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The Massachusetts Environmental Trust

Charles H.W. Foster* and Frances H. Foster**

In 1988, the Massachusetts legislature established the Massachusetts Environmental Trust to administer Boston Harbor pollution settlement funds. Since that time, the Massachusetts Environmental Trust has emerged as a national model for innovative management and distribution of environmental settlement funds. This Article presents a history and analysis of the Trust based on personal accounts by Massachusetts Environmental Trust insiders and archival records.

The analysis exposes significant flaws in environmental settlement practices. The settlement process is unpredictable and opaque. The settling parties often lack the expertise needed to apply settlement funds effectively. Yet, they fail to consult, involve, or inform those who could best assist in that effort—affected communities and environmental experts. Settlement terms frequently value punishment and deterrence over environmental benefit. Even when settlements seek to address environmental damage, they define that damage too narrowly. As a result, the funds often go to short-term, small-scale, or even unrelated projects while much of the damage that was the subject of the settlement remains unaddressed.

The Massachusetts Environmental Trust provides an environment-centered model designed to enhance predictability, transparency, participation, and expanded use of settlement funds. The Massachusetts Environmental Trust’s experience demonstrates that an independent third party with environmental expertise and community knowledge, contacts, and reputation...
can develop and administer the flexible, creative, individualized schemes needed to respond to present and future damage to the natural and human environments.

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INTRODUCTION

In a 1994 keynote address, Joel Gross, Deputy Chief of the Justice Department’s Environmental Enforcement Section, proclaimed environmental trusts “unheralded successes of the environmental movement.”1 Environmental trusts originated in the mid-1970s as a “new approach . . . to help remedy environmental damage.”2 The trusts receive funds from environmental offenders and the developers of projects that harm the environment. The funds include fines and penalties for illegal pollution discharges and permit


violations, monetary awards made to compensate for irremediable environmental damage caused by, for example, a pesticide or oil spill, and payments required as a condition of a building or development permit.¹³

The trusts hold and manage the funds to improve the environment. “This can be in direct or even specified ways, such as a particular treatment, training, or research action or, in the case of payments held as a permanent endowment, for the improvement of the environment as a whole in perpetuity.”¹⁴

Over the past four decades, pioneers from Virginia to California have established environmental trusts at the local, state, regional, and national levels.⁵ These trusts differ in size, structure, and name but share a common mission: to do something for the environment to compensate for action taken against the environment.

Today, environmental trusts remain just as unheralded. They are largely overlooked by academics, policymakers, and practitioners.⁶ Yet, never before has the need for environmental trusts been greater. The BP Deepwater Horizon oil spill seared into the national consciousness the very real dangers of an environmental disaster and the necessity for an effective mechanism to respond to long-term as well as short-term environmental damage.

This Article presents the first in-depth analysis of an environmental trust. It uses the Massachusetts Environmental Trust (MET) for its case study. In 1988, the Massachusetts legislature established the MET to receive and manage $2 million in settlement funds derived from a federal lawsuit over Boston Harbor pollution.⁷ Since its founding, the MET has disbursed more than $19 million for environmental protection, remediation, outreach, education, and research.⁸ This amount includes more than $4.4 million from thirty-four settlements, judgments, civil actions, and administrative consent orders.⁹ In the process, the MET has emerged as “a national model for innovative management and distribution”¹⁰ of environmental settlement funds.

We selected the MET for this study because one of this Article’s authors, Charles H.W. Foster, served for almost two decades as a founder, trustee, and vice chairman of the MET. We base our study on a wide variety of sources. These sources include personal accounts by MET insiders, internal memoranda,
correspondence, unpublished settlement agreements, and archival materials, as well as more conventional legal texts and academic commentary.

This Article has two main goals. The first goal is to present the environmental settlement process in action. The Article begins with a critical analysis of the MET’s origins, challenges, and twenty-five year experience with settlements. This analysis exposes significant flaws in the environmental settlement scheme. The MET confronted a settlement process that was unpredictable and opaque. Parties often finalized plans for the use of settlement funds before revealing that settlement discussions were even underway. The effect was to exclude those with the greatest stake in the outcome—the affected communities—and the MET from helping to design the ideal scheme for “channeling settlement funds back to the environment.”

The MET experience also revealed an environmental enforcement and settlement process that prized punishment and deterrence over environmental benefit. That process adopted such narrow definitions of victim and harm that it consistently limited relief to cases with identifiable victims and quantifiable damages. In so doing, it ignored an unfortunate reality of environmental disasters—the ultimate toll may well be unknown and unknowable at the time of the settlement negotiations. As a result, the process constrained the MET’s ability to disburse settlement funds for optimal environmental benefit or even to obtain such funds in the first place. Instead, litigants often applied funds to unrelated environmental problems or to uses with no connection to the environment at all.

This Article’s second goal is to inspire new directions for reform. As a MET founder wrote in November 1987, “There is every reason to believe that an imaginative approach to the Boston Harbor situation could trigger important reforms and approaches nationally.”

The MET provides a new vision of the environmental settlement process. Over the past twenty-five years, the MET has developed innovative approaches that enhanced process predictability and transparency, encouraged participation by affected communities and outside experts, promoted a longer-term view of the remediation process, and introduced an environment-centered model for enforcement. The MET also offers a promising example of how the environmental settlement process could better tailor use of settlement funds to address the particular effects of an environmental disaster. The MET has demonstrated that an independent third party with environmental expertise and community knowledge, contacts, and reputation can design the flexible, creative, and individualized schemes that are needed to respond to future as well as existing damage.

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The Article concludes that the MET provides an underappreciated but potentially highly effective model. The MET experience makes a compelling case for reform of the environmental settlement process and provides a starting point for future reform efforts. But the MET model will not achieve its potential until all affected by environmental disasters—be they litigants, judges, legislators, damaged communities, environmental activists, or the concerned public—become aware that environmental trusts exist.


The MET began as a modest, minimally-funded entity that most thought would be no more than a partial response to Boston Harbor’s pollution problems. Yet, today, it has become the largest environmental grantmaker in Massachusetts and a model for environmental reformers nationwide. As this Part will show, close analysis of the MET’s origins provides invaluable insights into the environmental enforcement and settlement process. The MET experience offers both positive and negative lessons. It shows the potential for creative use of environmental settlement funds to “right[] a wrong.” As MET Executive Director Robbin Peach observed, “The Trust was chartered as the incarnation of an innovative idea: that funds generated in environmental lawsuits should benefit the environment.”

At the same time, however, the MET’s origins also expose flaws in the environmental enforcement and settlement process. Specifically, the MET experience demonstrates that, rather than being a constructive interplay of interests and jurisdictions, the process of arriving at an environmental settlement is often messy and complex. In a pollution case, multiple, competing interests tend to drive the proceedings, delay resolution, and battle over issues that have little to do with the merits.

17. For an extended discussion of flaws in the environmental enforcement and settlement process, see Charles H.W. Foster & Frances H. Foster, Environmental Trusts (2014) (unpublished manuscript) (on file with authors).
Beginning in the late 1980s, Boston Harbor was transformed from America’s “dirtiest harbor” into one of its “greatest environmental success stories.” The Boston Harbor litigation featured a multitude of competing interests, jurisdictional conflicts, four lawsuits in federal and state courts, lengthy and byzantine proceedings, and a dizzying array of federal, state, and common law doctrines, legislation, and regulations. In the end, Boston Harbor’s cleanup was more the result of “colorful characters [and] political, bureaucratic, and legal twists and turns” than any consistent, effective enforcement effort.

The case began in “quixotic” fashion. In 1982, Quincy City Solicitor Bill Golden was jogging on a local beach and accidentally stepped on raw sewage from a Boston Harbor treatment plant. He was so furious that he filed suit in state court on behalf of the city of Quincy against the Boston Water and Sewer Commission and the Metropolitan District Commission (MDC), the agency responsible for water supply and sewage treatment for the entire metropolitan Boston area. The suit claimed that, by allowing raw sewage to enter the Boston Harbor, the MDC violated Massachusetts’s environmental protection legislation and committed common law nuisance. Quincy’s lawyers asked the Environmental Protection Agency (EPA) to join in the suit, but the EPA declined on jurisdictional grounds. As Assistant U.S. Attorney Ralph Childs explained, participation in a state court lawsuit would “be inconsistent with the whole federalist system and would raise lots of difficult issues of jurisdiction.”


21. DOLIN, supra note 18, at 3.


23. DOLIN, supra note 18, at 99.


25. See Doneski, supra note 18, at 563, 591–94 (citing and discussing Quincy’s claims and relevant Massachusetts legislation). Some observers at the time felt that Quincy’s complaint was “disingenuous” because of Quincy’s own untreated outfalls into the Harbor. Foster & Hoyte, supra note 5, at 2.

26. DOLIN, supra note 18, at 100 (quoting Ralph Childs).
The Quincy case triggered three years of litigation in state and federal courts. In June 1983, three developments brought federal courts into the legal fray. On June 3, 1983, the Justice Department, on behalf of the EPA, sued the MDC in federal court for failing to meet monitoring and record-keeping requirements under the MDC’s National Pollutant Discharge Elimination System permit. As the EPA emphasized, this suit was “limited to monitoring, testing and recordkeeping violations” related to discharges from one sewage treatment facility (the Nut Island facility). The case was later settled, with the MDC paying a $15,000 fine.

Four days later, on June 7, 1983, the Conservation Law Foundation of New England (CLF), a nonprofit environmental advocacy organization, made more comprehensive efforts to address Boston Harbor pollution. The CLF reportedly was “shocked” by the allegations in the Quincy suit and the inaction of state and federal enforcement agencies. It filed suit against the EPA as well as the MDC in federal court under the citizen suit provision of the Clean Water Act.

The final significant development occurred on June 30, 1983, when Michael Deland was appointed administrator of EPA’s Region 1 (New England). Deland “made the cleanup of Boston Harbor one of his top priorities.” As he later explained, he was “embarrassed” that the EPA had not “filed a suit about Boston Harbor years ago.” On January 31, 1985, the EPA sued the MDC, the Metropolitan Water Resources Authority (MWRA), the Commonwealth of Massachusetts, and the Boston Water and Sewer Commission “for repeated and continuing violations of the Clean Water Act . . . which have resulted in the unlawful discharge of massive quantities of raw and partially treated sewage and other pollutants into Boston Harbor and its adjacent waters.”

The federal complaints were assigned to Judge A. David Mazzone of the federal district court. The state suit was referred to Massachusetts Superior Court Judge Paul Garrity. Judge Garrity appointed Harvard Law School Professor Charles M. Haar, a well-known environmental activist, as a special master to determine the facts and propose remedies. Upon Haar’s
recommendation, Garrity issued an injunction barring any new connections to
the sewer system until the pollution matter had been resolved.\textsuperscript{38}

As might be expected, politics was not far behind. Massachusetts
Governor Michael Dukakis, accused by his opponent George H.W. Bush of
allowing Boston Harbor pollution to remain unaddressed, was priming his own
pending run for the White House and anxious to get the issue resolved.\textsuperscript{39}
Additionally, the man whom he had defeated for governor, Francis W. Sargent,
was chairing a special commission on the harbor with ready access to the
\textit{Boston Globe} and other public support outlets.\textsuperscript{40}

Massachusetts Secretary of Environmental Affairs James S. Hoyte later
remarked that he had found a “‘head-spinning’ measure of disarray and
disagreement” as to what should be done.\textsuperscript{41} But by May 1985, Judge Mazzone
had moved to consolidate all of the pending suits, and by September 1985, the
state was found to be legally responsible for polluting the harbor.\textsuperscript{42} The penalty
phase of the proceedings could then begin. The issue was no longer whether the
Commonwealth was liable, but where the expected penalty funds should go.

\textbf{B. Creation of the MET}\textsuperscript{43}

The origins and authors of the Massachusetts trust proposal are “obscured
by passage of time.”\textsuperscript{44} In retrospect, the proposal appears more a product of
serendipity than formal design. In a “stroke of good fortune for Boston
Harbor,”\textsuperscript{45} key federal and state officials and legislators involved in the process
were familiar with and sympathetic to the environmental trust concept. Some
even had first-hand knowledge of existing environmental trusts in other parts of
the country. Thus, here too the MET experience illustrates flaws in the
environmental settlement process. It shows that the formation and selection of
an environmental trust to administer settlement funds often occur on an ad hoc
basis and are highly dependent on the specific individuals involved in the
case.\textsuperscript{46}

\textit{I. National Developments}

In the years following Judge Mazzone’s Boston Harbor decision,
environmental trust proponents made a concerted effort to promote the general

\begin{itemize}
\item \textsuperscript{38} See Foster & Hoyte, \textit{supra} note 5, at 2.
\item \textsuperscript{39} \textit{Id.} at 11–12; see DOLIN, \textit{supra} note 18, at 143–44 (discussing the 1988 presidential campaign
and Boston Harbor issue); HAAR, \textit{supra} note 18, at 9–19 (same).
\item \textsuperscript{40} Foster & Hoyte, \textit{supra} note 5, at 3–4.
\item \textsuperscript{41} \textit{Id.} at 3.
\item \textsuperscript{43} This summary draws heavily on Foster & Hoyte, \textit{supra} note 5.
\item \textsuperscript{44} Foster & Hoyte, \textit{supra} note 5, at 11.
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} For another example, see Foster & Foster, \textit{supra} note 17, at 19 (describing the ad hoc
formation of the Virginia Environmental Endowment).
\end{itemize}

the Chesapeake Bay met in informal roundtable sessions in Washington, D.C. and Chicago’s O’Hare International Airport.\footnote{Foster & Hoyte, supra note 5, at 9. For summaries of these roundtable discussions, see 1986 Roundtable Minutes, supra note 49; Minutes for the Environmental Trusts/Funds Roundtable (Mar. 27, 1987), in FOSTER PAPERS, supra note 12.} They discussed settlement issues, exchanged information and experiences, and considered “the matter of an institutional structure to service the growing network of environmental trusts/funds nationally.”\footnote{Id. at 2–5.}

In 1987, environmental settlements and trust funds received national attention when Congressman Gerry E. Studds (D-MA), Chairman of the House Merchant Marine and Fisheries Committee’s Subcommittee on Fisheries and Wildlife Conservation and the Environment, held oversight hearings on what were then called federal “credit projects.”\footnote{Id. at 4.} The immediate impetus for the hearings was the recent experience of Studds’s constituent, New Bedford Mayor John Bullard, in a Clean Water Act case involving pollution of New Bedford Harbor.\footnote{Foster & Hoyte, supra note 5, at 11.} Federal authorities required New Bedford to pay the entire $150,000 penalty to the U.S. Treasury rather than allowing the city to use those funds to remediate the actual environmental damage.\footnote{Id. at 19–20, 33–34 (statement of Gerry E. Studds, Chairman, Comm. on Merch. Marines & Fisheries).}

The 1987 hearings included extensive debate over the merits of environmental settlements and use of funds by third parties as well as published testimony on and summaries of the environmental trust concept and precedents.\footnote{The published materials included summaries of environmental trust precedents, merits, and obstacles. Id. at 68–80 (citing to Stever, supra note 6), 84–88 (citing to Foster, supra note 2).} At the close of the hearings, Congressman Studds observed that some form of encouragement was needed to stimulate the use of mitigation projects.\footnote{Id. at 19–20, 33–34 (statement of Gerry E. Studds, Chairman, Comm. on Merch. Marines & Fisheries).} Because of his interest in the pending Boston Harbor case, Studds was “receptive to the settlement approach and used his influence within the federal establishment to encourage the application of the concept to Boston Harbor.”\footnote{Charles H.W. Foster, Massachusetts Environmental Trust 1 (2011) (unpublished manuscript) (on file with authors).}

Federal personnel directly involved in the Boston Harbor pollution case also increasingly supported a creative settlement that would allow penalty funds to remain in Massachusetts. The EPA regional administrator, Michael Deland, was concerned with resolving the issue promptly and healing his agency’s breach with Massachusetts state agencies.\footnote{Foster & Hoyte, supra note 5, at 11.} As a result, he was willing to persuade a reluctant Justice Department to support the use of penalty funds outside of the conventional payment to the federal treasury.\footnote{Id.} Deland’s chief legal aide, Patrick Parenteau, was a strong proponent of this approach.
Parenteau, who had been lead counsel for the National Wildlife Federation earlier in his career, had personal knowledge and experience with environmental trusts. In fact, in this capacity, Parenteau had “pressed for a . . . permanent trust settlement to protect the endangered whooping crane in Nebraska.”

Finally, the presiding judge in the case—Judge A. David Mazzone—was a well-advised but behind-the-scenes participant in the settlement process. Judge Mazzone did not directly champion and implement the environmental trust approach. Nonetheless, according to one participant in the Boston Harbor settlement process, the judge “‘understood what was going on, was tough-minded throughout, but was not prepared to be punitive just for punishment’s sake.’”

2. State Developments

At the state level, prominent figures in both the Massachusetts executive and legislative branches supported an environmentally beneficial settlement of the Boston Harbor case. From the start, environmental trust proponents “found an attentive ear” in Secretary of Environmental Affairs James S. Hoyte. Hoyte headed the Executive Office of Environmental Affairs (EOEA), the state agency that held the principal responsibility for the Boston Harbor case. In another “singular coincidence,” Hoyte’s undersecretary, William M. Eichbaum, was already well acquainted with the environmental trust concept. Eichbaum had served as an assistant secretary in the Pennsylvania and Maryland governments and had direct experience with the creation of an earlier environmental trust—the Chesapeake Bay Trust. He also was familiar with the 1986 and 1987 environmental trust roundtables.

Throughout the penalty phase of the Boston Harbor case, former Secretary of Environmental Affairs Charles H.W. Foster kept Hoyte and Eichbaum informed of environmental trust “precedents in Massachusetts, Virginia, Chesapeake Bay, the Hudson River, the Gulf Coast, the Great Lakes,

61. Id.
63. Foster & Hoyte, supra note 5, at 11 (stating that Judge Mazzone “was not directly involved in promoting the environmental trust concept”).
64. Id. (quoting James S. Hoyte); see also Letter from Douglas I. Foy, President, Conservation Law Found., to Charles H.W. Foster (Oct. 12, 2000) (on file with authors) (“The hero in this whole process was Judge Mazzone, who hammered the state and the feds to clean up the harbor, and made clear he intended to enforce the Clean Water Act.”).
65. Foster & Hoyte, supra note 5, at 10.
66. Id.
67. Id.
68. Id.
69. Id.
Foster, a leading advocate and participant in the environmental trust movement, had worked with several environmental nonprofits and philanthropies, including the World Wildlife Fund/Conservation Foundation, New England Natural Resources Center, Fund for New England, and California Environmental Trust.

Another advisor and proponent of an environmental trust approach for the Boston Harbor case was Susan Ives, a graduate of Harvard’s Kennedy School of Government. As a student, Ives had written a seminar paper on this very subject for Harvard law professor and Quincy case master Charles Haar. Hoyte hired Ives as a special assistant to suggest and evaluate possible trust options. Hoyte, Eichbaum, Foster, and Ives consulted regularly throughout the settlement negotiations process. “Each was strongly committed to the concept of an environmental trust as part of any settlement.”

EOEA agencies provided additional government support for settling the Boston Harbor case. As Foster and Hoyte later observed:

[These agencies,] weary of the endless battles and public criticism, were ready to get on with the job of harbor clean-up . . . . The state’s Office of Coastal Zone Management was particularly interested in a possible trust arrangement, because the $2 million in state penalty funding, if retained at the state level, could help satisfy the matching fund requirements for a major national estuary planning and research project for Boston [H]arbor and Massachusetts Bay.

Finally, environmental trust proponents gained a key ally in the Massachusetts legislature—Thomas F. Finneran, a respected Boston legislator and future speaker of the Massachusetts House of Representatives. As luck would have it, Finneran had a keen interest in the Boston Harbor and in the environment generally. As a result, he became a strong advocate of the environmental trust as a means to administer any future Boston Harbor settlement funds. Finneran played an active role in accomplishing this goal by

70. Id.
71. Id. at 8, 10.
72. Id. at 10–11.
73. Id. at 10. For a copy of Susan Ives’s seminar paper, see FOSTER PAPERS, supra note 12.
74. Foster & Hoyte, supra note 5, at 10–11. For examples of Susan Ives’s memoranda, see FOSTER PAPERS, supra note 12. Another Kennedy School graduate, Maureen Kennedy, also provided invaluable assistance but in a less official capacity. See, e.g., Draft Memorandum from Maureen Kennedy (June 30, 1987) (presenting a detailed analysis of environmental trust options and issues), in FOSTER PAPERS, supra note 12.
75. Foster & Hoyte, supra note 5, at 11. See, e.g., Letter from Foster to Eichbaum, supra note 12 (referring to a lunch meeting and discussing possible approaches to settling the Boston Harbor case), in FOSTER PAPERS, supra note 12.
76. Foster & Hoyte, supra note 5, at 11.
77. Id. at 11–12.
78. Id. at 12.
79. Id.
80. See id.
first assisting state government efforts and then introducing the legislation that ultimately made the MET a reality.  

C. The Settlement Agreement and Enabling Legislation

On April 13, 1988, federal and state parties announced they had reached a settlement that, as Secretary Hoyte put it, “cast[] the Commonwealth as a ‘cooperative partner with the EPA in efforts to heal the harbor, and not as a recalcitrant violator.’” The parties agreed to a formal finding of legal responsibility for the pollution by the Commonwealth, the payment of a fine of $425,000 to the federal government, and the sum of $2 million appropriated in lieu of additional penalty money. The $2 million was to be deposited “into a separate account for the Boston Harbor-Massachusetts Bay Environmental Trust . . . to coordinate and fund projects dedicated to the restoration, protection, and environmental education for Boston Harbor and the Massachusetts Bay.”

On July 27, 1988, the Massachusetts legislature enacted section 7 of Chapter 236 of the Acts of 1988. This legislation validated the settlement agreement, expanded the proposed Trust’s jurisdiction to include additional Massachusetts coastal areas, established within the EOEA the “Boston and Lynn [H]arbors and Massachusetts, Buzzards and Cape Cod Bays Environmental Trust Fund” (later shortened to the “Massachusetts Environmental Trust”), and appropriated $2 million for the Trust. Section 7(a) defined the Trust’s mission:

It shall be the sole purpose of the Trust Fund to fund and coordinate projects to restore, protect, and improve the quality of Boston and Lynn harbors and Massachusetts, Buzzards and Cape Cod Bays, to increase understanding of the Bays and their resources and the effect of human activities upon them, and to encourage public involvement in activities which promote the harbors and Bays as living resources and public treasures for present and future citizens of the commonwealth of Massachusetts.

The legislation also broadly defined the governing structure of the new quasi-independent, quasi-governmental organization. It stated that the Trust was to be governed by a board of trustees of “seven distinguished citizens . . . [with] standing in the community and experience” appointed by and

81. Id.; see infra Part I.C (discussing the legislation).
82. Foster & Hoyte, supra note 5, at 12.
84. Boston Harbor Stipulation and Order, supra note 83, ¶ 2.
85. MASS. GEN. LAWS ch. 236, § 7 (1988).
86. Id. § 7(a).
87. Id.
responsible to the secretary of environmental affairs. It also called upon the trustees to “adopt operating rules and procedures for its organization and activities” and “criteria for project grants to be made to qualifying not-for-profit organizations, community associations, civic groups, schools or public agencies.”

Finally, in “an important concession,” the legislation provided that only use of the initial $2 million fund would be directed by the secretary of environmental affairs and governed by the Boston Harbor court stipulation and order. Expenditure of any interest on this fund or subsequent money received by the Trust was left to the discretion of the trustees. As the next Part will show, implementation of this legislation created significant challenges for the MET.

II. INSTITUTIONAL CHALLENGES

From the outset, the individuals responsible for implementing the new Trust—first the secretary of environmental affairs and then the trustees—confronted four major challenges. They had to: (1) establish the Trust’s credibility; (2) determine how the Trust would be funded once it had exhausted the initial $2 million settlement funds; (3) define the Trust’s jurisdiction; and (4) assert and safeguard the Trust’s independence from government and legislative interference.

A. Credibility

The first step was to establish the Trust’s credibility by fulfilling the enabling act’s directives. To do so, the secretary of environmental affairs had to appoint trustees, and the trustees had to formulate and adopt operating rules and grantmaking criteria.

1. Trustees

The most immediate and urgent task was to identify seven individuals who would meet the high legislative standard for trustees: “distinguished citizens . . . [with] standing in the community and experience.” Secretary Hoyte turned to his advisors, Eichbaum, Foster, and Ives, to recommend suitable candidates. By the end of 1988, “an initial panel of ‘distinguished citizens’ had been identified, cleared with the governor’s office, and readied for

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88. Id. § 7(b).
89. Id. § 7(a)–(b).
90. Foster & Hoyte, supra note 5, at 13 (“[This] important concession had been hammered out among the settlement parties.”).
91. MASS. GEN. LAWS ch. 236, § 7.
92. Id.
93. See id. § 7(b).
94. Id.
95. Foster & Hoyte, supra note 5, at 13.
appointment by the Secretary." 96 Those individuals consisted of two former secretaries of environmental affairs, Charles H.W. Foster and James S. Hoyte, the latter of whom left government in 1988 and returned to law practice; two well-known regional nonprofit leaders, Hannah T.C. Moore and Alan Wilson; the legislative sponsor of the enabling act, Thomas F. Finneran; a respected national expert on nonprofit law, Marion R. Fremont-Smith; and a prominent business leader who would end up serving as chairman for more than a decade, Maynard Goldman. 97 In June 1989, Hoyte’s successor, Secretary John De Villars, “appointed the initial slate of trustees, provided space for the Trust at the EOEA, approved the assignment of CZM’s [Coastal Zone Management’s] Judith Pederson to serve as acting executive director, and presided over the Trust’s initial meeting.” 98

Throughout its existence the MET has continued to emphasize trustee selection as a means to enhance its credibility. The MET has sought to “broaden” 99 the professional and geographical diversity as well as the prominence of its trustees. For example, in 1996, the MET expanded its board of trustees to add two trustees from central and western Massachusetts with extensive local and regional experience and perspectives. 100

The MET has further buttressed its reputation for expertise and community contacts by relying on “a large cadre of advisors from both the public and private sector to assist . . . in planning programs and making funding decisions.” 101 These advisors represent a wide range of professional backgrounds. They “come from universities, biological and oceanographic research laboratories, state and federal agencies, conservation commissions, private industry and from environmental organizations of local, regional, and national scope.” 102 As will be discussed below, 103 the MET’s track record of expertise and community involvement has had a significant impact on the settlement process. Parties have specifically cited this quality as a rationale for selecting the MET to administer settlement funds. 104

96. Id.
100. Id. at 7. In 1996, the Massachusetts legislature expanded the MET’s legislative charter statewide to cover “all commonwealth waterways” and enlarged the MET’s board of trustees to “nine distinguished citizens, two of whom shall be residents of the western part of the commonwealth.” Environmental Enhancement and Protection Act, 1996 Mass. Acts 61 (enacted at MASS. GEN. LAWS ch. 15, §§ 40–41).
102. Id.
103. See infra Part III.B.3.c.
104. For an example, see infra note 398 and accompanying text (discussing selection of the MET in the ExxonMobil case).
2. Operating Rules and Grantmaking Criteria

In 1989 to 1990, the trustees further enhanced the Trust’s credibility by implementing the legislature’s other charge. At their initial meetings, they adopted two documents that set out the Trust’s operating rules and grantmaking criteria: the Rules and Procedures of the Boston and Lynn Harbors and Massachusetts, Buzzards and Cape Cod Bays Environmental Trust Fund (Rules and Procedures) and the Mission Statement.

The Rules and Procedures focused principally on governance issues. This document provided a brief summary of trustee powers, meetings, and voting procedures. It also authorized the appointment of committees and officers “to assist in the administration of the Trust Fund.” In addition, the Rules and Procedures stated in broad terms the Trust’s general objectives, criteria for disbursing funds, and prospective sources of supplementary funding.

The Rules and Procedures largely tracked the enabling act’s text and directives. For example, the document reproduced verbatim the statute’s definition of the Trust’s mission. Similarly, it adopted the enabling act’s division of authority between the secretary of environmental affairs and the board of trustees. Article II stated that “in accordance with [s]ection 7 of Chapter 236 of Acts of 1988,” the secretary and board of trustees have power over the “general management of [Trust] affairs.” However, just as in the statute, the Rules and Procedures assigned the secretary the leading role, including appointment of trustees, an administrative director, and any other officers. The board of trustees, in contrast, was to “advise the Secretary.”

The Rules and Procedures also specifically referenced the enabling act in its brief “project criteria” section. Article V pledged to “disburse[]” the initial $2 million “in accordance with said [s]ection 7 of Chapter 236.” Moreover, it implemented the enabling act’s directive to adopt “rules and procedures” for “solicit[ing], receiv[ing], and expend[ing]” “other monies.”

107. Rules & Procedures, supra note 105, arts. II–III.
108. Id. art. IV(1).
109. Id. arts. I, V–VI.
110. Id. art. I. Article I did supplement this definition, however, by listing five “steps” the MET would take to achieve its mission: “1) advance scientific understanding and the spread of scientific knowledge; 2) preserve and enhance water quality and habitat; 3) restore aquatic and land resources; 4) promote and conduct conservation programs; and 5) develop educational and citizen involvement programs relating to the marine and coastal environment.” Id.
111. Id. art. II(1).
112. Id. arts. II(1), IV(1).
113. Id. art. II(1). The board of trustees also had the authority to delegate powers to committees it established. Id. art. II(2).
114. Id. art. V.
115. Id. art. V(1).
Article V set out the objectives trustees would consider in selecting projects, the preferred recipients, and types of awards. However, here too, in this provision for Trust use of funds not appropriated by the legislature, the Rules and Procedures acknowledged statutory constraints. Even in expenditure of interest and outside funds, the Trust’s choice of recipients and awards had to be “feasible and consistent with [s]ection 7 of Chapter 236.”

The second document, the Mission Statement, also responded to the enabling act’s charge to adopt rules and procedures and project criteria. The Mission Statement addressed only the Trust’s grantmaking and development activities. Its provisions were virtually identical to those in the Rules and Procedures. The Mission Statement’s major contribution was to provide more concrete information about when and how the Trust would spend the initial $2 million in settlement funds. It stated that by July 31, 1990, the Trust would disburse $400,000 to three remedial projects identified in the Boston Harbor court stipulation and order. These projects would involve study, restoration, cleanup, and youth education activities in “sites that had been adversely impacted by the improperly operating sewage treatment facilities in Boston Harbor.” In addition, the Trust would reserve $100,000 “for administrative and coordination purposes.” Finally, the Trust would allocate the bulk of the settlement—$1,500,000—for six scientific and public outreach projects addressing “contamination of Boston Harbor, Massachusetts and Cape Cod Bays.”

Since 1990, the MET has continued to update, supplement, and adopt rules relating to trust operations and grantmaking criteria. For example, in 1997, the trustees issued a formal set of rules and procedures, which included a modification of the Trust’s governing structure to add the position of vice chairman. The MET also gained credibility by making the procedures and criteria for submission and approval of grant applications easily accessible to the public. It posts on its website the relevant forms and summaries of the

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117. *Rules & Procedures*, supra note 105, art. V(2). Article V(2) stated that these funds “shall be used initially to support projects in furtherance of the following objectives: improve coordination among organizations concerned with marine and coastal environment; encourage public involvement and constituency building; and support programs and opportunities for citizen education.” *Id.* It also stated that the preferred recipients were “existing organizations” and that the types of awards were “on a cost-shared basis.” *Id.*
118. *Id.*
120. Compare *id.* at 4, with *Rules & Procedures*, supra note 105, art. 1.
122. *Id.* at 5.
125. *Id.*
grants available, examples of projects that the MET “typically support[s],” and a list of “prefer[red] . . . projects[.].” It even posts a “slide show of past grantee projects.”

### B. Supplementary Funding

From the start, the trustees have emphasized the need to secure outside funding “to perpetuat[e] the Trust’s charitable activities beyond expenditure of the original $2 million in settlement proceeds.” Since the federal court order specified the location of the remedial projects, the Trust would have little geographical flexibility unless it obtained additional resources. In internal discussions, it was clear that the trustees had intentions more ambitious than becoming merely project managers for the federal government. Accordingly, the trustees provided in both the Rules and Procedures and the Mission Statement short lists of prospective sources of “supplementary funding.” These included other appropriated funds, fines and penalties, settlement funds from “marine related court cases,” fees and taxes, “income tax check-off receipts,” and “gifts and grants from public and private sources.”

By 1990, the trustees had drafted and approved a formal plan for initiating a Trust-financed environmental grant program for the period 1990 to 1992. This document, entitled Program Plan 1990–1992 (Program Plan), set out the Trust’s future “development activities.” Its goal was to “augment [the Trust’s] expendable base of settlement funds with resources of a more permanent nature” by “securing at least $1 million in capital funds of its own.”

In addition to the list of possible funding sources, the Program Plan offered several creative proposals to secure both designated and undesignated funds from individuals, corporations, foundations, and government agencies. These included expansion of the Trust’s role as repository of settlement funds, administrative transfers from public agencies as well as legislative appropriations, and a $1 million “triple-double challenge” capital campaign.

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130. *Id.*


135. *Id.* at 4.

136. *Id.*

137. *Id.* at 4–5. Under the triple-double challenge, the MET proposed to “set[] aside $150,000 of its unrestricted interest income, seeking a contribution of twice that amount ($300,000) as a first challenge, and double that sum ($600,000) in a third challenge.” *Id.* at 4.
In the interim, the Trust would use the annual income on the original $2 million state settlement appropriation to initiate its own grantmaking program.\textsuperscript{138}

Early in 1991, a possible solution to the MET’s own continuing financial dilemma appeared. Legislative trustee Thomas Finneran, on his way to becoming the speaker of the Massachusetts House of Representatives, had offered an amendment authorizing a special environmental license plate, the surcharge for which would accrue to the MET’s benefit.\textsuperscript{139} After many fits and starts, the first plates became available on August 10, 1994.\textsuperscript{140} Marked by the distinctive flute of a whale and the tag line “Preserve the Trust,” the license plates were an instant success and “provided [the MET] a significant infusion of funds.”\textsuperscript{141} In fact, by 1996, Massachusetts drivers had purchased over 60,000 plates and the MET had received over $2 million in funds.\textsuperscript{142}

In 1998 and 1999, the MET worked with the legislature to introduce two additional license plates to accommodate the central and western parts of the State.\textsuperscript{143} One plate featured the brook trout, a fish native to western Massachusetts. The other plate celebrated the mill heritage of the Blackstone Valley in central Massachusetts. The income from sales of these plates was also directed to the MET. In just one year—2000—the three license plates “generated $1.2 million in revenue” for the MET.\textsuperscript{144}

The MET has pursued numerous other sources of funding. For example, in 1994, it instituted an “affinity checking program” in collaboration with the Bank of Boston.\textsuperscript{145} Under this program, bank customers could purchase checks bearing the logo of the “Preserve the Trust” license plate, and a portion of the fee would be donated to the MET.\textsuperscript{146}

The MET has also looked for support from a wide variety of other prospective donors, including the legislature, government agencies, private

\begin{itemize}
\item \textsuperscript{138} See MASS. ENVT. TRUST, TRANSITION DOCUMENT 2 (1991) [hereinafter TRANSITION DOCUMENT] (“Interest from the original $2 million settlement, approximately $350,000, is available at the Trust’s discretion to further the purposes of the Trust.”), in FOSTER PAPERS, supra note 12.
\item \textsuperscript{139} Foster, supra note 58, at 3. Representative Ed Teague, a MET board member, and State Senator Marc Pacheco cosponsored the bill, and the Massachusetts legislature ultimately approved. 1995 MET ANN. REP., supra note 1, at 5; see also Appropriations Act for 1994, 1993 Mass. Acts 728 (enacted at MASS. GEN. LAWS, ch. 110, § 287 (1993)).
\item \textsuperscript{140} Usha Lee McFarling, State Puts Whales on Road; License Plates with Images to Help Support Environmental Work, BOS. GLOBE, Aug. 11, 1994, at 29.
\item \textsuperscript{142} Goldman, supra note 141, at 3.
\item \textsuperscript{143} 10TH ANNIVERSARY REP., supra note 16, at 14. For pictures of the three license plates, see MET Overview, supra note 9.
\item \textsuperscript{144} 2000 MET ANN. REP., supra note 11, at 8.
\item \textsuperscript{145} Robbin Peach, Letter from the Executive Director, in MASS. ENVT. TRUST, 1994 ANNUAL REPORT 5 (1995).
\item \textsuperscript{146} Id.
\end{itemize}
corporations, and foundations.\footnote{See, e.g., \textit{TRANSMISSION DOCUMENT}, supra note 138, at 3 (reporting the Trust’s plans to “solicit[] corporate donations”); \textit{Foster}, supra note 58, at 3–4, 6, 9 (reporting efforts to obtain support from foundations); Letter from Maynard Goldman to Susan F. Tierney, Sec’y of Envtl. Affairs (Aug. 5, 1992) (requesting that the MWRA divert penalty funds into a grants program administrated by the MET), \textit{in FOSTER PAPERS}, supra note 12; \textit{supra} notes 139–144 and accompanying text (discussing legislative authorization of license plates).} It has also explored diverse funding approaches, such as income tax checkoffs, lottery proceeds, and “round-up” of water bills to an even number with the difference donated to the Trust.\footnote{For discussions of these proposals, see \textit{Foster}, supra note 58, at 3, 6, 10; Letter from Charles H.W. Foster to Maynard Goldman (Oct. 17, 1994), and Letter from Charles H.W. Foster to Robbin Peach (Jan. 27, 2001), \textit{in FOSTER PAPERS}, supra note 12.} As will be discussed below,\footnote{See infra Part III.} the MET has had particular success obtaining settlement funds from environmental enforcement actions.

Unfortunately, the MET trustees have never adopted the most promising and comprehensive proposal—use of funds to create a permanent endowment fund.\footnote{Memorandum from Charles H.W. Foster to Robbin Peach (Sept. 9, 1992) (“Although I remain wistful about not having a permanent endowment, I do not sense much interest on the part of the trustees.”), \textit{in FOSTER PAPERS}, supra note 12.} As the principal proponent of this scheme explained, an endowment approach “could relieve the problem of short-term, one-time projects [and promote] . . . the longer-term investments in the environment that are really needed (e.g., increasing the scientific understanding of Boston Harbor processes).”\footnote{Memorandum from Charles H.W. Foster to Maynard Goldman and Robbin Peach 2–3 (Oct. 18, 1994), \textit{in FOSTER PAPERS}, supra note 12.}

\section{C. Jurisdiction}

The MET has also confronted a third challenge—how to define its jurisdiction in a way that best promotes “responsible and effective environmental stewardship.”\footnote{Goldman, \textit{supra} note 141, at 3.} Since its founding, the MET has significantly expanded the scope of its philanthropic activities both geographically and substantively.

\subsection{1. Geographical Expansion}

The MET has experienced a remarkable transformation since its origins in the Boston Harbor settlement agreement. What began as a modest trust to “coordinate and fund projects . . . for Boston Harbor and Massachusetts Bay”\footnote{Boston Harbor Stipulation and Order, \textit{supra} note 83, ¶ 2.} is now a major grantmaking organization that serves the “water resources of the entire Commonwealth.”\footnote{\textit{MET Overview}, supra note 9.} Both the Massachusetts legislature and MET trustees are responsible for expanding the Trust’s geographical purview.
In the 1988 enabling act, the Massachusetts legislature took the first step. Rather than simply codifying the terms of the settlement agreement, the legislature changed the jurisdiction and even the legal name of the Trust to encompass not only Boston Harbor and Massachusetts Bay but also other coastal areas—Lynn Harbor, Buzzards Bay, and Cape Cod Bay.\textsuperscript{155}

In 1990, the MET Board of Trustees further enlarged the MET's geographical base. In the Program Plan, the trustees redefined the Trust's "scope of activity" to include "the entire Massachusetts coastal zone."\textsuperscript{156} The Program Plan set out a persuasive rationale:

Although the enabling legislation specifies five harbors and bays as the principal beneficiaries of the Trust's actions, the trustees hold the view that such water bodies are discrete entities in name only. Since Massachusetts' coastal waters intermingle freely, the Trust must, of necessity, concern itself generally with the marine and tidal waters of the Commonwealth.\textsuperscript{157}

Two years later, the trustees once again expanded the MET's jurisdiction to reflect this "connectivity of water resources."\textsuperscript{158} In 1992, they decided that the MET's "coverage and programs" should encompass as well "all the waterways and watersheds that drain into the Massachusetts coastal zone."\textsuperscript{159} As a result, the MET's jurisdiction now stretched westward as far as the Quabbin Reservoir in central Massachusetts.\textsuperscript{160}

In 1996, the Massachusetts legislature took the final step. It amended the enabling act to give the MET authority to address "all commonwealth waterways."\textsuperscript{161} Thus, the MET's geographical scope today includes "the state's more than 10,000 miles of rivers and streams, 1,638 ponds and lakes, 1,519 miles of coastline, 48,000 acres of salt marsh, over 40,000 acres of tidal flats and estuaries, ocean resources, and 27 watersheds."\textsuperscript{162}

2. \textit{Substantive Expansion}

The changes in the MET's substantive jurisdiction have been just as dramatic. As early as 1990, the trustees challenged the artificial distinction between water and land resources. As the Program Plan put it, "the lands adjacent to these waters help determine the well-being of the harbors and bays . . . ."\textsuperscript{163} Because of this linkage between land and water resources, the

\textsuperscript{155} See \textit{supra} notes 85--87 and accompanying text (discussing and quoting the enabling act). This expansion of jurisdiction had another important impact. It "ensured the support of some key constituencies . . . [for] the Trust's proponents." Foster & Hoyte, \textit{supra} note 5, at 13.
\textsuperscript{156} \textit{PROGRAM PLAN, supra} note 134, at 2.
\textsuperscript{157} \textit{Id}.
\textsuperscript{158} See \textit{10TH ANNIVERSARY REP.}, \textit{supra} note 16, at 8 (summarizing these changes).
\textsuperscript{159} \textit{Id}.
\textsuperscript{160} \textit{Id}.
\textsuperscript{161} Environmental Enhancement and Protection Act, 1996 Mass. Acts 61 (enacted at MASS. GEN. LAWS ch. 15, §§ 40–41); see Goldman, \textit{supra} note 141, at 3 (discussing this legislation and stating that "[c]ommon sense and sound environmental principle underscore this more comprehensive charge").
\textsuperscript{162} \textit{MET Overview, supra} note 9.
\textsuperscript{163} \textit{PROGRAM PLAN, supra} note 134, at 2.
trustees announced that they would consider projects that “involve water and/or related land resources and are located within the limits of a city or town bordering on salt or tidal water.”

Since that time, the MET has continued to emphasize the connection between land and water. For instance, its Tenth Anniversary Report proclaimed that the “continued health of water resources often depends deeply on adjoining land use” and provided examples of approaches the Trust has used “to help preserve and conserve land that is critical to the health and appreciation of the state’s water resources.” These included interest-free loans, grants, and other funds to help purchase waterfront land along Buzzards Bay, Bufflehead Bay, and the Neponset River. In 2006, the Massachusetts legislature too recognized the relationship between land and water resources. It amended the enabling act to provide: “Project grants may also include monies for land acquisition and construction of paths and local bikeways to provide greater public access to the harbors and bays as part of the trust fund.”

From the start, the MET has also gone beyond water resources to stress the human interface with the environment. As Executive Director Peach observed in the MET’s 2000 Annual Report, “Massachusetts’ natural communities and human communities are inseparable.” Indeed, the two original documents that created the Trust—the 1986 settlement agreement and the 1988 enabling act—specifically called attention to this human element. The settlement agreement included “environmental education” as one of the Trust’s principal tasks. The enabling act went further and directed the new Trust to “fund and coordinate projects . . . to increase understanding of . . . the effect of human activities upon [the harbors and Bays] and to encourage public involvement.” Similarly, the legislation described the five “harbors and Bays” it covered as not only “living resources” but also “public treasures for present and future citizens of the commonwealth of Massachusetts.”

Throughout its history, the MET has emphasized the “delicate balance between humans and the environment.” It has funded projects that address the human impact on the environment. For example, in 2012, it awarded the Coalition for Buzzards Bay $50,000 to “implement strategies to reduce . . . wastewater and agricultural pollution” in Buzzards Bay. At the same time, the MET has also funded projects that focus on the environment’s impact on humans. For instance, under its recently created Human Health and

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164. Id.
165. Id.
166. Id.
168. 2000 MET ANN. REP., supra note 11, at 3.
170. 1988 Mass. Acts 803 (enacted at MASS. GEN. LAWS ch. 236, § 7(a)).
171. Id.
172. 2000 MET ANN. REP., supra note 11, at 5.
Environment Program, the MET awarded a grant to the Physicians for Social Responsibility to educate health care providers on the threats of toxic chemicals to child development.174

The MET has made environmental education a key grantmaking initiative. It has supported projects to expand adult education courses in environmental sciences;175 fund university conferences, internships, and research projects;176 and produce “[w]eb-based maps, photos, [and] other outreach materials.”177 The MET has put particular emphasis on “educating the stewards of tomorrow.”178 It has funded projects to bring environmental issues into local elementary, middle, and high school classrooms through new curricula,179 lectures by researchers,180 and even “traveling exhibit[s].”181 In addition, the MET has supported programs to give young people first-hand experience with environmental cleanup and remediation.182

The MET has also made community “awareness of and involvement with local natural resources”183 a centerpiece of its grantmaking activities. Indeed, in its 1996 Annual Report, the MET announced that its mission was to “support grassroots action and the idea that a constituency for the environment cannot be

175. See, e.g., 2000 MET ANN. REP., supra note 11, at 14 (reporting a $10,300 grant to Cape Outdoor Discovery “[t]o support the RISE Educational Collaborative”).
177. FY 2012 GRANT AWARDS, supra note 173, at 1–2 (reporting a $15,600 grant to the Association to Preserve Cape Cod, Inc.).
178. 10TH ANNIVERSARY REP., supra note 16, at 22.
180. See, e.g., 2000 MET ANN. REP., supra note 11, at 14 (reporting a $14,725 grant to Citizens for the Protection of Waquoit Bay “[t]o educate high school students about current related research related to watershed issues by bringing researchers into the classroom”).
181. See, e.g., MASS. ENVTL. TRUST, 1997 ANNUAL REPORT 6 (1998) [hereinafter 1997 MET ANN. REP.] (stating that the MET provided a general grant to support the Boston Harbor Association’s Boston Harbor Beaches Project, which “included the development of a traveling exhibition about the beaches” for “high school students and other youth from neighborhood community centers”), in FOSTER PAPERS, supra note 12.
182. See, e.g., 1997 MET ANN. REP., supra note 181, at 7 (describing the participation of over five hundred school children in cleaning up the Housatonic River and riverbanks); 1996 MET ANN. REP., supra note 141, at 8–9 (discussing MET-funded environmental education initiatives in Chelsea, which combined “both work-based and traditional academic learning” for local high school students).
established by proclamation but must be built, one person at a time, on the local level. Accordingly, the MET has funded projects that promote community-level identification of environmental threats and monitoring of remediation efforts. It has also encouraged direct action by community groups. A prime illustration is the Great Barrington Housatonic River Walk project. Over one thousand community volunteers cleaned up more than 225 tons of trash from the Housatonic River in Berkshire County and constructed an 800-foot community walking trail complete with native plant species, “informational signage,” and a trail guide. The project ultimately won “a gold medal for grassroots activism in the annual urban river restoration awards made by American Rivers, a leading river conservation organization based in Washington, DC.”

The MET has paid special attention to the needs of “low income or ‘environmental justice’ communities.” For example, the Trust has funded environmental education programs in Chelsea, a community to the north of Boston that is both “economically depressed” and “ethnically diverse.” Similarly, the MET awarded a grant to the Island Alliance to produce materials, including bookmarks on Boston Harbor water quality and beach recreation issues, in English, Haitian, Spanish, Portuguese, Vietnamese, and Chinese. These materials “were distributed to local libraries, community centers and bookstores . . . [in] traditionally underserved minority neighborhoods.” The MET has promoted environmental initiatives in urban communities in central and western Massachusetts as well. For instance, in 2005, it gave Nuestras Raices $48,000 over two years “[t]o support ‘Protectores de la Tierra’ where inner city youth learn about and steward land by the Connecticut River, then provide tours, workshops and activities to youth and adults throughout Holyoke.”

The MET has further “extend[ed its] reach into communities” by encouraging environmental philanthropy at a local level. In 1996, it launched a three-year Community Partnership Program, which made grants “to five

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185. See, e.g., GRANTMAKING LEGACY, supra note 14, at 6 (reporting a $20,000 grant to Concerned Citizens of Freetown “[t]o educate and mobilize local residents so that they can identify and protect wetlands through a tire clean-up, workshops on environmental justice and wetlands, and negotiations with town officials on zoning and proper land uses”).
186. See 1997 MET ANN. REP., supra note 181, at 7 (describing this project).
187. Id.
188. Id.
189. Id.
190. MET Grant Programs, supra note 129 (listing examples of projects MET general grants “typically support”).
192. 1997 MET ANN. REP., supra note 181, at 6 (discussing and providing pictures of these bookmarks).
193. Id.
community foundations to help them establish or enhance environmental grantmaking programs." Under this initiative, the MET awarded the foundations one-to-one match challenge grants. Within a year, all five foundations "met their match and . . . began to support projects within their local communities and throughout the state." By 2000, the MET had expanded this approach to other organizations under its Community Foundation Endowment Program.

Finally, the MET has adapted and enlarged its substantive jurisdiction to address changing environmental needs, opportunities, and priorities and to respond to emerging, often unanticipated crises. The Trust has stressed the importance of "funding flexibility" to promote both "long-term vision and short-notice responsiveness." A notable example of this flexibility occurred in 2005. The MET Board of Trustees approved a new strategic plan with a "shift in program emphasis [to] reflect[] emerging environmental issues related to climate change, sprawl, degraded habitats, compromised water systems, and public health matters associated with water resources." Despite this notable expansion of its substantive jurisdiction, the MET has failed to take the next step and adopt a truly "holistic" approach that would respond to the "full dimensions" of an environmental disaster. As the principal advocate of this approach, Charles H.W. Foster, observed, "everything is hooked to everything else in an ecosystem." In a March 2001 letter to Executive Director Peach, Foster expressed his concern about the MET's overly narrow criterion for its grant programs—the MET's willingness to support only "water projects" and its exclusion of other projects that could address factors that "indirectly but significantly affect water resources." He cited examples where the MET's emphasis on "water aspects" disserved the

195. Id.
197. 2000 MET ANN. REP., supra note 11, at 12.
200. Goldman, supra note 14, at 2. For an example of such a project, see FY 2012 GRANT AWARDS, supra note 173, at 3 (reporting a $16,552 grant to the Deerfield River Watershed Association “[t]o study macroinvertebrate communities in small headwater streams in forested portions of the Deerfield River watershed . . . to document and increase awareness and understanding of the biodiversity these resources currently support, particularly in the face of continued development pressures and the impending longer-term threat of climate change”).
201. Foster, supra note 58, at 10.
204. Letter from Foster to Peach, supra note 202. Foster had "suggested use of the term 'water and related resources' to define the scope of [the MET's] interests for activities like the General Grants Program." Id. The MET did in fact adopt this term, See, e.g., 2000 MET ANN. REP., supra note 11, at 14 (stating that the MET's general grants "program supports general environmental projects state-wide with a focus on water and related resources"). Nonetheless, as Foster pointed out, "despite this generous interpretation of our mission, we still seem to be fixed more on water than related resources." Letter from Foster to Peach, supra note 202.
environment and resulted in “a strained rationale [and] a discarded opportunity.”

Foster concluded that, as a start, the MET should “loosen[] the water handcuffs . . . to include projects that although marginally water resources-related, are otherwise meritorious.”

At a May 2001 trustees meeting, Foster “presented the case for a . . . holistic view of water resources” and called upon his colleagues to “modify . . . [the MET’s] strict insistence on a water nexus for all of [its] grant-making decisions.” Unfortunately, the trustees rejected this proposal and decided that the MET “should continue to recognize water as [its] primary grant-making responsibility.” This emphasis on water continues today. For example, in a recent call for general grant applications, the MET stated: “All projects funded by the Trust must increase understanding of or restore, protect, or improve the condition of a water body of the Commonwealth of Massachusetts . . . .”

D. Independence

The MET was the product of remarkable cooperation among all three branches of government. It was created by judicial decree, authorized by the legislature, and implemented by the executive branch. Yet, since its founding, the MET has discovered that there are “drawbacks” as well as . . .

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205. See Letter from Foster to Peach, supra note 202 (“For example, in our Boston Bridges project, we are now attempting to stuff the more generic environmental needs of a metropolitan region into a water resources structure, feeling that we need to use a watershed framework to rationalize our involvement in the urban environment.”). Foster was particularly concerned about rigid application of the water criterion to the MET’s innovative new programs:

For example, is it sensible to insist that community foundations use our funds only for water resources projects? As we help the Commonwealth move toward a sound environmental education program, do we need to limit our involvement to water education only? Are “new alliances” to be encouraged just for water-related projects? Do we really want to limit our “new horizons” to issues and opportunities occurring in the aquatic environment? And for the exciting new youth-philanthropy program, where we encourage a thoughtful assessment first of community needs, why should we limit our young grant-makers to water projects only?

Id.

206. Id.

207. Foster, supra note 58, at 10.

208. Id. Although the MET trustees did not formally adopt the “holistic view,” recent grantmaking activities suggest that the MET has in fact broadened its scope and mission to put more emphasis on “related resources.” See supra text accompanying note 200. However, the MET’s principal focus remains water resources.

209. Foster, supra note 58, at 10. “[S]everal of the trustees cited the specific statutory provisions under which the MET operated, and the group as a whole felt that until the legislative language was changed,” the MET should continue its emphasis on water. Id. In addition, “[i]t was pointed out that the directed portion of [the MET’s] program already gave the Trust a measure of latitude to make exceptions.” Id. For a critique of this “unduly narrow interpretation” of the statutory language, see Letter from Foster to Peach, supra note 202.


211. See supra Part I.
“distinct advantages to [its] governmental status.”212 Because of this status, the MET has been the target of executive and legislative efforts to direct and control its use of funds.213 Thus, the MET’s ultimate institutional challenge has been to assert and maintain its credibility as an independent grantmaking entity while still operating as a quasi-governmental body.

The MET’s founders envisioned the new Trust as a hybrid institution with quasi-governmental and quasi-independent features. As discussed above,214 the 1988 enabling act expressly recognized both aspects. On the governmental side, the legislation established the Trust as a “separate fund” on the “books of the [C]ommonwealth”215 and appropriated to the Trust $2 million in principal.216 Moreover, it stipulated that the secretary of environmental affairs would appoint the board of trustees, and then the board would advise the secretary on spending the $2 million trust principal and “effecting the purposes of the Trust Fund.”217

At the same time, however, the enabling act also gave the new Trust a significant measure of independence. It conferred discretion on the trustees to raise, obtain, and disburse “other monies” subject only to the limitations of the Trust’s own rules and procedures.218 Competition over these “other monies” was to become the principal source of conflict among the MET, legislature, and executive branch.219 Unfortunately, the enabling act provided no further guidance regarding the allocation of authority between the Trust and the government or how the Trust should balance and implement its quasi-governmental and quasi-independent functions, rights, and responsibilities.

Even before the new Trust began operations, one of its founders expressed misgivings about the indeterminate status of the Trust vis-à-vis government. In letters to the two top officials of the EOE, Secretary James Hoyte and Undersecretary William Eichbaum, Charles H.W. Foster called attention to the lack of criteria for selecting trustees and the uncertain definition of the trustees’ “advisory” role. For example, in a November 13, 1987 letter to Eichbaum, Foster emphasized that in selecting the board of any future trust, the “EOEA . . . should resist the usual practice of a politically-balanced cast of characters.”220 Instead, “[t]he purpose of the process [should] be to ensure from the outset both an illustrious and credible group . . . with some perceived measure of detachment from the agency parties at interest.”221 After the enabling act formally established the Trust, Foster repeated this call for

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213. See infra notes 237–270 and accompanying text.
214. See supra notes 85–92 and accompanying text.
215. 1988 Mass. Acts 803 (enacted at MASS. GEN. LAWS ch. 236, § 7(a)).
216. Id.
217. Id. at 804, § 7(b).
218. Id. at 803–04, § 7(a), (c)(iv).
219. See infra notes 237–270 and accompanying text.
220. Letter from Foster to Eichbaum, supra note 12, at 2.
221. Id.
“[t]rustees who are more than special interest and political appointees.” As he explained in an August 13, 1988 letter to Hoyte, “What is important is that the [t]rustees not be (or perceived to be) rubber stamps for the state program. While they should remain essentially fund managers, there will have to be some role for them in even-handly recommending grants and awards and selecting the most qualified recipients.”

In his correspondence with Eichbaum and Hoyte, Foster also flagged another problem in the enabling act—the legislation’s failure to specify how the board was to advise the secretary on expenditure of the $2 million trust principal. In fact, as Foster emphasized, this was already more than a theoretical issue. In 1988, prior to “activation” of the board, Secretary Hoyte had unilaterally committed trust fund resources to subsidize Bays Program studies. In a March 5, 1989 letter to Undersecretary Eichbaum, Foster warned that any expenditure of trust funds without the board’s advice would likely violate the enabling act and be “illegal.”

According to Foster, at the very least, the Secretary’s action raised serious questions about “what the role of the board will be in the future.” He concluded: “We should be clear about that from the outset.”

Unfortunately, the MET’s own founding documents—the Rules and Procedures and Mission Statement—also failed to flesh out the Trust’s quasi-governmental and quasi-independent aspects. Both documents essentially tracked the enabling act’s text and directives. The trustee-drafted Program Plan for 1990 to 1992 staked out a special independent role for the Trust. The Trust “plan[ned] to . . . operate as a quasi-public, independent environmental philanthropy.” To promote its independence, the Trust intended to “supplement the support services” the EOEA currently provided by “engag[ing] an executive director of its own.” Finally, the Program Plan emphasized that the Trust “expects to function primarily as a grant-making

223. Id.
224. 1988 Mass. Acts 804 (enacted at MASS. GEN. LAWS ch. 236, § 7(b)).
226. Letter from Foster to Eichbaum, supra note 225.
227. Id.; Letter from Foster to Hoyte, supra note 222.
228. Letter from Foster to Eichbaum, supra note 225.
229. Id.; see Letter from Foster to Hoyte, supra note 222 (asserting that Hoyte’s use of “a staff group that expects to assign the use of [the $2 million funds] . . . makes the role of the Board of Trustees unclear”).
231. Id.
233. PROGRAM PLAN, supra note 134, at 1–2.
234. Id. at 1.
entity so that its operations do not become duplicative of, or competitive with, those of existing agencies or organizations."

In its 1991 Transition Document, the MET provided an even bolder statement of its special status and independence:

Unlike the conventional State agency, established to carry out a program directly with appropriated funds, the Massachusetts Environmental Trust has the ability to generate funds to be spent by others. As a quasi-independent entity, the Trust can operate in both the public and private sectors. Under the guidance of non-governmental trustees, it can objectively and credibly advance and carry out programs to improve the environment.

Over the next two decades, the MET would encounter numerous tests of its independence.

The first salvo came from the executive branch. In 1991, the MET received $192,000 as part of a settlement between the Commonwealth of Massachusetts and the Monsanto Corporation for violations of the state’s Clean Waters Act. Monsanto was to pay the money in four annual $48,000 installments. In January 1992, the new Secretary of Environmental Affairs, Susan F. Tierney, approached the MET and proposed that the last three installments be used to hire and support a “Director of Water Policy and Planning for the Executive Office of Environmental Affairs.” She enclosed a copy of the job description and the resume of the individual the EOEA had selected as “the most qualified candidate” for the position.

Tierney’s proposal met strong resistance, including reportedly “a confrontation with [Tierney’s] staff.” One trustee emphasized that approval of this proposal would set a dangerous precedent for the independence of the Trust and for future use of settlement funds for remedial purposes. In a memorandum to the MET trustees, Foster explained:

[F]unds derived from an agency’s own (or related) enforcement actions should never be used to advance its own programs. If not illegal, the practice is at least unethical. Carried to excess, it comes perilously close to bounty hunting. It would not take long for the principle of penalty funds

235. Id. at 2.
236. TRANSITION DOCUMENT, supra note 138, at 4. The MET has continued to emphasize its special status and independence. See, e.g., 2001 MET ANN. REP., supra note 176, at 13 (“Established as an instrumentality of the state, the Trust operates with independent financial and policy-making status.”).
239. Id.
240. Id.
241. Foster, supra note 58, at 4.
242. Id.
being applied toward environmental improvement, which we have helped pioneer through the Boston Harbor settlement, to fall into disrepute and public disfavor. A promising, major, equitable source of funds for remedial activity would then be lost for all time.\textsuperscript{244} Nonetheless, the MET trustees ultimately “agreed to funding the first year, with an annual review.”\textsuperscript{245} In reflecting on this decision, Foster later wrote in a letter to Robbin Peach, “With the clairvoyance of hindsight, we may have made a serious mistake by opening the door to the use of Trust funds for the secretary’s personal staff. . . . Actions of this sort are likely to kill the goose that is now beginning to lay such golden eggs.”\textsuperscript{246}

This was by no means the end of the government’s attempts to use MET funds “to offset agency appropriations shortfalls.”\textsuperscript{247} A notable example occurred in 1993, when a new Secretary of Environmental Affairs, Trudy Coxe, approached the MET trustees with proposals for “(1) continued funding for the Water Policy staff position and (2) funding for staff of a new Wetlands Restoration and Banking Program.”\textsuperscript{248} These funding requests got an even chillier reception. As the minutes of 1993 MET board meetings reveal, what emerged was a collision between MET trustees and government officials over the very meaning of the Trust’s quasi-independent, quasi-governmental status.\textsuperscript{249}

For the trustees, the issue was independence. They insisted that the “Trust was not a funding agency for the EEOA.”\textsuperscript{250} They argued that a decision to fund EEOA personnel would be contrary to the MET’s “principal activity or interest”\textsuperscript{251} and could have serious implications for the future. One trustee described this as a “potentially explosive issue.”\textsuperscript{252} Another trustee expressed particular concern about the timing of the requests.\textsuperscript{253} The MET was about to introduce its license plate program as a means to obtain financial support from Massachusetts citizens.\textsuperscript{254} Thus, “[i]f the Trust [was] seen as backdoor funding

\begin{itemize}
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} Minutes from the Massachusetts Environmental Trust Board of Directors Meeting 2 (Dec. 8, 1993) [hereinafter MET, Board Meeting Minutes (Dec. 8, 1993)], in FOSTER PAPERS, supra note 12.
  \item \textsuperscript{246} Letter from Charles H.W. Foster to Robbin Peach (July 7, 1993), in FOSTER PAPERS, supra note 12.
  \item \textsuperscript{247} Letter from Foster to Goldman, supra note 212; see also Foster, supra note 58, at 8 (reporting “continuing administrative difficulties prompted by agency jealousy of the Trust’s independence”).
  \item \textsuperscript{248} MET, Board Meeting Minutes (Dec. 8, 1993), supra note 245, at 2.
  \item \textsuperscript{249} Minutes from the Massachusetts Environmental Trust Board of Directors Meeting (June 2, 1993) [hereinafter MET, Board Meeting Minutes (June 2, 1993)], in FOSTER PAPERS, supra note 12; MET, Board Meeting Minutes (Dec. 8, 1993), supra note 245.
  \item \textsuperscript{250} MET, Board Meeting Minutes (June 2, 1993), supra note 249, at 5 (quoting Charles H.W. Foster).
  \item \textsuperscript{251} MET, Board Meeting Minutes (Dec. 8, 1993), supra note 245, at 4 (quoting Maynard Goldman). Trustees also cited financial concerns. See id. at 3–4 (discussing statements by trustees Maynard Goldman, James Hoyte, and Marion Fremont-Smith that the MET did not have sufficient resources to fund both positions).
  \item \textsuperscript{252} Id. at 4 (quoting James S. Hoyte).
  \item \textsuperscript{253} Id. at 3 (discussing statements by Charles H.W. Foster).
  \item \textsuperscript{254} Id.; see supra notes 139–144 and accompanying text (discussing the license plate program).
\end{itemize}
for the Secretary it [would] present a big problem with people’s perceptions.”

For government representatives, in contrast, the issue was the MET’s governmental nature. Specifically, as Secretary Coxe and Undersecretary Leo Roy emphasized at the December 8, 1993 board meeting, the EOEA provided the MET office space and financial support for administrative expenses, such as telephone costs. In fact, at one point in the meeting, Roy responded to trustee opposition with an “implied ultimatum” that the EOEA might withdraw its funding of MET administrative expenses. As he put it, “accommodation goes both ways.” MET Chairman Maynard Goldman replied that “if the intent of this exchange was for the Trust to either fund the projects or leave the office, the Trust would move.” Trustee James Hoyte went still further and had his own warning for Roy. “[T]he legislature may question the integrity of the situation, and EOEA should be concerned too.” The meeting ended in a stalemate.

The Massachusetts legislature has also tested the MET’s independence. As discussed above, the legislature has played an instrumental role in the MET’s development. It established the Trust and appropriated the initial funds, expanded the Trust’s jurisdiction, and authorized what was to become the principal source of MET resources—the license plate program. At the same time, however, the legislature has also made efforts to raid MET funds. The “biggest blow of all” occurred in 1996, when the legislature passed the Massachusetts Rivers Act. Section 13 of the Act required the MET to provide at least $100,000 annually for five years to the Department of Environmental Protection to finance that agency’s river-related activities. As one trustee later observed, “This legislative raid on the Trust’s funds, carried out without consultation or the advance knowledge of the Trust, was what many of us had feared now that substantial license plate revenues were beginning to accrue to our account.”

Legislative attempts to gain control of MET funds continue today. For example, a recent House bill proposed to amend the 1988 enabling act to

255. MET, Board Meeting Minutes (Dec. 8, 1993), supra note 245, at 3 (quoting Charles H.W. Foster).
256. Id. at 4–5 (discussing statements by Leo Roy and Trudy Coxe).
257. Id. at 4.
258. Id.
259. Id. Goldman also commented that “the phones, etc. used by the Trust were helpful, but that the office space supplied to Trust staff left much to be desired.” Id.
260. Id.
261. Id. at 5.
262. See supra notes 85–92, 139–144, 155, 161, 167, 170–171 and accompanying text.
263. Id.
264. Foster, supra note 58, at 7.
266. Id. § 13.
267. Foster, supra note 58, at 7.
stipulate that “any monies or interest thereon received by” the MET from its sale of license plates “shall be subject to appropriation.”

So far, despite being a target for the executive branch and legislature, the MET has been able to retain a significant degree of independence. But as one trustee warned in 2001, “a fund balance of now more than $5 million may become irresistible in the future, particularly if the Commonwealth returns to hard economic times.” Thus, preservation of its independence may well prove to be the MET’s greatest institutional challenge.

III. SETTLEMENTS

Since its founding, the MET has received thirty-four settlements totaling over $4,400,000. These settlements run the gamut from the $2 million Boston Harbor settlement that initially funded the Trust to a decidedly more modest payment of $3870 from a 2012 Massachusetts Department of Environmental Protection (MassDEP) consent order against Island Airlines for improper management of hazardous wastes at a Cape Cod airport. The MET’s most publicized settlements have tended to come from federal criminal and civil actions, such as the $1 million “community service payment” from ExxonMobil Pipeline Co. in 2009 and the $225,000 monetary settlement from ICI Americas, Inc. in 1992. In fact, however, state civil and administrative actions have constituted the main sources of MET settlements. For example, in the first decade of its existence, the MET received fifteen settlements from Massachusetts cases and only four settlements from federal cases.


269. See Letter from Charles H.W. Foster to H.D.S. Greenway (June 6, 2001) ("[S]uccessive secretaries of environmental affairs have remained stalwart about maintaining a measure of independence for the Trust. Having three former secretaries serving as trustees, and the Speaker of the House among its founders, has helped maintain that independence."), in FOSTER PAPERS, supra note 12.

270. Id.

271. MET Overview, supra note 9.

272. See supra Part I.


Federal and state cases have involved a wide variety of environmental offenses, including violations of water pollution, air pollution, hazardous waste, and fisheries statutes and regulations. Settlement terms have been just as diverse. As will be discussed in more detail below, some settlements contain specific directives regarding when, where, and how the MET must spend the funds. Others have simply made “donations” to the MET and/or left expenditure of funds to the MET’s “discretion.”

Close analysis of the MET’s settlement experience gives invaluable real-world insight into settlement goals, processes, and uses of funds.

A. Goals

The environmental enforcement and settlement process is largely “violation-driven.” Its principal goal is to punish the wrongdoer and in so doing deter future misconduct. Monetary penalties are considered essential to punish and deter. As former EPA Deputy Administrator Jonathan Cannon explained, the “sting” of monetary penalties “ensur[es] both compliance in a particular case and . . . compliance in a more general way throughout the regulated community.” Often lost in this quest for punishment and deterrence is a larger goal—the need to address the immediate and long-term environmental damage caused by the violation.

Settlement agreements may provide that the violator will complete some environmentally beneficial project at its expense or pay the cost of having


278. See infra Part III.C.1.


281. Hearing on H.R. 3411, supra note 2, at 7 (testimony of Jonathan Cannon).

282. As Professor Kenneth Kristl observed, “Deterrence, and not environmental benefit, will drive EPA’s approach to a settlement.” Kristl, supra note 47, at 232.
someone else complete such a project.\textsuperscript{283} Such projects are generally referred to as “credit projects” because the violators receive credit for the project’s cost against the violators’ legal liabilities. For example, instead of meeting the government’s demand for a $500,000 cash penalty, the violator may propose that it spend $500,000 on a credit project. The violator may prefer the credit project structure because the violator can participate in deciding how the money will be spent and because the public will see the violator in a positive role—improving the environment.

Reform-minded judges, legislators, enforcement officials, parties, and scholars have called attention to the need to apply some portion of settlement funds to credit projects and have explored innovative ways to do so.\textsuperscript{284} Yet, these approaches have ultimately failed to achieve their potential because they are at best supplementary and remain “subservient to the deterrence policy served by [monetary] penalties.”\textsuperscript{285}

For the MET, in contrast, the overarching goal of the settlement process is “to channel the proceeds of the settlement of an environmental lawsuit into improving the environment.”\textsuperscript{286} Although the MET recognizes the need for “tough enforcement of the environmental laws,”\textsuperscript{287} it also maintains that “[e]nforcement should go hand-in-hand with environmental research, restoration, and public education programs . . . .”\textsuperscript{288} Indeed, participants at the MET’s Fifth Anniversary Conference concluded that “credit projects should be the rule, not the exception.”\textsuperscript{289}

The MET does not directly administer settlement funds. Instead, the Trust “turn[s] settlement proceeds from environmental lawsuits into targeted grants that address specific environmental problems.”\textsuperscript{290} The MET has asserted two main objectives in awarding such grants. Its first objective is to apply

\textsuperscript{283} Under EPA policy, “[d]efendants / respondents may not simply make a cash payment to a third party conducting a project without retaining full responsibility for the implementation or completion of the project.” Memorandum from John Peter Suarez, Assistant Adm’r, Office of Enforcement & Compliance Assurance, EPA, to Reg’l Counsels et al., pts. I.B, II.A (Dec. 15, 2003) [hereinafter Suarez Memorandum], available at http://www2.epa.gov/sites/production/files/documents/seps-thirdparties.pdf (discussing guidance concerning the use of third parties in the performance of supplemental environmental projects (SEPs) and the aggregation of SEP funds). Defendants may hire a third party as a “contractor[] or consultant[] to assist in implementing a SEP.” Final EPA Supplemental Environmental Projects Policy Issued, 63 Fed. Reg. 24,796, 24,802 (May 5, 1998). However, they may not transfer to that third party their responsibility and legal liability for “ensuring that a SEP is completed satisfactorily.” Id.; see Suarez Memorandum, supra, pt. II.A (listing restrictions on the use of third party organizations in managing SEPs and SEP funds and stating that such organizations may not be “mere recipients of donated funds”).

\textsuperscript{284} See Foster & Foster, supra note 17, pt. III (providing a detailed analysis of reforms and their limits).

\textsuperscript{285} Kristl, supra note 47, at 231–32.

\textsuperscript{286} 10TH ANNIVERSARY REP., supra note 16, at 24 (quoting Maynard Goldman).

\textsuperscript{287} Letter from Robbin Peach to Lois Schiffer, Assistant Att’y Gen., Dep’t of Justice 1 (Nov. 1, 1994), in FOSTER PAPERS, supra note 12.

\textsuperscript{288} Draft Letter from Robbin Peach (May 5, 1993), in FOSTER PAPERS, supra note 12.

\textsuperscript{289} Letter from Peach to Schiffer, supra note 287, at 1.

\textsuperscript{290} 2000 MET ANN. REP., supra note 11, at 5.
settlement funds to remediate damage caused by the environmental offense at issue. As one trustee put it, there is an “ethical side of the settlement picture . . . [and] something right about using penalty money to remediate damage.”  

The MET’s second objective is “forward-looking.” The MET seeks to “disburse the proceeds of environmental settlements” not only for “projects that restore damaged resources” but also for projects that “prevent future harm to the environment.” For the MET, the key to achieving this second grantmaking objective is to “engage a wide range of constituents in projects that will have a long-term impact.” In this coalition-building effort, the Trust has put particular emphasis on using settlement funds to educate the “stewards of tomorrow” and to promote grassroots environmental groups and initiatives.

The MET experience also illustrates the tension between two different definitions of settlement goals—the dominant paradigm’s punishment and deterrence approach and the MET’s environment-centered approach. For example, on February 2, 2006, the MET’s program coordinator, Amy Breault, participated in a Boston Bar Association panel discussion of the MET’s restricted settlement grants program. The other panelists were EPA lawyers, Amelia Katzen and Hugh Martinez. As Breault explained in a subsequent memorandum to the MET board of trustees, “it was [her] hope that such a meeting would drum up interest in the program and lead to future revenue.” Instead, her presentation of the MET program and its merits met outright hostility from the EPA representatives. In fact, Ms. Katzen asserted that the EPA would not enter into any settlement arrangement that included a contribution to the Trust. Katzen’s rationale was that under such a scheme, “the violator is not directly involved and is ‘off the hook as soon as the check is handed over.’”

291. Letter from Charles H.W. Foster to Wendy G. Vanasselt (Feb. 23, 1998), in FOSTER PAPERS, supra note 12; see also 1995 MET ANN. REP., supra note 1, at 13 (“There is justice in having a person or corporation that has despoiled the environment pay to make it whole again.” (quoting Ann Berwick, Chief, Envtl. Prot. Div., Mass. Att’y Gen.’s Office)).
293. 2001 MET ANN. REP., supra note 176, at i.
294. 10TH ANNIVERSARY REP., supra note 16, at 22.
295. Id.
296. The MET has also used other funds, such as license plate revenues, to achieve these goals. See supra notes 175–197 (discussing the MET’s overall educational and community grantmaking initiatives).
297. Memorandum from Amy Breault to Board of Trustees 1 (Apr. 13, 2006) (on file with authors).
298. Id.
299. Id.
300. Id. at 2.
301. Id. (quoting Amelia Katzen).
B. Process

The MET provides a twenty-five year case study on how and why an environmental trust can obtain settlement funds.

1. Sources of Settlement Funds

a. Litigants

Litigants in environmental enforcement cases—prosecutors, citizen suit plaintiffs, and defendants—have been the principal sources of MET settlement funds. Both federal and state prosecutors have designated the MET to receive funds. For example, in United States v. Rockmore Co., the federal prosecutor, Assistant U.S. Attorney Jonathan F. Mitchell, contacted the MET and “inquired if the Trust would be able to conduct a program in Salem Harbor.” After receiving an affirmative answer, he negotiated a plea agreement with the Rockmore Company, which included a $75,000 “community service payment” to the MET “to be used exclusively for water quality projects along the Massachusetts coast, with preference for qualified projects in Salem Harbor.”

On the state side, the Massachusetts Attorney General’s Office and MassDEP have played a pivotal role in directing criminal, civil, and administrative settlements to the MET. As Amy Breault reported in her 2006 memorandum to the MET board of trustees, “generally [MET] settlements are the result of negotiations with the [Attorney General’s] office and/or [Mass]DEP.” From the start, these state settlements have been a significant source of MET funding. A prime example is the MET’s 1991 settlement—the payment by Monsanto of $192,000 “[t]o be used at the discretion of the Trust.”

Citizen suit plaintiffs have also been responsible for a few MET settlements. The most prominent such group is the Massachusetts Public Interest Research Group (MASSPIRG). For example, in 1989, MASSPIRG brought suit against ICI Americas for violations of the Federal Clean Water Act. The parties ultimately settled the case in May 1992.

305. Memorandum from Breault to Board, supra note 297, at 3.
306. MET SETTLEMENTS 1989–2001, supra note 276, at 3; see Foster, supra note 58, at 4 (“In the meantime, a few other settlements were directed to the Trustees by the Attorney-General’s office, including a . . . six figure sum from the Monsanto Corporation.”).
307. See MET, Board Meeting Minutes (June 2, 1993), supra note 249, at 4 (noting that “MassPirg had given the Trust the largest settlements to date”).
309. Id.
selected the MET to receive $225,000—nearly one-third of the sum ICI Americas paid under the consent decree.310

Occasionally, environmental defendants have been the source of MET settlements. For instance, in a June 30, 1993 memorandum to MET trustees, Robbin Peach reported that the “Trust ha[d] received an unexpected $200,000”311 from a settlement between the Commonwealth of Massachusetts and Citgo Petroleum Corporation. According to Peach, “[t]he defendant recommended using the Trust, based on [Peach’s] Boston Bar Assoc[iation] talk on March 18th!”312

b. Judges

Massachusetts federal and state judges have not directly championed the environmental trust concept in general or the MET in particular.313 Nonetheless, a few judges have encouraged parties to seek more creative uses of settlement funds to focus specifically on the areas actually harmed by the environmental violation at issue. Two recent federal criminal cases are illustrative: United States v. Bouchard Transportation Co.314 and United States v. ExxonMobil Pipeline Co.315

In Bouchard, Chief U.S. Magistrate Judge Marianne B. Bowler formally approved a criminal plea agreement between Bouchard Transportation Company and the federal government on November 18, 2004.316 Under the agreement, Bouchard accepted responsibility for an April 27, 2003 spill of an estimated 98,000 gallons of fuel oil into Buzzards Bay and agreed to pay a $10 million fine.317 The agreement provided that $7 million of the $10 million would go to the North American Wetlands Conservation Act Fund (NAWCA), a congressionally-authorized program run by the Department of Interior’s Fish and Wildlife Service. NAWCA funds wetland conservation efforts throughout the United States, Canada, and Mexico.318 Before accepting the plea agreement, Judge Bowler stated: “This Court strongly recommends that the fine

310. MASSPIRG v. ICI Americas Consent Decree, supra note 275, at 7.
311. Memorandum from Robbin Peach to Board Members (June 30, 1993), in FOSTER PAPERS, supra note 12.
312. Id.
313. See supra notes 63–64 (discussing Judge Mazzone’s role in the Boston Harbor case).
moneys paid into [NAWCA] be used to fund eligible wetland conservation projects in the Buzzards Bay Watershed Area of Massachusetts.”

Her statement galvanized local groups to press for NAWCA funds to be earmarked for Buzzards Bay rather than distributed nationally or internationally. One of these groups—the Buzzards Bay National Estuary Program—reported that although Judge Bowler’s “guidance” could not preempt the law,” many believed that it would “de facto result in most or all of the fines sent to the NAWCA program [to] be spent in Buzzards Bay.” In response, the MET organized and funded a coalition of twenty-seven Bay environmental groups and towns, called the “Buzzards Bay Watershed Partners,” to apply for NAWCA funds. Over the next three years, this group received $6,385,000 of NAWCA’s $7 million Bouchard settlement for protection and restoration projects in Buzzards Bay.

On April 6, 2009, the parties in ExxonMobil presented a criminal plea agreement providing for a multimillion-dollar community service payment to NAWCA to Massachusetts District Judge Patti B. Saris. This case resulted from ExxonMobil’s January 9, 2006 spill of approximately 15,000 gallons of diesel fuel and kerosene into the Mystic River. Judge Saris refused to approve the plea agreement because she did not “feel comfortable about the organization” that was to receive the $5,640,982 community service payment. She emphasized that NAWCA, “a good or fine organization but [one that] . . . isn’t focused on Mystic Valley problems,” was not required to spend any of the funds on “wetlands in the area affected.” Judge Saris said, “It should go to Mystic Valley. I mean, I’ve grown up here my whole life. It’s just—I don’t want to demean it—it’s an unfortunate spot. It could be more beautiful or it could at least be better, and so I think it should go to Mystic.”

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321. Id.
323. Watershed Partners, supra note 322 (discussing and listing NAWCA grants from the Bouchard settlement).
326. ExxonMobil Sentencing Transcript, supra note 324, at 12.
327. Id. at 10.
328. Id. at 16.
329. Id. at 11–12.
She concluded by directing the parties to “come up with a solution that we know some money, at least some, will go to the Mystic Valley area.”

The parties revised the plea agreement to divide the community service payment in two: (1) $4,640,982 to NAWCA to “be used . . . exclusively for qualified coastal wetland restoration projects within the District of Massachusetts, with preference to qualified coastal wetland restoration projects within the Mystic River watershed” and (2) $1,000,000 to the MET to “be used . . . exclusively for qualified wetland restoration or water quality projects within the Mystic River watershed, with preference to qualified projects in the Lower Mystic River area.” Judge Saris approved the revised plea agreement on May 1, 2009.

c. Community Groups

The ExxonMobil case reveals another source of MET settlements—community groups. As MET Program Director William W. Hinkley remarked, the ExxonMobil “payment to MET was very much driven by the community organizations that advocate for the Mystic River and environmental justice populations in the watershed.”

Mystic River watershed groups and residents became involved late in the settlement process. They heard about the proposed plea agreement only weeks before the April 6, 2009 sentencing hearing. After they “did some research,” these groups became convinced that NAWCA was “simply unsuited” to address the needs of low-income urban watershed communities. They had particular concerns about the “severely restrictive and expensive requirements for NAWCA funding,” the burdensome application
and the fact that NAWCA had never awarded a grant for a “project in Lower Mystic or in a densely developed urban area.” Judge Saris later summed up the groups’ position best: “They are saying, as a practical matter, they can’t get it; they’re too poor; they can’t write the project; they don’t have enough wetlands; and their major priority, which is cleaning up the sediment, can’t be paid for from this.”

After concluding that NAWCA was an “inappropriate recipient” for the ExxonMobil community service payment, Mystic groups searched for a more suitable organization. They “were encouraged to contact the . . . MET which had actual experience with the quite similar Bouchard spill on Cape Cod and the use of many small non-profit organization projects to compensate for damage.” The groups got in touch with the MET and received assurances that the Trust “could administer the community service payment in this matter as suggested by the local organizations.”

Their next step was to press the U.S. Attorney’s Office and the court to direct the funds to the MET rather than NAWCA. The attorney for one community group—the Chelsea Collaborative—and the CLF submitted memoranda to the court explaining their opposition to NAWCA and their support for the MET. On April 6, 2009, a “small delegation, represent[ing] many environmental advocates and environmental advocacy organizations,” presented its case at the sentencing hearing. As discussed above, these representatives found a receptive ear in Judge Saris and ended up with a partial victory. The federal government and ExxonMobil agreed to award $1 million to the groups’ chosen recipient—the MET—to spend on a broad range of projects in the Mystic River watershed. The MET subsequently awarded

339. ExxonMobil Sentencing Transcript, supra note 324, at 40 (testimony of Eugene Benson (discussing NAWCA’s “incredibly burdensome and daunting” application process, which takes an estimated “400 hours to complete”).
340. CLF, ExxonMobil Memorandum of Information, supra note 338, at 4.
341. ExxonMobil Sentencing Transcript, supra note 324, at 68.
342. ExxonMobil Second Memorandum of Information, supra note 338, at 5.
344. ExxonMobil Second Memorandum of Information, supra note 338, at 5.
345. Letter from Hinkley to Foster, supra note 334. The groups did not “talk directly to counsel for ExxonMobil although one of the residents ha[d] spoken to some other people at ExxonMobil about this over time.” ExxonMobil Sentencing Transcript, supra note 324, at 34 (testimony of Eugene Benson).
346. For the texts of these memoranda, see ExxonMobil Memorandum of Information, supra note 337; CLF, ExxonMobil Memorandum of Information, supra note 338.
347. ExxonMobil Sentencing Transcript, supra note 324, at 41 (testimony of EkOngKar Singh Khalsa of the Mystic River Watershed Association).
348. See supra notes 326–333 and accompanying text.
349. Mystic River watershed organizations and residents tried unsuccessfully to persuade Judge Saris to reject the revised plea agreement. See, e.g., ExxonMobil Second Memorandum of Information, supra note 338, at 2. 4–5 (criticizing the revised plea agreement’s allocation of 82.2 percent of the community service payment to NAWCA as “inappropriate” and recommending that the court reject the agreement and “instead ask the United States Attorney for a sentence” in which the MET would receive the entire community service payment).
350. See supra note 332 and accompanying text.
four grants totaling $1 million to the lower Mystic River communities of Boston, Chelsea, Everett, Malden, Medford, and Somerville to address storm water pollution, invasive weeds, water quality monitoring and improvement, and habitat restoration.  

*d. Another Environmental Trust*

Finally, the MET received a settlement from another environmental trust—the Fund for New England (FNE). The FNE was a “wholly-owned subsidiary” of the New England Natural Resources Center, a regional nonprofit organization that future MET founder and trustee Charles H.W. Foster launched in 1970. The New England Natural Resources Center established the FNE in December 1982 “to attract, aggregate, manage, and marshal monies from a wide variety of sources,” including environmental settlements.

In 1988, the FNE received $100,000 from the settlement of a citizen suit brought by MASSPIRG against General Electric (GE) for the company’s pollution of the Saugus River. By 1991, the FNE had spent most of the funds on an “ecological survey of the river.” In 1993, the FNE transferred the remaining $26,000 to the MET “to implement recommendations of the Saugus River Study.”

*2. Impetus*

The impetus for MET settlements has come both from contacts by litigants and other interested parties and from the MET’s own initiatives to obtain settlement funds.

*a. Contacts by Litigants and Other Interested Parties*

As the previous subpart has shown, several MET settlements began when a litigant or other interested party directly contacted the MET to gauge the Trust’s possible interest in administering the settlement. Often this contact was
based on previous interactions with the Trust. For instance, in the 2010 Rockmore case, the prosecutor who approached the MET—Assistant U.S. Attorney Jonathan F. Mitchell—had also prosecuted the 2004 Bouchard and 2009 ExxonMobil oil spill cases.\footnote{See Letter from Hinkley to Foster, supra note 303 ("The selection of MET was solely at the discretion of the U.S. Attorney, though it is notable that the prosecutor in this case also prosecuted the Bouchard and ExxonMobil oil spill cases.").} Similarly, in the ExxonMobil case, many of the community groups that contacted the MET had first-hand experience with the MET’s funding process. As Ivey St. John of the Charlestown Waterfront Coalition emphasized in her testimony at the April 6 sentencing hearing, these groups had recently applied for the MET’s $500,000 grant for lower Mystic projects.\footnote{ExxonMobil Sentencing Transcript, supra note 324, at 51, 54 (discussing applications for MET’s $500,000 grant).}

Another example is MASSPIRG. In 1993, MASSPIRG considered the MET for an $835,000 settlement in what was then the largest citizen suit in Massachusetts—another action against GE for pollution of the Saugus River.\footnote{MET, Board Meeting Minutes (June 2, 1993), supra note 249, at 3–4 (discussing this potential GE settlement).} Just the year before, MASSPIRG had selected the MET to receive a $225,000 settlement from the ICI Americas case.\footnote{MET, Board Meeting Minutes (June 2, 1993), supra note 249, at 3.} MASSPIRG engaged in “a lengthy dialogue”\footnote{See infra Part III.C.3 (discussing the MET’s insistence on having an active role in the administration of settlements).} with the MET over the terms of the settlement. The MET ultimately declined the settlement because, as MET Chairman Maynard Goldman explained, “their proposal was for the [MET] to act only as an escrow agent with no input on distribution of the funds and no payment for services.”\footnote{Id. For a copy of the draft escrow agreement, see FOSTER PAPERS, supra note 12. See infra Part III.C.3 (discussing the MET’s insistence on having an active role in the administration of settlements).}

Sometimes the contacts have been more indirect. For instance, in 1996, Mary Nichols, EPA assistant administrator for air quality, contacted Joseph Bodovitz, President of the California Environmental Trust (CET).\footnote{Letter from Charles H.W. Foster to Robbin Peach (Apr. 24, 1996) (on file with authors).} Nichols, a former CET board member, was negotiating a national settlement with General Motors Corporation for Clean Air Act violations.\footnote{Id. The government charged that, from 1991 to 1995, General Motors installed illegal “defeat devices” in Cadillacs. See Mobile Sources, U.S. DEPT' JUSTICE, http://www.justice.gov/enrd/4445.htm (last updated Sept. 2014). The defeat device is a computer chip that “reduces the effectiveness of the emission control system.” Id.} She was “anxious to find some ready mechanism to distribute and put the settlement moneys to work.”\footnote{Letter from Foster to Peach, supra note 364.} Because of California’s and New England’s “deep involve[ment] in auto emissions and air quality matters,” Nichols approached Bodovitz to inquire whether the CET and the MET would be interested in administering the
settlement fund. Bodovitz in turn contacted MET trustee Foster, who had helped form the CET in 1984.

b. MET Initiatives

The MET has used a variety of approaches to attract settlements. These have ranged from formal proposals to informal outreach efforts. Some of these initiatives have been successful. Others have not. Four cases illustrate the diversity of MET approaches.

The first case, Commonwealth v. Town of Plymouth, featured a formal proposal by the MET for settlement funds from a specific case. Plymouth was a state civil action against the town of Plymouth for violations of the Massachusetts Clean Waters Act. In April 1991, the MET submitted a proposal to the Massachusetts Attorney General’s Office to be the recipient of Plymouth settlement funds. This proposal proved successful. On December 6, 1991, Attorney General Scott Harshbarger announced that Plymouth had agreed to a settlement, which included a $15,000 payment to the MET.

The second case, Commonwealth v. H.B. Fuller, involved a more general MET request for settlement funds as well as face-to-face meetings. On August 5, 1992, MET Chairman Maynard Goldman sent a letter to Susan Tierney, Secretary of Environmental Affairs and chair of the MWRA. Goldman stated that the MET “respectfully request[ed] that the [MWRA] Board of Directors consider diverting a portion” of the penalties the MWRA receives “for violations of MWRA requirements” “into a grants program, to be managed by the . . . Trust.” In the fall of 1992, MET representatives met with the MWRA Board. Although the MWRA did not adopt the MET’s proposed scheme, these efforts resulted in a minor victory. Under a February 19, 1993 consent decree, Minnesota firm H.B. Fuller agreed to pay $316,650.
for “misrepresent[ing] its sewer discharges in reports filed with the . . . MWRA.” This payment included an $8325 contribution to the MET. According to MET Executive Director Robbin Peach, after the fall meeting, “the MWRA staff had steered this small administrative penalty to the Trust.”

The third case, United States v. General Electric Co. (GE Housatonic River case), featured another approach—more informal personal contacts by an individual MET trustee. In 1996, this action against GE for polychlorinated biphenyl (PCB) contamination of the western Massachusetts Housatonic River “reignited [the MET’s] interest in settlements.”

On August 5, 1997, the Boston Globe published an article in which EPA Regional Director and former MET trustee John DeVillars stated that he had decided to request designation of the Housatonic River as a Superfund site but would continue direct negotiations with GE in hopes of reaching a settlement.

In response to this article, Foster sent a letter to DeVillars on August 9, 1997. He wrote: “I would urge you to consider some kind of alternative approach such as use of the Massachusetts Environmental Trust which you helped create.” Foster also contacted GE and “suggest[ed] . . . a voluntary contribution in lieu of a settlement via the Trust.” Neither DeVillars nor GE ultimately supported his recommendation. Under a 2000 consent decree, GE agreed to clean up the river and pay $15 million to federal and state government Natural Resource Trustees for restoration projects in Connecticut and Massachusetts.

The fourth case, Commonwealth v. Citgo Petroleum Co., demonstrated the potential of even indirect approaches to produce settlements. In March 1993, Robbin Peach gave a speech to the Boston Bar Association. Three months later, as a result of this speech, the MET ended up with a $200,000 settlement.

378. Id.
379. MET, Board Meeting Minutes (June 2, 1993), supra note 249, at 3.
381. Foster, supra note 58, at 6.
384. Foster, supra note 58, at 6.
387. See supra note 312 and accompanying text.
388. Id.
3. **Reasons for Selection of the MET as a Settlement Funds Recipient**

Several factors explain the MET’s selection as a recipient of settlement funds. The key factors are the Trust’s experience, success, expertise, independence, and flexibility.

a. **Experience**

MET proponents often emphasize the Trust’s experience with settlements. For example, in presenting the *Rockmore* plea agreement for court approval, Assistant U.S. Attorney Jonathan Mitchell stated that the agreement included a $75,000 community service payment to the MET, “a state-established nonprofit organization that has taken environmental cases for community service payments in the past.”

Similarly, in the *ExxonMobil* case, attorney Eugene Benson stressed the fact that the MET has “been around for more than 20 years now . . . [and] gets funds from the Commonwealth, from civil cases, from fines. It does requests for proposals, and it distributes the money to government and nonprofits for environmental programs.”

What has made the MET particularly attractive is its demonstrated ability to administer the most typical form of settlement funds—restricted funds that “come with some sort of a caveat, with a geographical restriction, a programmatic restriction, or some other set of criteria that would satisfy terms of that case.”

Other MET advocates cite the Trust’s extensive track record with environmental grantmaking more generally. For instance, in their memoranda in the *ExxonMobil* case, community groups referred to the MET’s “long and distinguished history of issuing requests for proposals and . . . funding environmental projects.”

b. **Success**

The MET’s success has been another significant factor influencing the Trust’s designation to receive settlement funds. For example, Ann Berwick, Chief of the Environmental Protection Division of the Massachusetts Attorney General’s Office, explained her office’s choice of the MET to manage settlements thus: “In the years since its creation, the Trust has been a major force in creating public awareness of threats to the environment and building a constituency to serve as stewards of our lands and waters.”

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390. ExxonMobil Sentencing Transcript, supra note 324, at 36 (testimony of Eugene Benson).
391. Id. at 59 (testimony of William Hinkley) (responding to Judge Saris’s question of whether the MET “could follow as a matter of law” a requirement that the settlement fund “has to be used for projects in the Mystic River area to promote water quality and access to the water”); see infra Part III.C.1 (discussing implementation of restrictive settlements).
392. ExxonMobil Memorandum of Information, supra note 337, at 4; ExxonMobil Second Memorandum of Information, supra note 338, at 4.
c. **Expertise**

The MET’s expertise also has been a selling point. As Part II.A has shown, from its inception, the MET has put considerable emphasis on enlisting the services of prominent trustees and advisors from across the professional and geographical spectrum.\(^{394}\) This expertise has allowed the MET to evaluate grant proposals, make funding decisions, and plan programs on state, regional, and local issues as diverse as technical scientific research studies to neighborhood efforts to clean up a contaminated creek.\(^{395}\) Through funding both “sophisticated . . . [and] more modest applicants,”\(^{396}\) including municipalities, educational institutions, nonprofit organizations, private consulting firms, and individuals, the MET has developed particular expertise, contacts, and interest in promoting grassroots environmental groups and initiatives.\(^{397}\)

The MET’s broad-ranging expertise was a major reason why Mystic River watershed groups favored selection of the Trust to administer ExxonMobil settlement funds. Advocates stressed that the MET was “used to dealing with urban rivers,” local environmental organizations and projects, and all of the issues they wanted to address with ExxonMobil funds.\(^{398}\)

d. **Independence**

The MET prides itself on its independence. Despite its quasi-governmental status, the MET consistently maintains that it is an independent environmental philanthropy and not a subordinate agency of the Massachusetts government.\(^{399}\) Similarly, although the MET has been the recipient of settlements from citizen advocacy groups, it has tried to avoid any perception that it is aligned with such organizations.

The MET defines itself instead as a bridge between government, private industry, and citizenry.\(^{400}\) In awarding grants, “[p]reference is given to proposals that encourage cooperation between local organizations or between business, government and citizen groups . . . .”\(^{401}\) In the settlement process, the

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\(^{394}\) See supra Part II.A.1.

\(^{395}\) See supra Part II.C.2 (discussing MET grantmaking).

\(^{396}\) Letter from Charles H.W. Foster to Robbin Peach (Feb. 16, 1993), in FOSTER PAPERS, supra note 12.

\(^{397}\) See supra notes 175–197 and accompanying text (discussing the MET’s community focus).

\(^{398}\) ExxonMobil Sentencing Transcript, supra note 324, at 40. This included “wetland restoration, increased access to the water for recreation, improved water quality, environmental justice, and related environmental improvements.” Id. at 38 (testimony of Eugene Benson).

\(^{399}\) See supra Part II.D.

\(^{400}\) Press Release, MET, Dighton Company Settlement Penalty Funds Will Go Towards Study of Taunton Watershed (May 26, 1992), in FOSTER PAPERS, supra note 12 (“The Trust unites government, individuals and the business community to act on their common concern for the health of the Commonwealth’s coastal resources.”).

\(^{401}\) MASS. ENVT. TRUST, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY 3 (Oct. 11, 1994) [hereinafter MET, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY] (comments by Robbin Peach), in FOSTER PAPERS, supra note 12; see Peach, supra note 16, at 4; MET Grant Programs,
MET has reached out to defendants as well as enforcement agencies.\textsuperscript{402} In fact, one trustee called for “enlisting the active interest and cooperation of the defendant”\textsuperscript{403} and even argued that environmental settlements “are more apt to occur when it is the violator who initiates the action.”\textsuperscript{404} In marked contrast to federal enforcement agencies’ policy, he supported “even-handed treatment” of defendants and “[t]ook exception to the view that having the defendant help craft the relief for its own violations is necessarily inappropriate.”\textsuperscript{405}

MET independence is also important in the administration of settlement funds. Advocates have put particular emphasis on the advantages of the MET over federal alternatives. For example, in his August 9, 1997 letter to DeVillars, Foster stressed two benefits of directing a future GE settlement to the MET rather than a “federal natural resources trust fund.”\textsuperscript{406} First, he cited the MET’s ties to the affected community. Because of its recent cooperative program with community foundations, including a foundation located in the area where PCB contamination occurred, the MET “ha[d] the capacity to move grant funds right down to the grassroots level.”\textsuperscript{407} Second, Foster pointed out possible institutional problems with the federal scheme, noting: “I am skeptical about the federal natural resources trust fund approach because of the potential for agency bickering and bias.”\textsuperscript{408}

e. \textit{Flexibility}

MET proponents have identified flexibility as another feature that makes the MET superior to a federally established entity. They argue that because the MET is not subject to often narrow, congressionally dictated restrictions on grantmaking, the Trust can tailor its distribution of settlement funds to meet the specific conditions and needs of the area actually harmed by the environmental disaster. The \textit{ExxonMobil} case provides a prime example of the impact flexibility can have on a settlement decision. Indeed, flexibility was the principal reason the Mystic River watershed community groups championed the MET rather than NAWCA to be the recipient of settlement funds. As one spokesperson asserted, the MET “comes without the baggage . . . and the limitations that NAWCA comes with . . . .”\textsuperscript{409}

Community groups focused on three restrictions in the NAWCA-enabling legislation that they found especially “incompatible with the realities” of the

\textsuperscript{402} See, \textit{e.g.}, MET, Board Meeting Minutes (June 2, 1993), \textit{supra} note 249, at 3 (discussing contacts with GE); \textit{supra} note 384 and accompanying text (discussing the same).

\textsuperscript{403} Memorandum from Foster to Goldman and Peach, \textit{supra} note 151, at 1.

\textsuperscript{404} Foster, \textit{supra} note 2, at 86–87.

\textsuperscript{405} Memorandum from Foster to Goldman and Peach, \textit{supra} note 151, at 1.

\textsuperscript{406} Letter from Foster to DeVillars, \textit{supra} note 383.

\textsuperscript{407} \textit{Id}.

\textsuperscript{408} \textit{Id}.

\textsuperscript{409} \textit{ExxonMobil Sentencing Transcript, supra} note 324, at 36 (testimony of Eugene Benson).
One restriction was NAWCA’s one-to-one matching requirement, under which applicants had to raise nonfederal funds that equal or exceed the amount requested in their grant proposal. Critics argued that this matching requirement was “a difficult if not impossible hurdle” for communities located near the ExxonMobil oil spill. According to Eugene Benson, the likelihood that “lower-income communities that are deciding whether they lay off teachers or fire fighters or police or don’t fill potholes in the street . . . are going to start buying open space and come up with matches over the next few years is zero.”

The second restriction was NAWCA’s lengthy and technical grant application process. The federal government itself has estimated that completion of a NAWCA grant application takes up to four hundred hours. At the ExxonMobil sentencing hearing, Roseann Bongiovanni, Associate Executive Director of the Chelsea Collaborative, pointed out that the NAWCA application process is so complex and burdensome that her organization would first have to obtain a $40,000 grant to hire a consultant to write a proposal for NAWCA funding. In fact, this is precisely what happened in the Bouchard case. The MET provided funding to Buzzards Bay community groups for assistance in completing NAWCA grant applications.

The third problematic restriction was NAWCA’s narrow definition of eligibility for grants. Critics emphasized that, under its enabling legislation, NAWCA can consider only those projects that promote long-term conservation of wetlands and associated habitats for migratory birds, fish, and wildlife. They claimed that this definition and the strict selection criteria NAWCA employs are “so tilted toward wetland restoration and waterfowl” that NAWCA effectively “exclude[s] virtually all viable projects in [the Mystic River Watershed] area.” As Roseann Bongiovanni put it:

410. ExxonMobil Memorandum of Information, supra note 337, at 5.
411. See id. at 1–2 (discussing this requirement).
412. Id. at 2.
413. ExxonMobil Sentencing Transcript, supra note 324, at 37.
414. See ExxonMobil Memorandum of Information, supra note 337, at 4–5. Also problematic were the “rigorous federal grant reporting requirements.” Id. at 4.
416. See Press Release, Coalition for Buzzards Bay, First $2.3 Million in Bouchard Oil Spill Penalty Funds to Protect 285 Acres of Coastal Lands on Buzzards Bay (Jan. 13, 2005) (reporting that a “$10,000 grant from the MET supported development of the grant applications” to NAWCA by Buzzards Bay groups).
417. See, e.g., ExxonMobil Memorandum of Information, supra note 337, at 2–3 (criticizing and citing relevant NAWCA legislation).
418. ExxonMobil Sentencing Transcript, supra note 324, at 37 (testimony of Eugene Benson); see News on NAWCA, MYSTIC RIVER WATERSHED ASS'N (Dec. 16, 2010), http://mysticriver.org/myrwa-blog/2010/12/16/news-on-nawca.html (reporting a year after the ExxonMobil settlement that “NAWCA’s strict grant criteria and focus on preservation and restoration of large areas of wetland migratory bird habitat made it difficult for NAWCA to recruit and fund applications from the Mystic River region”).
419. ExxonMobil Memorandum of Information, supra note 337, at 2.
They won’t allow any open space projects. They won’t allow public access. The only thing that they’ll allow is waterfowl conservation, which basically is duck habitat. And in Chelsea, East Boston, and Revere, we’re not so interested in ducks, and I mean that with no disrespect. We’re interested in people and helping people connect to their waterfront.\footnote{ExxonMobil Sentencing Transcript, supra note 324, at 49.}

Mystic River watershed groups argued that the MET was a more appropriate mechanism for distributing ExxonMobil settlement funds because it “doesn’t come encumbered by any of the burdens that NAWCA brings along with it.”\footnote{Id. at 41 (testimony of Eugene Benson).} The MET would impose no matching requirement\footnote{Id. at 37; see MASS. ENVTL. TRUST, REQUEST FOR RESPONSE (RFR) FOR LOWER MYSTIC RIVER WATERSHED WATER QUALITY AND WETLAND IMPROVEMENTS 9 (n.d.) [hereinafter MET, ExxonMobil RFR] (on file with authors) (stating that “[m]atching funds are encouraged but not mandatory”).} and had application and grantmaking processes that, although “rigorous,” were “very open [and] straightforward.”\footnote{ExxonMobil Second Memorandum of Information, supra note 338, at 1–2.} Most importantly, the groups recommended selection of the MET because of its flexibility in awarding grants. Unlike NAWCA, the MET was not handcuffed by “severely restrictive” statutory criteria.\footnote{For examples of such projects, see supra note 398 and accompanying text. See also ExxonMobil Sentencing Transcript, supra note 324, at 39–40, 49–54, 59.} It thus could ensure that the ExxonMobil settlement would fund the projects those who lived near the oil spill—not Congress—deemed most urgent.\footnote{MET Grant Programs, supra note 129.}

C. Use of Settlement Funds

The MET prides itself on its “innovative management and distribution of funds derived from environmental lawsuit settlements.”\footnote{Id. (summarizing MET’s restricted grants program).} Indeed, it has created a restricted grants program devoted exclusively to the administration of such funds.\footnote{Enforcement Actions—2005, MASS. EXECUTIVE OFF. ENERGY & ENVTL. AFF., http://www.mass.gov/eea/agencies/massdep/service/enforcement/enforcement-actions-2005.html (last}
Exploration & Oil, Inc. required payment of $75,000 to the MET “[t]o be used at the discretion of the Trust.”\(^{430}\) In such cases, the funds usually are “applied to [the MET’s] existing grant programs.”\(^{431}\)

Other settlements provide detailed instructions on how the MET must apply funds. The 1992 GE plea agreement is illustrative.\(^{432}\) The agreement included a two-page attachment that set out the goals, phases, specific projects for MET funding, and an outside “advisory committee [to] . . . provide guidance and technical assistance to the [MET] in shaping and carrying out the program, and . . . review and comment upon proposals submitted to the [MET].”\(^{433}\)

As noted above, the MET has extensive experience in administering settlements with “some sort of a caveat.”\(^{434}\) MET settlements often come with geographic restrictions. For example, in 1998, the MET received a $100,000 settlement payment from the Borden and Remington Corporation and the Tillotson Corporation in a case involving several violations of Massachusetts air, water, and hazardous waste legislation and regulations.\(^{435}\) One such violation was the release of contaminated wastewater into Fall River’s sewer system.\(^{436}\) The settlement agreement directed the MET to expend the $100,000 “in accordance with the Trust’s procedures for a water-related environmental project that will contribute to urban redevelopment in Fall River.”\(^{437}\) In 2000, the Trust awarded three grants for environmental education programs in Fall River and for purchase of an “important” privately-owned land parcel in order to “enhance protection of the Fall River municipal water supply system”: $42,000 to the City of Fall River; $30,280 to Greater Fall River Land Conservancy; and $27,720 to Green Futures, a nonprofit environmental education and advocacy organization based in Fall River.\(^{438}\)

Many MET settlements contain substantive conditions. For instance, in 1993, the Massachusetts Attorney General’s Office settled a civil suit against


\(^{431}\) 10TH ANNIVERSARY REP., supra note 16, at 22. Sometimes the settlement agreement specifically provides for this general use of funds. For example, the 1992 GE plea agreement stipulated that if the MET has expended “substantially all” of the settlement proceeds and concluded that the costs of administering the remaining funds “outweigh[] the incremental benefit,” the MET (with the approval of the advisory committee) “may use the remaining funds for its general environmental education purposes.” Final Judgment at 4, attach. A, Commonwealth v. Gen. Elec. Co., No. 92-2342 (Mass. Super. Ct. Apr. 15, 1992) [hereinafter 1992 GE Plea Agreement], in FOSTER PAPERS, supra note 12.

\(^{432}\) 1992 GE Plea Agreement, supra note 431; see infra notes 659–666 and accompanying text (discussing implementation of the GE settlement).

\(^{433}\) 1992 GE Plea Agreement, supra note 431.

\(^{434}\) See supra note 391 and accompanying text.

\(^{435}\) Julie Goodman, 2 Firms Will Pay $475,000 Penalty, PROVIDENCE J.–BULL., July 10, 1998, at 1C (reporting the settlement).

\(^{436}\) Id.


\(^{438}\) FY 2001 GRANT AWARDS, supra note 176, at 1.
the Leahy Construction Company, Inc. for “illegally dump[ing] thousands of gallons of raw septage near Wachusett Reservoir and Holden’s municipal wells.” 439 Under the settlement agreement, the Trust received $30,000 “[t]o conduct an educational campaign about septic system care, including toxic household waste disposal for citizens in the Holden area.”440 The MET used these funds to “support[] a public outreach campaign about septic system maintenance aimed at homeowners in the Wachusett watershed.”441

2. Funding Approaches

The MET has sometimes distributed entire settlements at one time. For example, in October 2009, five months after court approval of the ExxonMobil plea agreement, the MET issued an official request for response inviting proposals for funding under the $1 million settlement agreement.442 The MET received seven proposals.443 On June 11, 2010, the MET divided the $1 million among four grant applicants.444

In other cases, the MET has taken several years to disburse a settlement. For example, in 1996, the Trust received settlement proceeds and fines from a MassDEP consent order with the U.S. Postal Service.445 The consent order directed the MET to use the funds “for improvement of the water quality of the Cambridge Reservoir watershed, including but not limited to education, citizen action, or watershed improvement study.”446 The MET finished awarding grants from the $95,000 settlement in 2000.447

A few settlement agreements have specifically encouraged multiyear expenditure of funds by directing the defendant to pay proceeds in annual installments rather than as a single lump-sum payment. The MET’s first settlement—the 1991 Monsanto settlement—used such an arrangement. It stipulated that the MET was to receive $192,000 in four yearly installments.448

441. 10TH ANNIVERSARY REP., supra note 16, at 22.
442. MET, EXXONMOBIL RFR, supra note 423.
443. Letter from Hinkley to Mitchell, supra note 351.
445. MET SETTLEMENTS 1989–2001, supra note 276, at 1 (listing MassDEP consent order No. AP-NE-95-6001). The original amount of the settlement was $52,500. Id. In 1997, the MET received an additional $42,500. Id.
446. 2000 MET ANN. REP., supra note 11, at 10 (quoting the consent order).
447. The final grant was $65,000 to the Massachusetts Audubon Society-Drumlin Farm Sanctuary “to create and implement a watershed curriculum in the four communities of the Cambridge Reservoir Watershed.” Id.
448. See supra notes 237–246 and accompanying text (discussing the Monsanto settlement).
In several cases, the MET has “developed specialized projects” with separate advisory boards to help make funding decisions. For example, in 2000, the MET established the Town Line Brook Project to implement a $500,000 settlement from the Global Petroleum Corporation. This project included an eleven-person advisory committee. The committee played an active role in selecting, guiding, and reviewing grant awardees. As representatives of one of the principal awardees, GeoSyntec Consultants later wrote, “The success of this project is directly linked to the willingness of the MET oversight committee to embrace innovative approaches and seek solutions that provide high marginal benefit.”

Another MET funding approach has been to supplement or combine restricted grants with other funds from the MET or outside organizations. For instance, in 1994, to implement the terms of a settlement agreement, the MET awarded a grant to support a “fieldwork-based environmental education project” for Chelsea High School students. Two years later, the MET awarded a general grant to the Chelsea High School “to further incorporate environmental issues into the learning process.”

Outside organizations also have provided supplementary sources of support. For example, the MET’s 2000 grant to the Greater Fall River Land Conservancy “leveraged an additional award from the Massachusetts Self-Help Land Acquisition Program.” Similarly, one of the ExxonMobil grant awardees—the Mystic Valley Development Commission—received $175,000 from the MET and a $325,000 matching grant from the U.S. Army Corps of Engineers.

449. 10TH ANNIVERSARY REP., supra note 16, at 22.
451. See 2001 MET ANN. REP., supra note 176, at 11 (listing members of the Town Line Brook Advisory Committee and initial grants under the Town Line Brook Project).
453. 1996 MET ANN. REP., supra note 141, at 8.
455. 2000 MET ANN. REP., supra note 11, at 10.
456. Lower Mystic River Grants, supra note 444.
3. **Insistence on an Active Role**

The MET has consistently asserted that it must have discretion over expenditure of settlement funds. In fact, even before the Trust was created, one of its founders stated, “It serves no useful purpose to establish a trust mechanism to distribute pre-ordained grants.”457 From the start, the MET has translated principle into practice. It has rejected potential six- and seven-figure settlements on the grounds that it would have no input into distribution of the proceeds.

The MET implemented this approach in the first year of its existence. In 1989, the federal government and Commonwealth of Massachusetts entered into negotiations with AVX Corporation to settle a Comprehensive Environmental Response, Compensation, and Liability Act action for natural resource damage caused by AVX’s release of PCBs and other hazardous substances into New Bedford Harbor.458 When MET trustees became aware of these negotiations, they saw this as a golden opportunity to replicate the Boston Harbor model.459 They made “overtures”460 to the parties and worked with legal counsel at the EEOA and Massachusetts Attorney General’s Office “to optimize possibilities for the delivery of the New Bedford settlement funds into the Massachusetts Environmental Trust.”461 In the end, federal agencies preferred to establish their own natural resources committee to administer the program and allocate the funds.462 But, at the very last minute, they asked the MET to serve as a fiduciary agent for the multimillion-dollar settlement.463 In a “remarkable and precedential move,” the Trust declined on the grounds that it would have no say in how and where the settlement moneys would be spent.464 As a trustee later observed, “Given its tender age and limited resources at that time, this was a gutsy decision for the MET to make.”465

The New Bedford case was the first but by no means last case where the MET rejected a settlement because the Trust would have no discretion over distribution of settlement funds. For example, just a year after the New Bedford settlement, the MET rejected another invitation to serve as a mere repository of settlement funds—in this case, $835,000 from a citizen suit settlement with

460. *Id.*
463. *Id.*
464. *Id.*; E-mail from William Hinkley to Charles H.W. Foster (Mar. 5, 2012) (on file with authors) (“[A] brief e-mail from 2000 indicates that the reason that MET did not work out was that [t]rustees would not have adequate fiduciary oversight of the funds.”).
465. E-mail from Charles H.W. Foster to William Hinkley (Mar. 3, 2012) (on file with authors).
GE. A MET memorandum explained the Trust’s “primary concerns” with this arrangement: “For philosophical, as well as administrative reasons, the Trust cannot view itself merely as a bank, ministerial or escrow agent. As a philanthropy, the Trust typically takes an active role in determining appropriate distribution of funds from its account.”

The MET’s experience confirms the wisdom of its insistence on an active role. In 1992, the MET received the $225,000 ICI Americas settlement “to administer grants for the purpose of research and/or enhancement of the water quality of the Taunton River and Taunton River watershed, and to fund the environmental education programs concerning the Taunton River watershed and Mount Hope Bay.” The MET decided to focus on water pollution caused by “common everyday” human activities in the Taunton River watershed. It sought to “instill[] a community-wide awareness of the problem and galvaniz[e] citizens to take action.”

Rather than simply funding existing programs and organizations, the MET created, in the words of one participant, “a whole new educational grant program devised from scratch.” Drawing on its “local knowledge and its freedom to experiment,” the MET initiated the Taunton River Watershed Connections Project, a three-year “20-community educational initiative,” coordinated by the University of Massachusetts Extension and Bridgewater State College.

The Taunton River Watershed Connections Project developed an innovative water pollution prevention curriculum for local middle school and high school students that combined classroom instruction with “dynamic learning.” Through collaborative efforts of teachers, scientists, college students, conservation groups, and local businesses, students learned basic concepts and then applied them. Students’ hands-on education included water and soil collection, water quality monitoring, and “an environmental awareness community education project.” By 1996, fifty-five teachers and approximately 17,000 students from Taunton River watershed schools had participated in the program. The EPA described the Project as “a model for

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466. See supra notes 360–363 and accompanying text (discussing the GE settlement).
467. MASS. ENVTL. TRUST, PRIMARY CONCERNS WITH EXHIBIT A—ESCROW AGREEMENT (1993), in FOSTER PAPERS, supra note 12.
468. MASSPIRG v. ICI Americas Consent Decree, supra note 275, at 7.
469. 1995 MET ANN. REP., supra note 1, at 6.
470. Id.
471. E-mail from Charles H.W. Foster to Frances H. Foster (Apr. 27, 2012) (on file with authors).
472. Id.
475. Id. at 6–8.
476. 10TH ANNIVERSARY REP., supra note 16, at 22.
watershed outreach in pollution prevention from the school to the local community and businesses.”

4. Remediation and Beyond

The MET’s settlement experience demonstrates the full potential of environmental settlements. It shows that the settlement process can do more than punish and deter misconduct. That process can also provide funds for remediation of the damage actually caused by the violator. In fact, $400,000 of the Trust’s initial $2 million fund was used for this very purpose. As the MET stated in its June 1989 to June 1990 Annual Report, that money “support[ed] remediation projects . . . for sites that had been adversely impacted by the improperly operating sewage treatment facilities in Boston Harbor.”

The MET has gone beyond remediation, however. It also has used settlement proceeds to identify the root causes of an environmental disaster and develop a comprehensive response to “prevent future harm to the environment.” MET management of the Global Petroleum settlement illustrates this broader approach.

In 2000, the Trust received the largest settlement since its founding—$500,000 from a consent decree between the Massachusetts Attorney General’s Office and Global Petroleum for the company’s February 1997 spill of 11,000 gallons of gasoline from its Revere terminal. The effects of this spill included contamination of the Town Line Brook, “a largely overlooked and poorly understood waterway that courses through Malden, Everett, and Revere . . . .” The settlement agreement directed the MET to use the proceeds “[t]o secure significant environmental and public health benefits . . . [by] control[ling] discharges of contaminated storm water to the Town Line Brook . . . and to assist in the remediation of pollution that has come to be located there . . . .”

As discussed above, the MET first set up a separate Town Line Brook Project and advisory committee. It then adopted a multipronged strategy to address both goals of the settlement agreement—controlling discharges of storm water and remediating damage. It began with research. The MET awarded a $100,000 grant to GeoSyntec “to study the exact causes

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478. See supra notes 279–286 and accompanying text.
479. 1989–1990 MET ANN. REP., supra note 98, at 2; see also Mission Statement, supra note 106, at 4–5 (establishing the purpose of the $400,000 settlement funds).
480. 2001 MET ANN. REP., supra note 176, at i.
484. See supra notes 449–452 and accompanying text.
of . . . flooding in the Town Line Brook area, and to propose a variety of management and engineering options to correct the problem.\footnote{485} The Trust was particularly interested in options that would be affordable as well as effective.\footnote{486} GeoSyntec completed the study in 2001.\footnote{487}

Next, the MET focused on community awareness and involvement. It awarded a $95,563 grant to GeoSyntec and the Saugus River Watershed Council (SRWC), a local nonprofit environmental organization.\footnote{488} Under the grant’s terms, GeoSyntec and SRWC were to use the funds “[t]o provide public education and outreach to the communities of the Town Line Brook watershed and its two tributaries, Trifone Brook and Linden Brook, with regard to flood reduction and improvement of water quality.”\footnote{489}

GeoSyntec and SRWC used a variety of approaches to achieve these goals. For example, GeoSyntec “produced a compressed, easy-to-understand, 10-page Action Plan” to make the results of its study accessible to the general public and local decision makers.\footnote{490} GeoSyntec and SRWC also held meetings for communities affected by the Town Line Brook pollution. They defined community broadly to include residents, government officials, community groups, and businesses. For instance, GeoSyntec, SRWC, and the MET hosted an October 2001 strategy session for local officials and a November 2001 public forum.\footnote{491} Participants “explored the causes of flooding and water quality problems and discussed ongoing and potential public outreach/education activities, and mitigation alternatives to reduce flooding and improve water quality.”\footnote{492}

\begin{footnotes}
\footnote{486} GeoSyntec Study, supra note 485 (“MET was hoping to find an effective solution that would not drain the public coffers.”). Previous studies had suggested “hard engineering solutions that would cost tens of millions of dollars . . . .” Id.
\footnote{490} GeoSyntec Study, supra note 485.
\footnote{492} Id.
\end{footnotes}
In addition, GeoSyntec and SRWC emphasized education, with a special focus on middle school and high school students from the Town Line Brook watershed.\footnote{Larson, supra note 15 (discussing GeoSyntec and SRWC’s “education and outreach” initiatives, including programs for students from Everett, Malden, Revere, and Melrose); Town Line Brook Project Update, supra note 491 (reporting on projects “to increase public awareness and involvement in the watershed,” such as “education about the impact of pet waste on water quality, and natural history events for the public”).} They used MET grant funds to provide free educational programs and field trips that gave students first-hand experience with “water-quality testing, soil-sampling and plant and animal identification . . . .”\footnote{Larson, supra note 15; see Capone, supra note 482 (providing a detailed description of a field trip to the Town Line Brook by students from Malden’s Linden School). The goal of these programs was for “[s]tudents from area schools . . . to learn about their role in improving the watershed through classroom and field activities.” Town Line Brook Project Update, supra note 491.}

Moreover, GeoSyntec and SRWC promoted public awareness and involvement as well as remediation through community cleanup efforts. For example, in 2001, SRWC, State Representative Kathi Reinstein, and GE Aircraft Engines sponsored a “CoastSweep 2001” cleanup project of the Town Line Brook.\footnote{Volunteers Remove 10 Tons of Debris from Town Line Brook, SAUGUS RIVER WATERSHED COUNCIL (Oct. 2, 2001), http://www.saugusriver.org/news-011002.htm (discussing the cleanup project).} This project involved over seventy volunteers, including state and local officials, GE employees, SRWC members, students, and watershed residents.\footnote{Id.} By the end of the day, volunteers had removed ten tons of debris from the brook.\footnote{Id.}

Finally, the MET completed its multipronged strategy with implementation. It awarded the remainder of the Global Petroleum settlement funds to the city of Revere to put into effect recommendations from GeoSyntec’s study.\footnote{Id.} Revere used the funds for an “offline storage and marsh restoration pilot project . . . to assess and demonstrate the viability of full-scale implementation of [the study’s] recommendations[,] . . . [p]ublic access improvements such as passive recreational trails and wildlife observation points[,] . . . [p]ublic outreach regarding the project, and interpretive information at the site.”\footnote{Id.}

In sum, although the MET’s experience with the Global Petroleum settlement involved only a “2.5 mile long tidal creek . . . just north of Boston,”\footnote{Id.} its lessons are far-reaching. It suggests the potential of environmental trusts to use settlement funds to address past, present, and future environmental harm. As the next Part will show, this is only one of the many lessons that the MET offers.

\footnote{Volunteers Remove 10 Tons of Debris from Town Line Brook, SAUGUS RIVER WATERSHED COUNCIL (Oct. 2, 2001), http://www.saugusriver.org/news-011002.htm (discussing the cleanup project).}

\footnote{Id.}

\footnote{Id.}

\footnote{Town Line Brook Update, SAUGUS RIVER WATERSHED COUNCIL CURRENTS, Fall 2006, at 3, available at http://www.saugusriver.org/Fall2006Layout.pdf.}

\footnote{Id.}

\footnote{Quigley et al., supra note 452, at 78–79.}
IV. SETTLEMENT PROCESS FLAWS AND REFORMS

The MET aspires to be a national model for innovative administration and distribution of environmental settlement funds. Although it is a Massachusetts state organization and focuses exclusively on Massachusetts environmental issues, the MET has reached out to environmental trusts in other states and has participated in the national debate over environmental settlements. It has pressed federal as well as state officials for changes in settlement regulations, policy, and practice and has advocated for the use of environmental trusts. The MET thus offers guidance to reformers nationwide. It exposes flaws in the environmental settlement process and suggests potential reforms.

A. Flaws

As we have argued elsewhere, the environmental settlement process has four major flaws: (1) unpredictability, (2) lack of transparency, (3) limits on participation, and (4) constraints on the use of funds. The MET experience demonstrates how these flaws impede environmentally beneficial uses of settlement funds.

1. Unpredictability

Environmental settlements occur on an ad hoc basis. The decision to negotiate a settlement or even bring an action in the first place is left to the discretion of federal and state enforcement agencies and prosecutors. Few guidelines exist to encourage settlements or steer parties through the settlement process. Similarly, there are no formal procedures or mechanisms for potential recipients like the MET to contact parties and submit proposals for settlement funds. One result, in the words of one MET trustee, is that “a
good many opportunities have been neglected along the way.” The prospects for a settlement depend instead on the particular constellation of individuals and interests involved in a given case, as even the Boston Harbor case that created the MET illustrates.

Unpredictability in the settlement process has plagued the MET throughout the Trust’s twenty-five year history. According to one participant, “the results were quite spotty depending upon the inclination of a particular assistant attorney-general handling environmental cases to include an MET piece in the settlement.”

In some cases, the MET was fortunate enough to have a sympathetic prosecutor, concerned citizens’ group, or innovative judge. For example, in March 1993 testimony before the Massachusetts legislature, MET Chairman Maynard Goldman stated “[t]he current Attorney General [Scott Harshbarger] has been supportive of the [MET] and its activities.” MET Executive Director Robbin Peach two months later echoed this sentiment. She asserted that the MET had “received approximately half of its income from settlements recovered by a supportive attorney general’s office.”

In other cases, however, the MET has encountered resistance, sometimes to the point of “hostility” on the part of federal and state enforcement officials. In reflecting on his experience with settlements, MET trustee Charles H.W. Foster wrote: “What was especially galling to me was the attitude of the federal and state enforcement officers that this was their business not ours . . . .” “[B]oth the EPA and the state enforcement people felt that settlement funds were theirs to distribute as they saw fit.”

The terms of MET settlements, including the amount of the funds, specified projects, and constraints have been just as unpredictable. Here, too,
confusion reigns due to inadequate guidelines.\footnote{520}{See Hearing on H.R. 3411, supra note 2, at 4 (testimony of John Bullard) (referring to “confusion in [f]ederal policy”).} Parties often presented settlements to the MET as fait accompli. In fact, in some cases, settlements came as a complete “surprise” to the MET.\footnote{521}{Letter from Hinkley to Foster, supra note 303 (discussing the Rockmore settlement).} This exposes another, related flaw of the settlement process—lack of transparency.

2. \textit{Lack of Transparency}

Secrecy permeates the settlement process—from the initial enforcement decision to the ultimate settlement of a case.\footnote{522}{See Foster & Foster, supra note 17, at 7–8, 15, 22–23 (discussing lack of transparency in the traditional scheme and continuing problems under reforms).} No comprehensive federal and state databases exist to inform interested parties of pending and successful negotiations.\footnote{523}{Some federal and state agencies post proposed settlement agreements on their websites, issue press releases, and/or provide summaries of agreements. See Foster & Foster, supra note 17, at 17 & nn.111–12 (discussing and providing examples of these documents). For Massachusetts examples, see supra notes 273, 277, 325 and accompanying text.} In fact, many settlement agreements, including those involving the MET, are unpublished and inaccessible to the public.\footnote{524}{See Foster & Foster, supra note 17, at 7–8 (discussing unpublished agreements).} The settlement process often consists of “backroom negotiations”\footnote{525}{Mark Seidenfeld & Janna Satz Nugent, “The Friendship of the People”: Citizen Participation in Environmental Enforcement, 73 GEO. WASH. L. REV. 269, 279 (2005).} that are “outside the gaze”\footnote{526}{E-mail from William Hinkley to Frances H. Foster (July 12, 2012) (on file with authors).} of the MET and general public. This has been true even when prosecutors and violators were actively considering the Trust as a possible recipient of settlement funds. As MET Program Director William Hinkley observed, “[I]n many cases, we are not aware that a settlement is in the works until the very last minute.”\footnote{527}{Id. at 22–23 & nn.155–59 (discussing such limitations).}

The settlement process generally does not require notice even to those with the greatest stake in the outcome—the communities and individuals affected by the violation.\footnote{528}{Some federal and state laws provide for notice of proposed settlement agreements and consent decrees for public comment. See Foster & Foster, supra note 17, at 17 & nn.108–10. However, even these laws contain significant loopholes and exclusions. Id. at 22–23 & nn.155–59 (discussing such limitations).} For example, in the \textit{ExxonMobil} case, Mystic River watershed residents learned of the settlement agreement between the Justice Department and ExxonMobil shortly before the parties were scheduled to present the agreement for final court approval. They found out about the agreement only because Mitch Hartley of the U.S. Fish and Wildlife Service decided to attend a meeting of local community groups “to give them some overview of the NAWCA program and to give them sort of a sense of how it worked . . . .”\footnote{529}{ExxonMobil Sentencing Transcript, supra note 324, at 30 (testimony of Mitch Hartley).} As a result, these groups had to file their petition objecting to

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\begin{itemize}
  \item \footnote{520}{See Hearing on H.R. 3411, supra note 2, at 4 (testimony of John Bullard) (referring to “confusion in [f]ederal policy”).}
  \item \footnote{521}{Letter from Hinkley to Foster, supra note 303 (discussing the Rockmore settlement).}
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  \item \footnote{529}{ExxonMobil Sentencing Transcript, supra note 324, at 30 (testimony of Mitch Hartley).}
\end{itemize}
the proposed NAWCA community service payment “at the absolute last moment”—literally two hours before the sentencing hearing.\textsuperscript{530}

In a few cases, the MET learned of settlement negotiations from parties. Even then, however, the Trust often received only minimal information about the case and the terms of the settlement it might later have to implement. The \textit{Rockmore} case is illustrative. According to Hinkley, “the prosecutor simply inquired if the Trust would be able to conduct a program in Salem Harbor. The defendant and the details of the case were not revealed until both parties had accepted the agreement and a court date was set.”\textsuperscript{531}

Some negotiating parties have specifically prohibited communication of such information by confidentiality agreements. For example, in the \textit{GE Housatonic River} case, parties signed a legal document stating that “the parties, their representatives, and the mediator(s) may not disclose information regarding the negotiations including settlement terms, proposals, offers, or other written or oral statements made during the negotiations, to third parties, unless all parties otherwise agree.”\textsuperscript{532}

This lack of transparency may continue up to the very end of the settlement process. For instance, on December 6, 1991, the Massachusetts Attorney General’s Office and the town of Plymouth reached a settlement that included a $15,000 payment to the MET.\textsuperscript{533} The parties did not notify the MET.\textsuperscript{534} Instead, MET staff and trustees were “surprised to hear of the settlement”\textsuperscript{535} from a December 7, 1991 \textit{Boston Globe} newspaper article.\textsuperscript{536}

We acknowledge that secrecy can sometimes play a positive role in settlement negotiations.\textsuperscript{537} Our point is that the balance between the parties’ need for secrecy and the affected communities’ need for participation is poorly struck. For example, one state flatly prohibits the participation of affected community representatives in the state’s environmental settlement negotiations “due to the confidential nature of settlement negotiations.”\textsuperscript{538}

\textsuperscript{530} \textit{Id.} at 41 (testimony of EkOngKar Singh Khalsa), 68–69.
\textsuperscript{531} Letter from Hinkley to Foster, \textit{supra} note 303.
\textsuperscript{533} See \textit{supra} notes 369–372 and accompanying text (discussing the case).
\textsuperscript{534} Memorandum from Peach to Board Members, \textit{supra} note 371.
\textsuperscript{535} \textit{Id.}
\textsuperscript{536} \textit{Plymouth Agrees to Treatment Plant}, \textit{supra} note 370.
\textsuperscript{537} See Marc B. Mihaly, \textit{Citizen Participation in the Making of Environmental Decisions: Evolving Obstacles and Potential Solutions through Partnership with Experts and Agents}, \textit{27 PAC ENVTL. L. REV.} 151, 192 (2009–2010) (arguing that “a closed forum provides a superior setting for land use and environmental decision-making”). “Confidential discussions” and “private negotiations” can promote compromise, cooperation, and problem solving. \textit{See id.} at 190–92. Negotiations in a “private setting” can allow participants to gain familiarity with the issues and opposing parties’ agendas, develop “mutual trust,” explore even the riskiest options, and “articulate[] ideas which would have dismayed others in their respective groups . . . who [had] not been privy to the discussions.” \textit{Id.}
\textsuperscript{538} \textit{ARIZ. DEPT. OF ENVTL. QUALITY, COMPLIANCE & ENFORCEMENT HANDBOOK} 8-9 (2003), available at http://www.azdeq.gov/function/forms/download/ce_handbook.pdf (“Representatives of
3. **Limits on Participation**

The MET experience also shows that the settlement process often excludes those who could best help design environmentally beneficial uses of settlement funds—affected communities and outside experts.539

**a. Affected Communities**

Federal and state authorities have pledged to encourage public participation in all stages of the settlement process.540 Yet, even the most promising reforms restrict public access to and involvement in what may well be the most crucial stage—negotiations.541 In fact, in some cases, such as the **GE Housatonic River** case, a party has “refused to negotiate unless members of the community were left out of the process.”542 As a Pittsfield community group said of the GE negotiations, “It has been painful to watch others negotiate the fate of our community and our river.”543

Once parties have reached agreement, affected communities have greater opportunities to participate. Most notably, several federal and state statutes and regulations give the public at least thirty days to comment on a proposed agreement before that agreement becomes final.544 Some laws, such as the Federal Clean Air Act, even require the government to provide notice in the Federal Register of the proposed agreement and the public comment period.545 That statute requires the government to consider the comments, but does not require that the government respond to them.546

Even where communities are invited to participate in the settlement process, practical constraints may undermine these legal guarantees. This reality has been a particular problem for the communities involved in so many MET cases—environmental justice communities that lack the time, financial resources, and technical expertise to locate and evaluate proposed settlement

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539. See Foster & Foster, supra note 17, at 18–23, 32–34 (discussing exclusion of affected communities and outside experts).
540. See id. pt. III.B.2 (discussing “participatory reforms” and their limits). For example, in its May 2003 “Public Involvement Policy,” the EPA stated as one of its “goals . . . [to i]nvolve the public early and often throughout the decision-making process.” Public Involvement Policy, 68 Fed. Reg. 33,946, 33,948 (June 6, 2003).
541. See Foster & Foster, supra note 17, at 20, 23 (discussing limits on participation in negotiations).
542. Jastremski, supra note 532, at 53.
544. See Foster & Foster, supra note 17, at 17 & nn.108–10, 23 & n.156 (citing examples of federal and state statutes and regulations).
545. 42 U.S.C. § 7413(g) (2012) (“At least [thirty] days before a consent order or settlement agreement . . . is final or filed with a court, the [EPA] Administrator shall provide a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action or matter to comment in writing.”). 546. Id.; see Foster & Foster, supra note 17, at 22–23 (discussing Clean Air Act comments).
agreements and consent decrees. As Professor Eileen Gauna observed, “Many community residents and environmental justice organizations are busy addressing problems on shoestring budgets, and have little time or resources to peruse the Federal Register.”

In response to these practical constraints on participation, commentators have called for technical and legal assistance to “[d]isenfranchised groups,” including “hiring economists, engineers, and lawyers.”

The ExxonMobil case points to one particular limitation on participation—inequitable publicity. The mere fact that a proposed settlement agreement is open to public comment means little if the affected community does not know that the agreement exists—exactly what occurred in ExxonMobil. Yet, this is precisely the situation that many such communities confront.

Even if communities have the opportunity to review proposed settlement agreements and offer critical comments and alternative schemes for use of settlement funds, additional challenges remain. The GE Housatonic River case is a prime example. After a year of negotiations, the parties reached a settlement. The EPA posted on its website a summary of the proposed consent decree. The public had access to copies of the actual document at four locations and a period of sixty days to provide comments. Unfortunately, however, local community groups and residents were “at a serious disadvantage, confronted with a several hundred page technical document.” Because they had been excluded from the negotiations, they did not have sufficient time “to digest the information” and “gain the knowledge needed to respond well.” That is, lack of resources affects not only whether a community can respond, but also how quickly they can do so.


549. Anne L. Kelly, Reinvention in the Name of Environmental Justice: A View from State Government, 14 VA. ENVTL. L.J. 769, 777–78 (1995) (discussing these proposals); Mihaly, supra note 537, at 155, 207 (arguing that “lay participation cannot successfully affect environmental decision-making unless assisted by attorneys and experts” and proposing approaches to promote “a thoughtful partnership of citizens and experts”). Marc Mihaly also discusses existing and proposed schemes for “the financial subsidy of citizen participants” to cover the expense of obtaining and evaluating the relevant documents. Id. at 196–97.

550. See supra notes 529–530 and accompanying text (discussing inadequate notice).

551. See supra notes 528–530.


553. Jastremski, supra note 532, at 20–21. For the text of the EPA summary, see id. at 101–04 (app. A).

554. Id. at 21.

555. Id. at 83.

556. Id. at 86, 89.
b. Outside Experts

In a 1994 letter to Assistant Attorney General Lois Schiffer, MET Executive Director Robbin Peach wrote: “Environmental trusts . . . are uniquely positioned to help . . . structure supplemental environmental projects. . . . The trusts consist of thoughtful, logical, creative people with a useful base of experience and knowledge.”557 Yet, over the past twenty-five years, federal and state authorities have largely ignored the MET’s expertise in designing optimal uses of settlement funds. In case after case, they have excluded the MET from the settlement process.558

This myopic approach is not restricted to the MET. Nationwide, law, policy, and practice limit participation by outside experts in the settlement process.559 In so doing, the current scheme disregards the productive role these experts could play. “[A]llowing third part[ies] . . ., who specialize in environmental projects to come up with ideas [would] likely lead to increased idea generation as well as higher quality projects.”560

Instead, the principal participants are those often least suited for the job. Litigators and enforcement officials with minimal background in and commitment to environmental issues tend to dominate the settlement process.561 Particularly troubling is the “primacy of lawyers”562 on both sides of the table. As Professor Bradley Karkkainen has argued, lawyers encourage “split-the-difference, least common denominator negotiated settlements [that] . . . may turn out to be no solutions at all, but rather impediments to the truly creative problem-solving processes that are needed”563 to address both present and future environmental harms.

As the next subpart will show, this exclusion of environmental experts as well as the concerned public is only one of the reasons environmental settlements have failed to specify effective uses of settlement funds.

4. Constraints on the Use of Funds

At the April 6, 2009 ExxonMobil sentencing hearing, Assistant U.S. Attorney Jonathan Mitchell proclaimed that the proposed settlement was “a resounding success for the public. It sends a strong deterrent message to not only the oil industry, but also corporate America in general that they have to take their environmental obligations seriously.”564 By the end of the hearing,

557. Letter from Peach to Schiffer, supra note 287, at 1.
558. See, e.g., supra note 531 and accompanying text (discussing the Rockmore case).
559. See Foster & Foster, supra note 17, at 32–34 (discussing exclusion of experts).
561. See Foster & Foster, supra note 17, at 4–5, 32–34 (discussing participants in the settlement process).
563. Id. at 572.
the settlement had sent another message: theoretical and legal constraints can lead to “inappropriate” use of settlement funds. In essence, the two-year ExxonMobil negotiations resulted in a community service provision that diserved the community. Such constraints on the use of funds have challenged the MET throughout its twenty-five year history.

a. Dominance of Punishment and Deterrence over Environmental Benefit

Mitchell’s presentation confirmed that for many federal and state prosecutors, punishment and deterrence are the overarching goals of the environmental enforcement and settlement process. The principal objective was to hold the offender, ExxonMobil, accountable and in so doing deter ExxonMobil and others from future misconduct. Mitchell described the settlement as follows:

We’ve been able to arrive at a resolution in which a very large corporation has been accountable for its behavior. It is about to apologize in court for that behavior. It is about to pay the maximum fine allowable under the law. It is about to pay $5.6 million in community service money. It has put $4.6 million into its facility to avoid future spills. It is about to be monitored for the next three years by a court-appointed monitor to insure that it continues to behave, and it has to pay for the cleanup.

Mitchell then stressed the settlement’s broader significance—its “deterrent message” to other companies.

Although the ExxonMobil settlement also promoted environmental benefit as a secondary goal through its community service provision, this has not been true in other MET cases. The emphasis on punishment and deterrence has impeded the MET’s ability to receive settlements. As a MET trustee observed of his experience with government prosecutors, “sticking it to the offender was the priority, not arriving at a common sense, constructive settlement for all parties.”

The MET has particularly encountered resistance in federal cases. In 1995, CET President Joseph Bodovitz sought to explain that resistance:

Based on my earlier experience[...], and on Maynard’s report, it seems to me the problems are (a) legal—behind which people who don’t want trusts can hide; (b) political—there isn’t any big push for this except for our modest efforts; (c) financial—the prospect of free money from polluters has agency administrators salivating, and believing they can spend the money at least as well as an outside trust; and (d) cultural—within the Justice Department there are no particular rewards for negotiating nifty trust

565. See supra note 342 and accompanying text.
567. See supra Part III.A (discussing settlement goals).
569. See supra text accompanying note 564 (quoting Mitchell).
570. E-mail from Foster to Foster, supra note 512.
agreements, but relatively more applause for fining polluters and threatening criminal violations.\textsuperscript{571}

By 2006, MET Program Coordinator Amy Breault had concluded that no “significant revenue (if any) will be forthcoming through EPA settlements.”\textsuperscript{572} Both Justice Department and EPA officials have expressly rejected the MET position that environmentally beneficial credit projects should be the rule rather than the exception.\textsuperscript{573} Assistant Attorney General Roger Marzulla expressed this view most forcefully in correspondence with Foster: “Limitations are necessary because unfettered use of credit projects might impede overall enforcement of the environmental statutes.”\textsuperscript{574} He argued that unlike credit projects, monetary penalties ensure that defendants receive punishment for “environmental misconduct . . . [and] have proven to be the most powerful deterrent against future violations both for the individual defendant who pays them and for the regulated community as a whole . . . .”\textsuperscript{575} In short, punishment and deterrence trump environmental benefit.

Although the MET’s relationship with federal officials has always been cordial, issues of money and control tend to put federal officials’ interests in conflict with those of environmental trusts. As a result, settlement proceedings can be contentious affairs concentrating mostly on who will get the settlement money and how it will be expended. As one commentator put it:

To them, the public is emotional and ill-equipped to deal with technical matters. Participation programs demand large amounts of time, are difficult to manage, and conflict with the administrative goal of efficiency. In addition, environmental decisionmakers are as reluctant to give up power as are other administrators, and are similarly plagued by understaffed offices and limited funds.\textsuperscript{576}

In addition, both federal and state officials may be constrained by legal requirements that fines and penalties go to the general treasury.\textsuperscript{577}

\textbf{b. Narrow Definitions of Victim and Harm}

According to Jonathan Mitchell, what made the proposed ExxonMobil settlement so extraordinary was the nominal impact of the offense. He characterized ExxonMobil’s oil spill into the Mystic River as simply the result of “sloppiness,”\textsuperscript{578} It had “no victims” other than three boat owners who had

\textsuperscript{571} Letter from Joseph E. Bodovitz to Charles H.W. Foster (Mar. 13, 1995) (on file with authors).
\textsuperscript{572} Memorandum from Breault to Board, supra note 297, at 3.
\textsuperscript{573} See supra note 289 and accompanying text (setting out the MET’s view).
\textsuperscript{574} Letter from Marzulla to Foster, supra note 50, at 2.
\textsuperscript{575} Id. at 1–2.
\textsuperscript{576} Nancy Perkins Spyke, Public Participation in Environmental Decisionmaking at the New Millennium: Structuring New Spheres of Public Influence, 26 B.C. ENVTL. AFF. L. REV. 263, 292 (1999) (citations omitted); see also E-mail from Joseph Bodovitz to Charles H.W. Foster (July 22, 2009) (on file with authors) (“The Justice Dept. environmental lawyers wanted to be able to show Congress how valuable they were, by bringing lots of dollars into the federal treasury from fined polluters.”).
\textsuperscript{577} See Foster & Foster, supra note 17, at 8–9, 27–29.
\textsuperscript{578} ExxonMobil Sentencing Transcript, supra note 324, at 14.
sustained a grand total of $11,000 in damage.\textsuperscript{579} The spill “didn’t . . . kill fish or birds. It wasn’t washing up on the beaches.”\textsuperscript{580} Nonetheless, the federal government “took a stand, and . . . the public is done well by that.”\textsuperscript{581}

What emerged at the sentencing hearing was a very different vision of the ExxonMobil oil spill’s impact. Mystic River watershed community representatives and Judge Saris challenged Mitchell’s definitions of victim and harm. Indeed, Roseann Bongiovanni declared that she “fe[lt] somewhat insulted by Mr. Mitchell’s comments that there were no victims.”\textsuperscript{582} She pointed out that on the day of the spill, she and other Chelsea residents “couldn’t breathe because the smell of diesel was so horrible.”\textsuperscript{583}

Community representatives and Judge Saris herself looked beyond the immediate harm caused by the spill. For example, Eugene Benson stated that “the victims are long-standing. They’re people who live near the river who would like to use the river for recreation, and over the decades, as we’ve found, spills and other degradations of the water has made it not what it should be.”\textsuperscript{584} Bongiovanni went even further. “Our community is a victim each and every single day to environmental insults. This is a case of environmental justice.”\textsuperscript{585} Judge Saris provided another definition. “[T]he victim here is the environment” of the Mystic River watershed area—“the water and the cleanliness of the water and the cleanliness of the wetlands . . .”\textsuperscript{586}

These divergent views of victim and harm informed evaluations of the proposed settlement agreement. For Mitchell, because the victims and damage in the Mystic River watershed were at best “de minimis,”\textsuperscript{587} it was entirely appropriate to allocate the entire $5.6 million to NAWCA. He admitted under sharp questioning from Judge Saris that the Mystic River watershed could potentially receive “zero” from the settlement.\textsuperscript{588}

For those with more expansive views of victim and harm, the community service provision was unacceptable. As Judge Saris put it, “it’s got to be community service to the Mystic Watershed area.”\textsuperscript{589} The only debate was over whether the Mystic should be the beneficiary of some or all of the $5.6 million. As discussed above,\textsuperscript{590} the parties came up with a compromise provision that guaranteed at least $1 million would be spent on “Mystic priorities.”\textsuperscript{591}

\textsuperscript{579} Id. at 13. In addition, “[t]hey were all compensated by the Coast Guard.” Id.
\textsuperscript{580} Id. at 14.
\textsuperscript{581} Id.
\textsuperscript{582} Id. at 47.
\textsuperscript{583} Id. at 48.
\textsuperscript{584} Id. at 38–39.
\textsuperscript{585} Id. at 48.
\textsuperscript{586} Id. at 53. Judge Saris’s definition of the environment as a victim exposes another flaw in the environmental settlement process. The process does not adequately represent the interests of nonhuman victims. See Foster & Foster, supra note 17, at 22.
\textsuperscript{587} ExxonMobil Sentencing Transcript, supra note 324, at 13.
\textsuperscript{588} Id. at 17.
\textsuperscript{589} Id. at 65.
\textsuperscript{590} See supra notes 331–332 and accompanying text.
\textsuperscript{591} ExxonMobil Sentencing Transcript, supra note 324, at 70.
Narrow definitions of victim and harm have been a major constraint on MET use of settlement funds. Because of their focus on immediately identifiable victims and quantifiable damages, negotiating parties have tended to produce agreements requiring that “settlement funds . . . be spent out rather than used to create a permanent environmental improvement fund.”592 For example, the ExxonMobil and Rockmore agreements stipulated that the MET distribute funds within three years.593

Such agreements ignore the reality of environmental disasters. The ultimate toll on human and natural environments may well be unknown at the time of settlement proceedings.594 “[T]he threat . . . may be ‘gradual and silent, going undetected for years.’”595 Thus, the optimal settlement agreement would include, as one MET trustee argued, an award “that would ensure long-term attention to the ecosystems that [have] been affected.”596 Unfortunately, parties have adopted a different approach. Because of their narrow definitions of victim and harm, they have negotiated settlement agreements that promote “short-term, one-time projects . . . at the expense of the longer-term investments in the environment that are really needed.”597

c. Nexus Requirement

The ExxonMobil case also exposes the most significant constraint on the use of settlement funds—the notorious “nexus requirement.”598 Federal and to a lesser degree state enforcement authorities mandate that any proposed environmentally beneficial project undertaken as part of a settlement agreement must have an “adequate” relationship (nexus) with the violation at issue.599 In his 1994 keynote address at the MET Fifth Anniversary Conference, Joel Gross, Deputy Chief of the Justice Department’s Environmental Enforcement Section, set out the requirement thus: “There must be a nexus associated with the projects, e.g. the same ecosystems, populations and pollutants affected by the violation must be included.”600

592. Memorandum from Foster to Goldman and Peach, supra note 151, at 2.
596. E-mail from Foster to Foster, supra note 512.
597. Memorandum from Foster to Goldman and Peach, supra note 151, at 2–3.
598. See Foster & Foster, supra note 17, at 29–32 (discussing the nexus requirement and citing relevant literature).
599. Courts as well as enforcement agencies have invoked the nexus requirement. Id. at 30 & nn.215–20. In fact, the Federal Sentencing Guidelines require a nexus for any community service remedy. Id. at 30 & nn.215–16. Many states have adopted more lenient, discretionary approaches. Some states, like Colorado, do not even have a nexus requirement. Id. at 29 n.212.
600. MET, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY, supra note 401, at 4.
We argued earlier in favor of spending settlement funds in the geographical area that suffered the environmental damage. On its face, the nexus requirement seems congruent with that argument. As illustrated by the remarks of Assistant U.S. Attorney Jonathan Mitchell at the ExxonMobil sentencing hearing, the nexus requirement becomes problematic when combined with narrow definitions of victim and harm. Mitchell began his explanation of the $5.6 million community service payment to NAWCA as follows: “[W]e are required by DOJ policy to pick community service projects that have some nexus with the effects . . . .” Under Mitchell’s narrow definitions of victim and harm, ExxonMobil’s oil spill essentially had no “effects” on the Mystic River watershed and residents. Thus, Justice Department policy effectively ruled out community service projects that would specifically address Mystic issues. As a result, parties ended up with a proposed community service provision, under which, as Judge Saris underscored, potentially not “one penny [would] go” to the Mystic River watershed.

In many, if not most cases, this would be the end of the discussion. As a vast literature has documented, enforcement authorities, especially in the federal context, have increasingly “shrunk” both the definition and the scope of nexus to the point that few environmentally beneficial projects can meet the nexus requirement. This strict interpretation of nexus would likely preclude any allocation of ExxonMobil funds for environmental projects. Because the oil spill caused at most de minimis harm, no remedial project whatsoever would have an “adequate nexus” with the “effects” of the violation. Mitchell adopted a broader definition of nexus that allowed parties to allocate settlement funds for environmental purposes. He shifted the focus from ExxonMobil’s spill into the Mystic River to the impact of oil pollution in general on a “precarious ecosystem”—wetlands. Mitchell found a “clear and obvious nexus between wetland protection and oil pollution protection.” Accordingly, he contended that the proposed community service payment to NAWCA for wetlands-related projects satisfied the nexus requirement. Even though the parties acknowledged that NAWCA is a “North American-wide

601. See supra Part III.B.1.b (approving judges’ “focus specifically on the areas actually harmed by the environmental violation at issue”).
602. ExxonMobil Sentencing Transcript, supra note 324, at 15.
603. See supra Part IV.A.4.b.
604. ExxonMobil Sentencing Transcript, supra note 324, at 68.
605. See Kristl, supra note 47, at 241.
606. Mitchell had a track record of using settlement funds from “major environmental prosecutions” in Massachusetts to address environmental issues. ExxonMobil Plea Agreement Memorandum, supra note 332, at 5. Most notably, he negotiated settlements with Bouchard and with Overseas Shipholding Group, Inc. These agreements included community service payments to NAWCA for wetlands restoration in Massachusetts. See ExxonMobil Sentencing Transcript, supra note 324, at 18 (discussing these cases); see also supra notes 302–304 and accompanying text (discussing Mitchell’s role in the Rockmore case).
607. ExxonMobil Sentencing Transcript, supra note 324, at 15.
608. Id. at 15–16.
609. Id.
fund,” they “tried to . . . strike a balance between national and regional concerns” with “language in the plea agreement [that] requires the money to go to Massachusetts, the Massachusetts coast, with a preference for the Mystic River.”

Judge Saris found Mitchell’s definition of nexus just as problematic as his definitions of victim and harm. She responded, “If every single penny of this went to remote areas of Buzzards Bay to support waterfowl, that may be great for the Buzzards Bay community and for Massachusetts and the world, just because we want to preserve our environment, but it would not in my view be appropriately tailored to the situation in this case.” As a result, she directed parties to revise the plea agreement to ensure that the community service provision addressed environmental concerns on the local as well as regional and national levels.

The nexus requirement has often frustrated MET efforts to obtain and administer settlement funds. Unlike the ExxonMobil case, the problem usually has been enforcement agencies’ overly narrow definition of nexus. As a MET trustee observed from his experience with settlements, nexus is “one of the most troublesome features of government-involved settlements.” He concluded that “[t]he negotiators always want the narrowest focus; the recipients the largest.” The New Bedford case is a prime example. Federal officials invoked the nexus requirement to reject MET overtures to administer settlement funds. They adopted the “narrowest possible view of nexus for the expenditure of the funds.”

State as well as federal enforcement agencies are developing an increasingly strict definition of nexus. For instance, in 2006, MET Program Coordinator Amy Breault met with officials from MassDEP and the Massachusetts Attorney General’s Office. She reported that MassDEP had “expressed similar concerns” as the EPA and “the [attorney general’s] office . . . too [was] closely interpreting the definition of a [SEP] and . . . [would] only direct funds to the MET if the violation stemmed from the Clean Water Act or was clearly water-related and if the Trust would be capable, through the Restricted Program, of righting the wrong that occurred as a result of the violation.” She contrasted this with past practice. “Previously, MET has received settlement funds from a myriad of violations, and, if geographic/issue-related language was included, it was typically more general in nature.”

610.  Id. at 15, 17, 67.
611.  Id. at 65.
612.  Id. at 70.
613.  Letter from Foster to Bodovitz, supra note 203.
614.  Id.
615.  See supra notes 459–464 and accompanying text (discussing the New Bedford case).
616.  Foster, supra note 48, at 4.
617.  Memorandum from Breault to Board, supra note 297, at 3–4 (on file with authors).
618.  Id. at 3.
619.  Id.
The nexus requirement has not only been an externally imposed constraint on the MET’s use of settlement funds. The MET has contributed to the problem by internally creating its own nexus requirement. As discussed above, the MET has expressly limited its jurisdiction to disbursing funds for “water projects.” By resisting calls for a more “holistic” approach to the use of settlement funds, the Trust has effectively handcuffed itself.

d. Exclusion of Third Party Administration of Settlement Funds

The environmental settlement process generally excludes outside experts from participating in the formulation of environmentally beneficial uses of settlement funds. This exclusion continues in administration of such funds. Here, too, the settlement process ignores the productive role independent, experienced third parties like the MET could play in promoting environmental objectives.

The ExxonMobil case illustrates this flaw. The negotiating parties apparently did not even consider an environmental trust or independent nonprofit organization to receive the $5.6 million community service payment. Instead, they followed a practice all too familiar to the MET. Just as in the New Bedford, GE Housatonic River, and Bouchard cases, they selected a “federal agency” to administer the funds. It was only thanks to the intervention of community groups and Judge Saris that the “government . . . revisited its position regarding the community service payment[,] . . . familiarized itself with MET and the programs it supports, and . . . concluded that MET [was] well-positioned” to administer ExxonMobil funds. Had the ExxonMobil funds gone to a federal agency, it is unlikely the agency would have spent them in the Mystic Valley.

The ExxonMobil parties’ initial failure to select the MET or another independent third party seems to be more the product of oversight than deliberate exclusion. In other situations, the MET has confronted resistance to the very notion of third party administration of settlement funds. EPA policy and personnel have stated in no uncertain terms that the agency disfavors use of third parties. For example, the EPA’s SEP policy provides that when a defendant has agreed in a negotiated settlement to perform an environmentally beneficial project, the defendant cannot “simply mak[e] a cash payment . . . or

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620. See supra notes 204–210 and accompanying text.
621. See supra notes 201–207 and accompanying text (discussing proposals for a holistic approach).
622. See supra Part IV.A.3.b.
623. ExxonMobil Sentencing Transcript, supra note 324, at 40 (statement by Judge Saris).
624. ExxonMobil Plea Agreement Memorandum, supra note 332, at 1, 7.
625. See supra notes 324–333 and accompanying text (discussing Judge Saris’s skepticism).
626. See, e.g., supra notes 297–301 and accompanying text (discussing comments by EPA lawyer Amelia Katzen).
donation to a third party” to implement that project. According to a 2003 internal EPA memorandum, this is true even when that third party is an environmental organization that specializes in the very type of project specified in the settlement agreement.

Luckily for the MET, Massachusetts enforcement officials have been more receptive than their federal counterparts to third party administration of settlement funds. In fact, MassDEP’s SEP policy specifically cites as one of its “SEP Examples” the June 30, 2008 settlement with Hyannis Air Services, Inc., which included a $5350 payment to the MET.

Unfortunately, even when parties choose a third party, significant limitations may remain. As Part III has documented, several MET settlements have come with strings attached and extensive restrictions on MET discretion over expenditure of funds. Indeed, from the very start, the Trust encountered this problem. According to one of the MET’s founders, “Even the much heralded Boston Harbor pollution case directed where and how the funds would be spent...” These constraints on the use of settlement funds once again amount to a missed opportunity. They impede an independent, experienced third party like the MET from doing what it does best—disbursing funds in the creative, flexible manner, that is essential to address future as well as present environmental harms.

B. Reforms

The MET’s experience not only exposes flaws in the settlement process. It also offers potential reforms.

1. Addressing Flaws in the Settlement Process

The MET provides broad outlines of strategies environmental trusts could explore to address the four major flaws in the settlement process identified above: (1) unpredictability, (2) lack of transparency, (3) limits on participation, and (4) constraints on the use of funds.

a. Promoting Predictability

Looking back at his nearly three decade-long involvement with environmental trusts, Charles H.W. Foster concluded: “I remain convinced that..."
personal leadership and commitment can only go so far. There needs to be a supportive environment and a framework for action if even a good idea is to succeed. The MET demonstrates that environmental trusts can play an active role in creating that framework on both federal and state levels.

i. Advocating Changes in Settlement Law, Policy, and Practice

The MET has shown the critical importance of promoting predictability in the settlement process. It has called attention to the ad hoc nature of that process and encouraged federal and state authorities to develop more formal and uniform guidelines on the use of settlement funds for environmental purposes.

The MET has maintained that “[h]elping to influence the developing federal policy on settlements is a must.” In fact, as Part I.B has documented, this proactive approach began even before establishment of the Trust. Several individuals later involved in the design and operations of the MET joined a “California contingent” in a “determined effort” to persuade the EPA, Justice Department, and Congress of the “merits of environmental trust settlements.” These participants emphasized inconsistencies in federal approaches. For example, at the 1987 Environmental Trusts/Funds Roundtable, CET President Joseph Bodovitz reported that “[a]lthough the Dept. of Justice is sending negative signals on the idea of contributions-in-lieu-of-fines, there seems to be some growing [c]ongressional interest, reflected in language in the conference report on the 1986 [Clean Water Act] amendments.”

Similarly, in a 1987 letter to Representative Gerry Studds, Foster noted the “current policy dispute between Justice and EPA” and recommended legislative amendments that would “help resolve” that dispute. In a 1988 letter to Attorney General Richard Thornburgh, he expressed particular concern about the “absence of a coherent Justice policy” and the federal government’s failure to produce final or even preliminary guidelines on environmental settlements. Foster encouraged the Attorney General to “enunciate a Thornburgh policy while the guidelines are being debated.”

Although these overtures were largely unsuccessful, there was one notable exception—Representative Gerry Studds’s 1987 hearing on federal credit projects. Representative Studds concluded the hearing by recommending

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633. Foster, supra note 58, at 11.
634. See supra Part IV.A.1 (discussing unpredictability).
635. Letter from Foster to Goldman, supra note 148.
636. See supra Part I.B.
638. Foster & Hoyte, supra note 5, at 8; see supra notes 48–57 and accompanying text (discussing these efforts).
640. Studds Letter, supra note 279, at 82.
641. Letter from Foster to Thornburgh, supra note 50, at 1.
642. Id.
643. See supra notes 53–57 and accompanying text (discussing the hearing).
that Congress move “in the direction of attempting to clarify . . . [by] a more strongly worded statement . . . or . . . statutory language changes” “those circumstances under which these special projects might be pursued.”

The MET has continued these early outreach efforts to federal officials. For instance, in October 1994, MET Chairman Maynard Goldman and MET Executive Director Robbin Peach met with EPA Assistant Administrator for Enforcement Steve Herman to discuss possible changes in federal settlement policy. MET trustees and staff also have suggested reforms through correspondence with key federal officials. Two examples are Peach’s November 1, 1994 letter to Assistant Attorney General Lois Schiffer and Foster’s August 9, 1997 letter to EPA Regional Director John DeVillars.

Although the MET has identified the “federal ‘attitude’ with regard to settlements” as the principal impediment, it also has called attention to inconsistencies in state law, policy, and practice. The MET often has expressed concern about administrative and legislative actions that conflict with the Trust’s enabling act. For example, the MET has challenged proposed bills, including the 1993 Environmental Trust and Forfeiture Act and the 1996 Massachusetts Rivers Act, as “appearing directly contrary to the Trust’s organic act, established procedures, and its general fiduciary responsibilities.” In addition, the MET has exposed a lack of predictability in state enforcement agencies’ settlement policies and practices. For instance, in 2006, MET Program Coordinator Amy Breault pointed to a growing uncertainty in how the Massachusetts Attorney General’s Office and MassDEP defined SEPs and the conditions under which they would direct settlement funds to the MET. She recommended that “the next step [was] to sit down with [Mass]DEP and ask them to issue a formal opinion as to whether a contribution to MET is still considered a valid SEP.”

The MET experience suggests a variety of approaches environmental trusts could pursue to enhance predictability. Like the MET, environmental trusts could contact key federal and state personnel directly. Through correspondence and face-to-face meetings with such personnel, environmental trust representatives could help clarify existing, often unpublished, policies and practices and press for more predictable, appropriate, and accessible schemes. Environmental trusts also could take the lead in monitoring federal and state

644. *Hearing on H.R. 3411, supra note 2, at 2, 34.*
645. Memorandum from Foster to Goldman and Peach, *supra note 151* (discussing this meeting).
646. *See supra note 557 and accompanying text (discussing Peach’s letter).*
647. *See supra notes 383–384 and accompanying text (discussing Foster’s letter).*
649. *Draft Letter to Commissioner Struhs 1 (n.d.), in FOSTER PAPERS, supra note 12; see supra notes 264–267 and accompanying text (discussing the Massachusetts Rivers Act). For sources on the Environmental Trust and Forfeiture Act, see Goldman, *supra note 514; Letter from Foster to Peach,* *supra note 396; Peach, supra note 288.*
650. Memorandum from Breault to Board, *supra note 297, at 3–4.*
651. *Id. at 4.*
developments. For instance, at its Fifth Anniversary Conference, the MET “agreed to follow up to determine whether new regulations, polices, and or laws are being prepared and, if so, by whom.”

An even more ambitious strategy to promote predictability would be to participate in formulating laws and policies on environmental settlements. Environmental trust representatives could, as one MET trustee proposed, be members of “drafting teams.” If, at the very least, they could review and provide comments on “advance policy drafts.” As MET Executive Director Robbin Peach suggested in her letter to Assistant Attorney General Lois Schiffer, it could “be useful to have the advance perspective of the national environmental trust community prior to finalizing the [EPA settlement] policy document for public review . . . .”

The MET experience also suggests that environmental trusts could advance reforms in settlement law, policy, and practice by introducing lawmakers and policymakers to the concept and merits of environmental trusts. Over the past twenty-five years, the MET has made a concerted effort, through correspondence, meetings, and testimony on proposed bills, to familiarize government officials and legislators with environmental trusts in general and the MET in particular. For example, in a 1992 letter to Secretary Susan Tierney, MET Chairman Maynard Goldman presented a detailed summary of the MET’s origins, experience, administrative structure, and goals.

Similarly, in a 1993 letter to individual Massachusetts legislators, Robbin Peach set out the MET’s “concerns” about the proposed Environmental Trust and Forfeiture Act, provided a description of the MET and rationales for the use of environmental trusts, enclosed a list of “Trust-funded projects,” and asked the legislator to “note that the quality of projects in your district, and statewide, has been exemplary. Many have been models for projects elsewhere.”

The MET also has explored more indirect approaches to familiarize lawmakers and policymakers with environmental trusts. For instance, it invited federal and state officials to participate in its Fifth Anniversary Conference. The final participants included Massachusetts Secretary of Environmental Affairs Trudy Coxe, Deputy Chief of the Justice Department’s Environmental Enforcement Section Joel Gross, and EPA Regional Administrator John DeVillars.

652. Memorandum from Goldman to Board, supra note 648, at 1.
653. Memorandum from Foster to Goldman and Peach, supra note 151, at 3 (suggesting possible members of a drafting team, including environmental trust trustees).
654. Id.
655. Letter from Peach to Schiffer, supra note 287, at 2.
656. Letter from Goldman to Tierney, supra note 147.
657. Peach, supra note 288.
658. MET, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY, supra note 401. The MET also invited Assistant U.S. Attorney General Lois Schiffer, but she was unable to attend. Letter from Peach to Schiffer, supra note 287, at 1.
ii. Using Settlements to Promote Changes in Environmental Law, Policy, and Practice

The MET offers another lesson on how environmental trusts can help create a more predictable and effective framework for action. Over the past twenty-five years, the MET not only has promoted changes in law, policy, and practice on settlements. It also has used settlements to promote changes in law, policy, and practice on environmental issues. The 1992 GE case illustrates this approach.

In April 1992, the MET received $75,000 under a consent judgment against GE for illegal discharge of photochemical waste. The MET set up the Photographic Chemical Waste Project to administer the funds. The Trust’s first step was to hire Goldman Environmental Consultants, Inc. to conduct a research study of the photochemical waste discharge problem in Massachusetts and possible causes. The company “found a complex set of regulations, varying locally according to the requirements of each local sewage treatment authority.” In addition, it discovered that many photochemical users were not even “aware of...the regulatory requirements...” Goldman Environmental Consultants then “work[ed] with various regulatory agencies and the printing industry to revise regulations to make local and state regulations consistent...” It also launched public outreach and education programs. As the MET stated in its Tenth Anniversary Report, “This program served as a catalyst for the industry to work with the Department of Environmental Protection to develop standardized practices and compliance procedures for safe control of photochemical waste.”

b. Enhancing Transparency

The MET experience suggests possible reforms to make the settlement process more transparent. The Trust has focused principally on collecting information about settlements. MET trustees and staff often have called for the development of a database of settlements for “documenting precedents” and providing guidance for future settlements.

662. Id. at 79.
664. Id.
665. Id.
666. 10TH ANNIVERSARY REP., supra note 16, at 22.
In this regard, the EPA has taken the lead by creating a public database containing most of its own settlement materials.\(^{668}\) That is an important part of what Robbin Peach requested in a 1994 letter to Assistant U.S. Attorney General Lois Schiffer. Peach wrote, “EPA and Justice should make provisions internally to create a nationwide data base for settlements with provisions for keeping the information up to date.”\(^{669}\) In 1987, future MET trustee Foster contacted Environmental Law Institute President William Futrell, “to explore...some way of utilizing the Environmental Law Reporter [the Environmental Law Institute’s major publication] as a means of keeping track of new environmental settlements.”\(^{670}\) That effort failed, and the state response since then has been fragmented.\(^{671}\)

The MET shows that individual environmental trusts can contribute to the effort to make settlements transparent. For example, in 2001, the MET compiled a list of all settlements it had received since its founding.\(^{672}\) The Trust also has included in its annual reports lists of recent settlements.\(^{673}\) MET Program Coordinator Amy Breault suggested another possible contribution the MET might make: “[T]he Trust could consider becoming a ‘clearinghouse’ for water-related SEP project ideas; this would give defense attorneys an unbiased opportunity to flesh out SEP ideas prior to settlement negotiations with the EPA/[Mass]DEP/[Attorney General]. This ‘clearinghouse’ could also be used by various enforcement agencies...when they are considering entering into a SEP with a violator.”\(^{674}\)

The MET has used other techniques to make settlements more accessible to interested parties and the general public. Most notably, it has provided announcements and descriptions of MET-related settlements in press releases, newspaper articles, annual reports, and website postings.\(^{675}\) Another example is the 2001 article Preserving the Trust: The Founding of the Massachusetts Environmental Trust that MET trustees Foster and Hoyte prepared for a Harvard Kennedy School discussion paper series.\(^{676}\) They helped make the settlement process more transparent by providing an insiders’ account of how one settlement—the Boston Harbor settlement—was negotiated. But such efforts to make the negotiation process transparent are limited by the desire of

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\(^{668}\) The EPA maintains a database of cases and settlements that is limited to “significant” federal cases. See Cases and Settlements, EPA, http://www2.epa.gov/enforcement/cases-and-settlements (last visited Aug. 27, 2014).

\(^{669}\) Letter from Peach to Schiffer, supra note 287, at 2.


\(^{673}\) See, e.g., 1996 MET ANN. REP., supra note 141, at 14.

\(^{674}\) Memorandum from Breault to Board, supra note 297, at 4.

\(^{675}\) See, e.g., supra notes 15, 128, 400, 474.

\(^{676}\) Foster & Hoyte, supra note 5.
the parties for secrecy combined with the parties’ control over access to the negotiations.

In a memorandum to Maynard Goldman and Robbin Peach, Foster offered additional “specific suggestions” for enhancing transparency.677 These included “facilitation of a definitive descriptive piece(s) on settlements and environmental trusts for the benefit of legal practitioners, judges, environmental and enforcement agencies, the corporate community, non-profit organizations, and the public as a whole; . . . [and] sponsorship of research into legal, programmatic, financial, and institutional issues . . . .”678 As participants at the MET’s Fifth Anniversary Conference noted, such research projects could “explore why existing trusts aren’t used—instead, new ones are created; and take a systematic look at existing trusts, in order to assess where successes and failures lie, and how to increase success and decrease failure rates.”679 The conference took a first step in that direction with a roundtable discussion of five environmental trusts’ experiences and one specific case study—the 1990 Shell Oil settlement.680

Although the MET has emphasized reforms after parties have negotiated settlements, its actual experience with settlements demonstrates the need also to make earlier stages of the settlement process more transparent. As the Trust has discovered over and over again, the current system provides no formal mechanism to notify environmental trusts, other interested groups and individuals, and the general public that parties are even engaged in settlement negotiations.681 Instead, the MET has had to rely on word of mouth, media reports, or last-minute contacts by a negotiating party.682

This experience suggests a number of possible reforms environmental trusts might explore. At the very least, they might consider earlier efforts to obtain information on potential or pending negotiations. For example, at the 1987 Environmental Trusts/Funds Roundtable, FNE Executive Director William R. Humm reported that his organization was “currently tracking and exploring specific pollution events around New England that may be a source for contributions—in-lieu-of-fines.”683

Or environmental trusts could push for more ambitious reforms of the settlement process itself. Foster identified one such reform. “The crafting of the actual conditions [for use of settlement funds] might even be preceded by an open settlement conference where suggestions of all sorts [are] invited. While the final details of the settlement would still require negotiation among counsel for the defendant and the involved agencies, setting the agenda more openly

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677. Memorandum from Foster to Goldman and Peach, supra note 151, at 3.
678. Id. at 4.
679. MET, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY, supra note 401, at 2.
680. Id. at 1–4.
681. See supra Part IV.A.2.
682. Id.
683. 1987 Roundtable Minutes, supra note 51, at 3.
would avoid the appearance of a star-chamber proceedings . . . .684 As the next subpart will show, reforms of this sort could not only enhance transparency. They could also address another major flaw of the settlement process—limits on participation by those who could help design optimal use of settlement funds: affected communities and outside experts.

c. Encouraging Participation

The MET also provides general lessons on how to encourage participation in the settlement process. It has put particular emphasis on two groups: affected communities and outside experts.

i. Affected Communities

From the start, the MET has focused on the needs of environmental justice communities—the low income, usually minority, urban communities that bear the brunt of environmental damage.685 As the MET’s 1991 Transition Document stated, “The Trust feels that ‘blue-collar’ waterways . . . have not received the attention they deserve.”686 The MET has used both settlement funds and its own resources to address environmental injustice.687 For example, in October 2009 and June 2010, the Trust awarded over $1.5 million in grants to the Mystic River watershed, an area that contains the “majority of the most threatened environmental justice communities in Massachusetts . . . .”688 The MET distributed $1 million from the ExxonMobil settlement and an additional $508,000 from the Mystic River Program, a MET program funded through sales of the Trust’s three specialty license plates.689

The MET shows that environmental trusts can translate concern for environmental justice communities into concrete measures to encourage participation by such communities in the settlement process. The GE

684. Memorandum from Foster to Goldman and Peach, supra note 151, at 2.
Housatonic River case is illustrative. The principal site of GE’s PCB contamination was Pittsfield, a city the Massachusetts government officially classifies as an “economically depressed area” and an “environmental justice community.” Before the settlement, the MET provided funding to a local community group, the Housatonic River Initiative, to establish Housatonic River Restoration, Inc., “a broad-based coalition of interested and concerned stakeholders, to ensure public participation in the [negotiation] process.” The MET supported Housatonic River Restoration’s efforts to develop a “long-range plan” for the expenditure of the potential multimillion-dollar GE settlement to reflect the “vision and broad involvement” of local residents rather than “one-time fixes” by outside parties. Housatonic River Restoration used the funds to make “direct contact with over 1,000 individuals or groups living or working near the river;” to hold a regional conference “to facilitate brainstorming ideas for restoration of the river and its stewardship;” and to produce and publish a “professional document detailing a comprehensive, permanent plan for the care of [the] river.”

The MET has also gone beyond the environmental justice context to promote participation by affected communities more generally. For example, in the Bouchard case, the MET helped communities impacted by the Buzzards Bay oil spill build a coalition and successfully negotiate the NAWCA grant application process. According to MET Executive Director Robbin Peach, the result was that the “settlement money [that] could have been earmarked for anywhere in North America” ended up “funneled back to Buzzards Bay,” “the origin of [the] offense.”

ii. Outside Experts

The MET has emphasized the need to involve outside experts in both the formulation and administration of environmental settlements. Its experience suggests possible directions for reform.

One potential approach would be to include outside experts early in the settlement process—right after parties have determined responsibility for the environmental offense and calculated the appropriate monetary penalty. For example, in a 1987 report, future trustee Charles H.W. Foster argued that once “the question is simply what to do about the problem . . . one or more of the parties concerned should first commission an independent, professional study of the opportunities and options . . . and only then negotiate the particulars.” He contended that this approach would “avoid spur-of-the-moment decisions
about the size, purpose, and beneficiary of an environmental [settlement] . . . by litigators unfamiliar with environmental programs.”

Outside experts, such as existing environmental trusts, could also play an important role in the next stage of the settlement process. They could assist parties in “[t]he crafting of the actual conditions” for environmentally beneficial uses of settlement funds.

Finally, outside experts could participate more extensively in implementing the terms of environmental settlements. As participants at the MET’s Fifth Anniversary Conference underscored, the settlement process should “delegate responsibility and authority for administration to those with expertise in natural resource management.” The MET’s twenty-five year experience provides a compelling case that independent third parties, be they environmental trusts or “[n]on-profit environmental organizations of recognized leadership and stature,” are ideal vehicles for “receiving, managing, and administering settlement funds.”

d. Expanding the Use of Settlement Funds

The MET has called attention to a significant theoretical constraint on the use of settlement funds—the current scheme’s narrow definitions of victim and harm. As Part IV.A.4 has shown, the current scheme’s insistence on identifiable victims and quantifiable damage can limit an environmental trust’s ability to disburse settlement funds for optimal environmental benefit or even obtain such funds in the first place.

Reformers should explore more comprehensive definitions that reflect the reality of environmental disasters. The MET’s own experience demonstrates that harm may well transcend artificial man-made boundaries. For example, in the GE Housatonic River case, the PCB contamination originated at GE’s plant in Pittsfield, Massachusetts but ultimately spread “downstream from the site, extending through Massachusetts and into Connecticut.” Moreover, the MET has consistently emphasized that “water bodies are discrete entities in name only.” As Part II.C has documented, the Trust has invoked this rationale to extend its geographical jurisdiction far beyond the five harbors and bays specified in the initial enabling act.

Similarly, reformers should develop a more expansive definition of victim. The MET experience shows that the victim of an environmental offense may

697. Id.
698. Memorandum from Foster to Goldman and Peach, supra note 151, at 2.
699. MET, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY, supra note 401, at 4.
700. Memorandum from Foster to Goldman and Peach, supra note 151, at 2.
701. See supra Part IV.A.4.
703. PROGRAM PLAN, supra note 134, at 2.
704. See supra Part II.C.1.
not be easily identifiable or distinguishable from other resources. As Robbin Peach asserted in the Trust’s 2000 Annual Report, “Massachusetts’ natural communities and human communities are inseparable.” Indeed, the ExxonMobil sentencing hearing demonstrated that the very definition of the “community” harmed by an environmental disaster is elusive.

Finally, reformers should challenge the current scheme’s emphasis on immediate, short-term responses to an environmental offense. Instead, they should devise a new approach that recognizes that the full impact of an environmental disaster may be unknown and unknowable at the time of settlement negotiations. In fact, in some cases, an immediate response may be impossible. As Foster observed in 1987,

> [F]or certain kinds of pollution episodes, where the effects are long-standing and diffuse, establishing a permanent environmental trust is often the only really equitable remedy for the situation at hand. Despite the best of engineering and science, for example, pervasive substances like PCBs, chemicals, and petroleum derivatives just cannot be removed from living systems. Doing something for the environment is the only reasonable mitigating action that can be taken.

These new theoretical perspectives should inspire reformers to explore fundamental changes in environmental settlement law, policy, and practice. Reformers’ principal target should be the nexus requirement—the bane of the MET and other champions of environmentally beneficial uses of settlement funds. Reformers should focus first on federal and state enforcement agencies’ policies and practices. These administrative agencies have been and likely will continue to be the major source of settlement funds. At the very least, reformers should press for relaxation of current geographical and substantive limitations to reflect more comprehensive and realistic definitions of victim and harm. They also could challenge language in current policies, such as the EPA’s SEP policy, that discourages selection of third parties to administer settlement funds.

Moreover, reformers could consider changes in judicial policies and practices. For example, several recent federal criminal cases in which the MET was directly or indirectly involved—Bouchard, ExxonMobil, and Rockmore—demonstrated that fines and community service payments can be promising sources of settlement funds. Yet, just like federal administrative policies, the

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705. 2000 MET ANN. REP., supra note 11, at 3.
706. See supra Part IV.A.4.b.
707. See id.
708. Foster, supra note 2, at 85 (emphasis in original).
709. See supra Part III.B.1.
710. See supra notes 626–628 and accompanying text.
Federal Sentencing Guidelines contain nexus restrictions that impede creative responses to environmental disasters.\textsuperscript{712}

In addition, reformers might seek legislation to expand environmentally beneficial uses of settlement funds and environmental trusts. For instance, as one MET trustee recommended, Congress could enact legislation that would, \textit{inter alia}, allow “environmental and enforcement specialists” to deviate from “the normal nexus requirement” and would “defin[e] the purpose of an environmental improvement project, the circumstances under which the approach should be considered, and the range of requirements that could be imposed.”\textsuperscript{713} Such legislation could also include a “reporting requirement to Congress, for action of a certain magnitude, [to] ensure a measure of accountability while still permitting the agencies the degree of flexibility required to achieve the best mix of fines and mitigating actions.”\textsuperscript{714} Federal and state legislatures might even adopt environmental trust statutes.\textsuperscript{715}

The new theoretical perspectives should have an impact on settlement agreements as well as administrative, judicial, and legislative policy and practice. These perspectives should inspire parties to craft settlement agreements that better address both potential and existing effects from the specific environmental damage at issue. As the \textit{ExxonMobil} case illustrated,\textsuperscript{716} negotiating parties first should make efforts to identify and select an environmental trust or another third party with local knowledge, contacts, and reputation as well as environmental expertise. Parties then should draft provisions that give the organization maximum flexibility and independence to design the most appropriate, creative, and individualized schemes for distribution of settlement funds.

Finally, reformers should explore two more radical proposals that the MET resisted. They should revisit the permanent endowment and holistic approaches.\textsuperscript{717} Both approaches would provide environmental trusts with a full arsenal of possible remedies to respond to long-term as well as short-term damage to the natural and human environments.

2. \textit{Introducing an Environment-Centered Model}

The MET offers a new paradigm for environmental enforcement and settlements. As Part III.A has shown,\textsuperscript{718} the MET has challenged the conventional emphasis on punishment and deterrence and called for a more “environment-centered” model. It has had some success at the state level. In

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712. See U.S. SENTENCING COMM’N, SENTENCING GUIDELINES MANUAL § 8B1.3 & cmt. (2012); E-mail from Foster to Foster, supra note 518 (discussing possible reforms).
713. Studds Letter, supra note 279, at 83.
714. Id.
715. E-mail from Foster to Foster, supra note 518.
716. See supra Part III.B.1.c, 3.a. c.
717. See supra notes 150–151, 201–209, 596–597 and accompanying text (discussing these approaches).
718. See supra Part III.A.
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fact, on several occasions, Massachusetts government officials have proclaimed their support for what Secretary of Environmental Affairs Trudy Coxe called a “new mind-set.” Unfortunately, federal authorities have been less receptive.

The MET’s efforts could lead to a more consistent environment-centered approach to the settlement process. Enforcement officials could make the fundamental shift in perspective that the MET has long advocated. They could revise existing regulations, policies, and practices to “encourage settlement of pollution cases in ways that restore and enhance the environment impacted.” Or they could go still further and adopt “the view that remedying the environmental damage and/or improving the environment are more important than levying a fine.”

Reformers could also look at MET proposals to translate this vision into practice. For example, as Robbin Peach explained, enforcement authorities could adopt new regulations and policies that would require negotiating parties to direct “a significant percentage of penalty funds . . . back into the environment . . . [and make] credit projects . . . the rule, not the exception.”

They could also inject earlier into the settlement process the issue of “how best to remedy the environmental damage and/or achieve off-setting environmental values.” Under one proposal, “the remedial project [would] be considered first after calculating the minimal penalties due . . .” Under a more radical proposal, negotiating parties would not even get to the calculation of fines until the “environmental aspects have been dealt with satisfactorily . . .” Instead, “[s]ettlement discussions [would] begin by first examining the environmental impacts of the pollution incident, determining the actions warranted to restore and/or mitigate the damage, and identifying the amounts required to accomplish the needed actions.”

Reformers could promote more attention to the environmental aspects of a case by shifting authority away from the “legal and enforcement specialists of Justice and EPA.” Under this approach, “EPA’s program people [would] . . . take the lead.” In addition, as discussed above, they could change existing policies to include outside environmental experts in evaluating environmental impacts and in crafting appropriate projects. They might

719. MET, 5TH ANNIVERSARY CONFERENCE PROCEEDINGS SUMMARY, supra note 401, at 1.
721. Letter from Foster to Thornburgh, supra note 50, at 1.
722. Memorandum from Foster to Goldman and Peach, supra note 151, at 1.
723. Letter from Peach to Schiffer, supra note 287, at 1.
724. Memorandum from Foster to Goldman and Peach, supra note 151, at 2.
725. Letter from Peach to Schiffer, supra note 287, at 1 (emphasis in original).
726. Letter from Foster to Thornburgh, supra note 50, at 1.
727. Id.
728. Memorandum from Foster to Goldman and Peach, supra note 151, at 2.
729. Id.
730. See supra Part IV.B.1.c.ii.
even, as MET Fifth Anniversary Conference participants suggested, “designat[e]...special regions empowered to serve as experimental ‘laboratories’ to test out innovations and design the most cost-effective and environmentally-effective uses of settlement funds.”

3. **Building a Constituency**

In its 1997 Annual Report, the MET proclaimed that the “Trust seeks to build a constituency for the environment.” Over the past twenty-five years, the MET has explored a wide variety of strategies to encourage broad support at the national, regional, state, and local levels for environmental trusts.

For example, at the national and regional levels, the MET has worked to create a coalition of environmental trusts. Such a coalition could increase the use of environmental trusts by raising their visibility, accelerate information sharing, and build support for necessary reforms. More specifically, a coalition could draft guidelines or best practices for parties or courts considering the establishment of environmental trusts. The MET’s Fifth Anniversary Conference is illustrative. In 1994, the MET sponsored a conference in Cambridge, Massachusetts. The conference had two goals: to celebrate the Trust’s five-year accomplishments and “to refocus attention on the potential of, and impediments to, settlements.” Conference participants included representatives from environmental trusts in Alaska, California, Maryland, Massachusetts, and New Brunswick, Canada. These individuals shared their trusts’ experiences—both positive and negative. One session was entitled: “Environmental Trust Collaboration.”

Conference participants offered several proposals to promote future collaboration. As MET Chairman Maynard Goldman reported, “One specific proposal was to form a National Association of state-based Environmental Trusts which would facilitate a continuing exchange of information and a way to more effectively gather information and present our case in Washington and with the foundation and corporate communities.” Some environmental trust

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733. Foster, *supra* note 48, at 5 (“At the close of the conference, those assembled pledged to work together to form a national coalition of environmental trusts, thereby accelerating the sharing of information but also building a political support structure for the reforms needed.”).
735. See MASS. ENVTL. TRUST, 5TH ANNIVERSARY CONFERENCE PARTICIPANT LIST (1994), in FOSTER PAPERS, *supra* note 12. The conference also included representatives from state and local governments, philanthropies, academia, and the chairman of the Shell Oil Spill Litigation Settlement Trustee Committee. Id.
736. MASS. ENVTL. TRUST, 5TH ANNIVERSARY CONFERENCE AGENDA (1994), in FOSTER PAPERS, *supra* note 12. This was not the first conference to bring together environmental trusts. See *supra* notes 51–52 and accompanying text (discussing the 1986 and 1987 Environmental Trusts Roundtables). MET trustee Charles H.W. Foster helped organize those roundtables as well as the MET’s Fifth Anniversary Conference.
representatives preferred more informal arrangements. According to MET trustee Charles H.W. Foster, “Until we have a better handle on numbers, types, and sizes, I favor keeping the environmental trust movement informal and fitted to particular needs. As an example, [Chesapeake Bay Trust Executive Director] Tom Burden went away with the idea of a 10th anniversary celebration of his own.”

Rockefeller Family Fund Director Donald Ross offered another possible approach—participation of an academic institution, such as Harvard University, in the environmental trust movement. Foster later expanded on this proposal. He observed that Harvard’s Kennedy School might provide “a niche for us . . . . If so, our community would have a recognized place for environmental trust services, research, and education, and a good place to launch the national association when the right moment occurs.”

The MET experience also suggests strategies reformers might consider to build a constituency at the state and local as well as national and regional levels. For instance, the MET has made extensive efforts to enhance visibility of environmental settlements and environmental trusts. As discussed above, these efforts have ranged from direct contacts with federal and state officials to media announcements, interviews, and stories. Moreover, the MET has considered more comprehensive approaches to enhance visibility. For instance, in a memorandum to MET board members, Goldman suggested that the MET might “develop[] a marketing strategy” that could include “a slide and/or video presentation by the Trust to explain our purpose and goals to be used for marketing and public relations.”

In addition, the MET offers reformers examples of how to involve as well as inform the public. As the ICI Americas and Global Petroleum cases illustrate, the MET has a long-standing commitment to enlisting all sectors—government, business, private consulting firms, nonprofit organizations, community groups, environmental activists, and citizens—in designing and implementing schemes for the distribution of settlement funds.

Finally, the MET has emphasized the importance of outreach to potential participants in the settlement process. As Goldman asked in a 1994 memorandum, “How do we plant the seed in settlement discussions?” The Trust has focused principally on federal and state enforcement officials, corporate defendants, and lawyers but has also recognized the need for outreach.

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738. Letter from Foster to Goldman, supra note 148.
739. Id.
740. Id.
741. See Letter from Foster to Greenway, supra note 269 (suggesting that the Boston Globe Magazine “do a special piece on the Trust . . . . to inform the public”); supra notes 634–651, 656–658, 675–680 and accompanying text.
742. Memorandum from Goldman to Board, supra note 648, at 1–2.
743. See supra notes 469–477, 482–499 and accompanying text (discussing the ICI Americas and Global Petroleum cases).
744. Memorandum from Goldman to Board, supra note 648, at 2.
to judges.\textsuperscript{745} In general, the MET has relied on correspondence, face-to-face meetings, conferences, and workshops.\textsuperscript{746} In 2000, the Trust further promoted its outreach efforts by creating a new staff position for a restricted grants program coordinator.\textsuperscript{747} According to the MET’s 2000 Annual Report, one of the coordinator’s tasks was to “work to build awareness in the legal community about the Trust’s unique ability to receive settlement proceeds.”\textsuperscript{748}

Moreover, the MET’s experience suggests more indirect outreach strategies reformers might pursue. For example, individuals not directly affiliated with the environmental trust could play a vital role in outreach. A July 21, 2000 letter from Charles H.W. Foster to Robbin Peach illustrates this potential approach. Foster reported that “Harley Laing . . ., a now-senior member of Region 1 EPA,” was “really interested in help[ing] us promote environmental settlements and would be available this fall and winter to help us with some of the required missionary work among the Boston judiciary and law firm community.”\textsuperscript{749}

Another promising approach might be to create an internship program. This program would place a law student in the state “Attorney-General’s office, the office of the EPA’s regional counsel, or both . . . in order to spot and advance potential environmental settlements” and be an advocate for environmental trusts.\textsuperscript{750} This type of program could pay future dividends as well. It could “plant[] valuable settlement seeds in future practitioners and their mentors . . .”\textsuperscript{751}

\textbf{CONCLUSION}

Environmental settlements have the potential to “right[] a wrong”\textsuperscript{752} by financing improvements to damaged environments. Yet, as this Article has shown, environmental settlements sometimes fail to achieve their potential because the wrong people negotiate settlements, design uses of settlement funds, and administer the funds. The current scheme constrains environmentally beneficial uses of settlement funds with rigid definitions of victim, harm, and nexus that ignore the actual and particular consequences of the damage at issue. The process often reaches conclusions regarding the

\textsuperscript{745} See Memorandum from Breault to Board, supra note 297, at 4 (suggesting the MET “begin conducting outreach to judges to ensure that they are aware of the good work we do, and might opt to direct funding to the [MET’s] Restricted Program”); supra notes 297–299, 369–388, 400–405 and accompanying text (discussing outreach methods).

\textsuperscript{746} See supra notes 297–299, 369–388, 400–405 and accompanying text (discussing outreach methods).

\textsuperscript{747} 2000 MET ANN. REP., supra note 11, at 8.

\textsuperscript{748} Id.

\textsuperscript{749} Letter from Charles H.W. Foster to Robbin Peach (July 21, 2000), in FOSTER PAPERS, supra note 12.

\textsuperscript{750} Letter from Charles H.W. Foster to Robbin Peach (Mar. 19, 1998), in FOSTER PAPERS, supra note 12.

\textsuperscript{751} Id.

\textsuperscript{752} Larson, supra note 15 (quoting Robbin Peach).
application of available funds before the ultimate toll of an environmental
disaster on the natural and human environments is known or even knowable.

This Article offers suggestions for the future based on an examination of
the past. It argues that the environmental trust can provide an effective
mechanism for administering settlement funds. Environmental trusts provide
expertise, independence, and flexibility. They also offer community
knowledge, involvement, contacts, and reputation. As a result, environmental
trusts can provide responses to environmental degradation that are tailored to
the particular situation.

In 1998, MET Executive Director Robbin Peach wrote: “In this decade-
long evolutionary process, the Trust has emerged as a national model for other
organizations striving to make creative use of settlement funds.”753 She
concluded with the “hope” that the MET’s “success will inspire similar, equally
innovative, approaches to environmental stewardship.”754 Sixteen years later,
we conclude with the same hope.

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753. Peach, supra note 16.
754. Id.

We welcome responses to this Article. If you are interested in submitting a
response for our online companion journal, Ecology Law Currents, please
contact ecologylawcurrents@boalt.org. Responses to articles may be viewed at