

NLWJC- Kagan

Counsel - Box 006 - Folder 015

Environmental Crime Initiative

## ENVIRONMENTAL INITIATIVES

**OVERVIEW:** Under the theme of protecting communities from toxic chemicals, these are several initiatives building on the Administration's environmental record:

1. Increase Superfund cleanups at the nation's worst toxic waste sites, with the goal of cleaning up two-thirds of the sites on the current priority list. (cost: \$1.5 - \$2 billion)
2. A new set of proposals to cleanup and re-develop "Brownfields" to complement the Administration's previously announced tax incentive. (cost: \$400 million)
3. Safe drinking water for all Americans' communities through implementation of the recently enacted Safe Drinking Water Act reauthorization, and protection of drinking water sources. (cost: \$800 million)
4. Expanding the community right-to-know program to collect and make available via computer local information about toxic threats in air and water. (cost: \$355 million)
5. An environmental crimes legislative proposal that would increase penalties for the worst environmental offenders and strengthen the federal government's partnership with state and local law enforcement. (cost: zero)

### TOTAL COST:

Total 4-Year Cost for this agency-proposed agenda: \$3.05 - 3.55 billion

The package summarized above is set out in greater detail in the following pages. To construct an environmental package at lower cost, *two alternative packages* may be considered:

#### *Alternative Package A:* (cost: \$2.9 billion)

Low end of Superfund range would be selected. (revised cost: \$1.5 billion)

Brownfields same as above. (cost: \$400 million)

The scope of the right-to-know initiative would be limited to fewer communities. (revised cost: \$250 million)

The drinking water budget would be trimmed. (revised cost: \$750 million)

Environmental crimes, same as above. (cost: none)

#### *Alternative Package B:* (cost: \$1.5 billion)

Erase the Superfund Backlog: provide sufficient funding to permit EPA to clear out its

current backlog of 70 Superfund sites which are ready to be cleaned up, but for which funds have been unavailable. (New sites would continue to be added, however.) We would also expand the Reagan executive order to give more environmental agencies (in addition to EPA) authority to order cleanups. This proposal would end the waiting for communities with Superfund sites at which all preliminary assessments and design work has been completed but actual cleanup has been stalled because of a lack of funds. (cost: \$500 million)

Brownfields: Increase the EPA grant program to local governments for brownfields site assessment and cleanup as discussed in item II, but at a lower level. (cost: \$245 million)

Safer Drinking Water Implementation as described in item III, below, but at a lower level and without source water protection. (cost \$400 million)

Community Right-to-Know: As described below in item IV. (cost: \$355 million)

The Environmental Crimes legislative proposal described item V.

Note: Both CEQ and EPA believe that the resources in this alternative are too few, and too thinly spread among proposals, to support a presidential initiative on toxics, specifically, that will be either credible or well-received among major constituencies. There are other difficulties as well: the proposal to "clear the Superfund backlog" highlights the fact that we have created a backlog by inadequate budget requests; the drinking water request is likely to be derided by any constituency informed about the magnitude of the need.

#### I. ACCELERATED SUPERFUND CLEANUPS (cost: \$1.5 - \$2 billion)

OVERVIEW: There are currently 1,387 Superfund toxic waste sites. Some 362 cleanups have been completed, and at current levels of funding, a total of 650 sites will be cleaned up by the year 2000. This proposal would increase the total number of cleanups by the year 2000 to some 900 sites, allowing us to say two-thirds of the current sites will be cleaned up and the pace of additional cleanups doubled.

The proposal:

*Accelerate the Pace Of Cleanup.* Set an ambitious new goal for Superfund: doubling the pace of cleanup so that two-thirds of the existing Superfund sites are cleaned up by the year 2000.

*Issue an executive order to provide agencies with new authority to make polluters clean up toxic waste sites they created* By executive order, give Interior, USDA, and NOAA new authority to make polluters clean up toxic pollution, which will boost site cleanups and clean water protection. (These agencies already must oversee cleanup at many sites that are not on EPA's priority list, but lack full authority. This would modify the Reagan executive order delegating Superfund authority.)

## *Potential Negatives*

The fight with Congress over reauthorization has generally been very positive for the Administration in terms of our position that the largest polluters must pay their fair share. However, the congressional leadership has sought to suggest that we take our position just to be friendly to the trial lawyers as they say we have sought to do in other areas.

We have based this initiative on our estimates of the time and money typically involved in cleaning up a Superfund site. Despite our best efforts at sampling and other work to determine the extent of contamination at a Superfund site, we do sometimes find levels or types of contamination that take longer to remediate than originally anticipated. Such unanticipated circumstances -- or other unexpected delays (severe weather, labor problems, etc.) -- could keep us from reaching the goal set out in this initiative. We do believe that clean up will be completed or substantially completed on the additional sites covered by the initiative by 2000.

As with other aspects of our "polluter pays" message, the executive order expanding Superfund cleanup authority may generate criticism from those companies who are liable at particular sites. These are primarily mining sites managed by Interior, USDA, and NOAA that mining companies have contaminated and abandoned.

II. CLEANUP AND REDEVELOPMENT OF BROWNFIELDS (cost: \$400 million) Numbers reflect combined impacts of a new EPA initiative and the President's proposed Brownfields tax incentive.

OVERVIEW: This initiative would clean up and redevelop up to 30,000 contaminated brownfield sites in 300 communities. Brownfields sites are contaminated, abandoned, properties. The contamination is not serious enough for EPA to list the site on its ranking of the worst sites requiring cleanup, but serious enough that banks generally will not lend money for redevelopment because of their fear of potential liability for the contamination. Thus the site stays idle and remains a blight on our cities and communities. GAO estimates that there are some 450,000 brownfield sites in the United States. Of that number, EPA and Treasury estimate that some 130,00 would be eligible for the brownfields tax credit -- a fair estimate of the number of sites that are good candidates for redevelopment. This program would, therefore, help clean up as much as 25% of the sites that are candidates for redevelopment. This proposal will result in improved quality of life for 15 million Americans living within 5 miles of at least one brownfield site. It would also create new jobs in cleanup and redevelopment work, increase the local tax base; spur private-sector investment; and discourage urban sprawl by enhancing preservation of "greenfields." The proposal includes:

*Enactment of the Administration's Brownfields tax incentive*, announced in the State of the Union and later introduced in the House and Senate, to accelerate brownfields cleanup (\$2 billion cost already budgeted).

*\$340 million EPA brownfields grants program*; grants to cities for site assessment (up to \$200,000 each) and cleanup (up to \$500,000 each).

*\$40 million EPA state voluntary cleanup program support:* provides technical support and needed expertise for states offering cleanup guidance to industry.

*\$20 million EPA Worker Training Program* to train citizens living in brownfield communities in cleanup technologies to create opportunity for employment at these sites.

### *Potential Negatives*

This proposal would only provide a marginal increase in sites (13,000, not 30,000) cleaned up. The proposal "double counts" the number of clean-ups that will result from the Administration's announced \$2 billion tax incentive (17,000 sites).

III. SAFER WATER FOR ALL AMERICAN COMMUNITIES. (Cost: \$800 million over 4 years in addition to funding already included in our budget. EPA, NOAA, Interior, USDA.

OVERVIEW: This proposal reflects the recently signed Safe Drinking Water Act's expansion of EPA's drinking water program. The proposal incorporates a series of steps to stop toxic pollution from entering our drinking water sources and other streams and rivers, while providing new resources to state and local governments fighting toxic pollution. The proposal makes use of existing authority to make polluters clean up toxics that threaten our lands and waters. Legislative proposals for reauthorization of the Clean Water Act would advance these principles and strengthen protection against toxic pollution, especially from polluted runoff.

*Making Polluters Clean Up More Toxic Threats to Lands and Waters.* (no cost) Replace the Reagan Administration Executive Order that limits agency authority to compel polluters to clean up toxic waste sites that threaten our lands and waters with a new Executive Order that expands the authority of Interior, NOAA, and USDA to compel polluters to clean up.

*Protection for Drinking Water Sources.* (\$400 million) Congress has not yet provided full funding for the Safe Drinking Water bill, which you signed earlier this month and which contains proposals to strengthen the ability of EPA and state and local governments to protect drinking water supplies. This proposal would challenge Congress to restore the money for communities to protect their drinking water, through the Safe Drinking Water Revolving Fund that you proposed and provide additional funding for communities to protect their drinking water sources.

*Protecting Communities from Toxic Mine Wastes.* (\$332 million) Dedicate a Hard Rock Mining Reclamation Fund (DOI) and an expanded cleanup program to stop toxic discharges from hundreds of mines and restore thousands of miles of rivers to productive use. USDA would also undertake related activities.

*Targeting Farm Bill Resources to Reducing Toxic Cleanup.* (cost: none) The 1996 Farm Bill provided a number of opportunities for USDA to work in partnership with local governments and soil conservation districts on voluntary, community-oriented

conservation projects. This initiative would direct USDA to focus those programs on reducing toxic and agricultural pollution into our waterways, beginning with an effort to focus the Conservation Reserve Program on water quality goals. These efforts should result in water quality protection efforts covering more than 50 million acres of lands nationwide.

*State and Local Protection of Rivers and Beaches.* (cost: \$64 million) In order to provide front-line protection of rivers and beaches this initiative would have you direct EPA and NOAA to create new partnerships with state and local governments to control polluted runoff, and to manage critical coastal zone areas.

### *Potential Negatives*

The new resources for drinking water that may be viewed as an inadequate financial commitment, when needs are estimated to be in the tens of billions of dollars. In addition; other elements similarly may be regarded as inadequate to the magnitude of the need.

## IV. HONORING AMERICANS' RIGHT TO KNOW ABOUT TOXICS (Cost: \$355 mil.)

**OVERVIEW:** Announce a broad initiative to enhance the Right-To-Know program. Under this proposal, by the year 2000, EPA, the Department of the Interior, and NOAA will make more local environmental information about the quality of the air and water -- which for ordinary citizens can often be impossible to find -- available instantly for all American communities. This information would be coupled with information about food and products that present major risks to families. This new service would complement the information available from EPA's Toxics Release Inventory, which has been highly effective in informing citizens about chemical data from major manufacturing facilities in their neighborhoods.

*A Call for Expanded Right-to-Know Legislation.* (cost: none) Cabinet agencies will be directed to build on the success of our right-to-know laws to help families make informed choices about the products they use. The Administration will work with parents, scientists, the business community, and the Congress to provide better information to families, so that they will have the tools to protect themselves. This initiative will include common-sense and cost-effective ways to meet the following objectives:

- Assist parents in assessing and avoiding unique environmental health risks to children from products and chemicals;
- Provide information on the whole range of environmental health risk from toxics, including cancer, developmental, endocrine, and reproductive risks; and
- Encourage informed consumer choices by providing improved information.

*Making Right-to-Know Accessible to all Americans.* (cost: \$250 million) By the year 2000, every American should have access to timely information about toxic and other pollutants

in their local air, land, and water through a comprehensive monitoring system with computer links to schools, libraries, community centers and home computers in all cities with populations over 100,000.

- For the first time, set up a nationwide, federally funded, network to monitor key health indicators in the air and water. Monitoring would provide families with access to timely health-related data to make informed choices that directly affect their health, without requiring private parties to report more. For example, timely air quality information can mean the difference between hospitalization and a healthy day for an asthmatic child. Asthma is now the leading cause of hospitalization for young children in the United States.
- Expanding Right-to-Know About Water Quality. (cost: \$85 million) Federal agencies now monitor water quality in only half the nation's rivers, lakes, streams, and beaches. President Clinton is expanding the effort so that communities across America have information about what are the sources of pollution to their rivers, lakes and beaches.
- Increasing Availability of Right-to-Know Information. (cost: \$20 million) President Clinton is directing EPA to lead an effort to ensure that, by the year 2000, Americans have one-stop access to all of the environmental information available. Several government agencies, like NASA, the Interior Department, and the Commerce Department will bring together the information they already collect, so that citizens can get access through one place.

### ***Potential Negatives***

Right to Know is criticized as increasing the paperwork burden facing industry in a manner unrelated to real environmental risks. These concerns, however, should not apply to an approach that makes better use of existing reporting requirements and that focuses on vital common public health resources, such as clean air and water.

## **V. GETTING TOUGH ON ENVIRONMENTAL CRIMES (Cost: none)**

**OVERVIEW:** This proposal would increase penalties for the worse offenders, strengthen our partnership with state and local law enforcement agencies, and plug loopholes in existing laws that allow environmental crimes to go unpunished.

Illegal dumping of toxics and other environmental crimes are real crimes, and our families are the victims. Prosecutors, police, and investigators need better tools to protect our communities from the toxic threat posed by environmental criminals. To address these problems, we recommend the Administration propose a new Environmental Crimes Bill, which will strengthen community protection against environmental criminals. Illegal dumping of toxics and other pollutants is real crime, and communities are the victims. Police, prosecutors, and investigators need better tools to protect our communities from the toxic threat posed by environmental

criminals. This bill will ensure that the assets of environment criminals can be secured even before conviction, and are used to restore the communities they victimize. The bill would impose stronger penalties for the worst environmental crimes, and strengthen our partnership with state and local prosecutors. The bill will include provisions to:

- ***New authority for prosecutors to secure the assets of environmental criminals***, even before conviction, when those assets are needed to repair the environmental harm that has been done. Prosecutors should be able to secure the assets of environmental criminals when they threaten our communities. Criminal defendants are often able to shield their assets from prosecutors, and communities are often at risk that the damage done by the crime will remain unrestored. Authorize prosecutors to get a prejudgment order making placing criminal defendants' assets within the control of the court, to make sure those assets are available to clean up the environment. Broader even than a lien, this provision will allow prosecutors, after a hearing, to secure any of the assets belonging to an environmental criminal and make sure the money is there to clean up the environment for victimized communities.
- ***Impose stronger penalties for the worst environmental crimes***, and strengthen our partnership with state and local prosecutors with more tools and resources. Current law has no provision for environmental criminals whose offenses result in death or injury to the public, including to police and other law enforcement personnel. This proposal would enhance penalties for environmental crimes that result in death or serious bodily injury to law enforcement personnel or the public;
- ***Outlaw "attempts" to commit environmental crimes***. There are no laws against attempted environmental crimes, which hampers efforts to capture criminals before environmental damage is done through "sting" operations and other undercover work. This proposal will make it possible to conduct undercover operations and otherwise to make an arrest before toxics are released into the environment.
- ***Modify statutes of limitation to allow additional time for prosecution*** (not to exceed a total of eight years from the date of the violation) where a criminal tries to conceal an environmental crime. Current statutes of limitations have no exceptions for those who conceal their environmental crimes, with the result that some of the most egregious environmental crimes cannot be prosecuted.
- ***Strengthen environmental law enforcement partnerships***. Local law enforcement agencies often lack the resources to support environmental crimes prosecutions or to train their officers on detection and handling of environmental crimes. This problem hampers joint federal-state prosecutions, and has been made more urgent by the government shutdown and other efforts to cut EPA's enforcement budget and take the environmental cop off the beat. This initiative would provide that state and local officials would be able to receive an award of their costs in joint prosecutions with federal authorities of environmental crime, and the cost award would be added to the criminal fine the defendant would have to pay. The bill would seek \$1,000,000 in new money for training and support of state and local law enforcement officials.

- ***Assure restitution for victims of environmental crimes.*** The authority of courts to require environmental criminals to provide "restitution" to communities victimized by environmental crime should be clear. The communities that are victims of environmental crime should the right to have their environment and natural resources restored. The proposal would clarify the law to ensure that the courts may order convicted criminals to pay restitution for their crimes, by making payments to remediate or restore the quality of the environment to the full extent that it is damaged by an environmental crime.

***Potential Negatives***

May be concern in industrial community about aggressive enforcement.

E X E C U T I V E   O F F I C E   O F   T H E   P R E S I D E N T

14-Aug-1996 11:48am

TO:            Elena Kagan  
TO:            David Fein  
  
FROM:          Bradley M. Campbell  
              Council on Environmental Quality  
  
CC:            Wesley P. Warren  
  
SUBJECT:      EnviroCrimes

Welcome back, Elena. Here's where we are on environmental crimes.

DOJ yesterday presented the draft text for a new "lien" provision. I have three major objections to their proposal for the bill: first, the threshold is absurdly high (must show both defendant's intent to shelter assets, and that the assets would be needed to satisfy the ultimate judgment); second, there are so many affirmative defenses (four of them) that the authority, on its face, is too cumbersome and easy for defendants to disarm to be credible (these appear not very well thought-out, since at least two of the defenses are duplicative of another and also overlap with the threshold showing); third, by structuring the provision as an "order" rather than as a lien, the US does not have superior rights to any later holders if the defendant defies the order and shelters an asset.

After providing an initial set of scrawls reflecting these concerns, I talked DOJ staff through my concerns this morning (I tried to loop David into the call but reached voicemail). After discussion, DOJ staff conceded many of the criticisms and I verbally made a proposal on each of these issues to bridge the gap between my initial comments and the DOJ draft.

I'll circulate to you as soon as we have a DOJ response, or I can go into greater detail for you. Let me know.

**DRAFT --**  
**CONFIDENTIAL/ATTORNEY WORK PRODUCT/DO NOT DISCLOSE OR RELEASE --**  
**8/14/96**

**SEC. 9 PREVENTION OF ALIENATION OR DISPOSAL OF ASSETS NEEDED TO  
REMEDY ENVIRONMENTAL HARMS CAUSED BY ENVIRONMENTAL CRIMES**

(a) Chapter 39 of title 18, United States Code, is amended  
by adding the following new section --

**"§ 839. Prejudgment Orders to Secure Payment for  
Environmental Damage.**

"(a) At the time of the filing of an indictment or  
information for the violation of any of the statutory provisions  
set forth in 18 U.S.C. § 838(a), or at any time thereafter, if  
after notice to the defendant, the government shows probable  
cause to believe that --

(1) the defendant may conceal, alienate or dispose of  
property, or to place property outside the jurisdiction of the  
federal district courts; and,

(2) the defendant will thereby reduce or impair the  
defendant's ability to pay, in whole or in part, for removal or  
remediation of environmental pollution or damage and restoration  
of the environment, resulting from the statutory violation(s),

the district court may order the defendant not to alienate or  
dispose of any such property, or place such property outside the  
jurisdiction of the federal district courts, without leave of the

court. The government shall bear the burden of proving by a preponderance of the evidence, the cost for the removal or remediation of the environmental pollution or damage and restoration of the environment.

"(b) Defenses

The defendant may establish the following affirmative defenses to a motion by the government under this section --

(1) that the defendant possesses other assets sufficient to pay the costs of removal or remediation of the environmental pollution or damage and restoration of the environment, resulting from the statutory violation(s), and the defendant places those other assets under the control of the court, or

(2) that the removal or remediation of the environmental pollution or damage and restoration of the environment has been accomplished, to the satisfaction of the government.

"(c) Procedures

Any proceeding under this section shall be governed by the Federal Rules of Criminal Procedure.

"(d) Property Defined

For the purposes of this section, "property" shall include -

(1) Real property, including things growing on, affixed to, and found in land; and,

(2) Tangible and intangible personal property, including money, rights, privileges, interests, claims and securities.

"(e) Expiration of Order

The court may amend an Order issued pursuant to this section at any time. In no event, however, shall the Order extend beyond sentencing, in the case of a conviction, or a dismissal or acquittal of the prosecution.

"(f) All Writs Act

Nothing in this section shall in any manner diminish the powers of the court otherwise available under the All Writs Act, 28 U.S.C. § 1651."

(b) The table of sections of chapter 39 of Title 18, United States Code, is amended by adding after section 838, the following new section --

"§ 839. Prejudgment Orders to Secure Payment for Environmental Damage."

~~10242~~

EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
Washington, D.C. 20503-0001

LRM NO: 5371

FILE NO: 2124

URGENT

8/20/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 29

TO: Legislative Liaison Officer - See Distribution below:

FROM: Ron PETERSON *Ron Peterson* (for) Assistant Director for Legislative Reference

OMB CONTACT: Annette ROONEY 395-7300 Legislative Assistant's Line: 395-6194  
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Robert TUCCILLO 395-5609

SUBJECT: JUSTICE Proposed Draft Bill: The Environmental Crimes and Enforcement Act of 1996

DEADLINE: 3:00 P.M. Thursday, August 22, 1996

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.

COMMENTS: Please review the attached materials concerning the Administration's Environmental Crimes bill: (1) a summary description entitled "Getting Tough on Environmental Crimes"; and (2) the legislative initiative, which includes a transmittal message, the bill, a sectional analysis, and a one-page fact sheet. The only new legislative language is Sec. 9 regarding "prejudgement orders". Please provide comments no later the 3:00 PM Thursday 8/22/96. If you have not responded within the stated deadline, this office will presume that your agency/office has no objection to the attached.

\* \*

AGENCIES:

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- 25-COMMERCE - Michael A. Levitt - 2024823151
- 29-DEFENSE - Samuel T. Brick, Jr. - 7036971305
- 32-ENERGY - Bob Rabben - 2025866718
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- 54-HUD - Jeff Lischer - 2027081793
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- 62-LABOR - Robert A. Shapiro - 2022198201
- 76-National Economic Council - Sonyia Matthews - 2024562174
- 95-Office of Science and Technology Policy - Sam Seidel - 2024566020
- 107-Small Business Administration - Mary Kristine Swedin - 2022056700
- 114-STATE - Julia C. Norton - 2026474463
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EOP:

- Campbell\_B
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- Haun\_D
- Rea\_E
- Simms\_P
- Fitzpatrick\_M
- Fraas\_A
- Fein\_D
- Burke\_D
- Lance\_L
- Childs\_D
- Damus\_B
- Habber\_L
- Parrish\_J
- Kagan\_E
- Prince\_R
- Jukes\_J
- J. MURR

## *Getting Tough on Environmental Crimes*

Illegal dumping of toxics and other pollutants is real crime, and communities are the victims. Police, prosecutors, and investigators need better tools to protect our communities from the toxic threat posed by environmental criminals.

President Clinton is calling upon Congress to enact his Environmental Crimes Bill, which will strengthen community protection against environmental criminals. This bill will ensure that the assets of environment criminals can be secured even before conviction, and are used to restore the communities they victimize. The bill would impose stronger penalties for the worst environmental crimes, and strengthen our partnership with state and local prosecutors.

***1. Prosecutors should be able to secure the assets of environmental criminals when they threaten our communities.***

*Background.* Criminal defendants are often able to shield their assets from prosecutors, and communities are often at risk that the damage done by the crime will remain unrestored.

### *Legislative Proposal*

- ▶ President Clinton's Environmental Crimes Bill proposes new authority for prosecutors to secure the assets of environmental criminals, even before conviction, when those assets are needed to repair the environmental harm that has been done. Broader even than a lien, this provision will allow prosecutors, after a hearing, to secure any of the assets belonging to an environmental criminal, to make sure the money is there to clean up the environment for victimized communities.

***2. There should be tougher penalties for the worst environmental offenses.***

*Background:* Current law has no provision for environmental criminals whose offenses result in death or injury to the public, including to police and other law enforcement personnel. There are no laws against attempted environmental crimes, which hampers efforts to capture criminals before environmental damage is done through "sting" operations and other undercover work,. Current statutes of limitations have no exceptions for those who conceal their environmental crimes, with the result that some of the most egregious environmental crimes cannot be prosecuted.

### *Legislative Proposal*

President Clinton's Environmental Crimes bill would:

- ▶ Enhance penalties for environmental crimes that result in death or serious bodily injury to law enforcement personnel or the public;
- ▶ Outlaw "attempts" to commit environmental crimes;

- ▶ Modify statutes of limitation to allow additional time for prosecution (not to exceed a total of eight years from the date of the violation) where a criminal tries to conceal an environmental crime

### *3. We should strengthen environmental law enforcement partnerships.*

*Background.* Local law enforcement agencies often lack the resources to support environmental crimes prosecutions or to train their officers on detection and handling of environmental crimes. This problem hampers joint federal-state prosecutions, and has been made more urgent by the government shutdown and other efforts to cut EPA's enforcement budget and take the environmental cop off the beat.

#### *Legislative Proposal*

- ▶ President Clinton's bill would provide that state and local officials would be able to receive an award of their costs in joint prosecutions with federal authorities of environmental crime, and the cost award would be added to the criminal fine the defendant would have to pay.
- ▶ President Clinton will seek \$1,000,000 in new money for training and support of state and local law enforcement officials.

### *4. We should provide for restitution of those victimized by environmental crimes.*

*Background.* The authority of courts to require environmental criminals to provide "restitution" to communities victimized by environmental crime should be clear. The communities that are victims of environmental crime should have the right to have their environment and natural resources restored.

#### *Legislative Proposal*

- ▶ President Clinton's bill would clarify the law to ensure that the courts may order convicted criminals to pay restitution for their crimes, by making payments to remediate or restore the quality of the environment to the full extent that it is damaged by an environmental crime.

DRAFT: 8/20/96

MESSAGE TO THE CONGRESS TRANSMITTING  
THE "ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996"

To the Congress of the United States:

I am pleased to transmit for your immediate consideration and enactment the "Environmental Crimes and Enforcement Act of 1996."

The Act will significantly advance three vital concerns important to the American people: environmental protection, law enforcement, and effective federal-state partnerships.

First, the American people have made it abundantly clear that they want strong environmental protection. Protecting our environment is a fundamental community value. We all want clean air, safe water, and healthy neighborhoods for ourselves and our families. Each of us has a sacred obligation to pass on a vibrant planet to future generations. This legislation provides an opportunity to further our commitment to protect human health, public safety, and the natural resources we all cherish.

Second, our citizens demand swift justice for those who violate our laws, including our environmental laws. The environmental scofflaw can threaten our neighborhoods, our children, and our quality of life every bit as much as the drug dealer and the thief. We need legislation that allows us to treat environmental crimes with the same degree of seriousness as other crimes. We owe it to the law-abiding citizens of this country to crack down on those who refuse to comply with environmental protections.

Third, the American people have asked us to forge effective partnerships among federal, state, and local governments. As former state officials, Attorney General Reno, Administrator Browner and I all know that the best solution to a problem often comes from those closest to the problem at the local level. At the same time, we need a strong federal presence in environmental enforcement to ensure that all Americans enjoy the basic protections to which they are entitled.

The Environmental Crimes and Enforcement Act of 1996 significantly furthers each of these goals by remedying specific deficiencies in existing laws. For example, this legislation enhances federal-state partnerships by authorizing courts to order convicted criminals to reimburse states and localities for costs they incur during federal environmental prosecutions. State and local investigators often initiate what become federal enforcement actions, and they often continue to work with federal officials through the trial stage. State laboratories provide analytical support, and state and local prosecutors participate in joint task forces with federal officials. Current law,

however, does not expressly allow courts to order those convicted of environmental crimes to reimburse states or municipalities for the costs they incur in these efforts. The reimbursement provision in the Act will greatly strengthen federal, state and local environmental protection by fostering these important cooperative efforts. The Act will also respond to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement.

This legislation will also reduce threats to State and local officials posed by the improper handling of hazardous substances by criminals. Police officers, fire fighters, paramedics, and other state and local officials come to the scene of an environmental crime with the goal of preventing further human injury, property damage, and environmental harm. As a result of their heroic efforts, they can suffer serious injury or death due to the reckless actions of environmental violators in handling dangerous chemicals and other hazardous materials. This legislation will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. We owe it to the men and women who risk their lives every day for our sake to provide this additional protection. Because these crimes put all members of the public at risk, the Act similarly provides for enhanced punishment whenever any person suffers death or serious bodily injury due to a criminal violation of federal environmental law.

The Act also closes a loophole exploited by the most devious violators of environmental law. Under current law, criminals can escape justice by hiding their wrongdoing long enough to invoke the statute of limitations against prosecution. The Act seeks to relieve this problem by providing for an extension of the statute of limitations where the violator has engaged in such affirmative acts of concealment.

This legislation adds an "attempt" provision to environmental statutes -- a provision similar to those found in other criminal laws -- so that we may prosecute the criminal even when we stop a crime in progress. Under current law, federal agents are often placed in an untenable situation when they come upon an environmental crime about to be committed. They can stop the would-be criminal before the crime is completed and before the environment is harmed, but then they might well be unable to prosecute because no crime has occurred. Adding an "attempt" provision will solve this problem by allowing for apprehension and prosecution of the violator before environmental damage occurs. This provision will also remove a major obstacle to environmental investigations by allowing for the use of environmentally benign substitutes for hazardous materials in undercover operations.

Finally, the Environmental Crimes and Enforcement Act of 1996 will amend the federal restitution statutes to clarify the authority of the courts to provide for restitution in environmental crimes cases. Restitution typically provides reimbursement to victims who are directly harmed by crimes. While the victims of environmental crimes often suffer physical injuries and pecuniary losses, environmental crimes also cause more widespread and longstanding damage. The victims include all members of the community that would have used or enjoyed the damaged environmental resources. This legislation provides needed clarity and guidance in this area by including environmental offenses among the crimes specifically covered by the restitution statute. It will also make explicit the authority of federal courts to ensure that those charged with environmental crimes do not dispose of the assets needed to pay for the cost of their violations.

We owe the American people the assurance that our air, drinking water, and neighborhoods are safe and clean. This legislation will enhance environmental protection by strengthening environmental criminal enforcement and federal-state cooperation in these critical enforcement efforts.

I urge the Congress to take prompt and favorable action on this legislation.

## **A BILL**

To increase penalties and strengthen enforcement of environmental crimes, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the "Environmental Crimes and Enforcement Act of 1996".

### **SEC. 2. FINDINGS.**

The Congress finds that --

- (1) Federal investigation and prosecution of environmental crimes play a critical role in the protection of human health, public safety, and the environment;
- (2) the effectiveness of environmental criminal enforcement efforts is greatly strengthened by close cooperation and coordination among federal, state, and local authorities; and
- (3) legislation is needed to facilitate federal investigation and prosecution of environmental crimes and to increase the effectiveness of joint federal, state, and local criminal enforcement efforts.

### **SEC. 3. JOINT FEDERAL, STATE AND LOCAL ENVIRONMENTAL ENFORCEMENT.**

(a) Chapter 232 of title 18 is amended by adding after section 3673 the following new section 3674 --

**"§ 3674. Reimbursement of State or local government costs for assistance in Federal investigation and prosecution of environmental crimes.**

"(a) Upon the motion of the United States, any person who is found guilty of a criminal violation of federal environmental law, or conspiracy to violate such law, may be ordered to pay the costs incurred by a state or local government or an agency thereof for assistance to the federal government's investigation and criminal prosecution of the case. Such monies paid shall be used solely for the purpose of environmental law enforcement.

"(b) This subsection applies to a violation of any of the following statutes, or conspiracy to violate any of the following statutes --

"(1) Section 14(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136l(b));

"(2) Section 16(b) of the Toxic Substances Control Act (15 U.S.C. § 2615(b));

"(3) Sections 10, 12, 13, and 16 of the Rivers and Harbors Appropriations Act of 1899 (33 U.S.C. §§ 403, 406, 407, 411);

"(4) Sections 309(c) and 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1319(c), 1321(b)(5));

"(5) Section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b));

"(6) Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. § 1908(a));

"(7) Section 4108(c) of the Shore Protection Act of 1988 (33 U.S.C. § 2609(c));

"(8) Sections 1423 and 1432 of the Safe Drinking Water Act (42 U.S.C. §§ 300h-2, 300i-1);

"(9) Sections 3008(d), 3008(e) and 3008(I) of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6928(d), 6928(e), 6928(I));

"(10) Section 113(c) of the Clean Air Act (42 U.S.C. § 7413(c));

"(11) Sections 103(b), 103(d), and 112(b)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9603(b), 9603(d), 9612(b)(1));

"(12) Section 325(b)(4) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11045(b)(4));

"(13) Section 303(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1733(a)); or

"(14) Section 5124 of title 49, United States Code."

(b) The table of sections of chapter 232 of title 18, United States Code is amended by adding the following after the item relating to section 3673:

"3674. Reimbursement of State or local government costs for assistance in Federal investigation and prosecution of environmental crimes."

**SEC. 4. PROTECTION OF GOVERNMENT EMPLOYEES AND THE PUBLIC.**

(a) Chapter 39 of title 18, United States Code, is amended by adding the following new section:

**"§ 838. Protection of government employees and the public from environmental crimes.**

"(a) Any person who commits a criminal violation of a federal environmental law identified in this paragraph that is the direct or proximate cause of serious bodily injury to or death of any other person, including a federal, state, local or tribal government employee performing official duties, as a result of the violation, shall be subject to a maximum term of imprisonment of twenty years, a fine of not more than \$500,000, or both, and, if the defendant is an organization, to a fine of not more than \$2,000,000. The laws to which this subsection applies are --

"(1) Section 309(c)(2), 309(c)(4), or 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1319(c)(2), 1319(c)(4), 1321(b)(5));

"(2) Section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b));

"(3) Section 3008(d) of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6928(d));

"(4) Section 113(c)(1) or 113(c)(2) of the Clean Air Act (42 U.S.C. §§ 7413(c)(1), 7413(c)(2));

"(5) Section 103(b) or 103(d) of the Comprehensive Response, Compensation, and Liability Act (42 U.S.C. §§ 9603(b), 9603(d));

"(6) Section 325(b)(4) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11045(b)(4)); or

"(7) Section 5124 of title 49, United States Code.

"(b) Any person who commits a criminal violation of federal environmental law identified in this subsection that is the direct or proximate cause of serious bodily injury to or death of any other person, including a federal, state, local or tribal government employee performing official duties, as a result of the violation, shall be subject to a maximum term of imprisonment of five years, a fine of not more than \$250,000, or both, and, if a defendant is an organization, to a fine of not more than \$1,000,000. The laws to which this subsection applies are --

"(1) Section 14(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 1361(b)); or

"(2) Section 16(b) of the Toxic Substances Control Act (15 U.S.C. § 2615(b)).

"(c) For purposes of this section, the term "serious bodily injury" means bodily injury which involves --

"(1) unconsciousness;

"(2) extreme physical pain;

"(3) protracted and obvious disfigurement; or

"(4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

"(d) For purposes of this section, the term "organization" means a legal entity, other than a government, established or organized for any purpose, and such term includes a corporation, company, association, firm, partnership, joint stock company, foundation institution, trust, society, union, or any other association of persons."

(b) The table of sections of chapter 39 of title 18, United States Code is amended by adding the following after the item relating to section 837:

"§ 838. Protection of government employees and the public from environmental crimes."

**SEC. 5. ENVIRONMENTAL CRIMES TRAINING FOR STATE AND LOCAL LAW ENFORCEMENT.**

(a) This section may be cited as the "Environmental Crimes Training Act of 1996".

(b) The Administrator of the Environmental Protection Agency, as soon as practicable but not later than September 30, 1996, within the Office of Enforcement and Compliance Assurance, shall establish the State and Local Environmental Enforcement Training Program to be administered by the National Enforcement Training Institute within the Office of Criminal Enforcement, Forensics and Training. This Program shall be dedicated to training state and local law enforcement personnel in the investigation of environmental crimes at the Federal Law Enforcement Training Center (FLETC) in Glynn County, Georgia at the EPA-FLETC training center or other

training sites which are accessible to state and local law enforcement. State and local law enforcement personnel shall include, among others, the following: inspectors, civil and criminal investigators, technical experts, regulators, government lawyers, and police.

#### **SEC. 6. STATUTE OF LIMITATIONS.**

(a) Chapter 213 of title 18, United State Code, is amended by adding after section 3294 the following new section --

##### **"§ 3295. Felony environmental crimes.**

"(a) No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate, any of the offenses listed in subsection (b) unless the indictment is returned or the information is filed within five years after the offense is committed; however, when a person commits an affirmative act that conceals the offense from government regulators or law enforcement officials, that person shall not be prosecuted, tried, or punished for a violation of, or a conspiracy to violate, any of the offenses listed below in subsection (b) unless the indictment is returned or the information is filed within five years after the offense is committed, or within three years after the offense is discovered by a government regulator or law enforcement personnel, whichever is later but in no event later than eight years after the offense is committed.

"(b) This subsection applies to a violation of --

"(1) Section 309(c)(2), 309(c)(3), 309(c)(4), or 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1319(c)(2), 1319(c)(3), 1319(c)(4), or 1321(b)(5));

"(2) Section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b));

"(3) Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. § 1908(a));

"(4) Section 4108(c) of the Shore Protection Act of 1988 (33 U.S.C. § 2609(c));

"(5) Section 1423 or 1432 of the Safe Drinking Water Act (42 U.S.C. §§ 300h-2 or 300i-1);

"(6) Section 3008(d) or 3008(e) of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6928(d) or 6928(e));

"(7) Section 113(c)(1), 113(c)(2), 113(c)(3), or 113(c)(5) of the Clean Air Act (42 U.S.C. §§ 7413(c)(1), 7413(c)(2), 7413(c)(3), 7413(c)(5));

"(8) Section 103(b), 103(d), or 112(b)(1) of the Comprehensive Response, Compensation, and Liability Act (42 U.S.C. §§ 9603(b), 9603(d); 9612(b)(1));

"(9) Section 325(b)(4) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11045(b)(4)); or

"(10) Section 5124 of title 49, United States Code."

(b) The table of sections of chapter 213 of title 18, United States Code is amended by adding after section 3294 the following new section --

"§ 3295. Felony environmental crimes."

**SEC. 7. ATTEMPTS.**

(a) Section 14(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 1361(b)) is amended by adding a new paragraph 14(b)(5) --

"(5) **Attempts.**-Any person who attempts to commit the conduct that constitutes an offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such an offense."

(b) Section 16(b) of the Toxic Substances Control Act (15 U.S.C. § 2615(b)), is amended by inserting "(1)" before "Any" and by adding the following new paragraph --

"(2) Any person who attempts to commit the conduct that constitutes any offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(c) Section 309(c) of the Federal Water Pollution Control Act (33 U.S.C. § 1319(c)), is amended by adding after paragraph (7) the following new paragraph 309(c)(8) --

"(8) Any person who attempts to commit the conduct that constitutes any offense under paragraphs (2), (3) or (4) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(d) Section 105(c) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b)), is amended by striking "and" at the end of paragraph (1), striking the period at the end of (2)(B), and inserting "; and", and adding after paragraph (2) the following new paragraph --

"(3) Any person who attempts to commit the conduct that constitutes any offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(e) Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. § 1908(a)), is amended by inserting "(1)" before "(A)" and by adding the following new paragraph --

"(2) Any person who attempts to commit the conduct that constitutes any offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(f) Section 3008 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6928), is amended by adding after subsection 3008(h) the following new subsection --

"(i) Any person who attempts to commit the conduct that constitutes any offense under subsections (d) or (e) of this section shall be subject to the same penalties as those prescribed for such offense."

(g) Section 113(c) of the Clean Air Act (42 U.S.C. § 7413), is amended by adding after paragraph 6 the following new paragraph --

"(7) Any person who attempts to commit the conduct that constitutes any offense under subsections (1) or (2) of this section shall be subject to the same penalties as those prescribed for such offense."

#### **SEC. 8. ENVIRONMENTAL CRIMES RESTITUTION.**

(a) Section 3663(a)(1) of title 18, United States Code, is amended by striking "or" before "section 46312" and inserting "or an environmental crime listed in section 3674 of this title," after "section 3663A(c),"

(b) Subsection 3663(b) of title 18, United States Code, is amended by striking "and" at the end of paragraph (4), striking the period at the end of paragraph (5) and inserting "; and", and adding after paragraph (5) the following new paragraph --

"(6) in the case of an offense resulting in pollution of or damage to the environment, pay for removal and remediation of the environmental pollution or damage and restoration of the environment, to the extent of the pollution or damage resulting from the offense; in such a case, the term 'victim' in section 3663(a)(2) includes a community or communities, whether or not the members are individually identified."

#### **SEC. 9. PREVENTION OF ALIENATION OR DISPOSAL OF ASSETS NEEDED TO REMEDY ENVIRONMENTAL HARMS CAUSED BY ENVIRONMENTAL CRIMES**

(a) Chapter 39 of title 18, United States Code, is amended by adding the following new section --

**"§ 839. Prejudgment Orders to Secure Payment for Environmental Damage.**

"(a) At the time of the filing of an indictment or information for the violation of any of the statutory provisions set forth in 18 U.S.C. § 838(a), or at any time thereafter, if after notice to the defendant, the government shows probable cause to believe that --

(1) the defendant may conceal, alienate or dispose of property, or place property outside the jurisdiction of the federal district courts; and,

(2) the defendant will thereby reduce or impair the defendant's ability to pay restitution, in whole or in part, including removal or remediation of environmental pollution or damage and restoration of the environment resulting from the statutory violation(s),

the district court may order the defendant not to alienate or dispose of any such property, or place such property outside the jurisdiction of the federal district courts, without leave of the court. The government shall bear the burden of proving, by a preponderance of the evidence, the cost for the removal or remediation of the environmental pollution or damage and restoration of the environment.

**"(b) Defenses**

The defendant may establish the following affirmative defenses to a motion by the government under this section --

(1) that the defendant possesses other assets sufficient to pay restitution, including the costs of removal or remediation of the environmental

pollution or damage and restoration of the environment resulting from the statutory violation(s), provided that the defendant places those other assets under the control of the court, or

(2) that restitution, including the removal or remediation of the environmental pollution or damage and restoration of the environment, has been accomplished to the satisfaction of the government.

**"(c) Procedures**

Any proceeding under this section shall be governed by the Federal Rules of Criminal Procedure.

**"(d) Property Defined**

For the purposes of this section, "property" shall include --

(1) Real property, including things growing on, affixed to, and found in land; and,

(2) Tangible and intangible personal property, including money, rights, privileges, interests, claims and securities.

**"(e) Expiration of Order**

The court may amend an Order issued pursuant to this section at any time. In no event, however, shall the Order extend beyond sentencing, in the case of a conviction, or a dismissal or acquittal of the prosecution.

**"(f) All Writs Act**

Nothing in this section shall in any manner diminish the powers of the court otherwise available under the All Writs Act, 28 U.S.C. § 1651."

## **THE ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996**

### **SECTION-BY-SECTION ANALYSIS**

#### **Section 1**

Section 1 sets out the short title of this bill, the "Environmental Crimes and Enforcement Act of 1996."

#### **Section 2**

Section 2 states the Congressional findings upon which the Act is based. Specifically, the findings are that environmental criminal enforcement plays a critical role in the protection of human health, public safety, and the environment, and that these efforts are greatly enhanced by close cooperation and coordination among federal, state, and local authorities. The purpose of the legislation is to increase protection of the environment by strengthening federal law enforcement and by increasing the effectiveness of joint federal, state, and local criminal environmental enforcement efforts.

#### **Section 3**

Section 3 authorizes federal district courts to order convicted criminals to reimburse states and localities for costs they incur during federal environmental prosecutions. Moneys paid to state and local governments under this provision may be used solely for environmental law enforcement. This reimbursement provision applies to prosecutions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Toxic Substances Control Act (TSCA); the Rivers and Harbors Appropriations Act of 1899; the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Federal Land Policy and Management Act; and 49 U.S.C. § 5124, relating to transportation of hazardous materials.

This provision will strengthen criminal environmental enforcement by fostering cooperative efforts among federal, state, and local officials. State and local inspectors and investigators often initiate what become federal enforcement actions, and they continue to work with federal officials through the trial stage. For example, state laboratories provide analytical support. State and local prosecutors participate in joint task forces and are cross-designated as Special Assistant United States Attorneys. Although certain state courts may award

costs to state and local governments in state criminal proceedings, federal courts are not now expressly authorized to order such reimbursement. Providing for reimbursement will greatly increase the ability of state and local officials to cooperate in federal criminal proceedings to address violations of environmental law. Joint enforcement efforts also make the federal program more responsive to local communities.

Because the court may order reimbursement only upon motion of the United States, the discretion of both the federal prosecutor and the court will serve as a check against unwarranted cost awards. Allowable costs are limited to those incurred by a state or local government or agency for assistance to the federal government's investigation and prosecution of a case. Costs imposed on a defendant are payable directly to the state or local government in a manner analogous to the payment of restitution directly to the victims of a crime, thus obviating the need for a separate federal fund or federal administrator to collect and transfer the monies.

#### Section 4

Section 4 provides for enhanced punishment where a criminal violation of specified environmental laws directly or proximately causes serious bodily injury or death to any person, including any federal, state, local, or tribal government official.

Police officers, firefighters, paramedics and other public safety and public health personnel, often are the first on the scene of an environmental crime. In their efforts to protect others from harm, they themselves may suffer serious injury or death resulting from other people's criminal mishandling of dangerous materials or failure to comply with their legal duty to notify the government of releases of dangerous substances. Members of the public can also be injured or killed as a result of environmental crimes.

Section 4 will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. It does not establish a new or different crime, but instead provides for enhanced terms of imprisonment and enhanced fines for persons convicted of felony violations under specified federal environmental laws where death or serious injury results. The laws covered by this provision are: the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124. The section also provides for enhanced penalties for environmental misdemeanors under Federal Insecticide Fungicide and Rodenticide Act and Toxic Substances Control Act where death or serious

injury results, thereby transforming those violations into felonies.

For enhanced punishment to be imposed, section 4 requires that the defendant commit the underlying environmental crime and that the crime be the direct or proximate cause of serious bodily injury or death. The requirement of "direct or proximate" causation is in line with language used in other criminal provisions, see, e.g., 18 U.S.C. § 844 (personal injury resulting from arson), and limits the sentence enhancer to appropriate cases. Those who commit environmental crimes, for example, by illegally storing hazardous waste, are on notice that their actions may cause serious injury or death to other persons. Unlike existing endangerment provisions in certain environmental statutes that apply to threatened injuries, Section 4 requires actual injury or death, but does not require that the defendant intend or know of the injury or death that the defendant's crime causes. Such a result is reasonably foreseeable when the covered crimes are committed.

For the most part, the definition of "serious bodily injury" in Section 4 follows similar definitions in 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) and 18 U.S.C. § 1365(g)(3) (tampering with consumer products). The definition in Section 4, however, does not include "substantial risk of death." In other words, actual serious bodily injury or death (not just the risk of injury or death) must occur for enhanced punishment to be imposed under Section 4. Section 4 also includes "unconsciousness" within the definition of "serious bodily injury," thereby conforming to the definition of that term in the federal hazardous waste laws at 42 U.S.C. § 6928(f)(6).

Section 4 specifically lists certain government employees whose death or injury could trigger enhanced punishment. This listing is not intended to exclude other persons, including other government employees, from the provision's coverage, but rather to emphasize that the specified government employees are exposed to special risks and are thus especially likely to benefit from the added deterrence and protection engendered by this provision.

### Section 5

Section 5 responds to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement. It establishes within the Environmental Protection Agency a separate program dedicated to the training of state and local law enforcement personnel in the investigation of environmental crimes.

States and local governments are undertaking an expanded role in environmental enforcement, not only of their own laws but also of federal statutes pursuant to delegated authority. The Environmental Protection Agency has regularly trained state and

local investigators and regulatory personnel in courses conducted at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA. The need and demand for such training, however, has been greatly increasing.

### Section 6

Section 6 provides for an extension of the statute of limitations where a violator has engaged in affirmative acts of concealment of specified environmental crimes.

As is the case for most federal crimes, federal environmental crimes are currently subject to a five-year statute of limitations, which runs from the time the offense is committed. 18 U.S.C. § 3282. Some environmental crimes, including some of the most egregious ones, involve affirmative acts of concealment by the wrongdoers. Criminals who are the most deceptive, and thus able to hide their wrongdoing the longest, are most likely to escape the legal consequences of their acts through expiration of the statute of limitations.

Section 6 addresses this problem for a specified list of felony violations of environmental statutes by extending the limitations period for up to three years beyond the traditional five-year period when the defendant commits an affirmative act of concealment. In these circumstances, the limitation period extends to three years after discovery of the crime by the government. In no event does the limitations period extend beyond eight years after the offense was committed. This extended limitations period covers violations of various provisions under the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124.

For example, if a violator committed an affirmative act of concealment and the environmental crime were not discovered until three, four, or five years after it was committed, Section 6 would extend the statute of limitations to six, seven, or eight years after the crime was committed, respectively -- that is, up to three years after the time of discovery with an eight year cap. If a violator committed an affirmative act of concealment but the crime were nevertheless discovered by the government immediately after it was committed, there would be no extension under Section 6, and the limitations period would be the five-year period running from the time the crime was committed. Similarly, where there was no affirmative act of concealment, the five-year period would apply and would run from commission of the crime.

The burden rests on the government to prove an affirmative act of concealment under Section 6.

### Section 7

Section 7 amends specified environmental statutes to add attempt provisions. Under these new provisions, any person who attempts to commit an offense shall be subject to the same penalties as those prescribed for the offense itself.

The rationale for these new attempt provisions is similar to that for comparable provisions in other federal criminal statutes. Under these existing attempt laws, when law enforcement authorities uncover planned criminal activity and a substantial step is taken towards the commission of the crime, the crime can be stopped before it is completed and the perpetrator may still be prosecuted. For example, federal law makes attempted bank robbery a crime, punishable the same as bank robbery. 18 U.S.C. § 2113(a). Similar attempt provisions exist for numerous other crimes, such as uttering a Treasury check with forged endorsement (18 U.S.C. §§ 510); bank fraud (18 U.S.C. § 1344); damage to government property (18 U.S.C. § 1361); obstruction of court orders (18 U.S.C. § 1509); and obtaining mail by fraud or deception (18 U.S.C. § 1708).

There has been only one attempt provision in federal environmental criminal enforcement statutes. As a result, federal agents have been placed in the untenable situation of choosing between obtaining evidence necessary for a criminal prosecution and preventing pollution from occurring. For example, without an attempt statute, if agents stop a would-be environmental criminal from dumping hazardous waste, the perpetrator cannot be prosecuted for illegal dumping because no environmental crime has occurred. Only if the agents allow the dumping to occur, with the possibility of damage to the environment and risk to the public health, could the perpetrator be prosecuted for illegal dumping. These attempt provisions allow law enforcement personnel to stop environmental crimes before they are completed and still bring the wrongdoer to justice.

Attempt statutes serve another very important purpose in law enforcement. Undercover operations are widely recognized as a valuable tool to ferret out serious crimes. Where dangerous substances are involved, however, undercover operations carry the risk that the government will lose control of the substances and the public subsequently will be exposed to them. Attempt provisions facilitate undercover investigations by allowing prosecution where a defendant purposely engages in conduct that would constitute the crime if the circumstances were as the defendant believes them to be. Where feasible, attempt provisions allow the government to substitute benign substances for the substances that make the conduct illegal but still

prosecute for attempt the person who believes he is engaging in illegal conduct.

The new language added by Section 7 is analogous to the attempt provision contained in the federal drug laws. 21 U.S.C. § 846. An attempt to commit the conduct constituting one of specified environmental criminal offenses is punished in the same manner as the offense itself.

### Section 8

Section 8 amends the federal restitution statutes to clarify the authority of the courts to provide for restitution to all victims in environmental crimes cases.

Existing restitution statutes provide for restitution for bodily injury and property loss. Those categories of restitution address the harm suffered by victims of violent and economic crimes and are intended to make them whole for their physical injuries and pecuniary damages. The victims of environmental crimes also may suffer physical injuries and pecuniary losses. Indeed, environmental crimes often are economic crimes. At the same time, however, an environmental crime also may cause more widespread and longstanding damage, with the harm inflicted on all members of a community or communities affected by the environmental pollution or damage.

Section 8 clarifies the existing authority of the courts by including environmental offenses among the crimes explicitly enumerated in the restitution statutes. It makes plain that the costs of removal and remediation of environmental pollution or damage, and required restoration of the environment, are included within the coverage of that statute, to the extent of the pollution or damage resulting from the offense. This section recognizes that environmental crimes can harm entire communities and clarifies that the definition of "victim" in the restitution statutes may include all members of a community or communities, whether or not they are individually identified.

### Section 9

Section 9 authorizes the government, after notice to the defendant, to seek an order from the court to prevent a defendant charged with an environmental crime from dealing with its assets in a manner that would impair its ability to pay for the harm caused by its environmental violations. The government bears the burden of establishing the costs involved, and the defendant may avert such an order by showing that it retains sufficient assets to cover those costs or that it already has paid such costs. The Federal Rules of Criminal Procedure govern any proceedings under this section for an order to prevent the disposal or alienation

of assets. Such an order expires at the point of sentencing, or of dismissal or acquittal of the prosecution.

This section expressly codifies the authority already available to a court under the All Writs Act, 28 U.S.C. § 1651. It will prevent a defendant, during the pendency of criminal environmental charges, from concealing, disposing of, or otherwise dealing with its assets in such a manner that, if it is convicted and is ordered to pay the costs of the harm caused by its actions, sufficient assets no longer will be available for that purpose. If such authority were not available, defendants could easily thwart the purposes of the restitution provisions of this act and those found elsewhere in the law. Similar authority, to prevent the disposal of assets to pay for violations of law, can be found at 18 U.S.C. § 1345 (Injunctions against Fraud). At the same time, the section allows a defendant that can show that defendants other assets will be sufficient to pay for such harm, or that such costs already have been paid, to avoid being burdened by such an order.

## **ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996**

Federal investigation and prosecution of environmental crimes are critical to the protection of public health and safety and the environment. The Environmental Crimes and Enforcement Act of 1996 will strengthen the partnership among federal, state, and local enforcement officials and greatly enhance their abilities to prosecute environmental criminals. Below is a summary of the Act's major provisions.

Reimbursement for State and Local Governments -- The Act authorizes federal courts to order convicted criminals to reimburse state and local governments for costs they incur supporting federal environmental prosecutions. State and local governments already provide crucial support to federal environmental enforcement efforts, but they now do so at their own expense. At a time of shrinking budgets, cost reimbursement to states and localities by the criminal will greatly enhance federal, state, and local cooperation in federal environmental enforcement efforts.

Enhanced Punishment for Serious Injury or Death -- The Act provides for enhanced punishment where a criminal violation of the environmental laws causes serious injury or death to a public official or anyone else. Police officers, fire fighters, other public officials, and members of the public can suffer serious injury or death where environmental criminals mishandle dangerous chemicals and other hazardous materials. This legislation will ensure that the criminals who cause this suffering will face an appropriately enhanced punishment upon conviction.

New Tools for Prosecuting Concealed Crimes -- Environmental criminals can currently escape justice by hiding their wrongdoing long enough to invoke the statute of limitations against prosecution. As a result, the most devious violators are often the most difficult to punish. The Act remedies this problem by extending the statute of limitations where the violator has affirmatively concealed the environmental crime.

New "Attempt" Provisions -- This legislation adds "attempt" provisions to environmental statutes so that we may prosecute an environmental criminal even when we stop a crime in progress. Today, if a federal agent stops a would-be criminal who is attempting to commit an environmental crime, it might well be impossible to bring the criminal to justice. Adding attempt provisions will solve this problem by allowing for apprehension and prosecution before the crime is completed and before the environment is damaged. These provisions will also enhance investigations by allowing for the use of environmentally benign substances in undercover operations.

Restitution -- The Act will amend the federal restitution statutes to clarify that courts may provide for restitution to all victims in environmental crimes cases. This revision will help provide relief to all members of the community who suffer harm as a result of environmental crimes. It will also make explicit the authority of federal courts to prevent those charged with environmental crimes from disposing of assets needed to pay for the damages caused by their violations.

Training -- The Act will respond to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement.

## ***Compromise Proposal on Prejudgment Remedies***

***Background:*** Most prejudgment remedies we have reviewed are preliminary to seizure or forfeiture, to which a number of concerns have been raised.

This more limited lien would simply be security for ultimate payment of penalties and other obligations arising from conviction or related to the violation. The defendant could even continue to use (but not convey) the property in the ordinary course of business (addressing concern that innocent employees would suffer for the violations of the defendant). The scope of any hearing would be highly limited (addressing concern about pretrial discovery), but quite consistent with due process given the limited effect of the lien.

***Proposal:*** Title 18 would be amended to add a new section as with the following provisions:

### **Special Lien in Cases of Crimes Against Public Health or the Environment.**

(a) NOTICE OF LIEN -- At the commencement, or at any time during, the prosecution of a person for a violation of any law of the United States protecting public health, the environment, or natural resources, a United States Attorney may file with the clerk of the appropriate United States District Court a notice of lien with respect to any property owned by the defendant, and any instrumentalities or proceeds with a nexus to the violation regardless of ownership. The notice shall be supported with the following:

- (1) a showing of probable cause that the defendant committed the violation or that the instrumentalities or proceeds have a nexus to the violation;
- (2) the district, court, and docket number of the proceeding in which the violation has been charged; and
- (3) particular notice of the property and ownership of all property covered by the lien.

(b) EFFECT OF LIEN -- The lien described by the notice required under subsection (a) --

- (1) shall be in favor of the United States;
- (2) shall commence and attach at the time of filing;
- (3) shall be superior to the interest of any other person created subsequent to the filing of the notice;
- (4) shall not affect the use to which the property, assets, or instrumentalities may be put for lawful activity, nor the right of the defendant to receive rents,

proceeds, or make other profit from the lawful use and ownership of the property or otherwise to carry on a lawful trade or business, during the pendency of the proceeding in which the violation will be adjudicated;

(5) shall preclude the sale, conveyance, transfer, or other disposition of the property, instrumentality, or proceeds while the lien exists, except by consent of the United States Attorney;

(6) shall subject any and all assets covered by the lien to foreclosure if, one hundred and twenty (120) days after conviction of the violation, a defendant fails to meet the requirements for termination of the lien. Proceeds from foreclosure shall be retained in the registry of the court and applied to the obligations described in paragraph (c)(2).

**(c) TERMINATION OF LIEN** -- The special lien created by this section shall continue in effect until the earlier of the following:

(1) the defendant has been acquitted, or the United States Attorney has abandoned prosecution, of the asserted violation; or

(2) the defendant has been convicted of the violation but establishes to the satisfaction of the court that all of the following obligations have been paid or otherwise satisfied:

(a) Fines, penalties, assessments, and restitution obligations to the United States, as well as affected states and local governments, have been paid;

(b) The threat to public health, the environment, or natural resources created by the violation has been abated, mitigated, or eliminated, and the environment or natural resource has been remediated or restored, as appropriate; and

(c) costs of investigation, prosecution, and litigation incurred by state or local law enforcement, public health, environment, and natural resource agencies have been reimbursed to the extent requested;

or

(3) the United States Attorney moves to vacate the lien in the exercise of its discretion.

**(d) HEARING** -- A defendant may, upon motion filed within fourteen days after filing of the lien notice, request a hearing to contest the notice. The court shall hear and decide such motion as expeditiously as possible, and shall not permit discovery by any party.

8/7/96

LEGISLATIVE REFERRAL MEMORANDUM

Total Page(s): 23

TO: Legislative Liaison Officer - See Distribution below:

FROM: Ron PETERSON *Ron Peterson* (for) Assistant Director for Legislative Reference

OMB CONTACT: Holly FITTER 395-3233 Legislative Assistant's Line: 395-6194  
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fitter\_e@a1.eop.gov  
Carol DENNIS 395-4822

SUBJECT: **\*\*REVISED\*\*** JUSTICE Proposed Draft Bill: The Environmental Crimes and Enforcement Act of 1996

**DEADLINE: 10:00 AM Monday, August 12, 1996**

In accordance with OMB Circular A-19, OMB requests the views of your agency on the above subject before advising on its relationship to the program of the President.

**Please advise us if this item will affect direct spending or receipts for purposes of the "Pay-As-You-Go" provisions of Title XIII of the Omnibus Budget Reconciliation Act of 1990.**

DISTRIBUTION LIST:

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Lance\_L



## **A BILL**

To increase penalties and strengthen enforcement of environmental crimes, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### **SECTION 1. SHORT TITLE.**

This Act may be cited as the "Environmental Crimes and Enforcement Act of 1996".

### **SEC. 2. FINDINGS.**

The Congress finds that --

- (1) Federal investigation and prosecution of environmental crimes play a critical role in the protection of human health, public safety, and the environment;
- (2) the effectiveness of environmental criminal enforcement efforts is greatly strengthened by close cooperation and coordination among federal, state, and local authorities; and
- (3) legislation is needed to facilitate federal investigation and prosecution of environmental crimes and to increase the effectiveness of joint federal, state, and local criminal enforcement efforts.

### **SEC. 3. JOINT FEDERAL, STATE AND LOCAL ENVIRONMENTAL ENFORCEMENT.**

(a) Chapter 232 of title 18 is amended by adding after section 3673 the following new section 3674 --

**"§ 3674. Reimbursement of State or local government costs for assistance in Federal investigation and prosecution of environmental crimes.**

"(a) Upon the motion of the United States, any person who is found guilty of a criminal violation of federal environmental law, or conspiracy to violate such law, may be ordered to pay the costs incurred by a state or local government or an agency thereof for assistance to the federal government's investigation and prosecution of the case. Such monies paid shall be used solely for the purpose of environmental law enforcement.

"(b) This subsection applies to a violation of any of the following statutes, or conspiracy to violate any of the following statutes --

"(1) Section 14(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 136l(b));

"(2) Section 16(b) of the Toxic Substances Control Act (15 U.S.C. § 2615(b));

"(3) Sections 10, 12, 13, and 16 of the Rivers and Harbors Appropriations Act of 1899 (33 U.S.C. §§ 403, 406, 407, 411);

"(4) Sections 309(c) and 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1319(c), 1321(b)(5));

"(5) Section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b));

"(6) Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. § 1908(a));

"(7) Section 4108(c) of the Shore Protection Act of 1988 (33 U.S.C. § 2609(c));

"(8) Sections 1423 and 1432 of the Safe Drinking Water Act (42 U.S.C. §§ 300h-2, 300i-1);

"(9) Sections 3008(d), 3008(e) and 3008(I) of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6928(d), 6928(e), 6928(I));

"(10) Section 113(c) of the Clean Air Act (42 U.S.C. § 7413(c));

"(11) Sections 103(b), 103(d), and 112(b)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. §§ 9603(b), 9603(d), 9612(b)(1));

"(12) Section 325(b)(4) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11045(b)(4));

"(13) Section 303(a) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. § 1733(a)); or

"(14) Section 5124 of title 49, United States Code."

(b) The table of sections of chapter 232 of title 18, United States Code is amended by adding the following after the item relating to section 3673:

"3674. Reimbursement of State or local government costs for assistance in Federal investigation and prosecution of environmental crimes."

**SEC. 4. PROTECTION OF GOVERNMENT EMPLOYEES AND THE PUBLIC.**

(a) Chapter 39 of title 18, United States Code, is amended by adding the following new section:

**"§ 838. Protection of government employees and the public from environmental crimes.**

"(a) Any person who commits a criminal violation of a federal environmental law identified in this paragraph that is the direct or proximate cause of serious bodily injury to or death of any person, including a federal, state, local or tribal government employee performing official duties, as a result of the violation, shall be subject to a maximum term of imprisonment of twenty years, a fine of not more than \$500,000, or both, and, if the defendant is an organization, to a fine of not more than \$2,000,000.

The laws to which this subsection applies are --

"(1) Section 309(c)(2), 309(c)(4), or 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1319(c)(2), 1319(c)(4), 1321(b)(5));

"(2) Section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b));

"(3) Section 3008(d) of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6928(d));

"(4) Section 113(c)(1) or 113(c)(2) of the Clean Air Act (42 U.S.C. §§ 7413(c)(1), 7413(c)(2));

"(5) Section 103(b) or 103(d) of the Comprehensive Response, Compensation, and Liability Act (42 U.S.C. §§ 9603(b), 9603(d));

"(6) Section 325(b)(4) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11045(b)(4)); or

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"(7) Section 5124 of title 49, United States Code.

"(b) Any person who commits a criminal violation of federal environmental law identified in this subsection that is the direct or proximate cause of serious bodily injury to or death of any person, including a federal, state, local or tribal government employee performing official duties, as a result of the violation, shall be subject to a maximum term of imprisonment of five years, a fine of not more than \$250,000, or both, and, if a defendant is an organization, to a fine of not more than \$1,000,000. The laws to which this subsection applies are --

"(1) Section 14(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 1361(b)); or

"(2) Section 16(b) of the Toxic Substances Control Act (15 U.S.C. § 2615(b)).

"(c) For purposes of this section, the term "serious bodily injury" means bodily injury which involves --

"(1) unconsciousness;

"(2) extreme physical pain;

"(3) protracted and obvious disfigurement; or

"(4) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

"(d) For purposes of this section, the term "government employee" includes a person who, as part of that person's official duties, has the responsibility to respond to, investigate or report environmental violations, including, but not limited to: a police

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law enforcement personnel shall include, among others, the following: inspectors, civil and criminal investigators, technical experts, regulators, government lawyers, and police.

(c) The Secretary of the Treasury shall transfer to the Account \$1,000,000 for fiscal year 1997 and thereafter \$2,000,000 each fiscal year, in such amounts as are provided in appropriation Acts, for use in carrying out the provisions of this section. Moneys in the Account, to the extent determined by the Administrator to be in excess of the amounts needed for purposes of this section, shall be returned to the general revenues of the Treasury.

(d) This section does not reduce or otherwise modify or limit any other authorization for appropriations available to the Environmental Protection Agency.

#### **SEC. 6. STATUTE OF LIMITATIONS.**

(a) Chapter 213 of title 18, United State Code, is amended by adding after section 3294 the following new section --

##### **"§ 3295. Felony environmental crimes.**

"(a) No person shall be prosecuted, tried, or punished for a violation of, or a conspiracy to violate, any of the offenses listed in subsection (b) unless the indictment is returned or the information is filed within five years after the offense is committed; however, when a person commits an affirmative act that conceals the offense from government regulators or law enforcement officials, that person shall not be prosecuted, tried, or punished for a violation of, or a conspiracy to violate, any of the offenses listed below in subsection (b) unless the indictment is returned or the information is filed within five years after the offense is committed, or within three years after the offense is discovered by a government regulator or law enforcement

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personnel, whichever is later but in no event later than eight years after the offense is committed.

"(b) This subsection applies to a violation of --

"(1) Section 309(c)(2), 309(c)(3), 309(c)(4), or 311(b)(5) of the Federal Water Pollution Control Act (33 U.S.C. §§ 1319(c)(2), 1319(c)(3), 1319(c)(4), or 1321(b)(5));

"(2) Section 105(b) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b));

"(3) Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. § 1908(a));

"(4) Section 4108(c) of the Shore Protection Act of 1988 (33 U.S.C. § 2609(c));

"(5) Section 1423 or 1432 of the Safe Drinking Water Act (42 U.S.C. §§ 300h-2 or 300i-1);

"(6) Section 3008(d) or 3008(e) of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. §§ 6928(d) or 6928(e));

"(7) Section 113(c)(1), 113(c)(2), 113(c)(3), or 113(c)(5) of the Clean Air Act (42 U.S.C. §§ 7413(c)(1), 7413(c)(2), 7413(c)(3), 7413(c)(5));

"(8) Section 103(b), 103(d), or 112(b)(1) of the Comprehensive Response, Compensation, and Liability Act (42 U.S.C. §§ 9603(b), 9603(d); 9612(b)(1));

"(9) Section 325(b)(4) of the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. § 11045(b)(4)); or

"(10) Section 5124 of title 49, United States Code."

(b) The table of sections of chapter 213 of title 18, United States Code is amended by adding after section 3294 the following new section --

"§ 3295. Felony environmental crimes."

**SEC. 7. ATTEMPTS.**

(a) Section 14(b) of the Federal Insecticide, Fungicide, and Rodenticide Act (7 U.S.C. § 1361(b)) is amended by adding a new paragraph 14(b)(5) --

"(5) Attempts.-Any person who attempts to commit the conduct that constitutes an offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such an offense."

(b) Section 16(b) of the Toxic Substances Control Act (15 U.S.C. § 2615(b)), is amended by inserting "(1)" before "Any" and by adding the following new paragraph --

"(2) Any person who attempts to commit the conduct that constitutes any offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(c) Section 309(c) of the Federal Water Pollution Control Act (33 U.S.C. § 1319(c)), is amended by adding after paragraph (7) the following new paragraph 309(c)(8) --

"(8) Any person who attempts to commit the conduct that constitutes any offense under paragraphs (2), (3) or (4) of this subsection shall be subject to the same penalties as those prescribed for such offense."

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(d) Section 105(c) of the Marine Protection, Research, and Sanctuaries Act of 1972 (33 U.S.C. § 1415(b)), is amended by striking "and" at the end of paragraph (1), striking the period at the end of (2)(B), and inserting "; and", and adding after paragraph (2) the following new paragraph --

"(3) Any person who attempts to commit the conduct that constitutes any offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(e) Section 9(a) of the Act to Prevent Pollution from Ships (33 U.S.C. § 1908(a)), is amended by inserting "(1)" before "(A)" and by adding the following new paragraph --

"(2) Any person who attempts to commit the conduct that constitutes any offense under paragraph (1) of this subsection shall be subject to the same penalties as those prescribed for such offense."

(f) Section 3008 of the Resource Conservation and Recovery Act of 1976 (42 U.S.C. § 6928), is amended by adding after subsection 3008(h) the following new subsection --

"(i) Any person who attempts to commit the conduct that constitutes any offense under subsections (d) or (e) of this section shall be subject to the same penalties as those prescribed for such offense."

(g) Section 113(c) of the Clean Air Act (42 U.S.C. § 7413), is amended by adding after paragraph 6 the following new paragraph --

"(7) Any person who attempts to commit the conduct that constitutes any offense under subsections (1) or (2) of this section shall be subject to the same penalties as those prescribed for such offense."

#### **SEC. 8. ENVIRONMENTAL CRIMES RESTITUTION.**

(a) Section 3663(a)(1) of title 18, United States Code, is amended by striking "or" before "section 46312" and inserting "or an environmental crime listed in section 3674 of this title," after "section 3663A(c),"

(b) Subsection 3663(b) of title 18, United States Code, is amended by striking "and" at the end of paragraph (4), striking the period at the end of paragraph (5) and inserting "; and", and adding after paragraph (5) the following new paragraph --

"(6) in the case of an offense resulting in pollution of or damage to the environment, pay for removal and remediation of the environmental pollution or damage and restoration of the environment, to the extent of the pollution or damage resulting from the offense; in such a case, the term 'victim' in section 3663(a)(2) includes a community or communities, whether or not the members are individually identified."

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**THE ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996****SECTION-BY-SECTION ANALYSIS****Section 1**

Section 1 sets out the short title of this bill, the "Environmental Crimes and Enforcement Act of 1996."

**Section 2**

Section 2 states the Congressional findings upon which the Act is based. Specifically, the findings are that environmental criminal enforcement plays a critical role in the protection of human health, public safety, and the environment, and that these efforts are greatly enhanced by close cooperation and coordination among federal, state, and local authorities. The purpose of the legislation is to increase protection of the environment by strengthening federal law enforcement and by increasing the effectiveness of joint federal, state, and local criminal environmental enforcement efforts.

**Section 3**

Section 3 authorizes federal district courts to order convicted criminals to reimburse states and localities for costs they incur during federal environmental prosecutions. Moneys paid to state and local governments under this provision may be used solely for environmental law enforcement. This reimbursement provision applies to prosecutions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Toxic Substances Control Act (TSCA); the Rivers and Harbors Appropriations Act of 1899; the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; the Federal Land Policy and Management Act; and 49 U.S.C. § 5124, relating to transportation of hazardous materials.

This provision will strengthen criminal environmental enforcement by fostering cooperative efforts among federal, state, and local officials. State and local inspectors and investigators often initiate what become federal enforcement actions, and they continue to work with federal officials through the trial stage. For example, state laboratories provide analytical support. State and local prosecutors participate in joint task forces and are cross-designated as Special Assistant United States Attorneys. Although certain state courts may award

costs to state and local governments in state criminal proceedings, federal courts are not now expressly authorized to order such reimbursement. Providing for reimbursement will greatly increase the ability of state and local officials to cooperate in federal criminal proceedings to address violations of environmental law. Joint enforcement efforts also make the federal program more responsive to local communities.

Because the court may order reimbursement only upon motion of the United States, the discretion of both the federal prosecutor and the court will serve as a check against unwarranted cost awards. Allowable costs are limited to those incurred by a state or local government or agency for assistance to the federal government's investigation and prosecution of a case. Costs imposed on a defendant are payable directly to the state or local government in a manner analogous to the payment of restitution directly to the victims of a crime, thus obviating the need for a separate federal fund or federal administrator to collect and transfer the monies.

#### Section 4

Section 4 provides for enhanced punishment where a criminal violation of specified environmental laws directly or proximately causes serious bodily injury or death to any person, including any federal, state, local, or tribal government official.

Police officers, firefighters, paramedics and other public safety and public health personnel, often are the first on the scene of an environmental crime. In their efforts to protect others from harm, they themselves may suffer serious injury or death resulting from other people's criminal mishandling of dangerous materials or failure to comply with their legal duty to notify the government of releases of dangerous substances. Members of the public can also be injured or killed as a result of environmental crimes.

Section 4 will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. It does not establish a new or different crime, but instead provides for enhanced terms of imprisonment and enhanced fines for persons convicted of felony violations under specified federal environmental laws where death or serious injury results. The laws covered by this provision are: the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124. The section also provides for enhanced penalties for environmental misdemeanors under Federal Insecticide Fungicide and Rodenticide Act and Toxic Substances Control Act where death or serious

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injury results, thereby transforming those violations into felonies.

For enhanced punishment to be imposed, section 4 requires that the defendant commit the underlying environmental crime and that the crime be the direct or proximate cause of serious bodily injury or death. The requirement of "direct or proximate" causation is in line with language used in other criminal provisions, see, e.g., 18 U.S.C. § 844 (personal injury resulting from arson), and limits the sentence enhancer to appropriate cases. Those who commit environmental crimes, for example, by illegally storing hazardous waste, are on notice that their actions may cause serious injury or death to other persons. Unlike existing endangerment provisions in certain environmental statutes that apply to threatened injuries, Section 4 requires actual injury or death, but does not require that the defendant intend or know of the injury or death that the defendant's crime causes. Such a result is reasonably foreseeable when the covered crimes are committed.

For the most part, the definition of "serious bodily injury" in Section 4 follows similar definitions in 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) and 18 U.S.C. § 1365(g)(3) (tampering with consumer products). The definition in Section 4, however, does not include "substantial risk of death." In other words, actual serious bodily injury or death (not just the risk of injury or death) must occur for enhanced punishment to be imposed under Section 4. Section 4 also includes "unconsciousness" within the definition of "serious bodily injury," thereby conforming to the definition of that term in the federal hazardous waste laws at 42 U.S.C. § 6928(f)(6).

Section 4 specifically lists certain government employees whose death or injury could trigger enhanced punishment. This listing is not intended to exclude other persons, including other government employees, from the provision's coverage, but rather to emphasize that the specified government employees are exposed to special risks and are thus especially likely to benefit from the added deterrence and protection engendered by this provision.

## Section 5

Section 5 responds to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement. **[conform the balance of this summary to the OMB/EPA consensus on this provision:]** It establishes within the Environmental Protection Agency a separate account dedicated to the training of state and local law enforcement personnel in the investigation of environmental crimes, and it authorizes the following appropriations: \$1,000,000 for fiscal year 1997 and \$2,000,000 for each fiscal year thereafter.

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States and local governments are undertaking an expanded role in environmental enforcement, not only of their own laws but also of federal statutes pursuant to delegated authority. The Environmental Protection Agency has regularly trained state and local investigators and regulatory personnel in courses conducted at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA. The need and demand for such training, however, has been greatly increasing. Section 5 is designed to provide greater resources to address this rapidly growing need.

### Section 6

Section 6 provides for an extension of the statute of limitations where a violator has engaged in affirmative acts of concealment of specified environmental crimes.

As is the case for most federal crimes, federal environmental crimes are currently subject to a five-year statute of limitations, which runs from the time the offense is committed. 18 U.S.C. § 3282. Some environmental crimes, including some of the most egregious ones, involve affirmative acts of concealment by the wrongdoers. Criminals who are the most deceptive, and thus able to hide their wrongdoing the longest, are most likely to escape the legal consequences of their acts through expiration of the statute of limitations.

Section 6 addresses this problem for a specified list of felony violations of environmental statutes by extending the limitations period for up to three years beyond the traditional five-year period when the defendant commits an affirmative act of concealment. In these circumstances, the limitation period extends to three years after discovery of the crime by the government. In no event does the limitations period extend beyond eight years after the offense was committed. This extended limitations period covers violations of various provisions under the Federal Water Pollution Control Act; the Marine Protection, Research, and Sanctuaries Act; the Act to Prevent Pollution from Ships; the Shore Protection Act; the Safe Drinking Water Act; the Resource Conservation and Recovery Act; the Clean Air Act; the Comprehensive Environmental Response, Compensation, and Liability Act; the Emergency Planning and Community Right-to-Know Act; and 49 U.S.C. § 5124.

For example, if a violator committed an affirmative act of concealment and the environmental crime were not discovered until three, four, or five years after it was committed, Section 6 would extend the statute of limitations to six, seven, or eight years after the crime was committed, respectively -- that is, up to three years after the time of discovery with an eight year cap. If a violator committed an affirmative act of concealment but the crime were nevertheless discovered by the government immediately after it was committed, there would be no extension under Section 6, and the limitations period would be the five-

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year period running from the time the crime was committed. Similarly, where there was no affirmative act of concealment, the five-year period would apply and would run from commission of the crime.

The burden rests on the government to prove an affirmative act of concealment under Section 6.

#### Section 7

Section 7 amends specified environmental statutes to add attempt provisions. Under these new provisions, any person who attempts to commit an offense shall be subject to the same penalties as those prescribed for the offense itself.

The rationale for these new attempt provisions is similar to that for comparable provisions in other federal criminal statutes. Under these existing attempt laws, when law enforcement authorities uncover planned criminal activity and a substantial step is taken towards the commission of the crime, the crime can be stopped before it is completed and the perpetrator may still be prosecuted. For example, federal law makes attempted bank robbery a crime, punishable the same as bank robbery. 18 U.S.C. § 2113(a). Similar attempt provisions exist for numerous other crimes, such as uttering a Treasury check with forged endorsement (18 U.S.C. §§ 510); bank fraud (18 U.S.C. § 1344); damage to government property (18 U.S.C. § 1361); obstruction of court orders (18 U.S.C. § 1509); and obtaining mail by fraud or deception (18 U.S.C. § 1708).

There has been only one attempt provision in federal environmental criminal enforcement statutes. As a result, federal agents have been placed in the untenable situation of choosing between obtaining evidence necessary for a criminal prosecution and preventing pollution from occurring. For example, without an attempt statute, if agents stop a would-be environmental criminal from dumping hazardous waste, the perpetrator cannot be prosecuted for illegal dumping because no environmental crime has occurred. Only if the agents allow the dumping to occur, with the possibility of damage to the environment and risk to the public health, could the perpetrator be prosecuted for illegal dumping. These attempt provisions allow law enforcement personnel to stop environmental crimes before they are completed and still bring the wrongdoer to justice.

Attempt statutes serve another very important purpose in law enforcement. Undercover operations are widely recognized as a valuable tool to ferret out serious crimes. Where dangerous substances are involved, however, undercover operations carry the risk that the government will lose control of the substances and the public subsequently will be exposed to them. Attempt provisions facilitate undercover investigations by allowing prosecution where a defendant purposely engages in conduct that

would constitute the crime if the circumstances were as the defendant believes them to be. Where feasible, attempt provisions allow the government to substitute benign substances for the substances that make the conduct illegal but still prosecute for attempt the person who believes he is engaging in illegal conduct.

The new language added by Section 7 is analogous to the attempt provision contained in the federal drug laws. 21 U.S.C. § 846. An attempt to commit the conduct constituting one of specified environmental criminal offenses is punished in the same manner as the offense itself.

### Section 8

Section 8 amends the federal restitution statutes to clarify the authority of the courts to provide for restitution to all victims in environmental crimes cases.

Existing restitution statutes provide for restitution for bodily injury and property loss. Those categories of restitution address the harm suffered by victims of violent and economic crimes and are intended to make them whole for their physical injuries and pecuniary damages. The victims of environmental crimes also may suffer physical injuries and pecuniary losses. Indeed, environmental crimes often are economic crimes. At the same time, however, an environmental crime also may cause more widespread and longstanding damage, with the harm inflicted on all members of a community or communities affected by the environmental pollution or damage.

Section 8 clarifies the existing authority of the courts by including environmental offenses among the crimes explicitly enumerated in the restitution statutes. It makes plain that the costs of removal and remediation of environmental pollution or damage, and required restoration of the environment, are included within the coverage of that statute, to the extent of the pollution or damage resulting from the offense. This section recognizes that environmental crimes can harm entire communities and clarifies that the definition of "victim" in the restitution statutes may include all members of a community or communities, whether or not they are individually identified.

## **ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996**

Federal investigation and prosecution of environmental crimes is critical to the protection of public health and safety and the environment. The Environmental Crimes and Enforcement Act of 1996 will strengthen the partnership among federal, state, and local enforcement officials and greatly enhance their abilities to prosecute environmental criminals. Below is a summary of the Act's major provisions.

**Reimbursement for State and Local Governments** -- The Act authorizes federal courts to order convicted criminals to reimburse state and local governments for costs they incur supporting federal environmental prosecutions. State and local governments already provide crucial support to federal environmental enforcement efforts, but they now do so at their own expense. At a time of shrinking budgets, cost reimbursement to states and localities by the criminal will greatly enhance federal, state, and local cooperation in federal environmental enforcement efforts.

**Enhanced Punishment for Serious Injury or Death** -- The Act provides for enhanced punishment where a criminal violation of the environmental laws causes serious injury or death to a public official or anyone else. Police officers, fire fighters, other public officials, and members of the public can suffer serious injury or death where environmental criminals mishandle dangerous chemicals and other hazardous materials. This legislation will ensure that the criminals who cause this suffering will face an appropriately enhanced punishment upon conviction.

**New Tools for Prosecuting Concealed Crimes** -- Environmental criminals can currently escape justice by hiding their wrongdoing long enough to invoke the statute of limitations against prosecution. As a result, the most devious violators are often the most difficult to punish. The Act remedies this problem by extending the statute of limitations where the violator has affirmatively concealed the environmental crime.

**New "Attempt" Provisions** -- This legislation adds "attempt" provisions to environmental statutes so that we may prosecute an environmental criminal even when we stop a crime in progress. Today, if a federal agent stops a would-be criminal who is attempting to commit an environmental crime, it might well be impossible to bring the criminal to justice. Adding attempt provisions will solve this problem by allowing for apprehension and prosecution before the crime is completed and before the environment is damaged. These provisions will also enhance investigations by allowing for the use of environmentally benign substances in undercover operations.

**Restitution** -- The Act will amend the federal restitution statutes to clarify that courts may provide for restitution to all victims in environmental crimes cases. This revision will help provide relief to all members of the community who suffer harm as a result of environmental crimes.

**Training** -- The Act will respond to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement.

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**DRAFT: 7/30/96**

**MESSAGE TO THE CONGRESS TRANSMITTING  
THE "ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996"**

**To the Congress of the United States:**

I am pleased to transmit for your immediate consideration and enactment the "Environmental Crimes and Enforcement Act of 1996."

The Act will significantly advance three vital concerns important to the American people: environmental protection, law enforcement, and effective federal-state partnerships.

First, the American people have made it abundantly clear that they want strong environmental protection. Protecting our environment is a fundamental community value. We all want clean air, safe water, and healthy neighborhoods for ourselves and our families. Each of us has a sacred obligation to pass on a vibrant planet to future generations. This legislation provides an opportunity to further our commitment to protect human health, public safety, and the natural resources we all cherish.

Second, our citizens demand swift justice for those who violate our laws, including our environmental laws. The environmental scofflaw can threaten our neighborhoods, our children, and our quality of life every bit as much as the drug dealer and the thief. We need legislation that allows us to treat environmental crimes with the same degree of seriousness as other crimes. We owe it to the law-abiding citizens of this country to crack down on those who refuse to comply with environmental protections.

Third, the American people have asked us to forge effective partnerships among federal, state, and local governments. As former state officials, Attorney General Reno, Administrator Browner and I all know that the best solution to a problem often comes from those closest to the problem at the local level. At the same time, we need a strong federal presence in environmental enforcement to ensure that all Americans enjoy the basic protections to which they are entitled.

The Environmental Crimes and Enforcement Act of 1996 significantly furthers each of these goals by remedying specific deficiencies in existing laws. For example, this legislation enhances federal-state partnerships by authorizing courts to order convicted criminals to reimburse states and localities for costs they incur during federal environmental prosecutions. State and local investigators often initiate what become federal enforcement actions, and they often continue to work with federal officials through the trial stage. State laboratories provide analytical support, and state and local prosecutors participate in joint task forces with federal officials. Current law,

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however, does not expressly allow courts to order those convicted of environmental crimes to reimburse states or municipalities for the costs they incur in these efforts. The reimbursement provision in the Act will greatly strengthen federal, state and local environmental protection by fostering these important cooperative efforts. The Act will also respond to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement.

This legislation will also reduce threats to State and local officials posed by the improper handling of hazardous substances by criminals. Police officers, fire fighters, paramedics, and other state and local officials come to the scene of an environmental crime with the goal of preventing further human injury, property damage, and environmental harm. As a result of their heroic efforts, they can suffer serious injury or death due to the reckless actions of environmental violators in handling dangerous chemicals and other hazardous materials. This legislation will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. We owe it to the men and women who risk their lives every day for our sake to provide this additional protection. Because these crimes put all members of the public at risk, the Act similarly provides for enhanced punishment whenever any person suffers death or serious bodily injury due to a criminal violation of federal environmental law.

The Act also closes a loophole exploited by the most devious violators of environmental law. Under current law, criminals can escape justice by hiding their wrongdoing long enough to invoke the statute of limitations against prosecution. The Act remedies this problem by providing for an extension of the statute of limitations where the violator has engaged in such affirmative acts of concealment.

This legislation adds an "attempt" provision to environmental statutes -- a provision similar to those found in other criminal laws -- so that we may prosecute the criminal even when we stop a crime in progress. Under current law, federal agents are often placed in an untenable situation when they come upon an environmental crime about to be committed. They can stop the would-be criminal before the crime is completed and before the environment is harmed, but then they might well be unable to prosecute because no crime has occurred. Adding an "attempt" provision will solve this problem by allowing for apprehension and prosecution of the violator before environmental damage occurs. This provision will also remove a major obstacle to environmental investigations by allowing for the use of environmentally benign substitutes for hazardous materials in undercover operations.

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Finally, the Environmental Crimes and Enforcement Act of 1996 will amend the federal restitution statutes to clarify the authority of the courts to provide for restitution in environmental crimes cases. Restitution typically provides reimbursement to victims who are directly harmed by crimes. While the victims of environmental crimes often suffer physical injuries and pecuniary losses, environmental crimes also cause more widespread and longstanding damage. The victims include all members of the community that would have used or enjoyed the damaged environmental resources. This legislation provides needed clarity and guidance in this area by including environmental offenses among the crimes specifically covered by the restitution statute.

We owe the American people the assurance that our air, drinking water, and neighborhoods are safe and clean. This legislation will enhance environmental protection by strengthening environmental criminal enforcement and federal-state cooperation in these critical enforcement efforts.

I urge the Congress to take prompt and favorable action on this legislation.

Env Crimes - 8/8/96

1. Prejudgment Lien

Modeled after CT law

P.F. case - Lien on prop.

no forfeiture

→ "instruments of crime"  
Proceeds??

2. Mandatory restitution

opportunity - real  
responsibility

3rd day of train ride - community

(env crimes

not to know initiatives)

↳ EPA etc

## Env Crimes 7-30-96

Lois - what's in bill. Vetted in DOT, USAtty, EPA.

Ideas dropped along way: ① mand verlihuic -  
② asset finf. -

① local + state costs of invs + props (in fed cases)  
can be entered reimbursed or set aside

② if gov as result of env. crime - someone  
others serious injury - enhanced penalty.  
(current endangerment provis -  
not enough) Touya - ↑ to 20 yrs.

More common - 1st responder (cop / fireman) - go missing  
in - overcome by fines.

③ Training in state-local law enf.

④ SOL - extending up to 3 yrs. (cop)  
if just discovered

other concerns - old cases not so easy to by -

management concerns

Also, finality issues

⑤ Attempts provis -

Lets ~~the~~ enf. people stop where  
dumping takes place.

Who will help underscore efforts (?)

FBI support of this?

⑥ Restitution provis - just want to clarify  
(1 technical change: not clear if can be imposed  
where no probation is imposed. Appeal now on 2.)

(can't say we need this - will screw us in litigation.)

Also - where there's politics, it can order part.  
(judges in fact have been doing this).

Also - new def of "person"

### ① Mandatory retribution

Earlier viewed as central.

Inabil to pay / can't access aut.

→ healthy co. may be hit.

(discretion to sketch out payment schedule)

Can always go civilly to get  
clean-up done.

### ② Asset forfeiture.

Usually you do want to keep businesses going.

Instrumentalities - factories.

Proceeds - mostly. The real benefit of  
bad behavior.

Can do all this civilly again.

[wildlife - asset forfeiture - made someone  
crazy]

Political backlash?

Any pre-judgment remedies? (Tort) (Civil)  
(Burden will w/ poster hide on other side)

Suspense -

Debarment - DOJ tries to stay out

ww-lu good shape.

Need examples for  
each provision.

(constraint - If this admin -  
probably not a closed case)

Lessons incentive  
to plead. / LS - judge  
will find way  
to say - not a  
env. crime.

①  
ww - Not enough on restitution? - mandatory rel.  
Enhance w/ policy directives? - can't we have  
narrow provision  
w/ certain people.

②  
Also - involvement of FBI? - heightened role?  
(FBI - now has unit on env. crimes)  
DE - R FBI Resources.

LS - One possibility -  
do something on civil side.

- fed/st/local partnerships.  
(LS - sends wrong msg)

after- role contributing

crimes people nervous

DOT/EPA - eventually FBI + law enf ags.

Set up Env. Data Collecti- Ctr

<sup>2</sup> pull together data sources

get at env. criminals

funnel out to others who can prosecute

E,

All set for 472. I called Dianne and  
she will be waiting for your call at  
707. 865. 1431.

Day

1. Director has Penn

FRM should make it more  
of a priority.

Need  
ideas

generic allegory to director  
re law enf. priorities

2. Restitut - -

↓ Started out as asset for future -  
↓ Don't want to confiscate future

Clean it up! -

PO Maker pays - in criminal  
context.

(mandatory ~~set~~ <sup>res</sup> liability?)

Doesn't want by law - directive  
Doesn't want directive

EXECUTIVE OFFICE OF THE PRESIDENT  
COUNCIL ON ENVIRONMENTAL QUALITY

This is an update on  
the environmental crimes  
issue Katie mentioned  
to you. I also spoke  
to David Fine and  
Elana Kagan in your  
office.

Wesley Warren

Elana  
Kagan  
David  
Fine  
Katie

EXECUTIVE OFFICE OF THE PRESIDENT

26-Jul-1996 08:02pm

TO: (See Below)  
FROM: Diane Regas  
Domestic Policy Council  
SUBJECT: Environmetnal Crime directive

CEQ has been working with DOJ and OMB to prepare an announcement of an environmental crimes initiative. Attached is a draft Presidential directive to the Attorney General for inclusion in the announcement.

The directive focusses on the communities right to know, restitution, and help from the FBI for local law enforcement.

I think that DOJ is likely to be of the view that a directive is unnecessary, however I believe that a directive highlights the President's personal commitment to actions that will protect communities from environmental harm.

Distribution:

TO: Dennis Burke  
TO: Wesley P. Warren  
TO: David Fein  
TO: Elyse H. Fitter  
  
CC: Bradley M. Campbell  
CC: Elizabeth E. Drye

## ENVIRONMENTAL CRIMES UPDATE

(July 26, 1996)

### Background

DOJ is working on proposed legislation and a Presidential directive for the environmental crimes event currently scheduled for August 2. We are especially interested in making sure that any Administration proposals include a strong approach on restitution and a heightened law enforcement role for the FBI. Also, DOJ and EPA are looking into possible event sites in Maryland or northern Delaware.

### Status

Today at noon, DOJ gave us an update and reported good progress on a number of important parts of this initiative. However, they also reported that their senior management was not yet ready to go as far as we had wanted them to, especially on the issues of restitution and FBI assistance. As a result, a high-level discussion with DOJ officials is necessary to ensure DOJ will eventually have enough set to go in time for the event.

Draft legislation is currently going through review and could be completed before August 2. A bill outline of major provisions could be prepared now. However, currently DOJ does not want to include any provisions on restitution except bill language to clarify their authority to use existing restitution remedies in the case of environmental crimes. In addition, DOJ does not want to include any provisions on the FBI in the bill. Finally, DOJ does not want to do any directive from the President on any issues as part of the event.

Notwithstanding the other provisions in the legislation (making "attempts" a crime, punishing injuries to safety officials resulting from environmental crimes, and reimbursement of costs to state and locals), we are concerned that not having a directive from the President and having a bill that merely clarifies restitution authority may not be enough for a Presidential event.

### Issues

NOT put this??

DOJ needs to be persuaded that:

- (1) We need some kind of Presidential directive to show that we are doing something new and as much as we can even without legislation.
- (2) We need the strongest positions possible on restitution and FBI assistance.
- (3) We need a good site very soon that would be easy to get to (EPA is also looking for a site but does not have one yet.)
- (4) We need a proposal soon enough for them to vet with key groups (especially law enforcement and prosecutors) to build a support crowd.

Draft (proposed by Diane Regas)  
July 26, 1996

Memorandum on Protecting Communities from Environmental Crimes

*July xx, 1996*

*Memorandum for the Attorney General*

*Subject* Protecting Communities from Environmental Crimes

We have made tremendous progress over the last twenty-five years in protecting public health and the environment from toxics and other pollution. Most Americans and most companies do all they can to protect our environment. Yet a few bad actors still endanger families, communities and law enforcement officers by violating environmental laws.

When toxic wastes are transported and dumped illegally the harm can extend to police officers, fire fighters, paramedics, and to families who live next door. Pollution illegally dumped into a river can contaminate the drinking water of communities downstream, and pollute the fish that people eat from the river. In the last few years several spills have devastated the wildlife in rivers across America. Many of these environmental insults can persist for months and years--threatening communities, undermining family security and reducing the value of neighborhood homes.

For too long communities have not had the right to know when environmental laws are violated. People want to know where toxic wastes have been found--and what is being done to hold these criminals accountable for the damage they have done.

Law enforcement and prosecutors across the country need every tool we can give them to protect their communities from environmental insult--large or small. Protecting the environment and enforcing our important environmental laws can be the province of every local prosecutor. We can do more for communities, local law enforcement and victims of environmental crimes.

That is why I am directing you to take a number of important measures that will improve protection for communities from environmental offenders.

First, I want you to strengthen the protection for communities when the federal government undertakes prosecution of environmental cases. Communities have a right to know about environmental violations near their homes, and violators need to be held accountable for the harm they have done. Accordingly, I am directing you to require that all Assistant United States Attorneys seek community notification of environmental violations in all environmental prosecutions.

Second, you should take steps to make victims of environmental crimes whole. In particular, restitution of environmental harm should be sought whenever it is in the public interest. ]

Finally, I want you to work with state and local officials -- governors, attorneys general, legislators, district attorneys, and judges -- to ensure that the federal government is doing everything it can to help local officials prosecute environmental violators. In particular you should determine how the FBI can provide additional training to law enforcement officials on the federal laws and resources available to protect the health and environment of America's communities. ]?

To achieve these objectives, I expect you to identify funding where and when appropriate. You should report to me in writing by December 1, 1996 on the specific steps you will take to develop this policy.

William J. Clinton

[7.24.96 DRAFT]

### THE CLINTON ADMINISTRATION'S ENVIRONMENTAL CRIMES BILL

#### 1. We should have effective enforcement for the worst environmental offenses.

and the public  
[scribble]

*Background:* Current law fails to recognize that environmental crimes <sup>may harm the</sup> ~~often endanger the~~ safety of police ~~and other law enforcement personnel~~. There are no laws against attempted environmental crimes, making "sting" operations ~~impossible~~ and hampering efforts to capture criminals before environmental damage is done. Current statutes of limitations have no exceptions for those who conceal their environmental crimes, with the ironic result that some of the most egregious environmental crimes cannot be prosecuted.

#### Legislative Proposal

Why not  
Plan this  
up more?

- ▶ Enhanced penalties would be established for environmental crimes that ~~endanger the~~ <sup>case seems badly</sup> health or safety of law enforcement personnel or the public.
- ▶ A new federal law applicable to existing environmental laws would outlaw "attempts" to commit environmental crimes.
- ▶ Statutes of limitation would be modified to allow additional time for prosecution (not to exceed a total of eight years from the date of the violation) where a criminal takes affirmative acts to conceal an environmental crime.

#### 2. We should strengthen environmental law enforcement partnerships.

*Background.* Local law enforcement agencies often lack the resources to support environmental crimes prosecutions or to train their officers on detection and handling of environmental crimes. This problem hampers joint federal-state prosecutions, and has been made more urgent by the government shutdown and other efforts to cut EPA's enforcement budget and "take the environmental cop off the beat."

#### Legislative Proposal

- ▶ On motion by the United States, state and local officials would be able to receive an award of their costs in joint prosecutions with federal authorities of environmental crime, and the cost award would be added to the criminal fine the defendant would have to pay.
- ▶ New authorization would be provided for training and support of state and local law enforcement officials.

by whom?

#### 3. We should provide for restitution of communities victimized by environmental crimes.

*Background.* <sup>The ability of</sup> ~~There are many provisions for restitution of victims in the case of violent crimes, but no comparable provisions to permit courts to require environmental criminals to provide "restitution" to communities victimized by environmental crime.~~ The result is that

as with violent crimes,  
is it likely?

~~there may be no resources available to repair the damage done by an environmental crime, even where the criminal is convicted of the offense.~~

**Legislative Proposal**

- ▶ ~~Courts would be specifically authorized to require convicted criminals to pay restitution for their crimes, by making payments to funds administered by federal, state, or local agencies for the purpose of remediating or improving the quality of the environment injured by an environmental crime.~~

*The law will be drafted to raise that the law order*

*When not approved? who not make mandator*

**4. The President is taking administrative action to raise the stakes for environmental criminals. [KMcG: unreviewed by DOJ]**

**Background.** We can do better in deploying the resources of the Federal Bureau of Investigation (FBI) in helping state and local governments fight environmental crime. When criminals are convicted, we can be more aggressive in making sure that criminals do not benefit from their crimes.

**Executive Action**

- ▶ The President is today issuing a directive requesting that the Attorney General and the FBI Director: 1) enhance the role of the FBI in prosecuting environmental crime, through expansion of law enforcement coordinating committees by United States Attorneys; and 2) authorizing and directing United States Attorneys to make greater use of seizure and forfeiture, and restitution authority under current law.

?

***The Clinton Administration's Initiative  
To Strengthen Prosecution of Environmental Crime***

*of agencies selected*  
Criminal prosecution <sup>*important*</sup> under our environmental laws is reserved for the most serious threats to public health and the environment, and depends heavily on close partnership between the federal government and state and local environmental, public health, and law enforcement agencies. Unfortunately, due to gaps in the current environmental laws, and the severely limited resources of state and local law enforcement agencies, too many environmental crimes now go undetected or inadequately punished.

The Clinton Administration is challenging Congress to strengthen the hand of law enforcement when it comes to environmental crime. We are calling upon Congress to enact targeted reforms to the laws against environmental crime that meet four basic goals:

- ▶ ***Strengthen the current law***, so that federal, state, and local prosecutors can more effectively pursue the worst offenses.
- ▶ ***Strengthen our partnership with State and Local law enforcement***, by providing additional resources and training to state and local prosecutors who work to prosecute environmental crimes.
- ▶ ***Empower communities to restore resources injured by environmental crime***, by clarifying the authority of courts to require convicted criminals to pay for recleaning up and restoring the environment they damage.

The EPA Administrator and the Attorney General are ready to work with the Congress to enact legislation that meets these goals.

07/26/98

13:05

202 514 4231

ENKJ

001/015

**U.S. DEPARTMENT OF JUSTICE  
ENVIRONMENT AND NATURAL RESOURCES DIVISION  
POLICY, LEGISLATION AND SPECIAL LITIGATION SECTION  
WASHINGTON, D.C. 20530**

**FAX NUMBER 202/514-4231**

**CONFIRMATION NUMBER 202/514-1442**

**DATE: July 26, 1996**

**FROM: Tim Dowling**

**PHONE NUMBER: 514-4642**

**NUMBER OF PAGES TO BE TRANSMITTED (including cover):**

**TO: Wes Warren**

**PHONE NUMBER:**

**FAX NUMBER: 456-2710**

**MESSAGE: Re: Env. Crime Bill**

Attached are current drafts of the memo regarding asset forfeiture, the transmittal letter to the Congress, and the section-by-section analysis. We are continuing to revise these documents.

**DRAFT: 7/26/96**

**MESSAGE TO THE CONGRESS TRANSMITTING  
THE "ENVIRONMENTAL CRIMES AND ENFORCEMENT ACT OF 1996"**

**To the Congress of the United States:**

I am pleased to transmit for your immediate consideration and enactment the "Environmental Crimes and Enforcement Act of 1996."

The Act will significantly advance three vital concerns important to the American people: environmental protection, law enforcement, and effective federal-state partnerships.

First, the American people have made it abundantly clear that they want strong environmental protection. Protecting our environment is a fundamental community value. We all want clean air, safe water, and healthy neighborhoods for ourselves and our families. Each of us has a sacred obligation to pass on a vibrant planet to future generations. This legislation provides an opportunity to further our commitment to protect human health, public safety, and the natural resources we all cherish.

Second, our citizens demand swift justice for those who violate our laws, including our environmental laws. The environmental scofflaw can threaten our neighborhoods, our children, and our quality of life every bit as much as the drug dealer and the thief. We need legislation that allows us to treat environmental crimes with the same degree of seriousness as other crimes. We owe it to the law-abiding citizens of this country to crack down on those who refuse to comply with environmental protections.

Third, the American people have asked us to forge effective partnerships among federal, state, and local governments. As former state officials, Attorney General Reno, Administrator Browner and I all know that the best solution to a problem often comes from those closest to the problem at the local level. At the same time, we need a strong federal presence in environmental enforcement to ensure that all Americans enjoy the basic protections to which they are entitled.

The Environmental Crimes and Enforcement Act of 1996 significantly furthers each of these goals by remedying specific deficiencies in existing laws. For example, this legislation enhances federal-state partnerships by authorizing courts to order convicted criminals to reimburse states and localities for costs they incur during federal environmental prosecutions. State and local investigators often initiate what become federal enforcement actions, and they often continue to work with federal officials through the trial stage. State laboratories provide analytical support, and state and local prosecutors participate in joint task forces with federal officials. Current law,

2

however, does not expressly allow courts to order those convicted of environmental crimes to reimburse states or municipalities for the costs they incur in these efforts. The reimbursement provision in the Act will greatly strengthen federal, state and local environmental protection by fostering these important cooperative efforts. The Act will also respond to the urgent need expressed by state and local officials for additional federal training on environmental criminal enforcement.

This legislation will also reduce threats to State and local officials posed by the improper handling of hazardous substances by criminals. Police officers, fire fighters, paramedics, and other state and local officials come to the scene of an environmental crime with the goal of preventing further human injury and property damage. As a result of their heroic efforts, they can suffer serious injury or death due to the reckless actions of environmental violators in handling dangerous chemicals and other hazardous materials. This legislation will ensure that the criminals who cause this suffering will face an appropriately severe, enhanced punishment upon conviction. We owe it to the men and women who risk their lives every day for our sake to provide this additional protection. Because these crimes put all members of the public at risk, the Act similarly provides for enhanced punishment whenever any person suffers death or serious bodily injury due to a criminal violation of federal environmental law.

The Act also closes a loophole exploited by the most devious violators of environmental law. Under current law, criminals can escape justice by hiding their wrongdoing long enough to invoke the statute of limitations against prosecution. The Act remedies this problem by providing for a tolling of the statute of limitations where the violator has engaged in such affirmative acts of concealment.

This legislation adds an "attempt" provision to environmental statutes -- a provision similar to those found in other criminal laws -- that will allow law enforcement officials to stop environmental crimes before they happen. Under current law, federal agents are often placed in an untenable situation when they come upon an environmental crime about to be committed. They can stop the would-be criminal before the crime takes place and before the environment is contaminated, but then they are unable to prosecute because no crime has occurred. Adding an "attempt" provision will solve this dilemma by allowing for apprehension and prosecution of the violator before environmental damage occurs. This provision will also remove a major obstacle to undercover environmental investigations.

Finally, the Environmental Crimes and Enforcement Act of 1996 will amend the federal restitution statutes to clarify the authority of the courts to provide for restitution in

environmental crimes cases. Restitution typically provides reimbursement to victims who are directly harmed by crimes. While the victims of environmental crimes often suffer physical injuries and pecuniary losses, environmental crimes also cause more widespread and longstanding damage. The victims include all members of the community that would have used or enjoyed the damaged environmental resources. This legislation provides needed clarity and guidance in this area by including environmental offenses among the crimes specifically covered by the restitution statute.

We owe the American people the assurance that our air, drinking water, and neighborhoods are safe and clean. This legislation will enhance environmental protection by strengthening environmental criminal enforcement and federal-state cooperation in these critical enforcement efforts.

I urge the Congress to take prompt and favorable action on this legislation.

**Working draft 7/23 Environmental Crimes Bill****Section by section analysis:****Section 3. Joint federal, state and local environmental enforcement.**

In numerous cases, state and local agencies assist the federal government in the investigation and prosecution of environmental crimes. State inspectors and investigators often initiate what become federal enforcement actions, and continue to work with federal officials through the trial stage. State laboratories provide analytical support, and state and local prosecutors participate in joint task forces or are cross-designated as Special Assistant United States Attorneys.

This support makes the enforcement of environmental requirements stronger and more effective. Joint enforcement efforts also make the federal program more responsive to local communities.

In joint cases, state and local agencies, often operating with limited resources, effectively volunteer their services to the federal government. This is because there are no federal statutes that expressly allow courts to order defendants to reimburse states or municipalities for voluntary costs incurred during environmental law enforcement activities. Existing sentencing and probation provisions serve, in effect, to discourage joint federal/state/local initiatives.

This section strengthens a range of important joint federal, state and local environmental protection efforts. The section authorizes federal district courts, at the time of sentencing, to impose on a defendant costs incurred by state or local governments or government agencies. The court may so act only upon motion of the United States, and the court's action is itself discretionary. Thus, this section establishes two important safeguards on the imposition of costs: The federal prosecutor must exercise his or her discretion in deciding whether to move for costs; and the district court must thereupon decide whether the costs are warranted.

Allowable costs are limited to those incurred by a state or local government or an agency thereof. Costs are not authorized for expenses incurred by federal agencies or non-governmental organizations. In addition, costs are further limited to those incurred by the state or local government or state or local government agency for assistance to the federal government's investigation and prosecution of the case. Costs that are imposed on a defendant are payable directly to the state or local government (in a manner analogous to the payment of restitution directly to the victims of a crime), thus obviating the need for

a separate federal fund or federal administrator to collect and transfer the monies. The court may order payment of these costs as a condition of probation or supervised release, pursuant to 18 U.S.C. §§ 3563(b), 3583(d).

The environmental criminal violations for which costs may be imposed under this section are enumerated in paragraph (2). The section also requires that monies paid shall be used solely for environmental law enforcement.

#### Section 4. Protection of government employees and the public.

Federal, state, local and tribal law enforcement officers, public safety and public health officials can be placed at great risk of harm when others improperly handle hazardous materials. They also can be placed at great risk when others fail to comply with their legal duty to notify the government of releases of potentially harmful substances into the environment. Law enforcement and public health officials, such as police officers, firefighters and paramedics, respond to the scene of environmental violations with the goal of preventing human injury and property damage foremost in their minds. As a result, they may suffer serious injury or death simply in carrying out their official duties.

The public in general can be, and have been, put at grave risk by environmental criminals. Law enforcement, public safety and public health officials are especially susceptible to such risks because they serve as the front line in protecting the public from environmental crimes.

Those that commit environmental violations, for example, by illegally transporting, storing or discharging hazardous materials or by violating their duty to notify the government of hazardous releases of chemicals into the environment, are on notice, not only of potential criminal liability, but also that their actions may cause death or serious injury to other persons, including government employees who may come into contact with such pollutants or substances in the course of their official duties. The criminal violator should be subject to enhanced punishment in those instances where death or injury occurs.

Section 4 is a sentence enhancement provision, rather than a provision establishing new or different crimes. The section provides for enhanced terms of imprisonment and/or fines for persons convicted of certain felony violations of federal environmental laws where death or injury results. The section also provides for enhanced penalties for two environmental misdemeanors where death or injury results, thus transforming those violations into felonies.

The section requires that the defendant commit the underlying environmental crime and that the crime be the direct

or proximate cause of serious bodily injury to or death of any person, including a government employee performing official duties as a result of the violation. The requirement of "direct or proximate" causation is in line with language used in other criminal provisions, see, e.g., 18 U.S.C. § 844 (personal injury resulting from arson), and limits this sentence enhancer to appropriate cases. Unlike existing endangerment provisions in certain environmental statutes that apply to threatened injuries, this section requires actual injury or death but does not require that the defendant intend or know of the injury or death that the defendant's crime causes; such a result is reasonably foreseeable when these crimes are committed.

The section defines "serious bodily injury" as it is applied and defined at 18 U.S.C. § 113 (assaults within maritime and territorial jurisdiction) and 18 U.S.C. § 1365(g)(3) (tampering with consumer products), except that the provision for substantial risk of death is omitted. This section requires actual death. Also, unconsciousness is added to the definition as in the definition of serious bodily injury at 42 U.S.C. § 6928(f)(6) (hazardous waste).

The section applies to serious bodily injury to or death of any person. The statute specifies that any person includes certain government employees. The identification of certain government employees is not intended to exclude any other persons, but rather to make clear that those government employees are included in the term "any person." The section applies equally to an employee of the federal government or a state, local or tribal government.

#### Section 5. Environmental crimes training for state and local law enforcement.

States and local governments are undertaking a greatly expanded role in environmental enforcement not only of their own laws but also for the enforcement of federal statutes pursuant to delegated authority under a variety of environmental statutes. The Environmental Protection Agency has regularly engaged in the training of state and local investigators and regulatory personnel for such purposes in courses conducted at the Federal Law Enforcement Training Center (FLETC) in Glynco, GA. However, the need and demand for such training has been greatly expanding.

In order to promote and ensure safe and effective investigation and prosecution of environmental crimes at the state and local level, this section establishes within the Environmental Protection Agency a separate account dedicated to the training of state and local law enforcement personnel in the investigation of such crimes, and directs transfer to this account of certain funds as provided in appropriations acts.

## Section 6. Statute of Limitations.

As for most federal crimes, environmental crimes currently are subject to a five-year statute of limitations, which runs from the time the offense was committed. 18 U.S.C. § 3282. Ironically, some environmental crimes, including some of the most egregious crimes, involve affirmative acts of concealment by the wrongdoers. Criminals that are the most deceptive, and thus able to hide their wrongdoing the longest, are most likely to escape the legal consequences of their acts through expiration of the statute of limitations.

This section addresses this problem for a specified list of felony violations of environmental statutes by extending the limitations period for up to three years beyond the traditional five-year period. However, this extension of the limitations period is restricted to cases in which the defendant commits an affirmative act of concealment, and the limitations period extends to only three years after discovery by the government. Furthermore, in no event would the limitations period extend beyond eight years after the offense was committed.

Thus, if a defendant committed an affirmative act of concealment but the crime was nevertheless discovered by the government immediately after it was committed, then the three-year period running from the time of discovery would have no effect, and the limitations period would be five years, that is, five years running from the time the crime was committed. If the defendant committed an affirmative act of concealment and the crime was not discovered until four, five or six years later, then the statute of limitations would be extended to seven, eight or eight years after the crime was committed, respectively, that is, three years after the time of discovery with an eight year cap.

The burden rests on the government to prove an affirmative act of concealment on the part of the defendant. Where there was no affirmative act of concealment, the five-year limitations period applies and runs from the time the offense was committed.

## Section 7. Attempts.

Certain federal criminal statutes already provide for prosecution of attempted crimes. When law enforcement uncovers planned criminal activity and a substantial step is taken towards the commission of the crime, the crime can be stopped before it is committed and the perpetrator may still be prosecuted. For example, federal law makes attempted bank robbery a crime punishable the same as bank robbery. 18 U.S.C. § 2113(a). See, e.g., 18 U.S.C. §§ 510 (uttering Treasury check with forged endorsement); 1344 (bank fraud); 1361 (damage to government property); 1509 (obstruction of court orders); 1708 (obtaining mail by fraud or deception).

With one exception, there are currently no attempt provisions in federal environmental criminal enforcement statutes. As a result, federal agents are placed in an untenable situation. When they witness an environmental crime about to be committed, such as the midnight dumping of hazardous waste by a licensed hauler, they can stop the hauler before the dumping takes place and before the environment is contaminated -- but then the hauler cannot be prosecuted. Or they can allow the crime to take place and the dumper can be prosecuted -- but then the environment has been polluted. An attempt provision would allow law enforcement personnel in such instances to stop environmental crimes before they are completed but nevertheless to bring the wrongdoer to justice.

Attempt statutes serve another very important purpose in law enforcement. Undercover operations are widely recognized as a valuable tool to ferret out serious crimes. However, where dangerous substances are involved, undercover operations carry the risk that the government will lose control of the substances and the public subsequently will be exposed to them. Attempt provisions facilitate undercover investigations by allowing prosecution where a defendant purposely engages in conduct that would constitute the crime if the circumstances were as the defendant believes them to be. Where feasible, the government can substitute benign substances for the substances that make the conduct illegal but still prosecute for attempt the person who believes he is engaging in illegal conduct.

The language in each of the provisions in this section is analogous to the attempt provision contained in the federal drug laws. 21 U.S.C. § 846. An attempt to commit the conduct constituting one of several specified environmental criminal offenses is punished in the same manner as the offense itself. Enforcement of the criminal offenses included in this section will be strengthened by the addition of the attempt provisions.

#### **Section 8. Environmental Crimes Restitution.**

The restitution statutes provide for restitution for bodily injury and property loss. Those categories of restitution address the harm suffered by victims of violent and economic crimes and are intended to make them whole for their physical injuries and pecuniary damages.

The victims of environmental crimes also may suffer physical injuries and pecuniary losses. Indeed, environmental crimes often are economic crimes. However, environmental crimes also may cause more widespread and longstanding damages, such as when a violation of the Clean Water Act results in pollution of a body of water. The victims include the entire community that uses or derives benefits from the body of water.

This provision is intended to clarify the existing authority of the courts by including environmental offenses among the crimes explicitly enumerated in the restitution statutes. It makes clear that the costs of remediation of environmental pollution or damage, and required restoration of the environment, are included within the coverage of that statute, to the extent of the pollution or damage resulting from the offense. The Antiterrorism and Effective Death Penalty Act of 1996 codified the definition of "victim" for purposes of restitution. This section adds the environment to the definition of victim to clarify that the definition of victim is not intended to restrict the authority of courts to order restitution for environmental remediation and restoration in appropriate cases.

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