and funded for community service purposes. When negotiating on an entity to carry out community service, a prosecutor should be mindful of the criteria already discussed in this memorandum while also avoiding any general appearance of impropriety (*e.g.*, a personal affiliation or interest in the entity).

III. OTHER POSSIBLE FORMS OF SENTENCING IN ENVIRONMENTAL CRIMES CASES

Discussed below are several other forms of sentencing that have been applied in environmental crimes cases. Some of them may appear very similar to community service, but there are distinctions.[31] The major distinction is that actions such as audits, compliance plans, employee training, and pollution prevention all operate for the benefit of the violator in its operations, improving the likelihood of future compliance and perhaps making a corporation more efficient with respect to productivity. They may yield positive results; however, in contrast to outwardly directed community service, members of the public are only indirect beneficiaries. Trust funds also are distinct from community service, but in a different manner. Community service is limited by the length of the probation. *See* 18 U.S.C. § 3561 (c). A trust fund, on the other hand, although it initially may be established as a condition of probation, can continue to yield good results far into the future and beyond the limited life of probation.[32]

Environmental Audits, Comprehensive Compliance

Programs, and Employee Training

In order to detect and prevent any future violations and improve environmental and regulatory compliance, defendants in some cases have been required to perform environmental audits of their facilities, to design and implement comprehensive environmental compliance programs, or to conduct employee training.[33] (Prosecutors should be certain that the terms of an agreement do not allow a defendant thereafter to claim any privilege with respect to the audit.) In some plea agreements defendants have extended such requirements to facilities owned by the offender beyond the one directly involved in the violation at issue in a given case.[34]

Pollution Prevention

Some defendants have been required to undertake pollution prevention projects, which have two primary benefits: (1) they can result in the defendants' taking steps within their own operations that go beyond what environmental laws, regulations, and permits otherwise may require; and (2) they encourage defendants to find new and more efficient ways to operate while generating less waste and pollution. Under the terms of a plea agreement such requirements may extend beyond just the facility involved in a case to other facilities operated by the defendant.

Trust Funds

The Sentencing Commission in U.S.S.G. § 8B1.2(b) explicitly allows a court to require the defendant organization to create a trust fund to address future or expected harm. It is a tool that can be especially apt when the damage caused by environmental violations is widespread, long-lived, and persistent, and will continue to be a problem long after conventional cleanup activities have ceased and well beyond the authorized period of probation. Therefore, some plea agreements have required defendants to make payments to environmental trust funds that will operate into the future to monitor, restore, and preserve the environment and natural resources impacted by the violations. Any long-term trust fund should be for activities that have a medium and geographical nexus just as with community service work that is directly funded or carried out in the nearer term.

Public Admissions and Speeches

Defendants have been required to make public admissions of their environmental violations and sentencings in the media and to make speeches to trade groups about the potential sanctions imposed on those who commit environmental crimes.[35] Either can serve as an additional penalty for the violator and an effective deterrent to potential violators.

Some prosecutors also favor the media publication of apologies, approved by the government, by defendants in environmental crimes cases. For those interested in that option, ECS can furnish examples of such apologies. Not all prosecutors believe that apologies accomplish any more than do public admissions alone and that they may even soften the impact of a conviction.

APPENDIX 1

Congressionally chartered foundations, funds, organizations and/ or corporations that are statutorily authorized to accept donations:

FEDERAL ENTITY	TITLE	CHAPTER
National Park Foundation	16	1
National Conservation Recreational Areas	16	1
Boston Harbor Islands National Recreation Area	16	1
Santa Monica Mountains National Recreation Area	16	1
Land and Water Conservation Fund	16	1
National Trust for Historic Preservation in the U.S.	16	1A
National Forest Foundation	16	3
Junior Duck Stamp Conservation and Design Program	16	7
National Wilderness Preservation System	16	23
Marine Sanctuaries Program	16	32

Forest and Rangeland Renewable Resources Planning Research Programs	16	36
National Fish and Wildlife Foundation	16	57
Wildlife Partnership Program	16	57A
Multinational Species Conservation Fund	16	62
African Elephant Conservation	16	62
Asian Elephant Conservation	16	62A
Rhinoceros and Tiger Conservation	16	73
Neotropical Migratory Bird Conservation	16	80
Great Ape Conservation	16	82
Marine Turtle Conservation	16	85
Take Pride in America Program	16	66
Exotic Bird Conservation Fund	16	69
National Natural Resources Conservation Foundation	16	78
Coral Reef Conservation Fund	16	83
National Environmental Education and Training Foundation	20	65
Udall Scholarship and Excellence in National Environmental Policy Foundation	20	66
Abandoned Mine Reclamation Fund	30	25
National Sea Grant College Program	33	22

Future Farmers of America Program	36	709
National Academy of Sciences	36	1503
National Tropical Botanical Garden	36	1535
Society of American Florists and Ornamental Horticulturalists	36	2001

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[1] This document is the work product of the Environment and Natural Resources Division of the United States Department of Justice. It provides internal guidance only for prosecutors in that Division. It does not create any rights, substantive or procedural, that are enforceable at law by any party. No limitations are hereby placed on otherwise lawful prerogatives of the Department of Justice.

[2] This guidance does not address the most common criminal sanctions of fines and imprisonment.

[3] *See Affronti v. United States*, 350 U.S. 79, 80 (1955) (courts have no inherent authority to impose probation); *United States v. Casamento*, 887 F.2d 1141, 1177 (2d Cir. 1990) (courts have no inherent authority to impose restitution).

[4] Under 18 U.S.C. § 3563(b)(2), restitution can be imposed only as a condition of probation or supervised release. (The discretionary conditions in 18 U.S.C. § 3563(b) can be applied to supervised release following incarceration pursuant to 18 U.S.C. § 3583(d).) Since this is the only authority for imposition of restitution for environmental crimes, in the case of an individual defendant, restitution is due immediately only if the defendant has been put on probation with no incarceration. Otherwise, it is not payable until he or she is put on supervised release following incarceration. An unfortunate and perverse situation can arise, though, in a case where incarceration is imposed upon an individual defendant for an environmental crime, but restitution cannot be required until that defendant emerges from prison. That is precisely what occurred in a knowing endangerment case, *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001) (as amended). In *Elias* the defendant was sentenced to one of the longest prison terms to date in an environmental case, while a victim of the offense was left with permanent brain damage. It will be years before the victim may collect any restitution and, if the defendant should die in prison, no restitution ever will be paid.

Note that 18 U.S.C. § 3664(f)(1)(A) requires that an order of restitution be for the "full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant."

[5] *See United States v. Casamento*, 887 F.2d 1141,1177-78 (2d Cir. 1989) (order requiring defendants guilty of narcotics conspiracy to pay restitution to a fund for treatment of persons injured by addiction to narcotics struck down because the district court "identified no individual victims who suffered injury attributable to the appellant's crimes").

[6] Both 18 U.S.C. § 3663(a)(1)(A) and 18 U.S.C. § 3663A(a)(3) state that a court may order, "if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense". Additionally, 18 U.S.C. § 3663(a)(3) provides that the court may order restitution in "any criminal case to the extent agreed to by the parties in a plea agreement." That language means that restitution can extend to the harm caused by the defendant's entire course of criminal conduct, not just to the harm caused by the specific count(s) to which he has pled guilty. *See, e.g.*, *United States v. Peterson*, 268 F.3d 533, 535 (7th Cir. 2001); *United States v. Thompson*, 39 F.3d 1103, 1105 (10th Cir. 1994); *United States v. Soderling*, 970 F.2d 529, 532-534 (9th Cir. 1993); *United States v. Arnold*, 947 F.2d 1236, 1237-38 (5th Cir. 1991); *United States v. Domincio*, 765 F. Supp. 1259, 1260 (E.D. Va. 1991). Any such restitution beyond the count(s) of conviction, though, must be specifically agreed to by the parties. *See, e.g., United States v. Blake*, 81 F.3d 498, 507 (4th Cir. 1996); *United States v. Broughton-Jones*, 71 F.3d 1143, 1147-48 (4th Cir. 1995); *United States v. Tunning*, 69 F.3d 107, 115-16 (6th Cir. 1995); *United States v. Silkowski*, 32 F.3d 682, 688-89 (2d Cir. 1994). The language in 18 U.S.C. §§ 3663(a) and 3663A (a) does not mean that restitution can be extended to persons who are not victims of the defendant's criminal conduct. For example, LMN Company illegally disposes of hazardous wastes on four different properties, and all four property owners incur the costs of cleaning up the disposals. LMN pleads guilty to two of those disposals, but not to the other two. If agreed to by the parties, the plea agreement may require LMN to pay restitution to all four of the property owner victims of its violations. However, the agreement could not require LMN to make a payment to an environmental conservation foundation *as restitution*, since the foundation was not a victim.

[7] *See United States v. Gibbens*, 25 F.3d 28, 32-33 (1st Cir. 1994) ("[I]t is now well settled that a government entity (local, state, or federal) may be a "victim" for purposes of . . . [18 U.S.C. §§ 3663-3664] (and may be awarded restitution) when it has passively suffered harm resulting directly from the defendant's criminal conduct, as from fraud or embezzlement."); *see also United States v. Martin*, 128 F.3d 1188, 1190-92 (7th Cir. 1997) (collecting cases); *Ratliff v. United States*, 999 F.2d 1023, 1027 (6th Cir. 1993) (collecting cases); *United States v. Ruffen*, 780 F.2d 1493, 1496 (9th Cir. 1986).

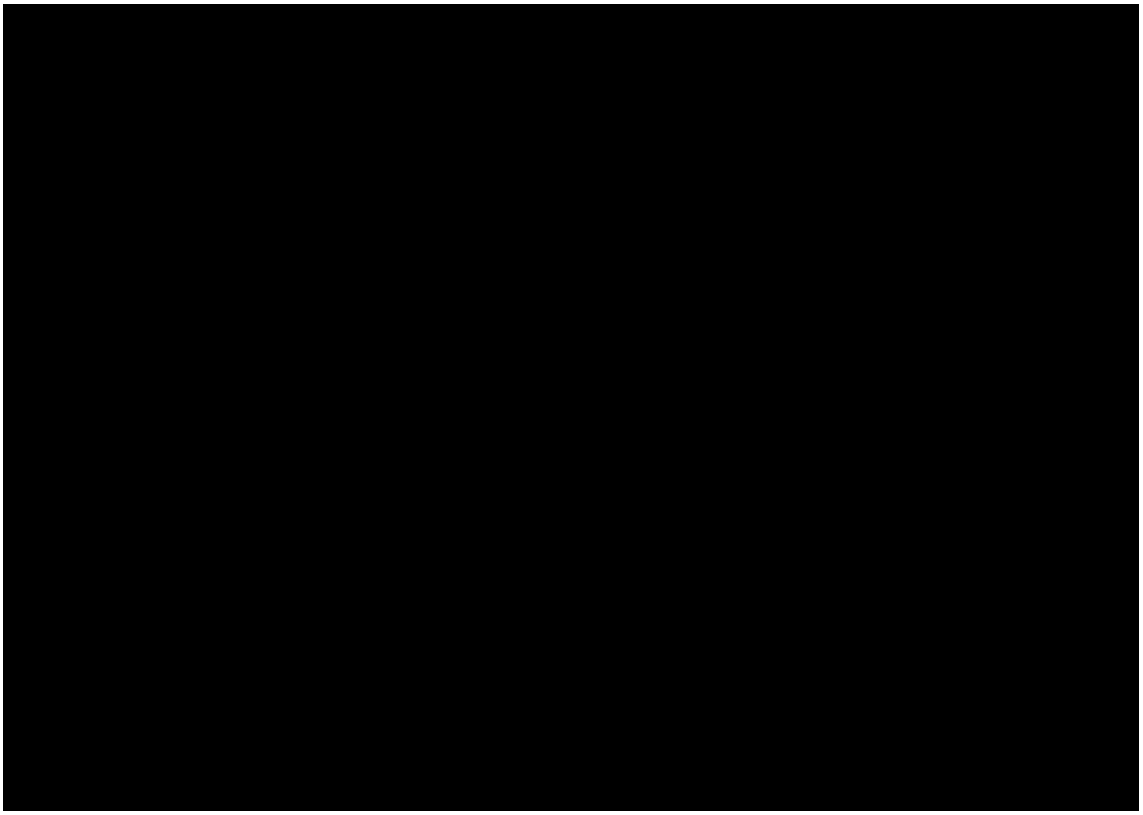
The relevant Title 18 provisions do not limit the concept of victim for purposes of restitution to only American governmental or other entities. At this writing on appeal in the Second Circuit is a case from the Southern District of New York involving lobsters poached from South African waters. *United States v. Bengis* (2d Cir., No. 07-4895-cr). While matters of ownership of the lobsters (and, therefore, whether South

Africa *was* a victim in this instance) are at issue in the case, notably absent is any challenge to the notion that, as a matter of law, South Africa *can be* a victim for purposes of federal restitution laws.

[8] *See United States v. West Indies Transport*, 127 F.3d 299, 315 (3d Cir. 1998). In this case, the Third Circuit ordered the defendants to pay restitution based on the Coast Guard's estimates of costs for cleanup of environmental damage caused by the defendants' criminal violations of the CWA. The court noted that a court order of restitution under 18 U.S.C. § 3663(a)(1)(A) is only authorized for violations of Titles 18 and 49, but upheld the district court's order, because the CWA violations were combined with Title 18 violations. 127 F.2d at 315. As discussed above, though, under 18 U.S.C. § 3563(b)(2), restitution ordered as a discretionary condition of probation is not limited to Title 18 offenses. *See United States v. Phillips*, 367 F.3d 846, 863 (9th Cir. 2004) (holding in a Clean Water Act case – that also led to a cleanup under CERCLA – that "site investigation costs may be recoverable through restitution orders. * * * To determine whether the Government may receive restitution, we must explore the dividing line between criminal investigation costs (which are not recoverable) and other investigation costs (which may be recoverable). * * * We ask whether the costs were incurred as a 'direct and foreseeable result' of the defendant's wrongful conduct. * * * A site investigation to determine what damage the defendant's conduct caused and to design an appropriate cleanup plan is likely not a routine matter in all such criminal cases. Rather, the Government incurs such expenses as a direct result of the *offense*, not as a direct result of the criminal prosecution. In such situations, 'investigation costs are a . . . subset of cleanup costs' and recoverable to the same extent."); *United States v. De La Fuente*, 353 F.3d 766, 773-74 (9th Cir. 2003) (upholding restitution order for cleanup and decontamination costs incurred by Postal Service and county agencies after defendant mailed letters that claimed to contain anthrax)*; United States v. Quillen*, 335 F.3d 219, 225-26 (3d Cir. 2003) (requiring defendant to pay restitution for cost of employing hazardous materials cleanup team after defendant mailed a threatening letter containing a white powdery substance to the state parole board); *United States v. Overholt*, 307 F.3d 1231, 1253-54 (10th Cir. 2002) (upholding award of restitution for "the cost to the Coast Guard of removing the storage tanks . . . and cleaning up the area" that defendant had contaminated through illegal disposal of hazardous wastewater). However, it could be argued that emergency response and remedial costs are no more involuntary than are investigation and prosecution costs; hence they should not be viewed as subject to restitution. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) ("The general common-law rule in force in other jurisdictions provides that, absent authorizing legislation, the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service.") (internal quotation marks omitted).

[9] *See United States v. Menza*, 137 F.3d 533, 539 (7th Cir. 1998) ("[T]he district court must consider whether the costs the DEA incurred from the clean-up, destruction, and disposal of the chemicals and laboratory equipment were matters of routine policy and procedure within the agency, which may prevent recovery, or

whether the costs incurred were unique to this case and accrued solely and directly as a result of Menza's criminal conduct."); *United States v. Meacham*, 27 F.3d 214, 218 (6th Cir. 1994); *Ratliff v. United States*, *supra*, 999 F.2d at 1027 ("[R]estitution may not be awarded under [18 U.S.C. § 3663] for investigation and prosecution costs incurred in the offense of conviction. * * * The fact that a defendant may have entered into an agreement to pay the costs of investigation to the government does not alter this conclusion.").



[11] For individuals, U.S.S.G. § 5F1.3 says only, "Community service may be imposed as a condition of probation or supervised release." The commentary speaks of limiting it to no more than 400 hours, but adds nothing more.

[12] On May 14, 2008, the Deputy Attorney General approved an addition to the United States Attorneys Manual, USAM 9-16.325, entitled "Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and 'Extraordinary Restitution'". That provision limits the authority of prosecutors to enter into agreements that include so-called "extraordinary restitution"; however, it expressly excludes from its operation the practice, to which this guidance relates, of including community service as a condition of probation in environmental crimes case resolutions. For USAOs contemplating community service as a condition of probation, it *requires* consultation with ECS.

[13] For individual defendants, the same language appears in U.S.S.G. § 5E1.1(c). The guidelines do not suggest how this is to be effected in a situation where an

individual defendant is sentenced to imprisonment, fine, and restitution for an environmental crime. While the fine and imprisonment would have immediate effect, the restitution would have to be a condition of probation, hence not take effect until the end of the incarceration.

[14] *See also* the commentary to the policy statement in U.S.S.G. § 8B1.3, where the Sentencing Commission expressed its view that community service is less desirable than a fine.

[15] Specifically, 31 U.S.C. § 3302(b), reads as follows:

Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim.

By requiring that government officials deposit in the Treasury any funds received, rather than expend such funds for other purposes, the MRA implements the constitutional principle that Congress controls public expenditures through exercise of its appropriations power. *See* U.S. Const., art. I, § 9, cl. 7 ("It, along with a portion of the Anti-Deficiency Act, 31 U.S.C. § 1341(a)(1)(A) (set out below), prohibits a federal agency from supplementing its own appropriated funds except as authorized by Congress.

Limitations on expending and obligating amounts

(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not--

(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; [31 U.S.C. § 1341(a)(1)(A)]

Arguably, they implement the "anti-augmentation" provision of the Constitution, which reads,No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.") Const., Art. I, sec. 9, cl. 7.

[16] *See* 42 U.S.C. § 10601 and www.ovc.gov . Except for several specifically identified situations in which fines are directed elsewhere (*see*, *e.g.*, 42 U.S.C. § 10601(b)(1)(A)(I) and (ii) and (B)(iii) relating to the Endangered Species Act, the Lacey Act, and the FWPCA), all fines from federal crimes go to the Crime Victims Fund. Monies from that fund are applied to activities that include the Victim Witness Coordinator positions in United States Attorneys' Offices and the FBI, victim notification, improving services for the benefit of crime victims, direct reimbursements for victims (*e.g.*, for medical, counseling, or funeral expenses), victims of terrorism, victims of crimes against the elderly, safe houses and shelters

for battered women and children, abused (especially sexually abused) Native American children, college campus victims, and drug-endangered children found in methamphetamine houses.

[17] During the development of this guidance this issue was the subject of extensive consultation among attorneys from ECS and from the Department's Office of Legal Counsel (OLC).

[18] Note that this limitation does not apply to pollution or wildlife offenses that are Class B or Class C misdemeanors with their low fine maximums. *See* 18 U.S.C. § 3559 for classifications of federal crimes.

[19] Such circumstances might include a situation in which the highest fine available against an entity or individual does not amount to sufficient punishment for the offense at issue.

[20] Because it is an equitable matter of reimbursing a specific victim for particular losses and that reimbursement should be in full, for purposes of this percentage restitution is not considered a part of the "criminal sanction package". Additionally, expenses such as those for undertaking a corporate compliance plan, because they are for the benefit of the defendant, are not part of the calculation. Any community service project proffered by an offender, regardless of its size or proportion, should be closely scrutinized to assure that it is not over-priced in order to inflate its apparent value.

[21] *See* footnote 16, *supra.*

[22] This would be similar to an individual defendant's being able to pay for a large community service project while not going to prison, thereby giving an appearance of the person's having "bought" his or her way out of incarceration.

[23] Although it was developed for civil settlement purpose, EPA's Supplemental Environmental Projects Policy (effective May 1, 1998), www.epa.gov/compliance/civil/seps/ , provides useful guidance on the concept of a nexus. It is the relationship between the violation and the proposed activity. The relationship exists if the work is designed to reduce the likelihood that similar violations will occur in the future; it reduces the adverse impact to public health or the harm to which the violation at issue contributes; or it reduces the overall risk to public health or the environment potentially affected by the violation at issue.

[24] It may not be possible, though, to address precisely the same aspect of that medium. For example, XYZ Corporation discharges ammonia in excess of its NPDES permit limitation into a river. With the pollutant effects dispersed downstream, it may not be possible to take any remedial action, the best course being for the river to heal itself. However, XYZ could be required to restore a nearby wetland that would keep other pollutants from entering the same river. The community service would not deal precisely with the effects of the violation, since

those effects could not be directly remedied. However, it could improve the quality of the affected water body in the area of the violation.

[25] The Comptroller General has interpreted the MRA to the effect that government agencies may not augment their funds beyond those allocated to them by Congress. *See Matter of: Federal Emergency Management Agency - Disposition of Monetary Award Under False Claims Act*, 1990 WL 268526 (Comp. Gen.), 69 Comp. Gen. 260. OLC has taken the position that the opinions of the Comptroller General are useful, although they are not binding on Executive Branch agencies, because of the Constitution's principle of separation of powers. *See* Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, to Emily C. Hewitt, General Counsel, General Services Administration (August 11, 1997).

[26] If the case involves a parallel civil enforcement proceeding, the prosecutor also should coordinate with the civil enforcers involved on any community service requirement that is being considered.

[27] 31 U.S.C. § 1341(a)(1).

[28] *See United States v. Blue Mountain Bottling Co.*, 929 F.2d 526, 529 (9th Cir. 1991); *Missouri Valley*, *supra*, 741 F.2d at 1549; *United States v. Wright*, 728 F.2d 648, 653 (4th Cir. 1984).

[29] The Tax Reform Act of 1969, 26 U.S.C. § 162(f), does not allow tax deductions "for any fine or similar penalty paid to the government for the violation of any law." However, if payment is not viewed as punishment, but rather as "compensatory or remedial" in nature, then it may be deductible. *See True v. United States*, 894 F.2d 1197, 1204 (10th Cir. 1990) ("compensatory or remedial payments are beyond the scope of section 162(f)"). If a defendant is allowed to claim a tax deduction to pay for a community service, the public, in effect, is subsidizing part of the criminal sentence for the defendant.

[30] *See, e.g., United States v. Multi-Flow Dispensers, L.P.*, Criminal No. 98-239 (E.D. Pennsylvania):

Defendant agrees to perform organizational Community Service pursuant to § 8B1.3 of the Federal Sentencing Guidelines and in furtherance of satisfying the sentencing principles provided for under 18 U.S.C. Section 3553(a). Accordingly, the Parties agree that on the day of sentencing or within one day thereafter, the defendant shall pay a total of $100,000.00 to the City of Philadelphia Water Department for use in its "Cross-Connection Repair Program." The goal of the defendant's Community Service is to assist in this program mandated by the Pennsylvania Department of Environmental Protection to reduce pollutants entering rivers and streams from the City's storm sewers and includes a focus on identifying and correctly realigning lateral pipes that are cross-connected. Because the payment to the Foundation is Community Service by an organization, defendant further agrees that it will not seek any reduction in its tax obligation as a result of this Community Service nor will the

defendant characterize, publicize or refer to the Community Service as a voluntary donation or contribution.

[31] The comments earlier about the need for oversight, agency support, no unintended benefits to the defendant, and the like should be borne in mind with respect to these sanctions just as they are regarding community service.

[32] Conditions beyond community service under 18 U.S.C. § 3563(b)(12) may be based upon the more general authority of 18 U.S.C. § 3563(b)(22). They also may relate directly to the requirement in 18 U.S.C. § 3553(a)(1)(C) that a sentencing court consider "protect[ing] the public from further crimes of the defendant".

[33] U.S.S.G. § 8D1.4(c) and its Application Note authorize a court to order, as a condition of probation, an "effective compliance and ethics program", and the program should be "reasonably calculated to prevent and detect criminal conduct." That provision in combination with 18 U.S.C. § 3563(b)(22) should be sufficient authority for imposing requirements involving comprehensive environmental compliance programs, audits, court-appointed monitors, and employee training.

[34] While any of these requirements may be comprehensive, going beyond just the facility and the medium involved in the crime of conviction, at a minimum they should have both a geographic and a medium nexus to that crime. For example, a compliance plan, although it may extend to all aspects of a company's operations, specifically should include air pollution compliance at the plant where the air pollution violation that was the focal point of the prosecution occurred. Any pollution prevention project, *infra*, also should have both a geographic and a medium nexus.

[35] The condition that a violator make a public statement in the media admitting to its unlawful behavior is directly addressed in U.S.S.G. § 8D1.4(a). Such a statement has the clear potential for providing both specific and general deterrence, while also educating the public.