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Organizational Environmental Crime and the Sentencing Reform Act of 1984: Combining Fines with Restitution, Remedial Orders, Community Service, and Probation to Benefit the Environment While Punishing the Guilty

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ORGANIZATIONAL ENVIRONMENTAL CRIME AND THE 
SENTENCING REFORM ACT OF 1984: COMBINING FINES 
WITH RESTITUTION, REMEDIAL ORDERS, COMMUNITY 
SERVICE, AND PROBATION TO BENEFIT THE 
ENVIRONMENT WHILE PUNISHING THE GUILTY 

MARTIN HARRELL†

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of Law. The views expressed in this Article are solely those of the author and do 
not necessarily represent those of any federal agency.
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I. Introduction

Do criminal fines alone really punish, deter and rehabilitate corporations, partnerships and other organizations convicted of environmental crime or should courts couple fines with alternative sanctions such as restitution, remedial orders, community service and probationary conditions to achieve these goals as well as to benefit the environment?

Federal judges, prosecutors, defense attorneys and academicians have wrestled for several decades with the general question of how best to punish organizations convicted of criminal acts, and two divergent philosophies have emerged. On one side of the debate are the “economic” advocates. These advocates generally believe that fines, set sufficiently high, will achieve the punishment, deterrence, public safety and rehabilitation goals of criminal punishment by changing organizational behavior while minimizing further costs to society in terms of enforcement, punishment and oversight. Opposing the economic advocates are the “corporate reformists.” These advocates generally believe that because companies pass any imposed fines on to other groups, such as stockholders and consumers, fines fail to have any punishment, deterrent or rehabilitative effect on the organization or the people in it.

1. Federal environmental statutes broadly define the term “person” in making certain acts illegal. For example, the Clean Air Act defines the term “person” as “an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent or employee thereof.” Clean Air Act (“CAA”) § 302(e), 42 U.S.C. § 7602(e) (1988 & Supp. IV 1992). For the purposes of this Article, “organization” means all “persons” regulated by environmental statutes other than natural persons.


3. See Jeffrey S. Parker, Criminal Sentencing Policy for Organizations: The Unifying Approach of Optimal Penalties, 26 Am. J. Crim. L. 513, 570-73 (1989). In Parker’s view, there are four reasons for the “superiority of monetary penalties for organizations”: the responsiveness of businesses to fines, fines are easier to “scale” to harm, lower government costs and minimum social harm from the impact of punishment. Id. at 570.

4. See Richard Gruner, To Let The Punishment Fit The Organization: Sanctioning Corporate Offenders Through Corporate Probation, 16 Am. J. Crim. L. 1, 5-7 (1988). Gruner cites several advantages of using probation when sentencing organizations. Such sentences will: force high-level executives to adopt specific measures to avoid
This Article is not an exhaustive analysis of the pros and cons of organizational sentencing. Rather, it raises a narrower issue with legal and public policy components. First, do federal judges have the legal authority to sentence organizational defendants to provide restitution or perform remedial orders, community service, or probationary conditions in the form of alternative sanctions such as beneficial environmental projects ("BEPs") in addition to monetary fines? Second, if such authority exists, is it wise and useful public policy to expend additional governmental and private resources to design, implement and oversee performance of such sentences via the criminal justice system particularly when most judges, prosecutors and probation officers have little broad-based experience with environmental problems, regulations and objectives? Answering these questions requires consideration of two legal trends which emerged in the 1980s: the development and maturation of the federal government's environmental criminal enforcement program and expansion of federal judges' sentencing options, particularly in the areas of restitution, remedial orders, community service and probation. This Article concludes that the convergence of an active environmental criminal enforcement program and expansion of a court's sentencing authority presents judges with an opportunity to impose meaningful punishment which combines fines with alternative sanctions to achieve equally important societal goals: just punishment and environmental protection.

5. For a summary of competing philosophies and extensive citations to legal literature on this subject, see Wray, supra note 2, at 2019-21.

6. This Article's focus on organizational punishment is not meant to suggest that BEPs may never be used by courts in sentencing individuals. However, the use of BEPs with individuals presents several additional issues which generally are not faced when dealing with organizations. Because individuals face the threat of jail time for environmental crime, the possibility exists that prosecutors, defense attorneys and judges will "trade" jail time for performance of BEPs. See generally United States Sentencing Guidelines, U.S.S.G., Ch. 8, Part 2Q (1993). Such manipulation of the individual sentence guidelines would destroy Congress' desire for consistency in sentencing. Additionally, given the sometimes expensive costs of BEPs, it is likely that organizations will be in a better position to finance performance.

7. See Gruner, supra note 4, at 26-106. "After a decade of unsuccessful efforts, Congress enacted sweeping criminal sentencing reforms in the Sentencing Reform Act of 1984." Id. at 26. "These reforms include the availability of the following sentencing options for organizations: fines, probation, forfeiture, notice to victims and restitution. Parker, supra note 3, at 545.
In Section II, this Article will introduce the concept of BEPs as an alternative sanction and examine the United States Environmental Protection Agency’s (“EPA”) practice of permitting defendants in civil or administrative enforcement actions to perform similar tasks in exchange for reduced civil penalties. It will then discuss why the universe of acceptable beneficial tasks should be broader in criminal prosecutions. Specific cases will be used to illustrate how the participants in criminal environmental cases have fashioned creative sanctions combining fines and BEPs in a wide-ranging manner.

In order to understand and appreciate the current legal setting, to avoid mistakes of the past, and to utilize existing legal criteria when evaluating BEPs, it is imperative that we also examine the past in terms of environmental prosecutions and sentencing law and theory. Consequently, Section III will examine the historical development of environmental prosecutions in the United States. Section IV will then review the history of sentencing organizational defendants for criminal transgressions, particularly the imposition of organizational probation, and will focus on the evolving changes in federal sentencing wrought by Congress’ enactment of the Sentencing Reform Act of 1984 (“SRA”).

In Section V, this Article will identify and discuss several legal and policy issues presented by using BEPs in criminal environmental enforcement. This Article will conclude in Section VI that Congress has given federal judges the authority to impose BEPs on organizational defendants and that, notwithstanding certain institutional difficulties and societal costs, imposition and implementation of such tasks is better public policy in appropriate cases than a sentence which merely requires a corporation to pay the federal government on the day of sentencing. Finally, this Article will set forth basic criteria which participants in the criminal justice system should follow in order to make BEPs meaningful, reduce overall societal costs, and ensure the appropriate use of BEPs as part of punishment. The criteria are based on common themes found in EPA’s use of similar procedures in administrative and civil environmental enforcement, past and current federal sentencing statutes, and the current organizational sentencing guidelines.

II. What Is a Beneficial Environmental Project?

In its simplest form, a BEP can be a requirement that a defendant pick up roadside litter surrounding its facility for a period of time. At the other extreme, a BEP may require a defendant to engage in costly product reformulation, to install expensive pollution prevention hardware or to undertake complex environmental cleanup. BEPs may be imposed as restitution, either in the form of monetary payments or repair of damaged natural resources, cleanup of polluted areas, or performance of community service or probationary conditions. For the purposes of this Article, a BEP is a sanction, usually coupled with a fine, which requires the defendant to undertake, assure or fund the performance of environmentally-friendly tasks reasonably related to the organization’s criminal conduct and achievement of at least one of the four Congressional objectives of sentencing, namely punishment, deterrence, protection and rehabilitation.

EPA’s use of Supplemental Environmental Projects (“SEPs”), a narrower concept in civil environmental enforcement, is a good starting point in determining what BEPs are and how they can be incorporated into criminal enforcement. Examining SEPs will help identify broad categories of potential BEPs and criteria which the Agency uses in deciding whether to accept such projects in specific cases.

A. EPA and SEPs

When it brings an administrative or civil judicial enforcement action, EPA seeks compliance, injunctive relief and/or civil penalties. The Agency sometimes modifies the amount of a civil penalty in a particular case in exchange for performance of SEPs. According to EPA, SEPs are “environmentally beneficial projects which a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform.” The Agency utilizes SEPs


EPA defines each of the key phrases in the SEP Policy. “Environmentally beneficial means a SEP must improve, protect or reduce risks to public health or the environment at large.” Id. at 24,857. “In settlement of an enforcement action” means the violator has not begun the project prior to the Agency’s identification of a violation and that the Agency helps shape the SEP through the enforcement process. Id. “Not otherwise legally required to perform” means the defendant is not already required by federal, state or local law to take such action. Id.
to "obtain environmental and public health protection and improvements" which otherwise might not be achieved.11

In its current SEP policy, EPA sets forth seven categories of projects which the Agency will consider as SEPs. They are: public health projects directly related to the violation, such as diagnostic, preventive, or remedial actions; pollution prevention, pollution reduction, environmental restoration and protection, environmental assessments and audits, environmental compliance promotion, and emergency planning and preparedness.12 The Agency evaluates SEPs in a hierarchal fashion, with SEPs designed to prevent pollution from occurring being the most favored.13 The Agency also specifically rejects certain tasks which may have been permitted in the past such as general environmental educational programs, contributions to environmental research at colleges or universities, and projects unrelated to environmental protection.14

EPA's identification of the types of SEPs it will consider and those which it will reject stems from both programmatic and legal concerns. The Agency's emphasis on pollution prevention is in keeping with its statutory mission and the idea that it is better to prevent pollution from occurring rather than controlling it at the end of a discharge pipe or smokestack.15

However, EPA also recognizes that there are statutory and Constitutional concerns which restrict the Agency's ability to approve certain SEPs.16 Thus, the SEP must meet five legal criteria. First, an adequate "nexus" or "relationship between the violation and proposed project" must exist.17 To satisfy this criterion, the SEP need not involve the same pollutant as the violation, and the SEP may involve the site of the violation, or be within the "immediate

11. Id. at 24,856.
12. Id. at 24,858-60.
13. Revised SEP Policy, supra note 10, at 24,856-57. "A pollution prevention project is one which reduces the generation of pollution through 'source reduction,' i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment, prior to recycling, treatment or disposal." Id. at 24,858.
14. Id. at 24,860. These exclusions mirror projects fashioned by district court judges in sentencing organizations for criminal conduct under former federal sentencing law.
15. Id. at 24,857.
16. Id. at 24,857-58.
17. Revised SEP Policy, supra note 10, at 24,857-58. According to EPA, the nexus "relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future." Id. at 24,858.
geographical area” of the site of the violation, or within the same ecosystem.\textsuperscript{18} Second, a SEP must advance at least one of the objectives of the statute violated by the defendant.\textsuperscript{19} Third, EPA or other federal agencies may not play “any role in managing or controlling funds that may be set aside or escrowed for performance of a SEP.”\textsuperscript{20} Fourth, the settlement agreement must specify the “what, where and when” of a project rather than leaving such matters to further determination.\textsuperscript{21} Finally, the project may not be something EPA is required by law to do or provide EPA with additional resources outside the Congressional appropriations process.\textsuperscript{22}

EPA’s SEP policy is designed to permit Agency personnel to settle enforcement actions for reduced civil penalties in exchange for SEPs.\textsuperscript{23} However, defendants generally will not receive a “dollar-for-dollar” credit, since EPA will not reduce its civil penalty by one dollar for each dollar spent on the SEP, and EPA will not reduce the penalty below the “economic benefit” obtained by the violator through noncompliance.\textsuperscript{24}

B. Are BEPs Distinguishable From SEPs?

EPA uses the term SEP because the Agency believes it should not reduce or mitigate civil penalties which may otherwise be imposed simply because a defendant promises to perform tasks already required by law.\textsuperscript{25} It is appropriate in certain circumstances to combine tasks such as restitution or environmental remediation or cleanup to satisfy a criminal sentence. In such cases, courts incorporate a defendant’s civil obligation into the criminal sentence. While EPA would not approve such actions as SEPs in civil cases,

\textsuperscript{18} Id. The Agency defines “immediate geographical area” as the area within a 50-mile radius of the site of the illegal activity. Id. at 24,858 n.5.

\textsuperscript{19} Id.

\textsuperscript{20} Id.

\textsuperscript{21} Revised SEP Policy, supra note 10, at 24,857-58.

\textsuperscript{22} Id.

\textsuperscript{23} Id. at 24,860.

\textsuperscript{24} Id. at 24,860-61. EPA states its penalty rationale in the SEP Policy: Penalties are an important part of any settlement. A substantial penalty is generally necessary for legal and policy reasons. Without penalties there would be no deterrence as regulated entities would have little incentive to comply. Penalties are necessary as a matter of fairness to those companies that make the necessary expenditures to comply on time: violators should not be allowed to obtain an economic advantage over their competition who complied.

\textsuperscript{25} See EPA Policy on the Use of Supplemental Environmental Projects in Enforcement Settlements, 1, 4 (February 12, 1991) [hereinafter Original SEP Policy].
there are benefits to making them part of a criminal punishment. Moreover, in some criminal cases, it may be useful to have a corporate defendant undertake activities akin to EPA's view of SEPs, in other words, tasks which prevent or reduce pollution but which are not legally required. Given the potential broad range of activities which may be ordered as part of a criminal sentence, it is inappropriate to transfer EPA's SEP phraseology to criminal sentencing. Consequently, this Article uses "beneficial environmental projects" or BEPs to reflect the fact that both existing legal obligations and additional tasks may be included in criminal sentences.

C. Examples of BEPs in Criminal Cases

Prosecutors, EPA attorneys, criminal investigators, defense attorneys and judges have become increasingly creative in their attempts to include BEPs in environmental criminal cases. While it is impossible to definitively categorize the different permutations this creativity has taken, a brief examination of several cases illustrates the broad nature and scope of these activities. These descriptions will also be useful when thinking about the legal and policy issues discussed later in this Article.

1. BEPs: Going Beyond What Is Legally Required

In United States v. Norwood Industries, Inc.,26 the defendant, an adhesive tape manufacturer located in suburban Philadelphia, emitted regulated volatile organic compounds ("VOCs") in excess of applicable emission limits. Civilly, the Pennsylvania Department of Environmental Protection ("DEP") and Norwood entered into an administrative agreement in which the company agreed to install pollution control hardware, and to pay a seven-figure civil penalty.27 To settle the criminal prosecution, the United States and Norwood fashioned a settlement which required the company to perform several BEPs exceeding applicable legal requirements, which included: (1) spending at least $30,000 annually for five years on research to convert its operations to non-VOC use; (2) developing formal corporate environmental compliance procedures; (3) hiring an outside consultant to audit all environmental aspects of its operation; (4) moving all hazardous waste storage inside its facility; and (5) sponsoring a free conference for small businesses

on VOC compliance.\textsuperscript{28} Additionally, the centerpiece of the plea agreement required Norwood to convert its production employees from a five-day work week to a three or four-day work week for the purpose of limiting employee commuting in an attempt to reduce automobile emissions and ground-level ozone.\textsuperscript{29} At sentencing, the court fined the company $100,000, but suspended the fine on performance of the BEPs as conditions of probation.\textsuperscript{30}

2. BEPs: Incorporating or Aiding Performance of Legally Required Tasks

A substantial number of criminal sentences incorporate pre-existing regulatory requirements or legal obligations arising out of the criminal conduct into the criminal sentence in terms of a general requirement to comply. In United States v. Action Manufacturing, Inc.,\textsuperscript{31} the defendant company pled guilty to disposing of explosives-related hazardous waste illegally, and EPA and the defendant pursued remedial cleanup at the site.\textsuperscript{32} The parties agreed that the defendant would place $500,000 in an escrow account at sentencing as a condition of probation, with the money to be used exclusively for the company's cleanup pursuant to a plan approved by either EPA or the state regulatory agency.\textsuperscript{33} At sentencing, the court fined Action $500,000, but suspended $400,000 pending completion of the remedial action.\textsuperscript{34}

3. BEPs: Transferring Money or Property to Third Parties

Another type of BEP requires defendants to transfer money, land or other assets to a third party. This is simple when the defendant merely is reimbursing a third party, such as a government agency or private individual, for cleanup costs incurred because of the defendant's illegal conduct. However, BEPs have also been

\begin{itemize}
  \item \textsuperscript{28} United States v. Norwood Indus., Inc., Plea Agreement, No. 94-34 (Feb. 28, 1994) (on file with author) [hereinafter Norwood Plea Agreement].
  \item \textsuperscript{29} Id. at 7-8.
  \item \textsuperscript{30} The conservative estimate of the cost of the BEPs to the defendant is $250,000.
  \item \textsuperscript{31} No. 93-365 (E.D. Pa. 1993) (on file with author).
  \item \textsuperscript{32} United States v. Action Mfg., Inc., Plea Agreement No. 93-365, (March 12, 1993) (on file with author).
  \item \textsuperscript{33} Id. at 2-5. The company had to submit its cleanup expenditures for the pits to an EPA criminal enforcement attorney for review. Id. Until the costs related to the cleanup of the pits were determined, Action could not use the $500,000 to pay those costs, but had to come up with additional money. Id. at 9.
  \item \textsuperscript{34} Id. at 2-3.
\end{itemize}
used as restitution on a broader scale with less clearly identifiable victims.

The Exxon Valdez Alaskan oil spill prosecution is perhaps the most well known environmental criminal case. The United States prosecuted the Exxon Corporation and a subsidiary in 1991 for violations of several environmental statutes. Pursuant to a plea agreement, the court fined the two entities a total of $150 million.\(^{35}\) The court remitted $125 million of that amount based on factors which included Exxon’s cleanup costs for the oil spill and payments to injured parties.\(^{36}\) The defendants paid $12 million of the remaining $25 million fine into the North American Wetlands Conservation Fund,\(^{37}\) a Congressionally created trust fund.\(^{38}\) In addition, the defendants paid $100 million in remedial and compensatory payments.\(^{39}\) According to the plea agreement, this money was to be used “exclusively for restoration projects, within the State of Alaska.”\(^{40}\)

The 1994 prosecution of Steven Burnett and Dean Schrader, while involving individual defendants, illustrates how trust fund sentences have been created. The two men pled guilty to negligent violations of the Clean Water Act (“CWA”)\(^ {41}\) involving the discharge of dredge material in wetlands in Washington state.\(^ {42}\) As part of the plea agreement, the defendants agreed to place between $150,000 and $200,000 into a wetlands preservation trust fund created as part of the settlement to preserve wetlands in the area of the defendants’ illegal activity, with the final amount left up to the

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36. Id. at 6-8. Some of these factors involved Exxon’s commitment to perform tasks not otherwise legally required, such as spending 25% of its total research expenditures on environmental and safety issues. In this regard, the factors resemble BEPs employed in the Norwood case. For a further discussion of Norwood, see supra notes 26-30 and accompanying text.
37. Exxon Plea Agreement, supra note 35, at 8.
39. Exxon Plea Agreement, supra note 35, at 8-9. The $100 million payment consisted of $50 million paid to both the State of Alaska and the United States. Id.
40. Id. at 9. The plea agreement defined restoration to include “restoration, replacement and enhancement of affected resources, acquisition of equivalent resources and services, and long-term environmental monitoring and research programs directed to the prevention, containment, cleanup and amelioration of oil spills.” Id.
court. The plea agreement also recommended that the court impose community service on the defendants in the field of wetlands preservation. At sentencing, the court ordered restitution in the amount of $150,000, the minimum amount specified in the plea agreement. Additionally, the court imposed the payment of restitution and performance of fifty hours of community service as conditions of probation.

A different form of property transfer occurred in United States v. Hartford Associates. The defendant, a limited partnership which had drained substantial portions of wetlands to develop a site without a permit, pled guilty to negligently violating the CWA, and agreed to pay a $100,000 fine. More importantly for the environment, the partnership granted a conservation easement on approximately 100 acres of wetlands on the site to an environmental group in the state.

III. HISTORY OF ENVIRONMENTAL CRIMINAL ENFORCEMENT

All of the sentences discussed above resulted from plea negotiations. Since most sentences of this type will result from such plea agreements, it is important to ensure that they are both legal and defensible in terms of public policy. Before considering their legal and policy merits, however, it is essential to review the evolution of two legal developments, namely the initiation and maturation of a federal environmental criminal prosecution effort and the expansion of sentencing options governing organizations convicted of criminal conduct.

Federal criminal laws punishing those polluting the environment have existed since at least 1899 when Congress enacted legis-

44. Id. at 4.
45. Telephone Conversation with Mark Bartlett, Assistant United States Attorney, District of Washington.
47. See CWA § 309(c) (1)(A), 33 U.S.C. § 1319(c) (1)(A).
49. See id.
50. This is not to say that one of the parties or the court may not pursue such sentences independently. The alternative sentencing cases struck down by the appellate courts under the Federal Probation Act were objected to by one party or another, otherwise, they would not have been appealed. However, when the parties are in agreement, it is unlikely the court will reject the settlement, thus preventing appellate review.
lation designed primarily to aid navigation.\textsuperscript{51} Since that time, and especially since 1970, Congress has enacted a series of statutes broadly designed to protect the environment and human health.\textsuperscript{52} All of these statutes subject both individuals and organizations to criminal liability for certain types of offenses committed with varying degrees of \textit{mens rea}.\textsuperscript{53} Despite the presence of such prosecutorial authority, the federal government did not mount any systematic criminal enforcement effort for many years.\textsuperscript{54} Instead, the United States pursued environmental cases on an \textit{ad hoc} basic when acts of pollution and illegal behavior were so flagrant they could not be ignored.\textsuperscript{55}

In 1980, EPA, in conjunction with the Department of Justice ("DOJ"), initiated a pilot program to determine if a formal criminal law enforcement program should be developed within the Agency.\textsuperscript{56} After a two-year trial, the Agency and the DOJ decided to open a formal program, with EPA hiring twenty-three criminal investigators in October of 1982.\textsuperscript{57} In early 1983, DOJ established

\begin{footnotesize}
\begin{enumerate}
\item See Rivers and Harbors Act, 33 U.S.C. §§ 407, 411 (1964) (Act of March 3, 1899, Chap. 425, § 13; 30 Stat. 1152) ("It shall not be lawful to throw ... any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States . . . ").
\item See \textit{e.g.}, TSCA, § 16(b), 15 U.S.C. § 2615(b) (knowing or willful acts); CWA, § 309(c), 33 U.S.C. § 1319(c) (knowing and negligent crimes); RCRA, § 3008(d), 42 U.S.C. § 6928(d) (knowing violations); CAA, § 113(c), 42 U.S.C. § 7413(c) (knowing and negligent conduct); CERCLA, § 103(b), 42 U.S.C. § 9603(b) (knowing actions).
\item See \textit{e.g.}, Allied-Signal, Inc. v. I.R.S., 40 Env't Rep. Cas. (BNA) 1660 (3d Cir. Feb. 23, 1995). The United States prosecuted the defendant in connection with Kepone poisoning in the James River in Virginia. Adopting a form of alternative sentencing, the court first fined Allied Chemical $13.24 million, the statutory maximum, but then reduced the fine to $4.5 million when the defendant created and contributed $8 million to the Virginia Environmental Endowment. James W. Rodig, \textit{Corporate Contributions to Charity}, 9 J. Corp. L. 241, 247 (1984).
\item See Bruner, supra note 54 at 1320 (explaining that EPA experimented by hiring three criminal investigators).
\item \textit{Id.} at 1315.
\end{enumerate}
\end{footnotesize}
what is now the Environmental Crimes Section ("ECS"), a group of
criminal environmental prosecutors based in Washington, D.C.\textsuperscript{58}

By 1990, EPA had slowly increased its number of criminal in-
vestigators to approximately forty-five, still less than one agent per
state, and had assigned at least one attorney in each of the ten re-
geonal offices to work exclusively on criminal cases.\textsuperscript{59} These num-
bers did not impress Congress and as a result, Congress approved
the Pollution Prosecution Act.\textsuperscript{60} This legislation directed EPA to
increase its total number of special agents to 200 by October 1, 1995 and set specific annual staffing levels for criminal investiga-
tors.\textsuperscript{61} As of December 31, 1994, the Agency has met each annual
target and has approximately 140 agents located in thirty offices
scattered throughout the United States.\textsuperscript{62}

While EPA added to the size of its investigative and legal forces
in the 1980s, DOJ increased the size of the ECS in Washington, and
the Federal Bureau of Investigation began to investigate environ-
mental matters on a routine basis.\textsuperscript{63} Additionally, in the late 1980s,
federal prosecutors in local United States Attorney’s Offices be-
came increasingly interested in prosecuting criminal environmental
violations.\textsuperscript{64}

\begin{footnotesize}
\begin{enumerate}
\item[58.] \textit{Id.} at 1323. The Environmental Crimes Section grew from four lawyers at
its inception to twenty-five lawyers ten years later. \textit{Id.}
\item[59.] \textit{Id.} at 1325 (explaining legislation introduced due to concern with small
number of investigators).
\item[60.] P.L. No. 101-593, Title II, §§ 201-205, 104 Stat. 2962 (1990) (codified
\item[61.] See Bruner, \textit{supra} note 54, at 1325. "This Act ... provides for a fourfold
increase in the number of investigators by 1995. ... It [also] mandates the estab-
ishment of a National Enforcement Training Institute to provide training to fed-
eral, state and local personnel with regard to both criminal and civil enforcement." \textit{Id.}
\item[62.] Telephone conversation with Steven E. Chester, Deputy Director, EPA Of-

cine of Criminal Enforcement.
\item[63.] The Federal Bureau of Investigations and EPA investigate many cases
jointly, but they also investigate environmental violations independently or with
other federal agencies, such as the Defense Criminal Investigative Service, Naval
Criminal Investigative Service, and the Army’s Criminal Investigation Division as
well as with various state agencies.
\item[64.] Chapter 11, Title 5, United States Attorney’s Manual, transmitted to
United States Attorneys August 23, 1994. By 1994, Assistant United States Attor-
neys ("AUSA") handled the majority of federal environmental prosecutions, with
the Washington-based Environmental Crimes Section ("ECS") handling some
cases directly and supporting AUSAs in other cases. \textit{Id.} The result of this increase
in resources and interest has been predictable. According to DOJ statistics, the
United States prosecuted 973 individuals and 391 organizations for criminal envi-
ronmental violations between October 1, 1982 and September 30, 1994. Environmental
Criminal Statistics FY 83 through FY 1994 (Memorandum to Ronald Sarachten, Chief, Environmental Crimes Section, Department of Justice (Nov. 18, 1994)). Of the 1,364 defendants, approximately 58\% percent have been charged
\end{enumerate}
\end{footnotesize}
IV. Organizational Sentencing And Probation: The Historical Perspective

As the government's environmental prosecution program began to mature, Congress initiated a process of replacing antiquated sentencing practices with a completely new set of rules.

A. History of Corporate Probation

In 1916, the United States Supreme Court ruled in Ex Parte United States, that federal courts lacked authority to impose probation on any defendant absent statutory authorization. Congress responded in 1925 by enacting the Federal Probation Act ("FPA"). This statute authorized federal courts to suspend imposition or execution of a sentence and place a defendant on up to five years' probation "upon such terms and conditions as the court deemed best" when it was satisfied that "the ends of justice and the best interest of the public as well as the defendant [would] be served thereby." Thus, under the FPA, probation was not a direct sentence, but one which required the court to suspend the sentence imposed pursuant to the substantive statute of conviction. The FPA also authorized courts to make defendants pay a fine while on probation, to make restitution to "aggrieved parties" for actual damages or loss caused by the offense and to undergo rehabilitative treatment. The FPA's language did not distinguish between individual and organizational defendants, and courts were very slow to impose probation on businesses. Instead, judges fined organizations for criminal conduct, apparently giving no consideration to imposing probationary conditions on organizations.

in the past five years alone. Id. Courts have imposed more than $290 million in criminal fines, restitution and clean-up costs on individuals and organizations and over 580 years of prison time. Id.

66. Id. at 44 (holding judiciary cannot suspend criminal sentences without legislative authority).
68. 18 U.S.C. § 3651. Federal courts were not able to suspend sentences when the defendant was convicted of any offense punishable by death or life imprisonment. Id.
69. Id. Additionally, the court was authorized to require a defendant "to reside in or participate in the program of a residential community treatment center, or both, for all or part of the period of probation" subject to the Attorney General's approval. Id.
This judicial attitude began to change with the often-cited case of *United States v. Atlantic Richfield Co.* In 1971, the Coast Guard caught Atlantic Richfield discharging oil from a dock facility in Illinois into the Chicago Ship and Sanitary Canal. Atlantic Richfield pled *nolo contendere* to violating the Rivers and Harbors Act. Instead of fining the company the then-statutory maximum of $2,500, the district court suspended imposition of a fine and imposed a six-month period of probation. The court then imposed specific conditions of probation, including a requirement that Atlantic Richfield establish a program to respond to oil spills. The court also said it would appoint a trustee-like probation officer who presumably would implement the first condition if the defendant failed to do so.

On appeal by the defendant, the Seventh Circuit Court of Appeals ruled that the FPA permitted courts to suspend sentences and impose probation on corporations. However, the court found that the special conditions of probation imposed by the district court were unreasonable because they exceeded the scope of the court’s authority under the FPA. The Seventh Circuit stated that the imposition of probation under the FPA was designed to rehabilitate or supervise the defendant to prevent future illegal acts, not to be “used as a means of imposing unreasonable standards to the extent that the probationer may not know when they are satisfied.”

After this decision, district courts began to impose corporate probation more frequently, often suspending payment of fines in exchange for payment of money to charities or donation of services. However, federal appellate courts generally found that re-

70. 465 F.2d 58 (7th Cir. 1972).
71. Id. at 59.
72. Id.
73. Id.
74. *Atlantic Richfield*, 465 F.2d at 59. The court required the company to set up and complete the program within 45 days. Id.
75. Id. at 59.
76. Id. at 61.
77. Id. “In our opinion, the broad requirement imposed upon the defendant as a condition of probation goes beyond what was intended by the drafters of the Probation Act.” Id.
78. *Atlantic Richfield*, 465 F.2d at 61.
79. Judges had varying reasons for developing these sentences, but appellate opinions suggest that trial courts were frustrated in fashioning meaningful sanctions for businesses. For example, when sentencing the Japanese industrial giant Mitsibushi in the early 1980s, the district court stated, "these large corporate defendants could 'just write a check and walk away.'" *United States v. Mitsibushi Int'l. Co.*, 677 F.2d 785, 788 (9th Cir. 1982).
quiring charitable donations exceeded the statutory authority contained in the FPA for two reasons. First, the probationary conditions did not bear a reasonable relationship to the rehabilitation of the defendant or protection of the public, the goals of the FPA. Second, the statute’s restitution provision did not authorize such sentences because the charitable organizations were not victims, as they had not suffered a loss as a result of the offense.

For example, in *United States v. Missouri Valley Construction Co.*, an anti-trust prosecution, the defendant sought an “alternative sentence” which would reduce its fine from $2 million to $100,000 in exchange for a $1.4 million contribution to the University of Nebraska. The trial court imposed a $2 million fine, suspended all but $325,000 of it and ordered the defendant to contribute $1.475 million to the University of Nebraska. The Eighth Circuit reversed *en banc*, finding that the probationary conditions exceeded the court’s authority under the FPA’s provisions concerning non-fine monetary payments.

The Third Circuit reached a similar conclusion a few months later in *United States v. John Scher Presents, Inc.*, an anti-trust prosecution involving concert promoters. The government appealed the district court’s suspension of a fine conditioned on the defendants’ using its talents and expertise to raise and donate $100,000 to

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80. *See* Gruner, *supra* note 4, at 23. Initially, the Eighth Circuit held that requiring charitable contributions was permissible. *Id.* at 23 n.111. However, the Eighth Circuit reversed its holding in *United States v. Missouri Valley Constr. Co.*, 741 F.2d 1542, 1544 (8th Cir. 1984) (*en banc*). *Id.*

81. *See* Gruner, *supra* note 4, at 23 n.112.

82. *Id.* at 23-24. However, one court did allow a charitable organization to receive money from a corporate probationer because it “was serving as a ‘condit’ to efficiently transfer restitution payments to injured parties.” *Id.* at 24 n.115 (citing *United States v. Wright Contracting Co.*, 728 F.2d 648, 653 n.2 (4th Cir. 1984)).

83. 741 F.2d 1542 (8th Cir. 1984).

84. *Missouri Valley*, 741 F.2d at 1545. This contribution to the University of Nebraska was to be used to either endow a professorship in ethics, or to fund the construction of an addition to the school’s College of Engineering and establishment of a permanent ethics program in business and engineering. *Id.*

85. *Id.* The contribution was to be used for a professorship in ethics. *Id.*

86. *Id.* at 1548. The Eighth Circuit used *Missouri Valley* to overrule *United States v. William Anderson Co.*, 698 F.2d 911 (8th Cir. 1982), in which a panel of the Court approved such sentences. Gruner, *supra* note 4, at 23 n.110. Eventually, all appellate courts that have addressed this issue have found that such sentences exceeded the FPA. *Id.* at 23.

87. 746 F.2d 959 (3d Cir. 1984).

88. *Id.* at 960. The defendants were charged with violating the Sherman Act “by conspiring . . . to reduce or eliminate competition in the promotion of musical performances.” *Id.* at 961.
charities approved by the Probation Department. The district judge had imposed the community service as a probationary condition to serve "a rehabilitative and deterrent corporate purpose" which he called "symbolic restitution." However, like the Eighth Circuit, the Third Circuit found that the probationary condition went beyond the FPA's grant of authority.

Some district courts and at least one appellate court have approved some types of alternative sentences under the FPA. For example, a district court in New York State required a bakery to donate baked goods to needy organizations for one year as community service. The court theorized that the sentence would have a deterrent effect because employees would be continually reminded of the violations and the need to prevent reoccurrence. In United States v. Mitsubishi International Corp., the Ninth Circuit approved suspension of a fine in exchange for the defendant providing an executive for one year and $10,000 to a community-based outreach program for ex-offenders. However, the court noted that the company could choose to pay the fine if it did not like the suspended sentence, pointing out that suspension of sentence under the FPA was quasi-voluntary.

B. Current Sentencing Law

1. Sentencing Reform Act Of 1984

After years of debate and study over the purposes, successes and failures of federal sentencing philosophy and practice, Congress radically changed the landscape by enacting the Sentencing

89. *John Scher*, 746 F.2d at 961.
90. *Id.* at 962.
91. *Id.* at 963. The court noted, however, that its ruling did not question the idea that community service could be imposed on organizations in appropriate cases, despite the difficulty in having businesses perform such service. *Id.* at 963 n.3.
93. *Id.* at 1167.
94. 677 F.2d 785 (9th Cir. 1982).
95. *Mitsubishi*, 677 F.2d at 787. Unlike *Missouri Valley*, and other cases, the defendant did not attack the sentence as exceeding the court's authority under the FPA. *Id.* at 788. Instead, the defendant argued that the sentence, in its totality, exceeded the court's statutory authority under the substantive statute of conviction. *Id.* Thus, the Ninth Circuit did not face a direct FPA challenge to the court's creative sentence. *Id.*
96. *Id.* In other words, the defendant could always choose to accept the original sentence imposed, usually a fine. *Id.*
Reform Act of 1984 ("SRA").\textsuperscript{97} Prior to that time, federal law had emphasized rehabilitation of the defendant as a leading purpose of sentencing, especially in terms of probation, and gave judges virtually unfettered discretion in sentencing within statutory limits. The SRA broadens the goals of sentencing,\textsuperscript{98} narrows some aspects of judicial discretion,\textsuperscript{99} increases the amount of possible organizational fines\textsuperscript{100} and explicitly provides for sentences containing wide-ranging probationary conditions.\textsuperscript{101}

The SRA instructs courts to consider the various types of sentences available and the sentencing range available under guidelines developed by the United States Sentencing Commission.\textsuperscript{102} The Guidelines prescribe the available range of a sentence, thus limiting a judge’s discretion and informing the defendant and the public more precisely what the sentence would actually be.\textsuperscript{103} The SRA also requires judges to be consistent in sentencing, meting out similar punishments to defendants with similar criminal histories convicted of similar offenses.\textsuperscript{104}

With regard to organizations, the SRA requires courts to impose probation, a fine, or both; thus, probation is a specific sentence, unlike under the FPA.\textsuperscript{105} The SRA also authorizes criminal forfeiture, notice to victims and restitution as independent parts of


\textsuperscript{98} 18 U.S.C. § 3553(a)(2)(A)-(D). These goals are to punish, deter and educate the defendant and to protect society. Id.

\textsuperscript{99} Id. § 3553(a)(4)-(6); 28 U.S.C. § 994 (establishing United States Sentencing Commission).

\textsuperscript{100} 18 U.S.C. § 3571(c). The SRA sets different maximum fines for individuals and organizations. Compare id. § 3571(b) with § 3571(c). It also permits courts to calculate the statutory maximum fine three different ways to select whichever is greatest: (1) under the substantive offense of conviction; (2) under § 3571(c) which sets a statutory maximum of $500,000 per count for a felony committed by an organization; or (3) twice the pecuniary gain realized from the offense by the defendant or twice the pecuniary loss suffered by another person from the offense as described in 18 U.S.C. § 3571(d). Id. § 3571(c)(1)-(7).

\textsuperscript{101} Id. §§ 3551(c)(1), 3561-63.

\textsuperscript{102} Id. § 3553(a)(4)-(5) (referring to 28 U.S.C. § 994(a)(1)-(2)).

\textsuperscript{103} See 28 U.S.C. § 994(a)(1)-(2).

\textsuperscript{104} 18 U.S.C. § 3553(a)(6). Judges must consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” Id. These sentencing principles are often referred to as “determinate sentencing” and “consistency/fairness.” Parker, supra note 3, at 534-41.

\textsuperscript{105} 18 U.S.C. § 3551(c). Courts may impose probation for between one and five years for a felony and up to five years for a misdemeanor. Id. § 3561. For felonies, courts must impose a fine, restitution or community service as an express condition of a probation sentence, unless such a condition would be plainly unreasonable. Id. § 3563(a)(2).
punishment or as conditions of probation. Additionally, the SRA contains specific provisions governing when and for how long probation may be imposed. The statute requires imposition of mandatory conditions of probation. The SRA also authorizes discretionary conditions which may be imposed, including restitution, notice to victims, and a catch-all of "such other conditions as the court may impose." The SRA's legislative history makes clear that Congress intended this list of potential probationary conditions to guide courts in imposing probation, not to restrict their authority to fashion appropriate probationary conditions in specific cases. Thus, the SRA permits more extensive use of probationary conditions than did the FPA because it has broader statutory objectives which may be accomplished through use of probation.

However, in keeping with its stated purpose of limiting judicial discretion and achieving consistency in sentencing, Congress did not provide courts with carte blanche probationary authority in the SRA. Instead, Congress specified that conditions of probation must bear a "reasonable relationship" to the nature and circumstances of the offense, the history and characteristics of the defendant, and the four sentencing goals set forth in the SRA: punishment, deterrence, protection and rehabilitation. Moreover, discretionary probationary conditions may involve only those deprivations of liberty or property which are necessary to accomplish one or more of the SRA's goals in sentencing.

2. Organizational Sentencing Guidelines

To narrow federal judges' wide discretion in imposing punishment, the SRA established the United States Sentencing Commission ("Commission"), a seven-member independent commission

106. Id. § 3554-56. Criminal forfeiture requires a defendant to forfeit property to the United States. Id. § 3554. Notice to victims signifies that defendants may be required to notify victims and explain the conviction. Id. § 3555. Finally, restitution may be imposed. Id. § 3556.
107. Id. §§ 3561-63.
108. Id. § 3563(a)(1-3).
110. Id. § 3563(b)(4).
111. Id. § 3563(b)(22).
112. See S. Rep. No. 225, 98th Cong., 1st Sess. (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3278. "The list is not exhaustive, and it is not intended at all to limit the court's options - conditions of a nature very similar to, or very different from, those set forth may also be imposed." Id.
113. 18 U.S.C. § 3563(b).
114. Id.
located within the judicial branch of government. Congress authorized the Commission to "establish sentencing policies and practices for the federal criminal justice system" which would accomplish the SRA's four statutory goals, promote consistency and fairness in sentencing, and reflect current knowledge of human behavior concerning criminal justice. Congress also instructed the Commission to develop sentencing guidelines on broad categories of offenses to be used by participants in the federal criminal justice system: defendants, defense lawyers, prosecutors, probation officers, and judges. Once adopted by the Commission, they would go into effect unless changed by Congress.

After developing and issuing sentencing guidelines for individuals convicted of offenses, the Commission turned its attention to promulgating guidelines for organizational criminal defendants. The Commission considered several draft proposals reflecting the dramatically differing views of corporate punishment. One, drawn up principally by Jeffrey S. Parker, then deputy chief counsel for the Commission staff, relied primarily on monetary fines as punishment and minimized use of alternative sanctions such as probation. This draft represented the economic school of thought that monetary fines are powerful deterrents, preferable in organizational sentencing, and cost society less in terms of the loss from the offense as well as the cost of enforcement and punishment.

115. 28 U.S.C. § 991(a). The Commission members are appointed pursuant to § 991(a). Id.
116. Id. § 991(b)(1).
117. Id. § 994. In order to enact guidelines, an affirmative vote by four members of the Commission is needed. Id.
118. Id. § 994(p). In United States v. Mistretta, 488 U.S. 361 (1989), the Supreme Court upheld the constitutionality of the Sentencing Commission against an attack that its placement in the judicial branch violated the constitutional separation of powers doctrine. Id. at 367.
119. This caused the Commission to enter a fierce debate concerning how organizations should be punished for criminal conduct. This discussion has raised more issues than it has resolved. Depending on the viewpoint of the debater, the issues include an organization's legal culpability for the acts of individuals, what punishments deter organizations generally and with the least cost in terms of loss from the crime plus costs to society for enforcement and punishment, the ability of organizations to continue in business and operate without undue judicial interference, the need for punishment which brings about "real" change in organizational behavior, and whether fines achieve deterrence and change in organizational behavior. See generally Parker, supra note 3; Gruner, supra note 4.
A competing draft reflected the corporate reformist viewpoint which proposes that fines often do little to change corporate behavior because organizations pass costs of fines onto stockholders and consumers. Consequently, the organization and its individual actors are untouched by the effects of a fine. Their draft advocated more frequent imposition of probation and other non-monetary sanctions, even to the point of requiring companies to change internal practices or perform other tasks under court supervision.

After considerable public discussion, the Commission issued Chapter Eight of the current Sentencing Guidelines which exempted organizational defendants in environmental cases from the fine calculation provisions, but subjected them to the restitution, remediation and probation requirements. While the Commission did not adopt either viewpoint totally, it accepted many of the corporate reformist school's arguments, rejecting the idea that imposition of fines alone should be considered the standard or usual punishment for organizations. This conclusion is based on an examination of the Commission's general approach toward organizational sentencing and its identification of four principles or objectives, in order of importance, that courts should seek to achieve via criminal punishment.

In Chapter Eight, the Commission set forth four general principles to guide judicial sentencing of corporations, partnerships and other entities. First and foremost, courts are supposed to order


[A] system of fines may be perceived as amounting to a tariff system that permits corporations . . . to engage in criminal behavior so long as they are prepared to pay the criminal tax . . . [T]he aim of the criminal law . . . is to prevent the prohibited behavior, not simply raise the cost of engaging in it.

Id.

122. Id. at 82-83.


124. The Commission wrote that:
Organizations can act only through agents and, under federal criminal law, generally are vicariously liable for offenses committed by their agents. At the same time, individual agents are responsible for their own criminal conduct. Federal prosecutions of organizations therefore frequently involve individual and organizational co-defendants . . . . This chapter is designed so that the sanctions imposed upon organizations and their agents, taken together, will provide just deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct.

Guidelines, supra note 123, at Ch. 8, Introductory Commentary (emphasis added).
organizations "to remedy any harm caused by the offense." 125 Resources used to remedy harm should not be considered punishment, but a means for making the victim whole. 126 Second, courts should divest organizations of their assets via high fines if the defendant operated primarily for a criminal purpose. 127 Third, determination of fine ranges should be based on the seriousness of the offense and the organization's culpability. 128 Finally, imposition of organizational probation is appropriate when needed to ensure that another sanction will be implemented or to ensure that the organization will take internal measures to prevent future criminal conduct. 129 The Sentencing Commission's emphasis on "remedy ing harm" as the first concern of courts rather than determination of fines, as well as provision for organizational probation, demonstrates the influence of the corporate reformists on the final version of Chapter Eight.

The probationary section of Chapter Eight implements the SRA's expansive authorization of probation. 130 In the Sentencing Guidelines, the Commission requires courts to order a term of probation in eight circumstances for periods of up to five years. 131

As Congress did in the SRA, the organizational guidelines specify that probationary conditions must be reasonably related to the nature and circumstances of the offense and the history and characteristics of the defendant. 132 Chapter Eight also incorporates the SRA's limitation that probationary conditions may be used when they "involve only such deprivations of liberty or property as are

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125 Id.
126 Id.
127 Id.
128 GUIDELINES, supra note 123, at Ch. 8, Introductory Commentary.
129 See id.; § 8A1.2, Application Instructions.
130 See id. §§ 8D1.1 - 8D1.5.
131 The eight circumstance are: (1) to secure payment of restitution, enforce a remedial order or ensure completion of community service; (2) to secure payment of a fine if payment is not made in its entirety at the time of sentencing; (3) when an organization having more than 50 employees at the time of sentencing does not have an effective program to prevent and detect violations of law; (4) when the organization engaged in similar adjudicated criminal misconduct within five years prior to sentencing and the current offense occurred after that adjudication; (5) when "high-level personnel" of the organization engaged in similar adjudicated criminal misconduct within five years of sentencing and the current offense occurred after adjudication; (6) to ensure that changes are made within the organization to reduce the likelihood of future criminal conduct; (7) when a sentence does not include a fine; and (8) to accomplish one or more of the objectives set forth in the SRA at 18 U.S.C. § 3553(a)(2) (just punishment, deterrence, public protection and rehabilitation). GUIDELINES, supra note 123, § 8D1.1(a)(1)-(8).
132 Id. § 8D1.3(c).
necessary to effect the purposes of sentencing." However, in a policy statement, the Commission lists "recommended" probationary conditions requiring the organization, among other things, to publicize the crime and its punishment, to take certain measures to safeguard payment of any deferred fine, restitution or assessment, and to develop and implement a program to prevent and detect violations of law. Many of these "recommended" conditions of probation are not specifically listed in the SRA and are presumably based on the statute's "catch all" probationary provision. Consequently, Chapter Eight, Subpart D, read as a whole, clearly reflects that the Sentencing Commission accepted the "corporate reformists" argument that courts may use probationary conditions in a wide-ranging fashion.

Since adoption of Chapter Eight, the Commission has worked repeatedly to draft a comprehensive guideline for environmental organizational defendants. In 1991, it appointed an Advisory Group consisting of government lawyers from EPA and DOJ, representatives of the environmental defense bar and corporate legal community, and several law professors, including "corporate reformist" Professor Coffee. In November of 1993 the Advisory Group submitted a proposal to the Commission which continued to emphasize Chapter Eight's use of alternative sanctions. To date, the Commission has not acted on the Advisory Group's proposal.

V. BEPs in the Criminal Setting: Are They Legal and Wise?

The remainder of this Article will identify sources of legal authority for combining fines with BEPs, discuss legal and policy considerations raised through the use of such sanctions, and set forth basic criteria which should be used to evaluate and implement such punishment.

133. Id.
134. Id. § 8D1.4.
136. Final Proposal of the Advisory Group on Environmental Sanctions (November, 1998). The Advisory Group's efforts triggered renewed debate concerning how best to sentence organizations. When the Advisory Group put out its initial draft for public comment, the same forces which had opposed the Chapter 8 guidelines as being too intrusive on business decision making and providing for overly punitive fines banded together again. Their written comments, as well as their public testimony on May 10, 1993, before the Advisory Group, demonstrated their continued preference for "moderate" fines as the primary sanction.
A. Legal Issues

1. Does the SRA Authorize Sentences Containing BEPs?

In order to be legal, any sentence must fall within the statutory mandate of the SRA. As noted previously, that statute authorizes courts to impose a fine, probation or both on organizations in addition to providing criminal forfeiture, restitution and notice to victims. Consequently, a sentence requiring performance of a BEP must fall within one of these categories.

a. Criminal forfeiture and notice to victims

These aspects of sentencing have expanded a judge’s authority at sentencing; however, they do not provide a court with authority to sentence an organization to perform BEPs.

b. Restitution

Restitution traditionally has been a civil remedy designed to prevent a wrongdoer from retaining any benefits illegally obtained from another and to make the victim whole for damages. The SRA’s inclusion of restitution as a specific part of criminal sentencing follows on the FPA’s similar provision and that found in the Victim and Witness Protection Act of 1982.

In the environmental setting, restitution may be appropriate in several different instances. For example, restitution may be imposed in order to have the defendant reimburse a third party for costs incurred in remediating harm caused by the illegal act, such as the stereotypical “midnight dumping” of hazardous waste or other pollutants. Such costs may be incurred by the EPA, state or local regulatory agencies, or private parties.

Restitution may also be viewed as the legal basis for having defendants restore parts of the environment actually damaged by the offense, such as re-creating wetlands destroyed by illegal discharges. Since the defendant may be liable civilly for such restoration, inclusion of such a sanction as part of the criminal sentence obviates the need for a duplicative civil enforcement actions to obtain restitu-

137. 18 U.S.C. §§ 3551(c), 3554-56. Section 3555 provides that “notice may be ordered to be given by mail, by advertising ... or by other appropriate means.” Id. § 3555.


139. CERCLA § 107, 42 U.S.C. § 9607.
tion or remediation. More ephemerally, remediation of environmental harm can be viewed as making "the environment" or the general public whole - in other words, treating the environment or society as the "victim" deserving of restitution.\textsuperscript{140} Consequently, in appropriate cases, courts may impose BEPs as restitution, such as in the \textit{Exxon} and \textit{Hartford Associates} cases previously discussed.

c. Conditions of probation

The SRA’s authorization of wide-ranging conditions of probation contains the broadest legal bases for BEPs, particularly those which exceed existing legal requirements or obligations. While most of the explicitly listed conditions in the SRA are worded to apply to individuals, several may require BEPs.\textsuperscript{141} First, courts may impose community service as a condition of probation in addition to a fine or restitution and must impose it if the sentence does not include a fine or restitution.\textsuperscript{142} This brings up a fundamental question: what is community service in the organizational setting and how can a judge make it meaningful, both in terms of the defendant and the community?\textsuperscript{143}

Under the FPA, courts imposed community service on organizations in spite of inherent problems in having a fictional "person" perform such activities. Despite striking down the specific charitable contribution community service provision in \textit{John Scher}, the Third Circuit succinctly noted the value of community service in general.\textsuperscript{144} "Such sentences require that the defendant become personally involved - devoting both time and energy - in a project

\textsuperscript{140} The question of who or what is the "victim" in environmental criminal cases is outside the scope of this article. However, sentences which include restitution that goes to trusts or third parties purportedly acting in the public interest, rather than a person or organization which had incurred measurable costs in addressing the harm caused by the offense or who suffered direct loss, seem to be attempting to make "the environment" or "the public" whole.

\textsuperscript{141} 18 U.S.C. § 3563(a).

\textsuperscript{142} \textit{Id.} § 3563(a)(2).

\textsuperscript{143} The purpose of giving community service as a condition of probation must be to rehabilitate the probationer, deter future misconduct, provide a general deterrence of others or be deserved punishment. \textit{John Scher}, 746 F.2d at 962. In the corporation, however, community service must be formatted so that the corporate managers and employees will alter their behavior. \textit{Id.} at 963.

\textsuperscript{144} \textit{Id.}
that serves the public interest, and thereby inculcate in the defendant a sense of social responsibility."\textsuperscript{145}

In environmental cases where the defendant was sentenced under the FPA, courts occasionally imposed community service as a condition of probation. In \textit{United States v. Orkin Exterminating Co.},\textsuperscript{146} a pesticide prosecution in Virginia, the court required the defendant to perform 2000 hours of community service and suspended $150,000 of the $500,000 fine.\textsuperscript{147} In \textit{United States v. Nanticoke Homes, Inc.},\textsuperscript{148} a Delaware hazardous waste case, the court fined the company $300,000, and required it to perform 400 hours of community service. The court further required corporate officers, members of the family that owned the company, to perform twenty-five percent of the community service hours.\textsuperscript{149} Unlike the district court in \textit{John Scher}, these judges left the details of the community service to the discretion and judgment of the Probation Department.

Today, section 8B1.3 of the Sentencing Guidelines authorizes imposition of community service as a probationary condition when it is "reasonably designed to repair the harm caused by the offense."\textsuperscript{150} In Chapter Eight, the Sentencing Commission notes that "where the convicted organization possesses knowledge, facilities, or skills that uniquely qualify it to repair damage caused by the offense, community service directed at repairing damage may provide an efficient means of remedying harm caused."\textsuperscript{151} Thus, as long as

\textsuperscript{145} \textit{Id.} The Third Circuit acknowledged the particular problems presented by imposing community service on organizations, but refused to bar such sentences. \textit{Id.} at 963 n.3. The legislative history of the SRA also shows that Congress approves of the use of community service.

The provision is intended . . . to encourage continued experimentation with community service as an appropriate condition in some cases . . . . This condition might prove especially useful in a case in which the imposition of a fine or restitution is not appropriate, either because of the defendant's inability to pay or because the victims cannot be readily identified or the actual amount of injury is slight.

\textit{S. Rep. No. 225, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S.C.C.A.N. 3281.} Congress may have had in mind environmental prosecutions involving pollution which has dissipated by the time of sentencing or which can not be remedied directly when it described the appropriate use of community service.


\textsuperscript{147} \textit{See id.}


\textsuperscript{149} \textit{See id.}

\textsuperscript{150} \textit{GUIDELINES, supra} note 125, § 8B1.3.

\textsuperscript{151} \textit{Id.} § 8B1.3, comment. However, the commentary also states that "an organization can perform community service only by employing its resources or paying its employees or others to do so. Consequently, an order that an organization
the BEP reasonably repairs the harm caused by the offense, a court should be able to require a defendant to perform such a project as a form of community service. This will, of course, require an assessment of what is the harm and how it can be repaired. In the environmental setting, these questions can become complicated fairly quickly.

Nevertheless, the concept of community service is useful when considering having a defendant perform BEPs, particularly those which require the organization to perform tasks not otherwise legally required. Such BEPs could include general pollution prevention or reduction activities which fall outside the restitution or remedial order provisions of the Guidelines. However, community service may not be used to funnel funds or services to third-party groups not affected by the offense. The Sentencing Commission, perhaps mindful of past cases under the FPA, has specifically forbidden use of community service to endow university faculty positions or fund local charities “unless such community service provided a means for preventive or corrective action directly related to the offense and therefore served one of the purposes of sentencing.”

The second applicable condition of probation is the catch-all “such other conditions as the court may impose.” The SRA’s legislative history supports use of this provision to fashion probationary conditions not specifically listed in the statute. According to the statute’s legislative history, “(t)he list is not exhaustive, and it is perform community service is essentially an indirect monetary sanction, and therefore generally less desirable than a direct monetary sanction.”

152. Using community service to make organizational sentencing more meaningful has been a favorite suggestion of the “corporate reformists.” See Brent Fisse, Community Service As A Sanction Against Corporations, 1981 Wis. L. Rev. 970 (1981).

153. Id. at 974. For example, in Allied-Signal, Inc. v. I.R.S., 40 Env’t Rep. Cas (BNA) 1660 (3d Cir. Feb. 23, 1995), instead of imposing a $13.24 million fine, the court allowed the fine to be reduced if Allied Signal established the Virginia Environmental Endowment, a corporation created to improve the overall quality of the environment. Id.

154. GUIDELINES, supra note 123, § 8B1.3 comment.

155. Id. It must serve the purposes of sentencing set forth in 18 U.S.C. § 3553(a).

156. 18 U.S.C. § 3563(b)(22).

157. S. REP. No. 225, 98th Cong., 2d Sess. 95 (1984), reprinted in 1984 U.S.C.A.N. 3278. The conditions “are simply designed to provide the trial court with a suggested listing of one of the available alternatives which might be desirable in the sentencing of a particular offender. It is anticipated that . . . the court will review the listed examples . . . weigh other possibilities suggested by the case, and, after evaluation, impose those that appear to be appropriate under all the circumstances.” Id.
The Sentencing Commission presumably uses the catch-all provision, along with the explicit statutory authority for restitution, as its legal basis when it instructs judges in Chapter Eight that their first concern at sentencing should be to impose remedial orders, as conditions of probation, to "remedy the harm caused by the offense and to eliminate or reduce the risk" of future harm, including the creation of trust funds "to address that expected harm." The Commission does not cite any statutory authority for this provision; however, the Commentary to section 8B1.2 cites environmental cleanup as one situation subject to remedial action.

The SRA and the organizational sentencing guidelines clearly authorize courts to impose BEPs on defendants as conditions of probation in order to "repair" or "remedy" the harm caused by the offense or eliminate or reduce the future risk of harm. However, such BEPs must fulfill the statutory requirement that courts impose probationary conditions which are "reasonably related" to the nature and circumstances of the offense, the history and characteristics of the defendant, and the sentencing goals of the SRA, and only involve deprivations of liberty or property when are "reasonably necessary" to accomplish Congress's sentencing goals.

When correctly developed, BEPs satisfy all these criteria. First, a BEP focused on environmental harm generally caused by the offense will be "reasonably related" to the offense. Second, responsible prosecutors and judges will assess the BEP in light of the defendants' history and characteristics, particularly their ability to

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158. Id. However, the court may not impose a condition of probation which results in a deprivation of liberty, unless that deprivation is "reasonably necessary" in carrying out the purpose of the sentence. Id.

159. GUIDELINES, supra note 123, § 8B1.2.

160. Id. If remedial action is ordered, the appropriate governmental agency may have authority to coordinate the remedial cleanup. Id.

161. Id.

162. 18 U.S.C. § 3563(b). For the factors which the court must take into account to determine what is “reasonably related” and “reasonably necessary,” see supra notes 113-14 and accompanying text. In a case highly reminiscent of the FPA line of decisions, the Third Circuit ruled in United States v. Harvey, 2 F.3d 1318 (3d Cir. 1999), that the Sentencing Reform Act did not authorize courts to order a defendant to donate money to a charity as part of a sentence. Id. at 1330. The defendant was convicted of child pornography, and the trial court had ordered him to donate $5,000 to a local anti-pornography organization. Id.

163. 18 U.S.C. § 3563(b).
undertake and implement a BEP.\textsuperscript{164} More than would the mere payment of a fine, these projects will help achieve Congress' goals in sentencing: just punishment, deterrence, public protection, and rehabilitation.\textsuperscript{165} BEPs provide a just punishment for the offense if they are related to the nature of the offense and the harm created. Furthermore, BEPs will deter the defendant as well as others because they demonstrate that punishment will not be limited to merely "writing a check." BEPs will also protect the public against future crimes because of their deterrent value; hopefully BEPs will self-educate and rehabilitate the defendant.

2. \textit{Congressional "Power of the Purse" Restrictions}

Pursuant to Article I of the United States Constitution, Congress has the "power of the purse."\textsuperscript{166} This power may affect BEPs in several ways, depending in large part on how an alternative sanction is structured.\textsuperscript{167}

\textbf{a. The Miscellaneous Receipts Statute}

Among its thousands of pages, the United States Code contains a paragraph almost mythically referred to in government circles as the Miscellaneous Receipts Statute ("MRS").\textsuperscript{168} This obscure provision often is cited by the Comptroller General or others who vigorously guard the flow of money into and out of the federal Treasury.\textsuperscript{169} They claim that the MRS generally prevents the

\begin{itemize}
\item \textsuperscript{164} \textit{Id.} § 3553(a)(1).
\item \textsuperscript{165} \textit{Id.} § 3553(a)(2).
\item \textsuperscript{166} U.S. CONST. art. I, § 9, cl. 7.
\item \textsuperscript{167} For a general discussion of Congress' power of the purse, see K. Stith, \textit{Congress' Power of the Purse}, 97 YALE L.J. 1943 (1988).
\item \textsuperscript{168} Act of March 3, 1849, ch. 11, 9 Stat. 398 (codified as amended at 31 U.S.C. § 3302(b)(1982)). 31 U.S.C. § 3302(b) provides: "[e]xcept as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charges or claim."
\item \textsuperscript{169} EPA and the Comptroller General ("CG") have sparred over whether the MRS bars EPA's use of SEP's in enforcement cases, thanks in part to Congressional inquiries. In response to such an inquiry from Congressman John Dingell in 1991, the CG issued an opinion stating that EPA could not settle Clean Air Act ("CAA") enforcement actions concerning the mobile source regulatory program by having the violator perform public awareness programs. Comptroller General Opinion, No. B-247155 (July 7, 1992). When EPA refused to change its position that such settlements were legal, the Congressman again asked the CG for an opinion. The CG complied and issued a second opinion. See Comptroller General Opinion, No. B-247155.2 (March 1, 1993). The CG again noted that the Agency's authority did not extend to remedies unrelated to the violation. \textit{Id.}
\end{itemize}
United States from "giving up" higher monetary sanctions in exchange for alternative sanctions, particularly when a third party is receiving funds allegedly in lieu of a federal monetary punishment. Simply put, the MRS mandates that money owed to the federal government must be deposited in the Treasury upon receipt.

Attorneys can avoid any restrictions imposed by the MRS by properly structuring a plea agreement and sentence. Federal environmental statutes and Title 18 generally authorize imposition of a criminal fine "up to" a daily maximum per day of violation or per count, not a pre-determined specific amount. Determination of the specific amount is left to the informed judgment of the court. Consequently, it seems logical that criminal punishment triggers the MRS, if at all, only when the court makes a final determination as to the actual amount of the fine portion of the total

Synar, 478 U.S. 714, 726 (1986) (finding Congressional removal powers of CG and separation of powers prevents CG from functioning as part of executive branch). The CG's focus on the relationship between the violation and the SEP differs little from the appellate courts' rulings in FPA cases and the SRA's requirement that probationary conditions be reasonably related to the offense.

170. In Re Commodity Futures Trading Commission, B-210210 (Sept. 14, 1983), 70 Comp. Gen. 17 (1990). The judiciary also expressed concerns in Missouri Valley, about potential monetary diversions in cases sentenced under the FPA:

We note also that the effect of the monetary-payment conditions of probation in this case is to transfer to a private entity designated by the district court a substantial sum of money that would otherwise likely have gone, in the form of a fine, into the federal treasury. The appropriation of federal treasury funds is ordinarily a legislative function. . . . [W]e are reluctant to hold that Congress . . . delegated to the courts the power to allocate funds otherwise collectible as fines to any persons other than those expressly mentioned in the statute - that is, to aggrieved persons who have suffered actual damages or loss caused by the offense for which conviction was had, and to persons for whose support the defendant is legally responsible.

Missouri Valley, 741 F.2d at 1549-50.

A related concern involves federal agencies trying to supplement their activities without congressional appropriation. The CG cited this concern when examining EPA's SEP practices under the CAA. See Comptroller General Opinion, B-247155, supra note 169.

171. 31 U.S.C. § 3302(b).

172. See, e.g., CWA § 309(c) (1)-(3), 33 U.S.C. § 1319(c) (1)-(3). The criminal penalties section of the CWA provides for: "a fine of not less than $2,500 nor more than $25,000 per day of violation" if there is a negligent violation of the statute, "a fine of not less than $5,000 nor more than $50,000 per day of violation" for a knowing violation of the statute, and "a fine of not more than $250,000" for knowing endangerment. Id.

173. See, e.g., CAA § 113(c), 42 U.S.C. § 7413(c). The CAA provides punishment with fines "pursuant to title 18." Id.

punishment, and that payment of the fine amount satisfies the MRS.

b. Augmentation of Budgets and Anti-Deficiency Act

The MRS is intended to prevent federal agencies from spending money for their own causes by requiring it to be deposited in the Treasury for use as Congress directs. BEPs which act to supplement the budget or resources of a federal agency may run afoul of this fiscal limitation. For example, the Comptroller General ("CG") has opined several times that enforcement settlements or other agreements which reduce the amount of penalties or other fees going to the Treasury in exchange for university research or similar activities act to augment agency budgets and are illegal. This logic may be tenuous but it has casued federal agencies to distance themselves from this type of agreement.

The Anti-Deficiency Act addresses a related concern. It prohibits executive branch employees from spending money in excess of amounts available through Congressional appropriations or obligating the federal government to pay money prior to appropriation by Congress. This statute may come into play when a defendant establishes a trust fund involving money which arguably would have gone to the federal Treasury as a fine and which is so heavily influenced or controlled by government employees for public benefit that it really is a governmental rather than private entity. Government employees are thus spending unappropriated money for federal government purposes. As discussed below, some trust funds created pursuant to plea agreements have utilized government employees, acting in their public role, as decision makers. This arrangement brings the Anti-Deficiency Act into play and should be avoided. Trust funds should be controlled by independent third

175. Stith, supra note 167, at 1364. The MRS ensures that executive agencies do not obligate public funds to activities except in the amounts appropriated by Congress. Id.

176. See e.g., In re Commodity Futures Trading Comm’n, 70 Comp. Gen. 17 (1990).

177. See, e.g., Original SEP Policy, supra note 25 at 10.


179. Id. § 1341. The limitation provides: “[a]n officer . . . may not - (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or (B) involve either government in a contract or obligation for the payment of money before an appropriation is made . . . .” Id. § 1341(a)(1).

180. See generally Burnett Plea Agreement, supra note 43.
parties, not federal government employees acting within the scope of their professional duties.

c. Crime Victims Fund

By law, most criminal fines must be deposited into a special account in the Department of the Treasury known as the Crime Victims Fund ("Fund"). The money is used to pay for victim compensation and assistance programs. Consequently, once a fine has been imposed by a court, that money must go to the Fund to benefit victims of crime.

The Fund legislation presents the same problem as that encountered with the MRS: alleged diversion of money owed to the United States. As with the MRS, attorneys and judges may avoid this obstacle simply by carefully delineating the amount which is a fine, and that which is restitution or some other form of sanction imposed by the court. The fine amount must be paid to the Treasury like any other fine, and will be deposited into the Fund.

3. Trust Funds/Third-Party Beneficiaries

Prosecutors have used both statutorily-created and ad hoc trust funds controlled by third parties to obtain money for environmentally-related projects. While the projects paid for by such funds and the underlying criminal conduct have been related, the amount of direct linkage between the harm and the actual offensive conduct has varied.

Provisions authorizing federal trust funds or the acceptance of gifts exist throughout the United States Code. The North American Wetlands Conservation Fund has been used in at least one case to receive money provided by criminal defendants. For example, in the Alaskan Exxon oil spill prosecution, the defendants paid $12 million of the ultimate $25 million fine to the Fund for use by the Department of the Interior "to carry out approved wetlands conservation projects in the United States, Canada and Mexico."
However, a different situation occurs when the defendant agrees to create a trust fund as part of its criminal sentence. Payments into a trust fund are usually labeled as restitution to avoid Crime Victim Fund and MRS problems, and have been used for wide-ranging purposes. For example, in the *Burnett* wetlands case in Washington State, the defendants will pay $150,000 in restitution into a trust fund created as part of the sentence. Trust representatives, personnel from municipal and federal agencies and a local land trust have final authority on how to spend the fund to "preserve, protect and restore wetlands" in the Battle Ground, Washington area for citizens' benefit.\(^{186}\)

Trusts created as part of the sentence and funded by defendants' payments resemble charitable contributions selected by the parties or the courts which were struck down by appellate courts under the FPA. Besides purely legal concerns, the appellate courts believed that such selective funding of charities or other good causes embroiled judges in matters best left to others. The Fourth Circuit expressed such concern in an anti-trust prosecution:

Creative sentencing of the kind here undertaken . . . necessarily involves the court in selecting particular third persons to become beneficiaries of the probationer's assets - presumably acting in some way as "surrogates" for the public as the actually 'aggrieved party' . . . . Where the sums imposed for payment are also fixed by the court without reference to any measurable losses or damage, the court exposes itself to possibly justifiable and unanswerable criticisms both in respect of the particular beneficiaries selected and the specific sums awarded them. The danger thereby created, without compensating benefit, for unnecessary involvement of the criminal justice system in peripheral controversy is obvious.\(^{187}\)

Despite these concerns, the Sentencing Commission authorizes courts to create trust funds as part of a criminal sentence.\(^{188}\) Section 8B1.2(b) of the Guidelines permits judges to create trust funds.

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187. *United States v. Wright Contracting Co.*, 728 F.2d 648, 653 (4th Cir. 1984). *See also Missouri Valley*, 741 F.2d at 1550 (stating "courts are ill-equipped to pick and choose, among countless worthy causes, which nonaggrieved charitable organizations should receive large sums of money that would otherwise be paid to the treasury as fines.").

188. *GUIDELINES*, *supra* note 123, § 8B1.2(b).
funds to address “expected harm” when the court can “reasonably estimate” the magnitude of the future harm.\textsuperscript{189}

Trust funds may be appropriate in certain cases, especially when they are statutorily created, but creation of \textit{ad hoc} entities presents several problems which must be taken into consideration. First, as the courts discussed in the FPA line of cases, court selection or approval of funding of specific charities or good causes may lead to appearance of impropriety problems.\textsuperscript{190} Thus, the trust and its goals must be tied as directly as possible to the harm caused by the offense. Second, in terms of logistics, creation of trusts as part of the plea will place additional resource demands on lawyers on both sides in drafting and reviewing acceptable trust documents. This will complicate and likely delay resolution of cases. Finally, lawyers and judges should be concerned with who controls the trusts and their liability for such activity. Normally, third parties will control the fund’s activities, and the court must be shown that these individuals are the right people for the job. However, the individuals must ensure that their participation does not create “power of the purse problems” by transforming the fund into a federal activity using unappropriated federal funds.

B. Policy Issues

If BEPs are legal, there remain several public policy issues which must be addressed in evaluating the overall utility of this sentencing approach. The following questions about BEPs have merit, but the problems they present may be overcome by continued efforts to integrate criminal environmental prosecutions into the federal government’s overall regulatory program as well as increasing communication among government employees pursuing similar goals.

1. \textit{Do BEPs Duplicate Civil Enforcement?}

Persons involved in criminal and civil enforcement often draw a “bright line” distinction between each of those roles in environmental regulation. Prosecutors and criminal investigators generally seek to punish the guilty and deter others from similar activity. Broader regulatory objectives, such as technology-based injunctive relief or remedial cleanup, are generally left to civil enforce-
ment.  This approach is based in part on traditional distinctions in American criminal and civil law, on a pragmatic appreciation for the complexity of environmental law, and on most criminal justice system participants’ lack of expertise in compliance and clean-up standards and measures. Therefore, as some will claim, BEPs which impose existing legal requirements on the defendant, or which incorporate traditional civil remedies, may duplicate existing civil remedy mechanisms and intrude on the regulatory system set up by Congress.

These are valid concerns, and care must be taken to ensure that BEPs fit within the overall environmental regulatory program. However, Congress has already blurred the line between criminal and civil punishment by explicitly providing for imposition of restitution as part of the criminal sentence. The Sentencing Commission has taken this a step further by making remedying of harm the first priority of courts at sentencing, either in the form of community service or remedial orders. Consequently, the “bright line” distinction between criminal and civil enforcement has already become shadowy. Communication between the government’s criminal enforcement and regulatory personnel can lead to the development of meaningful BEPs which fit into, rather than disturb, the overall environmental regulatory scheme and an agency’s priorities. The Sentencing Commission has underscored the importance of communication by directing courts to “coordinate” remedial orders with administrative or civil actions taken by regulatory agencies.

When BEPs include remedial actions flowing directly from the illegal conduct, a related concern arises. In the federal system, the

191. Compare 33 U.S.C. § 1319(b) (permanent or temporary injunctions in civil enforcement) with § 1319(c) (fines and/or imprisonment in criminal enforcement).

192. Wray, supra note 2, at 2038. Wray used a similar argument with the introduction of probation into the corporation sentencing guidelines. Id. A primary issue with BEPs is: what can they accomplish that cannot already be achieved through other channels? Id. In comparison, Wray argues that probation is redundant because administrative and civil processes have two advantages: (1) a court lacks the resources to monitor the company’s compliance with the regulation as would the administrative agency; and (2) the judge has little guidance as to which corporate operations fall within the oversight authority.” Id. at 2039. This argument is equally applicable to the institution of BEPs, and may be addressed in a similar fashion.

193. GUIDELINES, supra note 125, §§ 8B1.2, 8B1.3.

194. Id. § 8B1.2, comment. Either the court or the appropriate regulatory agency may order remedial measures, but “if a remedial order is entered, it should be coordinated with any administrative or civil actions taken by the appropriate governmental regulatory agency.” Id.
Attorney General has plenary authority to investigate and prosecute criminal violations of the nation's environmental laws and to settle such cases.195 However, in environmental civil actions, EPA decides when to seek civil judicial relief and asks the Department of Justice to represent it in federal court.196 Additionally, EPA has administrative enforcement authority totally independent of the Department of Justice.197 The remedies sought in civil and administrative cases generally are selected and approved by the agency.198

In some instances, criminal defendants wish to resolve all liability arising out of the same conduct, and the United States enters into both criminal and civil settlements. These are referred to as "global settlements," and often involve different enforcement actions involving different government personnel. For example, a company may be guilty of violating federal pretreatment standards by discharging excessive concentrations of pollutants to the local sewage plant. The company might need to install an improved waste water treatment system to comply with the discharge limits. A global settlement involving the company could include a guilty plea with criminal punishment and a civil consent decree containing injunctive relief. The civil action could also resolve civil penalty matters for violations not covered in the guilty plea.

BEPs which incorporate remedies that normally would result from administrative or civil judicial enforcement tread a fine line between punishing the guilty and intruding on the regulatory agen-

195. United States v. Morgan, 222 U.S. 274 (1911). In Morgan, the Supreme Court held that the Attorney General has the authority to enforce the criminal laws and that this authority is not diminished without a "clear and unambiguous expression of the legislative will." Id. at 282. See also United States v. Orkin Exterminating Co., 688 F. Supp. 223, 224 (W.D. Va. 1988) (EPA's delegation of regulatory authority under federal pesticide statute to Commonwealth of Virginia did not divest Attorney General of criminal prosecutorial authority, absent specific declaration by Congress). See 28 U.S.C. §§ 516, 519 (reserving litigation to Department of Justice); Marshall v. Gibson's Products, Inc., 584 F.2d 668, 676 (5th Cir. 1978) (Attorney General has plenary power over all litigation involving the United States and its agencies absent Congressional directive).

196. See, e.g., CWA § 506, 33 U.S.C. § 1366 (the "Administrator shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this chapter."); CAA § 305, 42 U.S.C. § 7605 (Attorney General represents United States in civil actions under this chapter).

197. CWA § 309(g), 33 U.S.C. § 1319(g). The Administrator may assess penalties and demand payment for violation of the Act. Id. However, if the violator fails to pay the penalty, the Administrator must request the Attorney General to bring a civil action. Id. § 1319(g)(9). See also RCRA § 3008(a), 42 U.S.C. § 6928(a) (Administrator may order civil penalties, immediate compliance, or may commence a civil action against a violator); CAA § 113, 42 U.S.C. § 7413 (Administrator may commence a civil action for recovery).

198. See, e.g., CWA § 309(g), 33 U.S.C. § 1319(g).
cases’ authority. Prosecutors should consult early with regulatory agencies about the wisdom and practicality of implementing the BEP in the criminal setting versus the regulatory environment. If the defendant seeks a release from civil liability in exchange for the BEP rather than merely incorporating the civil injunctive or remedial action in the criminal sentence, civil enforcement personnel from the appropriate regulatory agency and/or Justice Department must be brought into negotiations because federal prosecutors lack authority to provide such releases in a criminal plea agreement.\footnote{The environmental statutes generally talk in terms of the Administrator of EPA commencing administrative or civil judicial actions, not the Attorney General. See CWA § 309, 33 U.S.C. § 1319(a), (g); RCRA § 3008(a), 42 U.S.C. § 6928(a).} At some point, a defendant’s desire for finality and the differences between criminal and civil actions may prevent BEPs from being included in the criminal sentence.

2. \textit{Do BEPs Increase Overall Societal Costs For Offenses?}

The “economic” advocates in criminal sentencing no doubt will argue that BEPs, particularly those which exceed existing legal requirements, increase the total or final cost to society of the offense and should be avoided. It is true that supervising a defendant perform specific tasks will consume more governmental and private resources than merely writing and processing a check.

However, many situations exist where inclusion of BEPs will be cost-efficient. If the BEP merely incorporates regulatory or clean-up obligations stemming from the illegal act, the sentence will save time and effort by negating the need of the regulatory agency to undertake a civil enforcement action for compliance or remedial action. This will save agency and judicial resources, as well as private resources expended in responding to or defending against the civil action. When a BEP requires the defendant to undertake supplemental action, the additional costs must be weighed against the benefits. BEPs should have a positive impact on the environment, ideally promoting pollution prevention and risk reduction.

3. \textit{Do BEPs Unduly Complicate the Criminal Justice System?}

It is fair to say that most federal judges and probation officers are ill-equipped to deal with anything but the most basic BEPs. Consequently, they should receive assistance from an environmental regulatory agency. This will increase the societal costs associated with oversight, but will ensure that the projects which are under-
taken are productive and performed properly. Regulatory agency assistance should be available if the BEP is effective and the regulatory agency believes it advances environmental protection. If, after reviewing a proposed BEP, the regulatory agency is not convinced of the overall merit of the proposal, the parties should seriously question the value of going forward with it. Recognizing the lack of expertise of the criminal justice system in various areas, the Sentencing Commission has endorsed consultation with regulatory agencies in several areas such as remedial orders and probationary conditions.200

4. BEPs Are Consistent With and Will Help Achieve the Nation's Environmental Goals

According to Congress, pollution prevention is a national goal,201 and it is one of the leading themes of environmental regulation today.202 The individual federal environmental statutes also contain Congressional goals and objectives sought to be achieved by the legislation.203 These goals should be incorporated into punishment of those convicted of environmental crime whenever feasible.

VI. CRITERIA FOR EVALUATING AND DEVELOPING BEPS IN CRIMINAL PROSECUTIONS

EPA's experience with SEPs, case law developed under the FPA, and provisions of the SRA and Chapter Eight of the federal sentencing guidelines provide criteria which prosecutors, judges and defense attorneys should use in fashioning BEPs for criminal cases against corporations, partnerships and other organizational defendants.

201. The Pollution Prevention Act of 1990 provides that, "[t]he Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible." 42 U.S.C. § 13101(b).
203. See CWA § 101(a), 33 U.S.C. § 1251(a) (objective of the CWA is to restore and maintain the integrity of water supply); CAA § 101(b), 42 U.S.C. § 7401(b) (CAA's purpose is to protect and enhance air quality); RCRA § 1002, 42 U.S.C. § 6902 (objective is to protect health and environment by conservation of energy and elimination of generation of hazardous waste); TSCA § 2, 15 U.S.C. § 2601 (objective is to protect health and environment by regulating toxic substances).
A. There Must Be a Reasonable Relationship Between The BEP and The Goals of the Sentencing Reform Act

Appellate courts have struck down creative probationary sentences under the FPA because they did not bear a reasonable relationship to the public protection and rehabilitative goals of the statute.\(^{204}\) Under the SRA and the Chapter 8 organizational guidelines, courts may impose probationary conditions which "involve only such deprivations of liberty or property as are reasonably necessary for the purposes" of sentencing.\(^{205}\)

Each BEP must be designed to achieve at least one of the SRA's sentencing objectives: punishment, deterrence, protection or rehabilitation.\(^{206}\) Since all of the objectives are equally important in Congress' eyes, a BEP which achieves deterrence is just as valid as one which furthers rehabilitation. For example, clean up of pollution resulting from an illegal activity clearly falls within the just punishment and rehabilitation goals of the SRA, and hopefully serves as a deterrent to the defendant and other potential environmental criminals.\(^{207}\) BEPs requiring defendants to reduce or prevent pollution beyond existing legal requirements similarly satisfy the punishment, rehabilitation and deterrence goals of the SRA.\(^{208}\)

Whether such sanctions are necessary to achieve the SRA's goals presents more of a philosophical than legal question reflecting the continued debate over how best to punish organizations generally for criminal behavior. Economic advocates generally believe that such non-monetary sanctions are not necessary to achieve Congressional objectives while the corporate reformist advocates likely will support BEPs as necessary to achieve meaningful punishment, deterrence, protection and rehabilitation. The necessity question may ultimately turn on the participants' personal views on how to punish organizational defendants, particularly in the environmental crime setting.

\(^{204}\) Gruner, *supra* note 4, at 23 n.112.
\(^{205}\) 18 U.S.C. § 3563(b). Probationary conditions may be imposed if such deprivations of liberty or property are necessary to effect the purposes of sentencing. *Guidelines, supra* note 123, § 8D1.3(c).
\(^{207}\) Id. § 3553(a)(2)(A)-(B).
\(^{208}\) Id.
B. The BEP Must Be Reasonably Related to The Nature and Circumstances of The Offense and Must Reasonably Repair or Remedy Harm Caused by The Offense

The SRA requires the court to take the nature and circumstances of the offense into account at sentencing. Additionally, the SRA, Chapter Eight of the organizational guidelines, and EPA’s SEP policy require that the project address the harm caused by the offense. Appellate courts rejected sentences under the FPA because the punishment, often charitable contributions, was not designed to remedy the harm directly if charitable contributions went to parties which had not been harmed.

The primary question raised by these requirements is how much of a direct relationship (or “nexus” to use EPA’s phrase) must exist between the offense and the BEP. Chapter Eight of the Sentencing Guidelines authorizes courts to impose remedial projects, community service or other probationary conditions to remedy or repair the harm caused or anticipated to be caused by an offense. The Commission’s examples generally refer to remediation of direct harm such as clean up of a specific area harmed by illegal disposal of hazardous substances.

However, many environmental offenses, particularly those involving water or air pollution, do not lend themselves to direct remedial action because of the transient nature of these resources. In contrast to the static nature of soil, water and air continually move and transport pollution from one area to another. This movement often also results in dissipation or dilution of pollution. Because the contamination may occur elsewhere or may be dissipated by the time the offense is discovered and prosecuted, the illegal discharge of pollutants into a waterway or the excess emissions of contaminants into the atmosphere are not so easily remedied by direct action taken at the specific site of the illegal activity.

Judges should apply the SRA and Chapter Eight broadly and in tandem with the “reasonable relationship” criterion to impose BEPs.

209. Id. § 3553(a)(1).
211. See, e.g., United States v. Harvey, 2 F.3d 1318 (3d Cir. 1993) (striking down sentence imposed under SRA which required defendant convicted of child pornography to donate $5,000 to anti-pornography organization). The Government conceded that the lower court had erred when it imposed the charitable contribution condition. Id. at 1330.
212. GUIDELINES, supra note 123, §§ 8B1.2, 8B1.3.
213. Id. § 8B1.2, comment.
involving similar types of pollution and harm as the underlying offense, but which may not be focused on the specific site of illegal conduct, or which involve other types of pollution at or near the site of a violation. For example, an illegal discharge of pollutants under the Clean Water Act into the Delaware River may not be capable of direct remedial action because the sheer volume of water present in the river has diluted and transported the pollutants away. However, acting via a BEP, a defendant could take action to protect the same river or watershed area by reducing permitted discharges from other facilities into the river or taking clean-up action at other portions of the waterway.214

The Norwood air pollution case exemplifies this type of BEP. There, the defendant emitted excess VOC emissions into the air in a geographical region which has chronic problems with ozone, a pollutant resulting from VOC and other emissions such as car exhausts. The BEPs negotiated by the parties and imposed by the court required the company to perform research to reduce VOC generation at that facility, a form of pollution prevention. This requirement was directly related to the harm caused by the offense. However, the sentence also required the company to reduce the amount of atmospheric pollution generated by employees’ commuting by reducing their number of work days each week. This was another form of pollution prevention, one tied to the ultimate consequence of VOC emissions (the formation of ozone), but which is not aimed directly at VOCs or the facility itself. Norwood’s agreement to move hazardous waste storage inside rather than outside involved a different type of pollutant than the offense, but involved management of potential environmental contamination at the same facility.215 The requirement that Norwood perform an environmental audit at the facility similarly encompassed a broader scope of pollutants than did the offense.

A variety of arguments can be made to support a broad interpretation of the “offense/harm” criterion. First, the SRA mandates that courts consider “the nature and circumstances of the offense” in sentencing.216 Congress enacted environmental statutes for the public welfare to protect and improve the Nation’s air, water and

214. EPA’s SEP Policy recognizes this by permitting projects to be performed at the site of the violation, or within a 50-mile radius of the violation’s location, or within the same ecosystem. See Original SEP Policy, supra note 25, at 5.

215. EPA’s SEP Policy permits projects to focus on pollutants other than the ones at issue in an enforcement action. Original SEP Policy, supra note 25, at 5.

soil, and to protect public health. Acts which violate these statutes endanger the public welfare and sentences should be fashioned which help achieve Congressional goals in enacting these statutes. Second, Congress has declared pollution prevention to be the national policy of the United States, and courts should seek to incorporate this approach as part of environmental sentencing. Third, this approach is consistent with that taken by EPA in its SEP Policy which permits projects addressing different pollutants or which are undertaken at locations other than the site of the original violation. Finally, this interpretation is also consistent with Congress' directive that the list of conditions of probation contained in the SRA be merely illustrative, not exhaustive.

C. What Are The Characteristics of The Defendant?

Both the SRA and EPA's SEP policy require the court to examine the history and characteristics of each violator. EPA wants to make sure that the defendant is financially and technically reliable to perform the BEP. The SRA requires courts to evaluate the defendant to "avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."

Both rationales support having courts carefully examine a defendant's background, history and ability to perform BEPs. Given the sometimes complex nature of these projects, courts must ensure that defendants are sincere in proposing and implementing them, and in having the necessary financial, technical and legal resources to ensure they are performed properly.

D. BEPs Should Not Replace Imposition of Criminal Fines and Defendants Should Be Barred From Claiming BEP Expenses as Tax Deductions

The SRA directs judges to impose a fine or probation or both; thus courts are authorized to create a sanction which combines

218. See id.
220. Original SEP Policy, supra note 25, at 5.
222. 18 U.S.C. § 3553(a)(1); Original SEP Policy, supra note 25, at 1.
both monetary and non-monetary penalties.\textsuperscript{224} EPA’s SEP policy generally prohibits Agency personnel from using SEPs to reduce civil penalties to very low levels because the Agency believes such action will undermine the deterrent effect of enforcement actions.\textsuperscript{225} Courts should follow a similar approach in the criminal arena. Imposition of a sentence which contains a criminal fine and a BEP creates a significant financial deterrent to the defendant and others. Substitution of a BEP for a criminal fine could send a message to organizational defendants that they may commit crimes and then avoid hefty criminal fines by performing some project after being caught. This message will undermine criminal enforcement’s usefulness in promoting environmental compliance, and will undermine the public’s perception that offenders are being punished. While BEPs may appeal to many involved in day-to-day environmental matters, the public may view them as easy punishment. Therefore, there must be a significant “traditional” punishment in the form of a fine, coupled with alternative sanctions such as BEPs.

Total replacement of a fine with a BEP defeats one of Congress’ purposes in enacting the SRA.\textsuperscript{226} Congress explicitly raised the maximum amounts individuals and organizations could be fined when it enacted the SRA,\textsuperscript{227} and thus clearly intended fines to be part of criminal sentences. Probation and restitution are additional parts of sentences, not total replacements for fines.\textsuperscript{228}

Moreover, imposition of fines will rebut the claim that BEPs divert money away from another laudable legislative goal, the Crime Victims Fund.\textsuperscript{229} Combination of fines and BEPs will serve various Congressional objectives: punishment, environmental protection, and funding of victim compensation and assistance programs.

The specific fine amount must be determined on a case-by-case basis, taking into account the stigma associated with criminal prosecution that is not present with civil enforcement. A useful guide-

\textsuperscript{224} Id. § 3551(c).
\textsuperscript{225} Original SEP Policy, supra note 25, at 11. When employing SEPs in settlement of enforcement actions, the Agency generally will seek to recover the “economic benefit” realized by the violator through noncompliance as well as “part of the ‘gravity component’ of the penalty.” Id. The Agency’s concept of economic benefit is similar to that of “pecuniary gain” contained in 18 U.S.C. § 3571(d), the provision of the SRA which increased potential criminal fines.
\textsuperscript{227} Id. § 3571(b)-(c).
\textsuperscript{228} Id. § 3572.
\textsuperscript{229} 42 U.S.C. § 10601(b).
line, however, would be one similar to that taken by EPA in utilizing SEPs; the fine should at least equal the "economic benefit" realized by the defendant in committing the offense in order to prevent the defendant from remaining better off than it would have been through compliance.\textsuperscript{230}

This is particularly true when considering the differing tax implications presented by criminal restitution or remedial actions. An organization can not deduct a criminal fine when calculating federal income taxes.\textsuperscript{231} However, the costs of a BEP may be claimed as a business expense when the payments are remedial rather than punitive in nature or intended to compensate another for loss.\textsuperscript{232} Consequently, in negotiating a BEP, the Government should require the defendant to agree that it will not deduct the costs of the BEP for tax purposes. If the defendant refuses, then the Government should calculate the tax benefits of the BEP and increase the criminal fine amount appropriately.

E. The Amount of the Fine Should Be Clearly Identified With Restitution and Other BEP Tasks Separately Classified

Since the SRA does not contain a sentence suspension provision like the FPA, restitution and probation are equal parts of the sentence.\textsuperscript{233} Consequently, the plea agreement negotiated by the parties and the sentence pronounced by the court should not consist of a partially or totally suspended fine. Instead, the sentence should independently reflect the fine, restitution and/or probation

\textsuperscript{230} Original SEP Policy, \textit{supra} note 25, at 11. The term "economic benefit" means the amount of money saved by the violator through noncompliance. EPA has different formulas for calculating "economic benefit," depending on whether the costs were avoided forever, such as in the case of waste water discharged into a river without treatment, or merely postponed, such as the delayed installation of air pollution control equipment. The term parallels Congress' use of the "pecuniary gain" concept in setting criminal fines in 18 U.S.C. § 3571(d). While the fine provisions of Chapter 8 of the Sentencing Guidelines do not specifically apply to environmental crime, recovery of "economic benefit" is consistent with the Sentencing Commission's directive that fines be set sufficiently high to prevent the violator from benefiting from the offense. GUIDELINES, \textit{supra} note 123, § 8C2.4, comment. According to the guidelines, "[i]n order to deter organizations from seeking to obtain financial reward through criminal conduct, ... when greatest, pecuniary gain to the organization is used to determine the base fine." \textit{Id}.  

\textsuperscript{231} 26 U.S.C. § 162(f).  

\textsuperscript{232} For a useful discussion of the tax provisions implicated by this issue in environmental criminal enforcement, see \textit{Allied-Signal}, 40 Env't Rep. Cas. 1660 (3d Cir. Feb. 23, 1995). There, after a 17-year battle, Allied-Signal lost its claim that $8 million paid to an environmental foundation it created was not part of a criminal sentence. The Third Circuit refused to allow the company to claim the $8 million payment as a business expense. \textit{Id}.  

\textsuperscript{233} 18 U.S.C. §§ 3556, 3561, 3571.
components. For example, rather than imposing a $500,000 fine and suspending $300,000 on completion of probationary tasks or restitution, the sentence should include a $200,000 fine, restitution and/or probationary tasks. A defendant’s failure to comply with any part of the sentence would make it subject to further action by the court.

This structure will eliminate any potential Miscellaneous Receipts Statute or Crime Victims Fund claims. If the fine is clearly identified as a specific part of the sentence, that is the amount which is due the Federal Government. Payment of that amount will satisfy these statutory requirements and prevent any claim being raised that funds due the Federal Government are being diverted.

F. Regulatory Agency Assistance Should Be Sought by Prosecutors, Judges and Probation Officers in Evaluating and Overseeing Implementation of The BEP

All parties should be concerned with who will be responsible for ensuring the environmental validity of the project and overseeing its implementation by the defendant. Courts will be very hesitant about imposing a BEP as part of a sentence if prosecutors and defense counsel can not assure judges that experts will assist the probation officer in making sure the defendant delivers. Prosecutors and defense attorneys must involve regulatory agencies such as EPA early in negotiations over BEPs. They must persuade regulators that the proposed BEP is sufficiently worthwhile to invest resources in overseeing implementation, particularly if oversight will require extensive time and effort taken from other competing demands. This involvement is consistent with Chapter 8 which authorizes courts to “consider the views of any governmental regulatory body that oversees conduct of the organization relating to the instant offense” when probation is imposed for various reasons.234

G. Courts Should Require The Defendant To Take Actions Beyond Those Already Required by Law Whenever Possible To Prevent or Reduce Pollution

In the criminal setting, defendants may be ordered to take clean-up action or some other task required by law in the form of community service, restitution, or remedial orders. This is appropriate given the nature of the criminal process and the broad sentencing goals of the SRA.

234. GUIDELINES, supra note 123, § 8D1.4, comment.
However, criminal justice participants should also be alert for opportunities to have defendants take actions which will prevent or reduce pollution, but are not required by law. Defendants should be encouraged to propose and implement these projects by receiving a substantial "reduction" in their fine. Examples of such tasks would be: (1) process changes which reduce actual pollution, (2) changing employee behavior to reduce individual pollution, such as commuting patterns, and (3) reductions in the amount of pollution generated by a particular process or facility.235

H. BEPs Should Require, Where Appropriate, That Defendants Establish Effective Programs To Prevent and Detect Violations of Environmental Statutes and Regulations

As part of its acceptance of arguments made by "corporate reformist" advocates of organizational sentencing, the Sentencing Commission authorized courts to determine whether organizational defendants had effective programs in place to prevent and detect violations of the law.236 If they did not, the Commission required that courts force companies with fifty or more employees to develop and implement such a program as part of probation.237

In the Norwood air case in eastern Pennsylvania, the company had to establish corporate environmental compliance procedures and publish an employee manual which satisfied the EPA.238 The program included such matters as a telephone "hotline" which employees could call to report environmental and other concerns to upper management without fear of retaliation. It also established an environmental manager who reported directly to senior management of the corporate parent rather than to line production supervisors at Norwood.

A similar program was imposed in the recent prosecution of a shipping business in South Florida. Authorities caught the Viking Princess cruise ship discharging oily bilge water into the Atlantic Ocean off the Florida coast in 1993.239 The court imposed a sentence negotiated by the parties which required the ship's owner,

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235. See Original SEP Policy, supra note 25, at 6 for examples of pollution prevention.
236. GUIDELINES, supra note 123, § 8C2.5(f). This factor is one component of the formula used to calculate fines for organizations convicted of non-environmental offenses. Id.
237. Id. § 8D1.4(c)(1)(citing § 8D1.1(a)(3)).
pursuant to Chapter 8 of the Sentencing Guidelines, to establish and maintain an effective environmental compliance program concerning the managing of waste oil, including bilge wastes, on the Viking Princess, plus payment of a $500,000 fine.\textsuperscript{240}

I. Defendants Should Acknowledge in All Public Discussions of The BEPs That They Result From Criminal Prosecution

Defendants must not be allowed to reap a public relations bonanza by performing BEPs. This would negate the deterrent impact of criminal prosecution and benefit rather than punish the defendant. Instead, the defendant must be required to acknowledge in all public discussions of the BEPs it performs, such as in advertisements,\textsuperscript{241} conferences, and seminars, that it is undertaking these tasks as a result of criminal prosecution.\textsuperscript{242}

VII. Conclusion

The federal government's environmental prosecutive efforts, in combination with the expansion of sentencing options for organizations, present opportunities for courts to impose a "package" of fines and alternative sanctions which punish the guilty, deter potential violators, protect the public, rehabilitate the offender, and benefit the environment more than merely having a corporate employee write a check payable to the United States Treasury. While not appropriate for every defendant, use of beneficial environmental projects is one way of imposing meaningful punishment on an organization convicted of environmental crime while helping this country achieve its environmental protection goals. Current law and public policy support increased use of BEPs, particularly those which result in the prevention or reduction of pollution. However, care must be taken when fashioning BEPs to avoid legal and policy obstacles. In the end, a properly conceived and implemented BEP will achieve Congress' criminal sentencing and environmental protection legislative goals much more than would the mere imposition and payment of a fine.

\textsuperscript{240} Id. at 4-5.
\textsuperscript{241} GUIDELINES, supra note 123, § 8D1.4(a). Having the defendant publicize the crime and its punishment is a recommended condition of probation in the Sentencing Guidelines. Id.
\textsuperscript{242} BEPs can produce favorable publicity for the Government about the prosecution and sentence which will help maximize the deterrent impact of the case. See, e.g., Joseph A. Slobozian, Malvern Company Gets An Environmentally Correct Sentence, PHILA. InQ., March 2, 1994, at B4 (indicating requirement that defendant publish advertisements in local newspaper and trade publication stating details of violation and acknowledging guilt, and noting sentencing judge's approval of proposed sentence).