SENTENCING GUIDANCE IN ENVIRONMENTAL PROSECUTIONS INCLUDING THE USE OF SUPPLEMENTAL SENTENCING MEASURES

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SUMMARY

I. INTRODUCTION

The purpose of this guidance is to assist federal prosecutors in crafting appropriate sentences, including the use of supplemental sentencing measures, in prosecutions of environmental crimes.

Environmental crimes can often result in widespread degradation of the environment and threaten the health and safety of entire communities. Because it is often difficult to identify individual victims of the offense and quantify their harm or risk of harm, and because pollutants can disperse quickly into the environment, traditional sentencing provisions may not fully address criminal violations of environmental laws.

Supplemental sentences must be used in conjunction with traditional criminal sentencing provisions. So used, supplemental sentencing measures may often more fully remedy the harm to the environment and the community caused by the violation, provide greater deterrence against criminal behavior, and encourage better corporate compliance with environmental laws. Supplemental sentences may also encourage more efficient environmental technologies and corporate management practices, leverage greater environmental and public health improvements, and advance important priorities like pollution prevention and environmental justice.

The Environmental Crimes Section of the Environment and Natural Resources Division and the United States Attorneys Offices are making greater use of supplemental sentences, usually in the process of negotiating pleas in environmental criminal cases. While recognizing the importance of preserving the discretion and flexibility of individual prosecutors to negotiate pleas that best address the particular violations, this guidance sets out the following recommendations designed to help ensure that any supplemental sentence is legally sound, effective, and consistent with Department policies. These guidelines are meant to apply primarily to corporations as well as other artificial entities like partnerships and associations. However, the Department does not prohibit individual defendants from engaging in community service to remedy any harm caused by the environmental violation(s), as long as these terms are negotiated in addition to and subsequent to the imposition of fines and terms of incarceration. This guidance also identifies some examples of supplemental sentences. The Analysis section describes the legal authorities for supplemental sentencing and explains in more detail the

following guidelines and examples of supplemental sentences. For further information or guidance in crafting supplemental sentences, prosecutors should call the Environmental Crimes Section at (202) 305-0321 and request to speak to the Duty Attorney.

This document constitutes only internal guidelines for the Department of Justice. The guidelines do 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 Justice Department.

II. GUIDELINES FOR NEGOTIATION OF PLEAS, INCLUDING SUPPLEMENTAL SENTENCING PROVISIONS, IN ENVIRONMENTAL CRIMINAL CASES

The use of supplemental sentences most commonly arises in the context of negotiated pleas. The guidelines for negotiating pleas in environmental criminal cases have two parts. Part One sets out general guidelines that prosecutors should follow in negotiating any criminal plea, including one in which a supplemental sentence in an environmental case is contemplated. Part Two sets out guidelines that relate specifically to the negotiation of supplemental sentencing provisions in environmental criminal cases.

Part One: General Guidelines for Negotiation of Pleas

- **Criminal Fines and Restitution Should be Sought as Appropriate**

  To maintain an effective deterrent and ensure appropriate punishment, prosecutors should always seek the payment of fines commensurate with the severity of the offense and seek restitution to any victims of the offense.
  [18 U.S.C. §§ 3572(b), 3553(a).]

- **Decision to Prosecute Individuals, or to Charge a Felony or a Misdemeanor Should be Made Independent of Trade-offs**

  The decision to prosecute individual defendant(s) should be made on the merits of the case, not in exchange for a corporate plea, large corporate fine, or supplemental sentence. Similarly, supplemental sentences should not be accepted in exchange for reducing otherwise appropriate felony charges.
  [U.S. Department of Justice, Federal Prosecution of Corporations at 1 (June 1999).]

- **Early Coordination Should Occur When There is a Parallel Civil Proceeding**

  If there is a parallel civil or administrative proceeding, or if a global settlement of all criminal and non-criminal violations is appropriate, the prosecutor should coordinate and consult early in the negotiations process with the appropriate Department and Agency personnel. ***[U.S. Department of Justice, Environment and Natural Resources Division Directive (ENRD) 99-21, Integrated Enforcement Policy (1999) (applies to ENRD attorneys); U.S. Department of Justice Directive, Environment and Natural Resources Directive 99-20, Global Settlement Policy (1999) (applies to all Department of Justice attorneys).]***

- **Consistent with the Miscellaneous Receipts Act, Criminal Fines Must be Directed to the Crimes Victims Fund**

  With certain statutory exceptions, all criminal fines must be deposited into the U.S. Treasury and directed to the Crimes Victims Fund; they may not be used to fund supplemental sentences. ***[31 U.S.C. § 3302(b); 42 U.S.C. § 10601(b).]***

- **Listing and Debarment Should be Referred to the Appropriate Agency**

  Prosecutors should not become involved with listing and debarment issues during settlement negotiations, although it is prudent to be aware of such issues, but rather should refer defense counsel to the appropriate federal agency. ***[U.S. Department of Justice, Federal Prosecution of Corporations at 12 (June 1999)]***

Part Two: Specific Additional Guidelines for Negotiation of Pleas in Environmental Cases Which Include Supplemental Sentences

- **Nexus Required Between Supplemental Sentence and Violation**

  There must be a clear nexus between the supplemental sentence and the criminal violation to help ensure that any harm or threatened harm to victims or the environment is addressed. In considering the harm caused by the offense and the remedy proposed by the supplemental sentence, both a geographical and an environmental medium nexus should be considered. ***[18 U.S.C. § 3553(a)(1).]***

- **Oversight Provisions Should be Included**

  A supplemental sentence should contain clear oversight and enforcement provisions.

- **All Terms and Conditions Should be Well Defined**

  All terms and conditions of the supplemental sentence should be well defined before entering into the plea agreement

- **Appropriate Regulatory and Technical Assistance Should Be Obtained During Negotiation of Supplemental Sentence**

  Prosecutors should obtain any necessary regulatory or technical expertise from federal or state agency personnel early on in the negotiation process and consider the history and characteristics of the defendant to make sure that the defendant is able to perform any supplemental sentence.

- **Supplemental Sentences Must Be Consistent with the Anti-Deficiency Act, and Cannot Supplement Appropriated Funding of Federal Programs**

  A supplemental sentence may not fund a federal program or project or perform an activity that an agency is already statutorily required to undertake. In particular, the government may not seek reimbursement for investigation and prosecution costs. However, a defendant may be required to pay for cleanup or other response costs incurred as a result of the violation and may make payments to statutorily-created funds to promote environmental and natural resource conservation and protection. ***31 U.S.C. § 1341(a)(1).***

- **Any Trust Fund Created by a Supplemental Sentence Must be Managed by Non-Federal Entity Chosen Without Favoritism**

  No federal agency personnel should control or manage a trust fund created by a supplemental sentence. The attorney choosing a charity, educational institution, public interest group, or other organization to receive the benefit of managing a trust fund established in a supplemental sentence, must ensure that there is not any favoritism, or appearance of favoritism.

- **Terms of Supplemental Sentence Should Be Evaluated to Ensure No Unintended Benefits to the Defendant Accrue**

  The defendant should not receive any unintended or inappropriate advantages from the supplemental sentence. Thus, the defendant should not receive credit for capital improvements or other changes already required to comply with civil consent decrees, permits or regulations, obtain tax relief, or hold out activities performed under a sentence in order to gain favorable publicity.

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III. EXAMPLES OF SUPPLEMENTAL SENTENCES IN ENVIRONMENTAL CASES

The following are examples of successfully negotiated supplemental sentencing measures obtained in recent cases. In all of these cases, a traditional sentence, such as a fine or prison sentence was also obtained. More detailed descriptions and actual language from recent plea agreements are set out in the Analysis section.

- **Environmental Remediation and Restoration**

  Many plea agreements have required defendants to pay for cleanup costs incurred by federal and state agencies in response to the environmental violations or have required that the defendants clean up the contamination themselves. Further, some defendants have agreed to go beyond remedying the damage caused directly by their violations and have taken additional steps to restore and enhance the environment near their facilities or near where the violations occurred.

- **Environmental Audits, Comprehensive Compliance Programs, and Employee Training**

  In order to detect and prevent any future violations and improve environmental and regulatory compliance, plea agreements may require defendants to perform environmental audits of their facilities, design and implement comprehensive environmental compliance programs, or to conduct employee training.

- **Pollution Prevention**

  Supplemental sentences that involve pollution prevention projects have two primary benefits. First, they are a way for the government to get the defendant to agree to take steps that go beyond what environmental laws, regulations, and permits may require. Second, they are good tools to encourage defendants to find new and more efficient ways to operate while generating less waste and pollution.

- **Costs to State and Local Governmental Agencies**

  Often, state and local regulatory and law enforcement personnel provide critical help in responding to environmental violations and cleaning up any environmental damage. Therefore, many plea agreements have included restitution payments to reimburse these agencies for their costs.

- **Trust Funds**

  The damage caused by environmental violations can often be widespread, long-lived, and persistent, and can therefore continue to be a problem long after

conventional cleanup activities have ceased. Therefore, plea agreements have often included payments to environmental trust funds to monitor, restore, and preserve the environment and natural resources impacted by the violations.

- **Public Apologies, Speeches, and Environmental Education**

  Requiring a defendant to apologize for the environmental violation in newspapers and other public media and to make speeches to trade groups about the potential sanctions imposed on those who commit environmental crimes can serve as an additional penalty for the violator and an effective deterrent to potential violators. In addition, having the defendant provide environmental education or regulatory training can help the regulated community avoid committing similar violations.

ANALYSIS

I. LEGAL AUTHORITIES FOR SUPPLEMENTAL SENTENCES

Criminal sentences may include terms of incarceration, fines, special assessment, payment of restitution to victims for bodily injury or property loss, and other supplemental sentencing provisions within certain limitations.[1] The purposes of supplemental sentences may involve restitution, probationary conditions, and community service.[2] None of the federal environmental statutes contain provisions specifically authorizing a federal court to order supplemental sentences. In addition, federal courts have no inherent authority to impose supplemental sentences.[3] However, there are three general sources of authority for supplemental sentences: (1) the Sentencing Reform Act ("SRA"), which governs the conditions of probation; (2) the Victim and Witness Protection Act ("VWPA"), which governs orders of restitution; and (3) the U.S. Sentencing Guidelines.

A. The Sentencing Reform Act

The Sentencing Reform Act ("SRA"), 18 U.S.C. § 3551 et seq, constituted a major revision of federal sentencing provisions. Several sections of the SRA govern the imposition of supplemental sentences as discretionary terms of probation.[4]

First, Section 3563(b)(2) gives courts the authority to order defendants to "make restitution to the victim of the offense" pursuant to section 3556. This section directs the court to

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[1] This guidance uses the term supplemental sentencing instead of alternative sentencing to emphasize that such sentencing provisions are meant to supplement, rather than replace, traditional sentences.

[2] See, Martin Harrell, Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines With Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty, 6 Vill. Envtl. L.J. 243 (1995).

[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. 1989), cert. denied, 493 U.S. 1081 (1990) (courts have no inherent authority to impose restitution).

[4] 18 U.S.C. § 3583(d) sets the conditions of supervised release. This section specifically cites the discretionary conditions of probation at sections 3563(b)(2) and (12) authorizing the court to order restitution and community service. The section does not cite the catch-all provision at section 3563(b)(22), but does state that a court may order "any other condition it considers appropriate."

order restitution in accordance with the Victim and Witness Protection Act ("VWPA")[5], which will be discussed more fully below. Second, section 3563(b)(12) of the SRA authorizes the court to order the defendant to "work in community service." Finally, Section 3563(b)(22) of the SRA authorizes the court to require the defendant to "satisfy other such conditions as the court may impose." The legislative history of the SRA explains that this last "catch-all" section gives the court discretion to impose other conditions of probation not specifically listed in the Act.[6] Therefore, this section may be a good source of authority for crafting cleanup orders and environmental supplemental sentences that may not be strictly viewed as restitution or community service in the traditional sense.[7] This provision may also be used to order a defendant to issue a public notice and apology for its violation.[8]

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[5] Id. § 3663.

[6] See, H.R. Rep. No. 98-1030, 98th Cong., 2nd Sess. 93, reprinted in, 1984 U.S. Code Congress & Admin. News 3276. ("Proposed 18 U.S.C. 3563(b) sets out optional conditions which may be imposed, the last of which makes clear that the enumeration is suggestive only, and not intended as a limitation on the court's authority to consider and impose any other appropriate conditions"). The legislative history also states that, "The list is not exhaustive, and it is not intended at all to limit the court's options - conditions of a nature very similar to, or very different from, those set forth may also be imposed." Id. at 3278.

[7] The legislative history states that a "court could in an appropriate case order restitution not covered by paragraph (b)(3) (and section 3556) under the general provisions of subsection [(b)(22]. See, H.R. Rep. No. 98-1030, 98th Cong., 2nd Sess. 93, 95-96, reprinted in 1984 U.S. Code Cong. And Admin. News 3182, 3278-79. There is also case law holding that the catch-all provision of supervised release at 18 U.S.C. § 3583(d), which is analogous to the section (b)(22), authorized other "restitution-resembling" orders that are not subject to the limitations of the VWPA. United States v. Daddato, 996 F.2d 903, 905 (7th Cir. 1993). See also, United States v. Brooks, 114 F.3d 106, 108 (7th Cir. 1997), cert. denied, 118 S.Ct. 115 (1997), (affirming decision in Daddato and criticizing concurring opinion in Gall v. United States, 21 F.3d 107, 111 (6th Cir. 1994) that criticized decision in Daddato).

[8] Under 18 U.S.C. § 3555, the court may order a defendant guilty of an offense involving fraud or any other intentionally deceptive practice to give reasonable notice and an explanation of the conviction to victims of the offense. The court cannot order the defendant to pay more than $20,000 for the notice. However, the legislative history makes it clear that notice under this section is only for cases involving fraud or other intentionally deceptive practices to help make sure that the victims are aware of the offense so that they can recover their losses. The history also states that the notice was not intended for "inappropriate" cases like a "technical violation" or to order "corrective advertising" or to subject a defendant to "public derision." See, H.R. Rep. No. 98-1030, 98th Cong., 2nd Sess. 84-85, reprinted in, 1984 U.S. Code Congress & Admin. News 3182, 3267-68.

B. The Victim and Witness Protection Act

The SRA, provides that the court, in imposing a sentence on a defendant found guilty of an offense, shall order restitution in accordance with the Victim and Witness Protection Act.[9] Importantly, as a discretionary condition of probation, restitution orders under the SRA are not limited to cases involving violations of Title 18, the Controlled Substances Act, crimes of violence, offenses against property, and offenses involving tampering with consumer products and can therefore include violations of other laws, including environmental laws.[10]

When sentencing a defendant convicted of an offense, the relevant provisions of the VWPA provide for restitution in cases of death or bodily injury or "damage to or loss or destruction" of a victim's property.[11] Section 3663(a)(2) defines a victim as "a person directly and proximately harmed" as a result of the offense.[12] It is often difficult in environmental cases to identify victims "directly and proximately harmed' by the violation. However, prosecutors are not restricted to this more narrow definition of a victim in negotiating plea agreements, because section 3663(a)(3) of the VWPA provides that the court "may" order restitution in "any criminal case to the extent agreed to by the parties in a plea agreement." Further, section 3663(A)(a)(3) states that the court "shall order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense."

Courts have generally held that the government may be defined as a "victim" for purposes of restitution, when it has "passively" suffered harm, including monetary loss, directly from the offense.[13] However, the government is not a victim of an offense when it voluntarily or actively

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[9] 18 U.S.C. §§ 3563(b)(2), 3556. See, Gall, 21 F.3d at 111; United States v. West, 942 F.2d 528, 632-33 (8th Cir. 1991).

[10] 18 U.S.C. § 3563(b)(2).

[11] Id. §§ 3663(b)(1) - (5).

[12] See, Casamento, 887 F.2d at 1177-78 (The court struck down an order requiring defendants guilty of narcotics conspiracy to pay restitution to a fund for treatment of persons injured by addiction to narcotics, because the court "identified no individual victims who suffered injury attributable to the appellant's crimes.")

[13] See, United States v. Gibbons, 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 the VWPA (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, Ratliff v. United States, 999 F.2d 1023, 1026 (6th Cir. 1993) (collecting cases); United States v. Martin, 128 F.3d 1188, 1190-92 (7th Cir. 1997) (collecting cases); United States v. Ruffen, 780 F.2d 1493, 1496 (9th Cir. 1986), cert. denied, 479 U.S. 963 (1986).

incurs costs that result from the violation, such as investigation and prosecution costs.[14] Therefore, in situations where environmental, public health, emergency response, or regulatory agencies expend resources to respond to contamination resulting from a criminal environmental violation pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"),[15] Oil Pollution Act ("OPA"),[16] and the Clean Water Act ("CWA")[17] or other applicable environmental statutes, these cleanup or response costs can be recovered from the defendant as restitution costs in a supplemental sentence.[18] However, agencies cannot recover money spent investigating or prosecuting environmental violations.

In cases involving damage or loss to property of a victim, the VWPA states that a court "may" order either the return of the property or the value of the property.[19] The statute does not specifically authorize restoration or remediation of property. However, in United States v. Sharpe, 927 F.2d 170, 174, (4th Cir. 1991), the Fourth Circuit held, without explanation, that the defendants who bombed a coal mine could be required to pay as restitution the costs for repairs

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[14] Id. See also, United States v. Meacham, 27 F.3d 214, 217-218 (6th Cir. 1994), cert. denied, 519 U.S. 1017 (1996) ("[R]estitution may not be awarded under the VWPA 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."); United States v. Menza, 137 F.3d 533, 539 (7th Cir. 1998) ("Third, the 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.").

[15] 42 U.S.C. § 9607(a).

[16] 33 U.S.C. § 2702(b).

[17] 33 U.S.C. 1321(f)

[18] See, United States v. West Indies Transport, 127 F.3d 299, 315 (3rd Cir. 1997), cert. denied, 118 S.Ct. 700 (1998). In this case, the Third Circuit ordered the defendants to pay restitution to the government based on Coast Guard's estimates of costs to pay for cleanup of environmental damages based on the defendant's 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 Title 18 and 49, but upheld the district court's order, because each of the CWA violations were combined with Title 18 violations. 127 F.2d at 315. However, as discussed above, under section 3563(b)(2) of the SRA, restitution ordered as a discretionary condition of probation is not subject to this limitation.

[19] 18 U.S.C. § 3663(b)(1).

to the mine, not limited to the replacement costs for damaged fixtures. In United States v. Mullins, 971 F.2d 1138 (4th Cir. 1992), the court explained that Sharpe allowed "repair costs for damage costs to real property, as a way of providing restitution in an amount equal to the value of the property on the date of the damage."[20]

Therefore, in environmental cases where there is damage to property belonging to or in the trust of identified victims, remediation or restoration costs can be awarded in a supplemental sentence as restitution, as long as the costs can be approximated. The victim can be a natural person, another corporation, or a government. Accordingly, the United States can receive restitution as the trustee where it owns the damaged property. The United States and Individual States can also receive restitution as the trustee in natural resource damage cases,[21] and under the Public Law Doctrine, individual states may also be able to receive restitution where State lands or waters held in public trust are damaged.[22]

C. The United States Sentencing Guidelines

The United States Sentencing Guidelines support the concept that supplemental sentences are important and appropriate in environmental crime cases. The Guidelines and policy statements promulgated by the Commission are issued pursuant to Title II and the SRA. 28 U.S.C. § 994(a). Chapter 8 of the Guidelines pertains to the sentencing of organizations.

The introductory commentary to Chapter 8 of the guidelines states, "First, the court must, whenever practicable, order the organization to remedy any harm caused by the offense." The commentary also states that probation is "appropriate" to "ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct."

Several provisions in Chapter 8 and the accompanying commentary bear directly on Supplemental Sentencing. Restitution is addressed by the guidelines at § 8B1.1. The guideline essentially restates the provisions of the SRA authorizing restitution as a condition of probation to an "identifiable victim" for the "full amount of the victim's loss."[23] Sections 8B1.4 and 5F1.4 of the guidelines interpreting the discretionary condition of notice to victims under the SRA

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[20] But see, United States v. Mitchell, 876 F.2d 1178, 1183-84 (5th Cir. 1989) (holding that, in the absence of any language in section 3663(b)(1) of the SRA, the district court erred in ordering restoration for costs expended to restore a damaged truck to working condition).

[21] See, e.g., CWA, 33 U.S.C. § 1321(f)(4); CERCLA, 42 U.S.C. § 9607(a)(4)(C); OPA, 33 U.S.C. § 2702(b)(2)A).

[22] See, Matthew R. Atkinson, On the Wrong Side of the Tracks: Public Access to the Hudson River, 13 Pace Envtl. L. Rev. 747, 769-772 (Spring 1996).

[23] § 8B.1.1(a)(2).

restate the requirement that notice is only for violations involving fraud or any other intentionally deceptive practices. However, section 8D1.4(a) allows for public apologies in environmental cases not involving fraud or other deceptive practices. It states that the court may order an organizational defendant to "publicize the nature of the offense committed, the fact of conviction, the nature of the punishment imposed, and the steps that will be taken to prevent the recurrence of similar offenses."

The guidelines and related commentary provide greater elaboration of the SRA's provisions regarding remedial orders and community service at Sections 8B1.2 and 3. The introductory commentary to Part B states that "A remedial order or an order of probation requiring community service can be used to reduce or eliminate the harm threatened, or to repair the harm caused by the offense, when that harm or threatened harm would not otherwise be remedied."

Section 8B1.3 authorizes an order requiring community service, where it is "reasonably designed to repair the harm caused by the offense." The commentary points out that since community service orders are "essentially an indirect sanction," they are "generally less desirable than a direct monetary sanction." However, the commentary favors community service orders that require the organization (and its employees) to perform the service itself where the organization "possesses knowledge, facilities, or skills that uniquely qualify it to repair the damage caused by the offense." This last statement apparently reflects a line of cases dealing with violations of the Sherman Act under the Federal Probation Act, 18 U.S.C. § 3651 (repealed).[24] In these cases, the court upheld donations to charity that suspended part of the criminal fine, because the monetary donation was incidental to the corporate defendants and its employees donating their time and effort to the charity. In these cases, the courts found the donation to charity acceptable as community service, because the defendants did not just "write a check and walk away" but were forced to alter their behavior through actual service to the community.[25]

Section 8B1.2 states that a remedial order imposed as a condition of probation can be used to remedy the harm caused by the offense or to eliminate or reduce any future harm to the

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[24] See, United States v. Mitsubishi, 677 F.2d 785 (9th Cir. 1982) (one year loan of executive to business community program for ex-offenders); United States v. William Anderson, 698 F.2d 911 (8th Cir. 1982) (defendants to work for charitable organization); United States v. Posner, 694 F.Supp. 881 (S.D. Fla. 1988) (defendant to work 20 hours a week to develop project to address homelessness); United States v. Danilow Pastry Co., 563 F.Supp. 1159 (S.D.N.Y. 1983) (donations of baked goods to local homeless shelters).

[25] See, Mitsubishi, 677 F.2d at 788; United States v. Scher Presents, 746 F.2d 959, 963 (3rd Cir. 1984).

extent that the harm is not addressed by an order of restitution.[26] Importantly, section 8B1.2 explicitly allows a court to require the defendant organization to create a trust fund to address future or expected harm, where that harm can be "reasonably estimated." The commentary to the section states that a remedial order can include a cleanup order for an environmental violation.

Finally, section 8D1.4(c) of the guidelines authorizes a court to order, as a condition of probation, a "program to prevent and detect violations of the law." This section would therefore authorize a supplemental sentence involving comprehensive environmental compliance programs, audits, court-appointed monitors, and employee training.

[26] Remedial orders under the Guidelines are presumably authorized under the catch-all provision at 18 U.S.C. § 3563(b)(22)of the SRA, since there is no other more specific provision.

II. GUIDELINES FOR NEGOTIATION OF PLEAS, INCLUDING SUPPLEMENTAL SENTENCING PROVISIONS, IN ENVIRONMENTAL CRIMINAL CASES

The following section describes in more detail the suggested guidelines for crafting supplemental sentences. It describes the statutory and legal bases, policy justifications and advantages, and tactical pitfalls to be avoided.

A. General Guidelines for Negotiation of Pleas

The following general guidelines apply to all plea negotiations, whether or not supplemental sentences are involved.

1. Criminal Fines and Restitution Should be Sought as Appropriate

As long as the payment of the fine does not impair the defendant from providing restitution to the victim(s) of the violation,[27] prosecutors should always seek the payment of fines commensurate with the severity of the offense and the other factors described below.

Federal sentencing guideline § 8C2.10 states that the court should determine the appropriate fine by applying the provisions of 18 U.S.C. § 3553.[28] Section 3553(a)(1) requires the court to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." Section 3563(b) of the SRA requires that any criminal sentence must be "reasonably related" and involve only "such deprivations of liberty or property" as necessary to fulfill the purposes of criminal sentencing set out at section 3553(a)(2) which are: "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from future crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." Accordingly, criminal fines should be assessed by considering several factors. First, the prosecutor should consider the seriousness of the defendant's conduct,

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[27] 18 U.S.C. §3572(b).

[28] Most major environmental statutes set out the maximum fine for criminal violations. See e.g. CWA, 33 U.S.C. 1319(c)(2); CAA, 42 U.S.C. § 7413(c); RCRA, 42 U.S.C. § 6928(d). In addition, the SRA provides for criminal penalties of $500,000 per felony or twice the gain derived by the defendant from the offense or twice the loss suffered by the victim. 18 U.S.C. §§ 3571(c)(4), (d). In the civil penalty context, the Environmental Protection Agency (EPA) has developed a model to calculate the economic benefit derived from noncompliance. See, EPA, Methodology for Computing the Economic Benefit of Noncompliance (August 1997). This document is available on EPA's Office of Enforcement and Compliance Assurance website at http://es.epa.gov.oeca.

including: (1) the nature and degree of the harm caused or threatened by the offense to human health, wildlife, and natural resources; (2) the extent to which the damage can, or cannot, be remedied; (3) the defendant's motivation in committing the offense and degree of culpability; (4) the extent to which the defendant profited from the offense financially or otherwise; (5) the degree to which the violation involved a breach of public trust; and (6) the amount of public disruption or concern generated by the offense.

Second, the prosecutor should consider the defendant's enforcement history, including its record of criminal, civil, and administrative violations, the degree to which the defendant is dependent on criminal activity for its livelihood, and the timeliness and extent of its cooperation in the investigation or prosecution of other corporate or individual targets. Importantly, the fine should also promote respect for the law, afford adequate deterrence, and protect the public from further crimes of the defendant.

2. The Decision to Prosecute Individuals, or Whether to Charge a Felony or a Misdemeanor Should be Made Independent of Trade-offs

As a general matter, prosecutors should not treat a corporation differently than any other defendant merely because of its artificial status.[29] Prosecuting corporations for environmental violations is appropriate, because the corporation itself is often the "person" responsible for applying for and complying with applicable state and federal environmental permits and regulations.[30]

There are many benefits to vigorous prosecution of corporate defendants. Prosecuting a corporation not only holds the corporation accountable for criminal behavior and helps to remedy the harm caused by the particular violation, but it can also improve the corporate culture and employee behavior regarding environmental compliance. Further, vigorous pursuit of a corporate defendant can send a strong message and deter similar violations by other corporations, leading to improved corporate-wide environmental compliance. However, accepting a corporate plea does not mean that individually culpable directors, officers, employees, or shareholders should

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[29] U.S. Department of Justice, Federal Prosecution of Corporations at 1 (June 1999).

[30] Most environmental statutes define a "person" as including corporations, partnerships and other artificial entities. See, e.g., the CWA, 33 U.S.C. § 1362(5); the Safe Drinking Water Act, 42 U.S.C. § 300(12); the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6903(15); and the Clean Air Act ("CAA"), 42 U.S.C. § 7602(e). In addition, under the doctrine of respondeat superior, a corporation may be criminally liable for the acts of its employees and other agents, if the corporate agent's acts were within the scope of the agent's duties and were intended, at least in part, to benefit the corporation. See, United States v. Automated Medical Laboratories, 770 F.2d 399 (4th Cir. 1985).

not also be personally prosecuted.[31] To fail to prosecute individuals would allow the corporation, in effect, to pass on the criminal sanction as a cost of doing business. All corporate employees, including those at the highest levels, should be aware that they face personal prosecution, with the possibility of incarceration, for criminal violations of environmental laws. Allowing a corporation to protect culpable individuals by agreeing to trade off prosecution of individual defendant(s) in exchange for a corporate plea, large corporate fine, or supplemental sentence significantly undermines the individual deterrent effect and should therefore be avoided.

3. Early Coordination Should Occur When There is a Parallel Civil Proceeding

Before beginning to structure a supplemental sentence, the prosecutor should check with civil attorneys and appropriate agency personnel to determine if there is a parallel civil or administrative proceeding and if that proceeding will address the violation and the harm it caused.[32]

If there is a parallel civil or administrative proceeding, then there are a number of issues that the prosecutor should consider in deciding whether to pursue a supplemental sentence. Where the prosecutor believes that the civil settlement should be reinforced or strengthened, the prosecutor may make the relevant terms of the civil settlement also terms of probation through a supplemental sentence that incorporates the civil remedy. For example, an environmental cleanup order can be added as part of the supplemental sentence thereby making the defendant subject to probation violation sanctions for failing to comply.

However, there may be situations where administrative or civil enforcement measures would be more appropriate or efficient. For example, most environmental statutes authorize the Environmental Protection Agency (EPA) to obtain emergency relief to protect against actions that present an imminent and substantial endangerment to human health or the environment.[33] In

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[31] See, U.S. Department of Justice, Federal Prosecution of Corporations at 14 (June 1999). The CWA and the CAA define a person, for purposes of enforcement, to include "any responsible corporate officer." 33 U.S.C. § 1319(c)(6); 42 U.S.C. § 7413(c)(6). See, United States v. Iverson, 162 F.3d 1015, 1025 (9th Cir. 1998).

[32] See, Department of Justice, Environment and Natural Resources Division, Directive 99-21, Integrated Enforcement Policy (1999). In addition, the commentary to section 8B1.2 of the Sentencing Guidelines authorizing the creation of trust funds for environmental cleanups specifically cautions that, since the EPA may already have the authority to issue remedial measures on its own, a remedial order by the court may not be necessary or if entered should coordinate with any administrative or civil actions taken.

[33] See e.g., Toxic Substances Control Act (TSCA), 15 U.S.C. § 2648; CWA, 33 U.S.C. § 1364; Safe Drinking Water Act, 42 U.S.C. § 300i; RCRA, 42 U.S.C. § 6973; CAA, 42 U.S.C. § 7603.

these situations, an immediate administrative order or civil referral may be more effective than attempting to structure a supplemental sentence at the end of a criminal prosecution.

There may also be situations where a supplemental sentence would unnecessarily duplicate ongoing efforts of the regulatory scheme or an ongoing civil or administrative enforcement proceeding. For example, a supplemental sentence requiring a company to install or modify pollution control equipment or cleanup hazardous waste may already be required as part of the regulatory permit, consent decree, or administrative order. In such situations, requiring the same action as a supplemental sentence may not be necessary or appropriate.

Finally, it may be appropriate to resolve civil and criminal liability arising out of the same conduct through a "global settlement." Global settlements often involve complex regulatory and legal issues. Therefore, prosecutors should consult early with EPA regulatory personnel and civil prosecutors and any settlement should be consistent with the Environment and Natural Resource Division's Global Settlement Policy, Directive 99-20 (1999). The policy makes five general recommendations for global settlements: (1) criminal plea agreements must be handled by criminal attorneys and civil settlements by civil attorneys; (2) each part of the settlement must separately satisfy the appropriate criminal and civil policies and criteria; (3) with respect to the civil settlement, all affected client agencies must approve the settlement; (4) there should be separate documents memorializing the plea agreement and the civil settlement; and (5) a defendant may not trade civil relief in exchange for a reduction in a criminal penalty.

4. Consistent with the Miscellaneous Receipts Act, Criminal Fines Must be Directed to the Crimes Victims Fund

In general, prosecutors should ensure that a supplemental sentence does not infringe on the federal appropriations process by augmenting an agency's budget or funding a federal program. The Miscellaneous Receipts Act ("MRA")[34] requires that any money received "for the Government" from any source be deposited into the United States Treasury. Since criminal fines are miscellaneous receipts, all fines paid must be deposited directly into the Treasury and cannot be diverted to fund a supplemental sentence or given to any federal agency. Similarly, where a federal agency may be defined as a "victim" of the crime, any money received must be deposited into the Treasury and cannot be retained by the agency for its own purposes. These criminal fines must then be deposited into an account of the U.S. Treasury known as the Crimes Victims Fund for use in funding state-run crime victims compensation programs.[35] There are some statutorily created exceptions applicable to environmental cases. First, criminal penalties collected pursuant to the Endangered Species Act and Lacey Act in excess of $500,000 are to be

[34] 31 U.S.C. § 3302(b).

[35] 42 U.S.C. § 10601(b).

deposited into the Cooperative Endangered Species Conservation Fund.[36] Second, a few environmental laws have specific funds that can be used to receive criminal penalties. For example, criminal penalties for oil spills under the CWA are to be deposited into the Oil Spill Liability Trust Fund.[37] Criminal penalties collected under CERCLA for failure to notify are to be deposited into the Hazardous Substance Superfund.[38]

Most of the written opinions interpreting the MRA have been issued by the Comptroller General, the head of General Accounting Office ("GAO") of the United States Congress.[39] Executive Agencies and members of Congress often seek opinions from the Comptroller General on issues related to agency appropriations. However, Opinions of the Comptroller General are not binding on courts.[40] The Office of Legal Counsel in the Department of Justice has taken the position that the opinions of the Comptroller General, while useful, are not binding on executive branch agencies, because of the Constitution's principle of separation of powers.[41] The Comptroller has interpreted 31 U.S.C. § 3302(b) as follows: "This statute requires an agency to deposit into the General Fund of the Treasury any funds it receives outside of the agency unless the receipt constitutes an authorized repayment or unless the agency has statutory authority to retain the funds for credit to its own appropriations." Matter of: General Services Administration Contract, B-214091, 64 Comp. Gen. 217, 218-19 (1985).

Under this provision, the Comptroller General has held that restitution payments made to a federal agency as a victim of a crime are miscellaneous receipts and must be deposited into the Treasury.[42] Government agencies may not spend funds beyond those which are specifically appropriated by Congress, because this amounts to an illegal augmentation of funds beyond those

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[36] Id. at § 10601(b)(1)(A); 16 U.S.C. § 1540(d); 16 U.S.C. § 3375(d).

[37] 26 U.S.C. § 9509(b)(8).

[38] 26 U.S.C. § 9507(b)(4).

[39] See generally, Bowsher v. Synar, 478 U.S. 714, 730-31 (1986) (describing the duties of the Comptroller General).

[40] See, Delta Chemical Corp. v. West, 33 F.3d 380, 382 (4th Cir. 1994).

[41] 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); Implementation of the Bid Protest Provisions of the Competition in Contracting Act, 8 Op. O.L.C. 236, 246 (1984).

[42] See, e.g., Matter of: Self-Insurance Status of Payments Received Under Probation Orders, 1977 WL 10430 (Comp. Gen.), 56 Comp. Gen. 788; Matter of: Disposition of Amounts Received for Damages to Government Motor Vehicles, 1985 WL 50673 (Comp. Gen.), 64 Comp. Gen. 431.

which Congress has authorized.[43] Similarly, federal agencies may not mitigate penalties in exchange for the defendant making a donation to fund education or research projects in furtherance of an agency's mission or goals, because this would "circumvent" the agency's appropriations in violation of the MRA.[44]

However, where an agency has statutory authority to retain certain receipts, it can do so without violating the MRA.[45] Also, federal agencies do not violate the MRA when, instead of receiving restitution in the form of money, they receive "in kind" replacement of damaged property.[46]

Of particular relevance to supplemental sentences is an opinion by the Comptroller General that concluded that the EPA did not have the authority under the CAA or its Supplemental Environmental Projects policy to enter into settlement agreements to allow violators to fund public awareness and other projects related to automobile air pollution in exchange for a reduction in civil penalties.[47] The Comptroller General held, among other things,

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[43] See, Matter of: Federal Emergency Management Agency - Disposition of Monetary Award Under False Claims Act, 1990 WL 268526 (Comp. Gen.), 69 Comp. Gen. 260.

[44] See e.g., Matter of: Commodity Future Trading Commission - Donations Under Settlement Agreement, 1983 WL 197623 (Comp. Gen.) (Unpublished) (Comptroller General rejected proposed Commission policy to mitigate penalties in exchange for defendant's promise to donate money to an institution devoted to furthering Commission's statutory function of developing information and education regarding futures trading); Matter of: Nuclear Regulatory Commission's Authority to Mitigate Civil Penalties, 1990 WL 293769 (Comp. Gen.), 70 Comp. Gen. 17 (Comptroller General rejected Commission's proposal to mitigate penalties on nuclear licensees in return for contributions to be used by the Commission to fund research grants to universities and other nonprofit institutions).

[45] See., e.g., Matter of: Disposition of Receipts From the Sale of Coal Mined During Emergency Reclamation Projects Under Title V of the Surface Mining Control and Reclamation Act of 1977, 1986 WL 64097 (Comp. Gen.) (Unpublished); Matter of: Job Corps Center Receipts, 1986 WL 60633 (Comp. Gen.), 65 Comp. Gen. 666.

[46] See, Matter of: Bureau of Alcohol, Tobacco, and Firearms - Augmentations of Appropriations- Replacement of Autos by negligent Third Parties, 1988 WL 222794 (Comp. Gen.), 67 Comp. Gen. 510 (Comptroller General held that the federal agency does not violate the MRA when it compels the party to make restitution by arranging or paying for repair of the damaged property).

[47] 1992 WL 726317 (Comp. Gen.) (Unpublished); 1993 WL 798227 (Comp. Gen.) (Unpublished). See also, Funds - Recovered Overcharges - Distribution - Department of Energy, 1980 WL 14040 (Comp. Gen.), 60 Comp. Gen. 15; Matter of: Department of Energy Retrieval of

that payments to an institution other than the federal government in lieu of payments to the Treasury circumvent the requirements of the MRA, and that allowing the agency to approve projects going beyond remedying the violation to carry out other statutory goals of the agency improperly permits the agency to augment its funding beyond Congressional appropriations.

Similarly, cases under the Federal Probation Act ("FPA") involving violations of the Sherman Anti-Trust Act have struck down restitution or community service orders that suspended part or all of the criminal fines, because these payments to third party charities reduced the amount in fines that would have otherwise gone to the United States Treasury.[48] Although the FPA is no longer in effect and not binding to cases decided under the SRA, its language and purpose are similar enough to the SRA and VWPA that courts may find their analysis persuasive. For example, like the VWPA that authorizes a court to order restitution for a victim "directly and proximately harmed by the offense," the FPA authorized the court to make "restitution or reparation to "aggrieved parties for actual damages or loss caused by the offense." Further, like the SRA, the FPA gave a court wide discretion to place a defendant on probation and to impose "such terms and conditions as the court deems best." Finally, although the FPA did not list the purposes of sentencing as does the SRA, it did require that the terms of probation serve the "ends of justice and the best interest of the public and the defendant."[49]

5. Listing and Debarment Should be Referred to the Appropriate Agency

Finally, prosecutors should be aware of non-penal sanctions, that may accompany criminal charges, such as potential suspension or debarment from eligibility for government contracts or federally funded programs.[50] These contracts often can comprise a large percentage of a corporation's business and may therefore be a major concern. Accordingly, defense counsel, as part of the plea negotiation, may attempt to persuade the prosecutor to resolve or become involved with the listing and debarment process as part of the plea agreement. This is not

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Moneys Erroneously Paid into United States Treasury Under Consent Order Settlements, 1984 WL 43487 (Comp. Gen.), 63 Comp. Gen. 189.

petroleum price and allocation regulations

[48] See, United States v. Missouri Valley, 741 F.2d 1542, 1549-50(8th Cir. 1984); Scher Presents, 746 F.2d at 963.

[49] 18 U.S.C. § 3651 (repealed).

[50] See, e.g., CWA, 33 U.S.C. § 1368; CAA, 42 U.S.C. § 7606.

appropriate and should not be allowed.[51] Such sanction decisions are civil, not penal, in nature and are therefore the responsibility of the relevant agency pursuant to applicable statutes, regulations, and policies.[52] Therefore, prosecutors should refer defense counsel to appropriate agency personnel.[53]

B. Specific Guidelines for Negotiation of Pleas Which Include Supplemental Sentences in Environmental Cases

The following guidelines are designed to address issues that can often arise in the context of plea negotiations over supplemental sentences.

1. Nexus Required Between Supplemental Sentence and Violation

Section 3563(b) of the SRA requires that any conditions of probation be "reasonably related" to the factors set forth in 18 U.S.C. § 3553(a)(1).[54] Section 3553(a)(1) requires the court to consider the "nature and circumstances of the offense and the history and characteristics of the defendant." This provision provides the basis for the important requirement that any environmental supplemental sentence have the appropriate "nexus" to the violation and the harm or threatened harm.[55] The commentary to the community service section of the U.S. Sentencing

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[51] See, United States v. BP Exploration Inc., Case No. A99-0141 CR (JKS) (D. Alaska)

> The Defendant has discussed this Agreement with its attorneys and understands that nothing contained in this Agreement is meant to limit the rights and authority of the United States to take further civil or administrative action against the Defendant or any affiliated or related corporation, including but not limited to, any listing and debarment proceedings to restrict rights and opportunities of the Defendant to contract with or receive assistance, loans and benefits from United States government agencies.

[52] 40 C.F.R. Part 32; 48 C.F.R. Subpart 9.4. See, Hudson v. United States, 522 U.S. 93, 102 (1997).

[53] See, U.S. Department of Justice, Federal Prosecution of Corporations at 12 (June 1999).

[54] See also, 18 U.S.C. § 3583(d) (containing similar requirements for conditions of supervised release).

[55] The United States Environmental Protection Agency's Supplemental Environmental Projects Policy (Effective May 1, 1998), which applies to civil settlements, treats the nexus issue as follows:

"2. All projects must advance at least one of the objectives of the environmental statutes

Guidelines at 8B1.3 underlines the importance of the nexus requirements by stating that, in the past, community service orders have not been related to the purposes of sentencing. For example, the commentary deemed a community service order requiring a defendant to endow a chair at a university or contribute to a local charity to be inconsistent with the guidelines unless such community service furthered a "preventative or corrective action directly related to the offense" and therefore served one the purposes of sentencing set out in the SRA.[56]

In considering the harm caused by the offense, both a geographical and environmental medium nexus should be considered. In other words, when contamination caused by a violation is limited to one site, the remedial order should apply to that site. When a violation damages a certain media, like a stream, the supplemental sentence should address the damage done to that media. Establishing this nexus can be difficult, because pollutants can diffuse into the atmosphere or large bodies of water making it difficult to remove the specific contaminants or undo the environmental harm. However, the general nature of the harm or risk of harm can still be identified and projects can be selected to offset that harm in the same ecosystem or general geographic area impacted by the violation. In situations where a defendant knowingly flaunted environmental laws and undermined regulatory programs, supplemental sentences involving environmental compliance or audit programs, a court-appointed monitor, employee training, and public apologies may be the best way to punish the company and prevent future violations and increase environmental awareness. These sentences may also deter other corporations from similar conduct and promote similar types of corporate programs industry wide.

2. All Terms and Conditions of a Supplemental Sentence, Including Oversight Provisions, Should be Well Defined

Sometimes, a defendant will try to persuade the government to allow it to subsidize an environmental or other project in the future, but the nature or terms of the project are left undefined or open-ended. This can happen when the parties cannot agree on a project, but there is a strong interest in not delaying the guilty plea. This outcome should be avoided.[57] The

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that are the basis of the enforcement action and must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if: a. the project is designed to reduce the likelihood that similar violations will occur in the future; or b. the project reduces the adverse impact to public health or the to which the violation at issue contributes; or c. the project reduces the overall risk to public health or the environment potentially affected by the violation at issue.

[56] See, also, Missouri Valley, 741 F.2d at 1549 (donation to foundation to endow university chair for ethics struck down as violation of the Federal Probation Act).

[57] EPA's Supplemental Environmental projects policy, effective May 1, 1998, at page 5 addresses the issue as follows:

dangers associated with such arrangements are: (1) loss of some control over the ultimate selection of the projects selected; (2) continued delays in choosing the project after sentencing; and (3) undermined ability to assess the feasibility of the project or the defendant's ability to perform or fund the project; and (4) inadequate oversight or enforcement for whatever project is selected.

Therefore, all terms and conditions of the supplemental sentence should be well defined before entering the plea agreement. Among the terms that may be helpful to include are: (1) completion of tasks to the satisfaction of the appropriate, designated regulatory agency; (2) full access by the government to information necessary to monitor and ensure compliance with the provisions of the plea agreement, including access to documents and facilities for sampling and inspection; (3) a requirement that the defendant hire an independent consultant to analyze compliance with the terms of the agreement and, if necessary, to develop corrective actions recommendations; (4) a requirement that the defendant make periodic reports on progress to the probation office, the court, and the government; (5) a provision that the regulatory agency serve as expert and advise the court and the probation office on the adequacy of compliance; and (6) identify an individual within the corporation, such as the president or general counsel, who will be personally responsible for implementation and completion of the supplemental sentence.

3. Appropriate Regulatory and Technical Assistance Should Be Obtained During Negotiation of a Supplemental Sentences

Supplemental sentences often require a defendant to perform or fund cleanups and other actions that are highly technical and take several years to accomplish. Therefore, there are certain steps that can be taken up front to help ensure effective compliance and enforcement of supplemental sentences at the time of negotiating a plea and at sentencing.

First, before agreeing on a supplemental sentence, the prosecutor should obtain technical or regulatory assistance from EPA or other agencies with the necessary expertise. Involving the agency can compensate for any lack of expertise at the probation office, the court, or the prosecutor's office. Obtaining this assistance early on ensures that the supplemental sentence will be feasible and practical and may also help persuade the court make the supplemental sentence part of the overall sentence. Where experts in an agency will be needed to perform an oversight role, arrangements should be made ahead of time to ensure that the agency is committed to the task and will devote any necessary personnel and resources.

Second, since section 3553(a)(1) of the SRA requires the Court to consider the "history

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"The type and scope of each project are defined in the settlement agreement. This means the "what, where, and when" of a project are defined by the settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be defined later (after EPA or the Department of Justice signs the settlement agreement) are not allowed.

and characteristics of the defendant" in establishing the condition of probations. The prosecutor should also consider the defendant in deciding whether a supplemental sentence is appropriate. In other words, the prosecutor should determine whether the defendant would be willing or able to perform or fund the supplemental sentence. Since supplemental sentences may well take a good length of time to complete and require ongoing cooperation with federal regulators, the prosecutor should consider the defendant's enforcement history and cooperation, or lack thereof, with federal investigators and prosecutors. In determining whether the defendant will be able to implement and complete the supplement sentence, the prosecutor may well want to consider the defendant's economic viability, management strength, and degree of technical competency.

If after examining these relevant factors, the prosecutor decides that the defendant is a good candidate, the prosecutor may well want to encourage the defendant to get involved in the performance of the supplemental sentence in the spirit of true community service. However, if the prosecutor determines that the defendant is unlikely to be a cooperative partner in implementing the supplemental sentence or does not have the resources or technical expertise to carry it out, the prosecutor may want to forego the supplemental sentence and limit the plea agreement to traditional sentencing terms.

4. Supplemental Sentences Must be Consistent with the Anti-Deficiency Act, and Cannot Supplement Appropriated Funding of Federal Programs

The Anti-Deficiency Act has an impact on supplemental sentences similar to the MRA by prohibiting the Executive Branch from spending money in excess of Congressional appropriations or from obligating federal funds prior to appropriation.[58] Therefore, as a general matter, a supplemental sentence may not fund a federal agency indirectly through a project that a federal agency is already specifically required by statute to do or by providing a federal agency with additional resources to perform an activity or function for which Congress has specifically appropriated funds for the agency to perform. In other words, a supplemental sentence cannot directly or indirectly fund federal programs. For example, the government may not be reimbursed for investigation and prosecution costs as they are already Congressionally funded.[59]

However, the Act would not prohibit supplemental sentences that require defendants to reimburse the federal government for expenses incurred by an agency in response to environmental violations, like emergency response or cleanup costs. In addition, the Act would not prohibit payments made to state and local governments for response costs incurred as a result of a violation. The only exception is where such payments serve to augment state or local

[58] 31 U.S.C. § 1341(a)(1). See, Matter of: Forest Service - Appropriations for Fighting Forest Fires, 1989 WL 240615 (Comp. Gen.) (Unpublished).

[59] This would also be a violation of the VWPA. See supra, text accompany notes 13-18.

programs that are funded by federal agencies as part of a federal program.[60]

Finally, Congress has established by statute a number of federal trust funds to promote environmental education, natural resource conservation, wildlife protection, and national park and forest stewardship, and other purposes.[61] Therefore, payments to these Congressionally established funds would not violate the Anti-Deficiency Act, despite the fact that some of these trusts provide additional resources to help agencies perform their statutorily-required duties and may be managed, implemented, or overseen by federal employees.[62] However, prosecutors should still ensure that payments to these funds will satisfy the nexus requirement.

5. Any Trust Fund Created by a Supplemental Sentence Must be Managed by a Non-Federal Entity Chosen Without Favoritism

There are two issues that prosecutors should be aware of when crafting a supplemental sentence that creates a trust fund to remedy the harm caused by the criminal violation. First, the Anti-Deficiency Act prohibits federal officials who are acting within the scope of their duties from managing or controlling environmental trust funds established by a supplemental sentence. Trust funds should be managed by neutral third parties, like local government officials or financial institutions, or the money from the plea agreement may be deposited in an escrow account and distributed at regular intervals as necessary until the supplemental sentence is

[60] See e.g., 33 U.S.C. §§ 1281-1299 (grants for publicly-owned treatment works); 42 U.S.C. § 300h-6 (grants for sole source aquifer demonstration programs).

[61] There are more than 350 national parks, forests, commissions, foundations, funds, and other federal organizations that may accept gifts. See, e.g., National Environmental Education and Training Foundation (NEETF), 20 U.S.C. § 5509; Wildlife Conservation and Appreciation Fund, 16 U.S.C. § 3744(g); Historic Preservation Fund, 16 U.S.C. § 470h; Abandoned Mines Reclamation Fund; 39 U.S.C. § 1231(b)(3); National Park Foundation, 16 U.S.C. § 19e; National Forest Foundation, 16 U.S.C. § 583j; National Fish and Wildlife Foundation, 16 U.S.C. § 3701; National Natural Resources Conservation Foundation, 16 U.S.C. § 5802; Boston Harbor Islands Recreation Area, 16 U.S.C. § 460kkk; Santa Monica Mountains National Recreation Area, 16 U.S.C. § 460kk; Cane River Creole National Historic Park, 16 U.S.C. § 410ccc; and Tumacacori National Historical Park, 16 U.S.C. § 410ss.

[62] For example, one of the purposes of the NEETF is to "encourage, accept, leverage, and administer private gifts for the benefit of, or in connection with, the environmental education and training activities and services of the United States Environmental Protection Agency." 20 U.S.C. § 5509(a)(2)(A). The Directors and members of the board of directors are appointed by the Administrator of the EPA. Id. at § 5509(b).

completed.[63] Federal officials may, however, provide technical oversight to ensure that any projects performed are implemented in accordance with the supplemental sentence. Second, there should be no actual or appearance of impropriety or favoritism in selecting the trust or charity elected to receive the money from the settlement.[64]

6. The Terms of a Supplemental Sentence Should be Evaluated to Ensure That No Unintended Benefits to the Defendant Accrue

In negotiating and structuring a supplemental sentence, it is important to avoid any unintended benefits accruing to the defendant that would undermine the purposes of criminal sentencing. Generally, a supplemental sentence should not include provisions that a defendant is already required to perform by law. For example, the government should not give credit to a defendant in a plea negotiation for capital improvements, other expenditures, or other changes that the defendant had already planned for or was required to make to meet regulatory permits, the terms of a civil consent decree, or other applicable regulations.

Defendants may also try to obtain tax relief for funds expended to comply with a supplemental sentence that would not be available if the same funds were used to pay a fine.[65] If

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[63] See, e.g., United States v. Lone Mountain Processing, Case No. 2:99CR00009 (W.D. Va.).

> Lone Mountain will be ordered to pay restitution in the amount of $1,510,000, to the Clerk of the Court. These funds will be paid into an interest-bearing escrow account established and administered by the Lenowisco Planning District Commission, with principal and interest to be paid within five (5) years of the date of the final payment made pursuant to this agreement for improvements to the sewage disposal system and other projects designed to improve water quality in the area of the Town of St. Charles and the Powell River watershed in Lee County, Virginia, to include the completion of a sewer line between the Town of St. Charles and the town of Pennington Gap, any other projects designed to improve water quality and sewage disposal systems in the area of the Town of St. Charles and the Powell River watershed in Lee County, Virginia, and reasonable auditing and administrative expenses incurred by Lenowisco Planning District Commission in administering the escrow account.

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

[65] 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, than it may be deductible. See, True v. United States, 894 F.2d 1197, 1204 (10th Cir. 1990); United States v. Allied Signal, 40 Env't Rep. Case 1660 (3rd Cir. 1995).

a defendant is allowed to claim a tax deduction to pay for a supplemental sentence, the public, in effect, is subsidizing part of the criminal sentence for the defendant. Another inappropriate benefit that defendants may seek to obtain is positive publicity or community relations from environmental projects or other supplemental sentences performed or paid for by the defendant as a result of the plea agreement. Allowing the defendant to reap these types of collateral benefits from plea agreement requirements clearly undermine the seriousness of the defendant's criminal environmental violations and the purposes of criminal sentencing. Therefore, prosecutors should require specific language in the plea agreement prohibiting the defendant from obtaining any tax benefits or gaining any advantageous publicity from its environmental projects or donations.[66]

[66] 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 $100,00.00 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.

III. EXAMPLES OF SUPPLEMENTAL SENTENCES IN ENVIRONMENTAL CASES

This last section describes some recently used types of supplemental measures and provides more specific guidance on some of the more common forms of supplemental sentences that might be employed. The examples contained in this section are drawn from actual recent cases. They are not exhaustive and are not meant to suggest that other types of sentences may not be appropriate in specific cases. All of the following supplemental sentences were the result of negotiated pleas and all involved substantial criminal fines.

A. Environmental Remediation and Restoration

In many plea agreements, defendants reimburse, as restitution, the costs incurred by federal, state, and local agencies in the remediation of environmental damage caused by the defendant's environmental violations.[67] In other cases, defendants have agreed to clean up the pollution themselves and then go beyond the damage directly linked to their criminal conduct and take additional steps to enhance and protect the natural environment near their facilities. For example, the plea agreement in United States v. Mid-South Terminal Company, Case No. 98-I-037 (W.D. Tenn.) included the following provisions:

> The defendant shall conduct remedial activities as required under U.S.S.G. § 8B1.2 to ameliorate the impact of the defendant's pollution of the Mississippi River by:
>
> (i) removing all scrap metal and other debris in the Mississippi River in the area where the defendant conducted its barge-loading operations; and
>
> (ii) removing accumulated waste materials on the banks of Mckellar Lake at both terminal facilities owned by the defendant on President's Island; and
>
> The defendant shall perform community service pursuant to U.S.S.G. § 8B1.3 by conducting the following activities:
>
> (i) assuming a leadership role in the President's Island "Water Matters" project and enlisting the support of all businesses on President's Island in ongoing environmental compliance efforts and cleanup activities sponsored by the President's Island "Water Matters" project; and
>
> (ii) providing heavy equipment and labor to support ongoing cleanup of the President's Island "Water Matters" project.

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[67] See e.g, United States v. Pearl Shipping Corp., Case No. CR98-000384 MHP (N.D. Cal.) (Company pled guilty to negligently dumping 3,000 gallons of oil in San Francisco Bay Company agreed to pay more than $1 million dollars for cleanup costs).

B. Environmental Audits, Comprehensive Compliance Programs, and Employee Training

Environmental audits can be very helpful in identifying violations within a company or a facility.[68] Good corporate citizens, especially larger corporations, are likely to conduct environmental audits already as normal business operations. However, companies that become defendants in environmental crimes cases may not have been conducting environmental audits at all. Therefore, in some cases, defendants are required to perform comprehensive environmental audits as part of their sentences with the additional stipulation that the government approve the defendant's selection of the auditor.

For environmental audits to be adequate, they should be conducted by auditors with both the expertise and sufficient independence to be objective. The audits should be comprehensive, cover all applicable federal and state regulations and all aspects of waste handling, pollution control, and corporate management issues relating to environmental matters, and be sufficiently intensive to uncover problems. The auditors should report to a corporate official with sufficient authority to see that needed changes recommended by the auditors are implemented. Prosecutors should require that defendants agree to allow federal or state regulators to be present during audits. In addition to retaining final approval authority for the audit, the government should also require that the defendant transmit preliminary drafts of the audit to the government and agree to a schedule of compliance with any violations discovered by the audit.

Some prosecutors have negotiated plea agreements that include broad comprehensive compliance and management programs that require both a regular program of environmental audits, corrective action for problems that are discovered, management systems to help ensure compliance with all federal, state, and local environmental regulations, and employee environmental training programs.

The plea agreement in United States v. Doyon Drilling, Inc., Case No. A98-0082-01 CR (JKS) (D. Alaska) contains instructive language calling for a strong environmental management program with many of the provisions recommended above:

> 2. Defendant DOYON DRILLING agrees to establish and maintain an effective environmental compliance program enforcing all environmental law, regulations, and permits. Defendant DOYON DRILLING agrees that the environmental compliance program will be diligently enforced by the officers and managers of DOYON DRILLING. As part of establishing and maintaining an effective compliance program, DOYON DRILLING will do the following:
>
> a) appoint a DOYON DRILLING employee as a responsible corporate officer

[68] See generally, Compliance-Focused Environmental Management System-Enforcement Agreement Guidance, EPA-330/9-97-002 (August 1997).

(RCO), who will have the requisite knowledge of DOYON DRILLING compliance obligations under this Agreement and the authority to insure that the obligations are fully implemented, and who will be directly responsible for monitoring, maintaining, and enforcing the provisions of the environmental compliance program. The U.S. Attorney's Office and the Court must approve the selection of the RCO. DOYON DRILLING will identify the RCO to the Court at the time of sentencing;

b) establish, at a time prior to sentencing, a Compliance Committee consisting of the RCO, the General Manager of DOYON DRILLING and the independent environmental consultant hired to develop DOYON DRILLING's compliance program, as described below or other suitable environmental consultant approved by the U.S. Attorney's Office and the Probation Office. This Compliance Committee shall report to the DOYON DRILLING board at each regularly scheduled board meeting;

c) retain, at a time prior to sentencing, the services of an independent environmental consultant to be approved by the U.S. Attorney's Office and Probation Office who will develop the environmental compliance plan, including the requisite employee training program. The consultant shall have full access to all DOYON DRILLING facilities, including but not limited to its drilling rigs and business offices, records relating to DOYON DRILLING's compliance with environmental laws, regulations and permits, and all present and past DOYON DRILLING employees;

d) identify all waste streams from the DOYON DRILLING rigs;

e) develop written work practice standards for DOYON DRILLING rigs regarding handling, storage, treatment, and proper disposal of all solid wastes and hazardous substances;

f) develop and implement a program to comply with all federal and state environmental laws, regulations, and permits. The program will adopt and implement the recommendations of the independent environmental consultant and will incorporate and employ the equipment and procedures necessary to prevent future noncompliance and violations. The program will include the development and maintenance of record keeping regarding the accumulation, treatment, storage, and proper disposal of all solid waste, as defined by RCRA. The program must be approved by the U.S. Attorney's Office, Environmental Protection Agency (EPA), and Probation Office prior to implementation. This program must be developed and fully implemented within one year of sentencing;

g) commence implementation of the compliance program and training following

the government's review and approval. The Defendant shall submit quarterly reports to the Court, U.S. Attorney's Office and Probation Office, signed by the RCO, describing the status of the implementation of the environmental compliance program and training. A status conference with the Court will be held on an annual basis commencing one year from the date this Agreement is executed, or more frequently as requested by the United States and approved by the Court, during the period of probation. The environmental compliance program will remain under the supervision of the Court for the duration of the term of probation subject to periodic announced and unannounced inspections by government officials. This term shall not be interpreted in any way to limit any governmental agency's exercise of its statutory or regulatory access or inspection rights.

h) train all employees, and contractor employees that are normally and regularly present at DOYON DRILLING facilities on the North Slope or are involved with waste handling or disposal, annually about the requirements of environmental law, regulations and permits and about the necessity of personal responsibility in enforcement of environmental laws, regulations and permits. This internal employee training will be in addition to any training provided by DOYON DRILLING's clients;

i) train all new DOYON DRILLING employees, and new contractor employees that are normally and regularly present at DOYON DRILLING facilities on the North Slope or have responsibility for waste handling or disposal, within two months of hiring about the requirements of environmental laws, regulations and permits and about the necessity of personal responsibility in enforcement of environmental laws;

j) direct supervisors to provide written certification annually to the RCO that all supervised employees have been properly trained;

k) hire an independent environmental auditor approved by the U.S. Attorney's Office and the Probation Office to conduct annual audits of all DOYON DRILLING rigs in operation to determine compliance with all environmental laws, regulations and permits, adequacy of the compliance program, and adequacy and frequency of environmental training. The auditor will not be associated with the independent consultant hired to develop the compliance and training programs. The auditor shall have full access to DOYON DRILLING's drilling rigs, business offices, facilities, records relating to DOYON DRILLING's compliance with environmental laws, regulations and permits and DOYON DRILLING employees.

These compliance programs can also include toll-free “hot lines” for employees to allow

employees and contractors to report environmental noncompliance without fear of retribution from the company. For example, the plea agreement in United States v. Henry County Public Service Authority, Criminal No. 98-84-R (W.D. Va.) contained the following language:

> The HCPSA will assure that there is a system in place which requires employees and private contractor employees to report environmental noncompliance within the HCPSA without fear of retribution. See U.S.S.G. § 8A1.2, Application Note 3(k)(5). This will include, at a minimum, establishment of a toll-free number for employees to use in reporting noncompliance.

C. Pollution Prevention

Pollution prevention projects can be used to reduce the sources of pollution produced by a company's manufacturing process thereby reducing emissions and going beyond compliance. Pollution prevention projects can also help the defendant find new, more innovative and less expensive ways to operate. For example, in United States v. Norwood Industries, Inc., Criminal No. 94-34 (E.D. Penn.), the defendant agreed to take the following pollution prevention projects:

> Norwood Industries, Inc. will undertake the following pollution prevention and/or reduction measures to reduce its volatile organic compound ("VOC") emissions and to prevent other types of pollution:
>
> (i) Norwood Industries, Inc. will engage in annual research and development aimed at replacing solvent-based products and processes with water-based materials. Norwood Industries, Inc. agrees to spend at least $30,000 annually on such research and development during its five-year period of probation.
>
> (ii) Within 90 days of sentencing, Norwood Industries, Inc. will move all hazardous waste materials from outdoors to indoors.
>
> (iii) Norwood Industries, Inc. will take the following steps to reduce motor vehicle emissions which contribute to the formation of ozone:
>
> (i) Within 30 days of sentencing, Norwood Industries, Inc. will join the Chester Valley Transportation Management Association, an organization which assists businesses and other organizations comply with federal and state Clean Air Act requirements.
>
> (ii) Within 60 days of sentencing Norwood Industries, Inc. will ensure that at least 80 percent of its maintenance and production employees work either three 12-hour shifts or four 10-hour shifts per week to reduce the number of

commuting trips employees take to work per week.

(iii) Within 60 days of sentencing, Norwood Industries, Inc. will utilize the Chester Valley Transportation Management Association to encourage all employees (including non-production/maintenance employees) to take mass transit to work, including development of a shuttle program from nearby mass transit stops to Norwood's Mavern facility.

(iv) Norwood Industries, Inc. will provide written notice to the United States Probation Office and to EPA when it has achieved these tasks.

D. Costs to State and Local Governmental Agencies

Often, state and local environmental regulatory and law enforcement agencies provide critical emergency response and remedial costs. In these situations, federal prosecutors can require, as restitution, that defendants reimburse these agencies for the costs associated with their efforts.[69]

E. Trust Funds

In a number of cases, defendants have been required to pay monies to pre-existing, statutorily-created trust funds to pay for projects aimed at reducing or remediating environmental harms resulting from the conduct. The plea agreement in United States v. Royal Caribbean Cruises Ltd (RCCL), Case No. A99-0089 CR (JWS)(D. Alaska) contained the following provisions:

> The Parties agree to recommend that $3,000,000.00 of the total criminal fine amount of $6,500,000.00 be suspended for the explicit purpose of RCCL applying the suspended amount in performing 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. § 3553(a). The explicit goal of RCCL's required community service is to fund environmental projects and initiatives designed for the benefit, preservation, and restoration of the environment and ecosystems in the waters of the United States along the coast of Alaska. These projects and initiatives are to include, but are not limited to,

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[69] See, e.g.,, United States v. Robert Kempton, Case No. 97-420-CR-T-24(B) (M.D. Fla.):

> Pursuant to 18 U.S.C. § 3663(a)(3) and/or 3663A(a)(3), defendant agrees to make restitution to the Environmental Protection Commission of Hillsborough County in the amount of $2,339.75, and to the Florida Department of Environmental Protection in the amount of 1,175.00.

the following: monitoring, study, restoration, and preservation of fish, wildlife, and plant resources; monitoring study, restoration, and preservation of fish, wildlife, and plant resources; monitoring, study, clean up, remediation, sampling, and analysis of pollution and other threats to the environment and ecosystem; research, education, and public outreach relating to the environment and ecosystem; and enforcement of environmental and wildlife protection laws. Accordingly, RCCL agrees that within 10 days after the final acceptance of this agreement, RCCL pay a total of $3,000,000.00 to the foundations below:

b. $2,000,000 to the National Park Foundation ("NPF"). The NPF is a charitable and nonprofit corporation established pursuant to 16 U.S.C. §§ 19e-19o. It was established to encourage "private gifts of real and personal property" for the benefit of the National Park Service in order "to further the conservation of natural, scenic, historic, scientific, educational, inspirational, or recreational resources for future generations of Americans." Id. § 19e. The NPF is empowered to "do any and all lawful acts necessary or appropriate to its purposes," including acceptance and administration of any "gifts, devises, or bequests." Id. §§ 19g, 19j. The monies shall be used for the purposes set forth above and accounted for to Congress in annual reports required by 16 U.S.C. § 19n.

c. $1,000,000.00 to the National Fish and Wildlife Foundation (the "NFWF"). The NFWF is a charitable and nonprofit foundation corporation established pursuant to 16 U.S.C. §§ 3701-3709. Its purposes include the acceptance and administration of "private gifts of property for the benefit of, or in connection with, the activities and services of the United States Fish and Wildlife Service," and the performance of "such other activities as will further the conservation and management of the fish, wildlife, and plant resources of the United States, and its territories and possessions for present and future generations of Americans." Id. § 3701(b)(1), (2). The NFWF is empowered to "do any and all acts necessary and proper to carry out" these purposes, specifically, solicitation, acceptance, and administration of "any gift, devise, or bequest . . . of real or personal property." Id. § 3703(c)(1), (7). The monies shall be used for the purposes set forth above, and in particular, to support and implement the enforcement of environmental and marine wildlife protection laws along the coast of Alaska, and accounted for to Congress in annual reports as required by 16 U.S.C. § 3706(b).

Alternatively, case specific funds have been created to manage and perform environmental projects. For example, in United States v. John Morrell and Company, Case No. CR 95-400 (D. South Dakota) the prosecutor negotiated the following provisions:

(1) defendant shall be fined a total of three million dollars ($3,000,000), of which one million dollars ($1,000,000) shall be remitted in recognition of restitution and community service made by the defendant as required by the following subparagraph of this agreement;

(2) defendant shall make restitution, remediation, and community service as required under U.S.S.G. §§ 8B1.1, 8B1.2, and 8B1.3, because of the impact of the defendant's pollution on the Big Sioux River and to the communities that live and work along the river, by making a payment of one million dollars ($1,000,000) to an environmental trust fund to be established by the City of Sioux Falls, South Dakota to be used to (a) reduce pollution and otherwise cleanup the Big Sioux River; (b) identify continuing sources of pollution of the Big Sioux River; (c) develop and implement strategies to eliminate and/or reduce pollution of the Big Sioux River; and (d) develop and implement projects for improving beneficial uses of the Big Sioux River and public lands located along the Big Sioux River. All expenditures from this trust fund shall be subject to final approval by the Court. In the event that an appropriate trust fund is not established by the City of Sioux Falls, payment shall be made to an environmental trust fund established for the purposes set forth in the subparagraph and managed by a financial institution to be designated by the United States Attorney, with the trust agreement for said fund subject to approval by the Court[.]

F. Public Apologies and Speeches

In many cases, defendants have entered into plea agreements that require them to make a public apology for their environmental crimes, most often in national and local newspapers and trade press. Among other things, a public apology can serve as an indirect penalty beyond criminal fines and serve as an effective deterrent, both to the defendant and to other potential violators. The apology is most effective if it includes the defendant's name, the nature of the offense and any harm caused by the offense, the fact that the defendant pled guilty or has been convicted, the penalty imposed, and the apology itself. Pursuant to plea agreement, defendants have also been required to speak to trade groups on the folly of committing their environmental crimes. For example in See, e.g., United States v. Colonial Pipeline Company, Inc., Case No. CR 99-224 (D.S.C.), the following provision was included in the plea agreement:

> Community Service: The Defendant shall develop a program to enhance the pipeline industry's awareness of its obligations under the Clean Water Act ("CWA"). Such program shall include: (a) at least two speeches or presentations at the annual meetings, or other generally attended comparable meetings, of such organizations as the American Petroleum Institute ("API") or the Association of Oil Pipelines ("AOPL"); and (b) the Defendant shall ensure publication of at least two articles on the obligations of pipelines under the CWA to trade publications such as the Pipeline and Gas Journal. The content of the speeches and articles shall include at least the following: (a) that pipelines are

prohibited under the CWA from discharging pollutants to the waters of the United States without a permit; and (b) the various measures taken by Defendant and other companies to prevent unpermitted releases to the waters of the United States, including but not limited to, exposed pipe surveys, internal line inspections, and close interval surveys, as well as the elements addressed by the prevention and detection program.

It is recommended that prosecutors lock in the details of the apology in the plea agreement, including the particular newspapers that will carry the apology, when the apology will be published, the size of the apology, and what the apology will say. Some prosecutors have put the precise language of the apology in the plea agreement. For example, In United States v. Regency Cruises, Case No. 94-245-CR-T-21C (M.D. Fla.), the plea agreement required that the following statement be published in a full-page advertisement in the St. Petersburg Times, the Tampa Tribune, and the Florida Environments newspapers within thirty days of sentencing:

> Regency Cruises Inc. recently pleaded guilty in Federal court to charges of illegally discharging plastics into the sea after being prosecuted by the United States Attorneys Office for the Middle District of Florida and the Environmental Crimes Section of the United States Department of Justice. During separate voyages of the Regency Cruises, Inc. vessels the Regent Rainbow and the Regent Sea in February 1993, plastic bags filled with garbage were illegally discharged into ocean waters thirty to forty miles west of Tampa Bay in violation of the Act to Prevent Pollution From Ships. As a result of this criminal conduct, Regency Cruises, Inc. was fined $350,000 and placed on probation for three years. Part of the terms of the probation were that we publish this advertisement. We are sorry for what we did, and we hope that our guilty verdict will be a lesson to others that environmental laws must be respected. We have taken steps to insure that such violations will not occur in the future.
>
> Board of Directors
> Regency Cruise Lines Inc.