Note

ENVIRONMENTAL DISCLOSURES AND SEC REPORTING REQUIREMENTS

I. INTRODUCTION

Issues of corporate disclosure generally pertain to financial matters.[1] However, public concern about the environment has prompted a good deal of discussion concerning how to make corporations behave more responsibly with respect to the environment.[2] Environmental

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1. *See, e.g.*, Basic, Inc. v. Levinson, 485 U.S. 224 (1988) (shareholders alleged financial harm because they sold their stock at "artificially depressed" prices after the corporation publicly denied the possibility of a merger). *See also* TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976) (shareholder alleged harm because a joint proxy statement was "incomplete and materially misleading" for not including some unfavorable information presented by an investment banker).

Basic arose under Rule 10b-5 of the Securities Exchange Act of 1934 (1934 Act). Rule 10b-5 provides, in pertinent part, that in connection with the sale of securities it is unlawful:

> (a) to employ any device, scheme or artifice to defraud,
> (b) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

17 C.F.R. § 240.10b-5 (1991). Rule 10b-5, though initially intended as a prohibition against insider trading, has become one of the core disclosure provisions of the 1934 Act. It now applies to most corporate disclosures.

TSC arose under Rule 14a-9 of the 1934 Act which prohibits the issuance of a proxy statement that is "false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading." 17 C.F.R. § 240.14a-9 (1991). It is well settled that corporate disclosures based on false or misleading statements in proxy solicitations give rise to liability. *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426 (1964) (holding that private suits based upon false and misleading proxy statements are permissible and that the trial court has the discretion to fashion the appropriate remedy).

2. *See* Thomas J. Schoenbaum, *The Relationship Between Corporate Disclosure and Corporate Responsibility*, 40 FORDHAM L. REV. 565 (1972). Investor access to information is only one goal of disclosure. The ethical and moral aspects of disclosure may be the primary concern. *Id.* at 578. The "heart of the problem" is addressing the effects of corporate actions on society, particularly on the environment, civil liberties, health, safety, and consumer rights. *Id.* Corporate disclosure rules create a direct relationship between securities laws and corporate responsibility. *Id.*

disclosure issues differ from traditional disclosure issues because of their potential impact on the public.[3] Environmental damage and pollution directly harm the public in that they create real physical dangers to individuals. Financial matters, generally the subject of disclosure debates, may injure corporate shareholders, yet such harm is merely financial.[4] When a corporation harms the environment, the potential injury is much broader and much more serious.[5]

This note will discuss the history of environmental disclosure required under federal securities laws and trends in the interpretation

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3. Leo Herzel & Richard Shepro, *Setting the Boundaries for Disclosure*, 16 SEC. REG. L.J. 179 (1988). Disclosure does not simply ensure equal access to information. There are also costs associated with disclosure. "A very important bargaining issue is involved: Putting a mirror behind a poker player can affect the outcome of the game in a very dramatic way." *Id.* at 181.

Whether one views environmental disclosure as more important than traditional disclosure issues or rather as simply one additional matter a corporation should discuss will depend upon one's view of corporate social responsibility. *See* David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979-1980).

> The fundamental question of corporate social responsibility is when, if ever, it is socially desirable that a corporation organized for profit forego profit because some decision[-]making body or process within the corporation [or within the legislative arena] purports to identify a social need that pursuit of the profit motive will not fill.

Id. at 12.

4. *See supra* note 1. For example, in business negotiations, forcing disclosure of the details can adversely affect the parties' ability to pursue their business goals. The costs associated with compelling environmental disclosures, however, are different. Forcing disclosure may impact upon the corporation's ability to evade environmental laws. Yet, this could be seen as a favorable result; whereas in the traditional business setting, forced disclosure may produce an unfavorable result by interfering unnecessarily with business operations.

5. *Compare In re* Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984, 634 F. Supp. 842 (S.D.N.Y. 1986) (toxic chemical leak caused the deaths of at least 2,100 people and injured over 200,000) *and In re* Union Carbide Class Action Sec. Litig., 648 F. Supp. 1322 (S.D.N.Y. 1986) (securities fraud class action arising out of the Bhopal tragedy was dismissed because omissions in Union Carbide's statements did not render other statements misleading) *with* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969) (shareholder harm based on insider trading).

While we cannot discount the significance to shareholders of financial injury to their investments, it is important to remember that disclosure issues revolving around environmental matters cause two distinct types of injuries. The first is the actual damage to the environment. The second is the harm to the corporate stock based on the corporation's failure to disclose material information. Public interest requires that such potentially enormous dual harm be considered more significant than the monetary losses shareholders may suffer.

and enforcement of the environmental disclosure requirements established by the Securities and Exchange Commission (SEC). Part II summarizes the changes in environmental disclosure requirements under federal securities laws over the past twenty years. Part III analyzes the SEC's most recent statement of environmental disclosure obligations and the current state of reporting. Part IV discusses trends in environmental enforcement and their implications on corporate disclosure obligations in the future.

II. BACKGROUND

Congress imposed affirmative disclosure obligations upon issuers of publicly traded securities in the Securities Act of 1933 (1933 Act)[6] and the Securities Exchange Act of 1934 (1934 Act).[7] The 1933 Act regulates by requiring disclosures associated with the registration and sale of securities.[8] The 1934 Act governs an issuer's annual and periodic reporting requirements.[9] The basic purpose of both Acts was to ensure that important information would be disclosed to the public, thus allowing investors to make informed business and investment decisions.[10]

In general, information must be disclosed if there is a substantial likelihood that a reasonable investor would find the information important to investment decisions.[11] Such information is deemed material and must be disclosed.[12] One of the difficulties with this

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6. 15 U.S.C. §§ 77a-77aa (1988).

7. *Id.* §§ 78a-78*ll*.

8. *See, e.g.*, *id.* § 77g (information required in registration statements); *id.* § 77j (information required in prospectus); *id.* § 77k (civil liability for false registration statements); *id.* § 77*l* (liability for false information in prospectus); *id.* § 77w (unlawful representations); *id.* § 77x (penalties).

9. *See, e.g.*, *id.* § 78m (periodical and other reports); *id.* § 78n (proxies); *id.* § 78q (records and reports); *id.* § 78r (liability for misleading statements); *id.* § 78t (liability of controlling person); *id.* § 78z (unlawful representations); *id.* § 78ff (penalties for violations).

10. *Id.* §§ 77a, 78b.

11. Basic, Inc. v. Levinson, 485 U.S. 224 (1988); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976). *TSC* set forth the standard for materiality in the context of proxy solicitations. This standard was expressly adopted by the Supreme Court in *Basic* for the § 10(b) and Rule 10b-5 context.

12. *TSC*, 426 U.S. at 449. Materiality contemplates "a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *Id.* The Court expressly rejected a standard for materiality that "includ[ed] 'all facts which a reasonable shareholder *might* consider important'" in investment decisions.

standard is determining when such information must be disclosed.

Through the years, the SEC has changed its disclosure requirements in response to judicial decisions,[13] legislative enactments,[14] and recommendations from professionals.[15] It has also issued interpretive releases to remind issuers of existing requirements at appropriate times[16] and to clarify questions raised by issuers.[17]

A. Statutory Framework

When it enacted the 1933 Act and the 1934 Act, Congress empowered the SEC with the authority to prescribe rules and regulations necessary to enforce the acts.[18] Pursuant to that authority, the SEC enacted Regulation S-K to establish requirements regarding the content of corporate statements issued as annual and periodic reports.[19] Various items within the regulation provide the specific disclosure requirements.[20]

Id. at 445 (quoting TSC Indus., Inc. v. Northway, Inc., 512 F.2d 324, 330 (7th Cir. 1975)). The Court was sensitive to the problem of setting such a low threshold for disclosure that civil liability would result from any existing omitted fact. *See id.* at 449 n.10.

13. National Resources Defense Council, Inc. v. SEC, 432 F. Supp. 1190 (D.D.C. 1977), *rev'd*, 606 F.2d 1031 (D.C. Cir. 1979).

14. 42 U.S.C. § 4321 (1988) (National Environmental Policy Act of 1969).

15. Exchange Act Release Nos. 33-6835, 34-26,831 (May 18, 1989), 54 Fed. Reg. 22,427 (1989) (MD & A Release).

16. *See, e.g.*, Exchange Act Release Nos. 33-6130, 34-16,224 (Sept. 27, 1979), 44 Fed. Reg. 56,924 (1979) (U.S. Steel Release).

17. Letter from SEC to Thomas Cole, Esq., Sidley & Austin, (Jan. 17, 1989) (1989 SEC No-Action Letter LEXIS 203) (stating the SEC's position on the disclosure of Superfund clean-up costs pursuant to Items 101 and 103, as well as the SEC's position on the "netting of insurance or contributions from other 'potentially responsible parties'" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) in determining the amounts to be disclosed).

18. Congress authorized the SEC to promulgate such rules "as may be necessary to carry out the provisions of" both the 1933 Act, 15 U.S.C. §§ 77a-77bbbb (1988), and the 1934 Act, 15 U.S.C. §§ 78a-78*lll* (1988). Congress also granted the SEC the power to establish rules and regulations requiring the disclosure of information "necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 77g (1988).

19. 17 C.F.R. § 229 (1982).

20. This note will focus on three items in Regulation S-K. Item 101 governs the description of business. 17 C.F.R. § 229.101 (1990). Item 103 governs the disclosure of legal proceedings. *Id.* § 229.103. Item 303 is Management's Discussion and Analysis (MD & A). *Id.* § 229.303. Over the years these sections have been modified and expanded to incorporate particular environmental disclosure requirements.

A general description of the business development is required under Item 101.[21] This includes a narrative description of the "material effects that compliance with Federal, State and local provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment" might have on the earnings, expenditures, or continuing operations of the corporation.[22] This information must also be disclosed if it will have an effect on a subsidiary of the corporation.[23]

Item 103 requires the disclosure of any "material pending legal proceedings" to which the corporation or any of its subsidiaries is a party.[24] Instruction 5 to Item 103 requires the disclosure of any administrative or judicial proceeding brought under environmental regulations[25] although there is a specific exception under Item 103 for "ordinary routine litigation incidental to the business."[26] To many businesses, however, environmental proceedings may be considered incidental to the business. To ensure that these proceedings would be disclosed, the SEC included a caveat in Instruction 5. This caveat states that a proceeding arising under any law designed to protect the environment or regulating the discharge of any materials into the environment shall *not* be considered "ordinary routine litigation incidental to the business."[27]

Item 303 contains the requirement for "Management's Discussion and Analysis."[28] Annual and periodic reports must include a discussion and analysis of the financial condition and the results of

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21. *Id.* § 229.101.

22. *Id.* § 229.101(c)(1)(xii).

23. *Id.* This section requires the disclosure of anticipated effects on earnings, expenditures, and competitive position in the market of the company itself or a subsidiary. *Id.*

24. *Id.* § 229.103.

25. *Id.* § 229.103, Instruction 5.

26. *Id.* § 229.103. Section 229.103 states that an issuer must "describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business." *Id.*

27. Instruction 5 states that an administrative or judicial proceeding shall never be considered "ordinary routine litigation" if (a) it is material to the business, (b) it involves a claim for damages or potential monetary sanction or charges exceeding 10% of current assets, or (c) a governmental authority is a party to the proceeding and the proceeding involves potential monetary sanctions. *Id.* § 229.103, Instruction 5.

28. *Id.* § 229.303.

operations of the issuer.[29] In addition to the specific items required to be disclosed, the regulation states that other information reasonably necessary to an understanding of the required discussions must also be provided.[30]

Periodic reports, where otherwise required,[31] must also contain "management's discussion and analysis of financial condition and results of operations."[32] The purpose of this disclosure is to ensure that the "reader" is able "to assess material changes in financial condition and results of operations between the periods."[33] The discussion and analysis required in these "interim" reports need only focus on material changes in financial condition[34] and results of operations[35] from the end of the last period to the end of the current period.[36] Registrants are also encouraged to discuss forward-looking information in their reports.[37] Any such information is expressly protected by the "safe-harbor rule" for projections.[38]

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29. *Id.* The regulations require that the following information be discussed in annual reports:

> (1) *Liquidity.* Identify any known trends or any known demands, commitments, events or uncertainties that will result in or are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way . . . .
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> (2) *Capital resources.* (i) Describe the registrant's material commitments for capital expenditures . . . (ii) Describe any known material trends, favorable or unfavorable, in the registrant's capital resources . . . .
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> (3) *Results of operations.* (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income . . . . [D]escribe any other significant . . . expenses . . . . (ii) Describe any known trends or uncertainties that . . . the registrant reasonably expects will have a material . . . impact on net sales or revenues or income.

Id.

30. *Id.* § 229.303(a). This provision ensures that all relevant information necessary to an understanding of the financial condition or operations of the corporation will be disclosed.

31. Interim period financial statements (periodic reports) may be issued voluntarily or pursuant to the requirement under Article 3 of Regulation S-X. *Id.* § 210.3-13. If interim reports are issued, they are then subject to the disclosure requirements of the MD & A. *Id.* § 229.303(b).

32. *Id.* § 229.303(b).

33. *Id.* The discussion and analysis must disclose any material changes in the Items specifically described in annual reports pursuant to 17 C.F.R. § 303(a). *Id.* Inflation and changing prices are specifically exempted from § 303(b). *Id.*

34. *Id.* § 229.303(b)(1).

35. *Id.* § 229.303(b)(2).

36. Time periods are provided in 17 C.F.R. § 229.303(b)(1), (b)(2).

37. 17 C.F.R. § 303(b), Instruction 6 (1990).

38. *See infra* notes 123-31 and accompanying text. These are the rules and regulations that govern the 1934 Act in its entirety.

Under the Code's "Rules of General Application," an issuer will be subject to liability for certain statements.[39] A "forward-looking statement" that was "made or reaffirmed without a reasonable basis or that was disclosed [without] good faith" shall be deemed fraudulent and will subject the issuer to liability.[40] Furthermore, an issuer will be subject to liability for any representations made in relation to the preparation of any required reports.[41] If an officer or director of an issuer makes, or causes to be made, any materially false or misleading statement, the issuer will be subject to liability under Regulation 13(b)2-2.[42] Liability also attaches if the issuer omits or causes another to omit any material facts needed to render other statements to an accountant not misleading.[43]

B. *Environmental Reporting After NEPA*

In 1969, Congress passed the National Environmental Policy Act (NEPA), a comprehensive legislative enactment that established both a national environmental policy and the means to effectuate the goals set forth.[44] In its preamble, NEPA expressly stated that its purpose was to create a national policy pertaining to the environment.[45]

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39. 17 C.F.R. § 240.3(b)-6 (1990).

40. *Id.*

41. *Id.* § 240.13(b)2-2.

42. *Id.*

43. *Id.* § 240.13(b)2-2(b). This subsection deals with statements made to accountants in connection with audits, financial statements, or the preparation and filing of required documents.

44. 42 U.S.C. §§ 4321-4361 (1969). In a message to Congress accompanying the proposed legislation, President Nixon said:

> As concern with the condition of our physical environment has intensified, it has become increasingly clear that we need to know more about the total environment . . . . [T]he present government structure for dealing with environmental pollution often defies effective and concerted action. . . . Despite its complexity, for pollution control purposes the environment must be perceived as a single, interrelated system. Present assignments of departmental responsibility do not reflect this interrelatedness.

Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970). The President then proceeded to outline the functions and components of the newly created "Environmental Protection Agency." *Id.*

45. 42 U.S.C. § 4321 (1969). Congress stated that the purposes of NEPA were

> to declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will

1. NEPA Policy

The Congressional mandate of NEPA was that all government agencies were required to integrate environmental awareness into their operations. Congress directed all governmental agencies, to the fullest extent possible, to interpret and administer the laws of the United States in accordance with the policies set forth in NEPA.[46]

Federal agencies were directed to evaluate their programs to determine "environmental impact."[47] Any proposal that possessed a potential effect on the environment would require a detailed statement explaining the anticipated effects of the proposal,[48] alternatives,[49] and any unavoidable effects of the proposed action.[50] NEPA also required that all federal agencies review their existing rules and regulations to determine if they complied with the new national environmental policy.[51] The breadth of NEPA was most apparent in a section through which Congress required all federal agencies to recognize the "worldwide and long range character of environmental problems" and to support any international programs designed to maintain "mankind's world environment."[52]

President Nixon ordered all federal agencies to implement the policies articulated in NEPA: "The Federal Government *shall* provide leadership in protecting and enhancing the quality of the Nation's environment to sustain and enrich human life. Federal agencies *shall* initiate measures needed to direct their policies, plans and programs

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> prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological system and natural resources important to the Nation.

Id.

46. *Id.* § 4332 ("Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts . . . ."). To carry out NEPA's policies, Congress directed federal agencies "to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources [to protect the environment]." *Id.* § 4331(b).

47. *Id.* § 4332(2)(C)(i).

48. *Id.*

49. *Id.* § 4332(2)(C)(iii).

50. *Id.* § 4332(2)(C)(ii).

51. *Id.* § 4333. The statute provides in pertinent part: "All agencies of the federal government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of [NEPA]." *Id.*

52. *Id.* § 4332(2)(F).

so as to meet national environmental goals."[53] In so doing, the President compelled all federal agencies to seriously consider the environmental impact of their ordinary operations.[54]

Accordingly, Congress directed the SEC to interpret the securities laws, *to the fullest extent possible*, in accordance with the overriding Congressional mandate of NEPA to protect and enhance the Nation's environment.[55] Although the SEC had the authority to require corporate disclosure in various situations, NEPA *did not* bestow power upon the SEC to prohibit environmental damage by the entities subject to its jurisdiction.[56]

2. Environmental Disclosure Requirements After NEPA

When NEPA became effective on January 1, 1970, the SEC's corporate disclosure requirements did not include statements of the environmental impact of corporate action or statements of corporate environmental policy. In 1971, the SEC issued its first interpretive release concerning environmental reporting, entitled "Disclosures

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53. Exec. Order No. 11,514, § 1, 35 Fed. Reg. 4247 (1970) (emphasis added). In addition to requiring an evaluation of agency policy and activities, the President included a provision mandating the disclosure of information "regarding existing or potential environmental problems." *Id.* at § 2(c). The information was to be disclosed to government agencies, institutions, and any other entities, as appropriate. *Id.*

54. Theodore Sonde & Harvey L. Pitt, *Utilizing the Federal Securities Laws to "Clean the Air! Clean the Sky! Wash the Wind!"*, 16 HOWARD L.J. 831 (1971). The applicability of NEPA extends not only to situations in which the SEC must analyze a particular policy, but also to situations in which the SEC may be required to take affirmative steps to uphold the government policy of environmental protection. *Id.* at 849. *See also* Zabel v. Tabb, 430 F.2d 199, 214 (5th Cir. 1970) (government regulatory agency has authority to consider the impact of regulated conduct on the environment and may refuse to allow such conduct on ecological or conservation grounds).

55. Calvert Cliffs' Coordination Comm'n, Inc. v. U.S. Atomic Energy Comm'n, 449 F.2d 1109, 1118 (D.C. Cir. 1971). The court concluded that NEPA mandated a careful and informed decision-making procedure, and it created judicially-enforceable rights. *Id.* at 1115. An agency decision, however, would be upheld unless it was based upon an arbitrary weighing of environmental considerations. *Id.* The role of the courts, as stated by Judge Skelly Wright, was "to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy." *Id.* at 1111.

56. Sonde & Pitt, *supra* note 54, at 849. The authors suggested that the SEC should require disclosure by corporations of what they are doing to our environment. *Id.* This should include, among other things, whether they are in compliance with environmental regulations. *Id.* Such a disclosure rule could effectively serve to satisfy the SEC's obligations under NEPA as well as being an additional means of forcing corporations to pay attention to the environment. *Id.* at 850.

Pertaining to Matters Involving the Environment."[57] The purpose of the release was to "call attention" to the existing requirements regarding disclosure of legal proceedings and the description of a registrant's business "as these requirements relate[d] to material matters involving the environment."[58] The release made no changes in reporting requirements. It simply stated that the existing disclosure requirements were applicable to environmental issues as well as traditional material information.[59]

In 1973, the SEC issued its first specific requirements for environmental disclosures.[60] These rules expanded required disclosures by adding the provision that all "material effects" of compliance with environmental laws must be disclosed.[61] With respect to the disclosure of legal proceedings, the SEC expanded the disclosure requirement to include "any administrative or judicial proceeding known to be contemplated by governmental authorities" arising under environmental laws.[62] Thus, any proceeding brought by a governmental authority was deemed material and required disclosure.[63]

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57. Exchange Act Release Nos. 33-5170, 34-9252 (July 19, 1971), 36 Fed. Reg. 13,989 (1971).

58. *Id.* The release noted that existing disclosure rules under the Securities and Exchange Acts require a discussion of compliance with any statutory authority that would necessitate significant expenditures, cause changes in the business, or affect the corporation's ability to conduct business and maintain earnings. *Id.* Specific statutes governing air, water, or other pollution control acts would trigger the disclosure requirements contemplated by this release. *Id.* The SEC also requires disclosure of material legal proceedings arising under federal, state, or local statutes relating to the protection of the environment. The Rivers and Harbors Act of 1899, the Federal Water Pollution Control Act, and the Clean Air Act were all expressly mentioned in this paragraph of the release. *Id.*

The Release also dealt with matters involving civil rights. The SEC appears to have adopted a similar approach for disclosures of civil rights violations by employers under title VII of the Civil Rights Act of 1964.

59. *See supra* notes 1-4 and accompanying text.

60. Exchange Act Release No. 5386, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,342 (Apr. 20, 1973). The SEC later suggested that the 1973 rules were adopted because disclosures under the 1971 release were unsatisfactory. *See* Exchange Act Release Nos. 33-6130, 34-16,224 (Sept. 27, 1979), 44 Fed. Reg. 56,924 (1979).

61. Exchange Act Release No. 5386, [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 79,342 (Apr. 20, 1973).

62. *Id.*

63. *Id.*

3. National Resources Defense Council Litigation, 1974-1979

In *National Resources Defense Council, Inc. v. SEC*,[64] several public interest groups[65] brought an action to require the SEC to modify corporate disclosure rules.[66] The groups sought to establish a rule that would require every reporting corporation to disclose the entire effect of its corporate activities on the environment.[67]

First, plaintiffs claimed that their proposed regulations were in the "public interest" based on NEPA policy.[68] Second, they claimed a need for the information, the disclosure of which was sought, in order to make "socially responsible investment decisions" and to further public education.[69] Finally, they sought access to SEC files to effectuate their goals.[70]

The linchpin of their claims was that corporate environmental disclosure requirements were insufficient to provide investors with the necessary information required to make "socially responsible"[71] and financially-sound investment decisions.[72] Additionally, plaintiffs contended that insufficient environmental disclosure requirements

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64. 389 F. Supp. 689 (D.D.C. 1974), *rev'd*, 606 F.2d 1031 (D.C. Cir. 1979).

65. The original plaintiffs in the action were the National Resources Defense Council, Inc. (NRDC); Project on Corporate Responsibility, Inc.; and the Center on Corporate Responsibility, Inc. *Id.* at 693. On September 1, 1976, the district court ordered the National Organization for Women, the Unitarian Universalist Association, the American Baptist Home Mission Society, and the Province of St. Joseph of the Capuchin Order to be joined as additional plaintiffs. *National Resources Defense Council*, 432 F. Supp. at 1197 n.17.

66. In 1971, plaintiffs had filed a "Rulemaking Petition" with the SEC to request that the SEC implement the NEPA mandate in its functions governing corporate disclosure. *National Resources Defense Council*, 389 F. Supp. at 694. The SEC declined to take any action. When the SEC eventually adopted changes (the 1973 Interpretive Release), their revisions did not materially affect environmental reporting requirements. *Id.* at 695. This action was filed as plaintiffs' only recourse to challenge what they perceived as insufficient disclosure requirements.

67. *Id.* at 694. Plaintiffs included a detailed petition of the disclosure they sought. Plaintiffs wanted every reporting company to be required to submit a detailed report for every product or activity in which they were engaged. *Id.* The reports would include: (1) the nature and extent of pollution caused; (2) the feasibility and plans for correcting the pollution; and (3) changes in products, manufacturing methods, policies, and projects. *Id.*

68. *Id.* at 692.

69. *Id.* at 698.

70. *Id.* at 692.

71. *See infra* notes 163-67 and accompanying text.

72. *National Resources Defense Council*, 389 F. Supp. at 694. The purpose of the federal securities law is full disclosure of material information.

thwarted the mandate of NEPA to interpret the securities laws *to the fullest extent possible* in accordance with the policy of environmental concern adopted in NEPA.[73] The plaintiffs asserted, and the court agreed, that the "investors [had] no available and reliable means of assessing the environmental impact of the particular corporation."[74]

The court held that the SEC had failed to comply with certain procedural requirements in formulating its regulations pertaining to environmental disclosures.[75] To exercise its "rule-making authority," the SEC was required to issue a satisfactory "statement of basis and purpose" so that a court could review those factors and policies actually considered by the SEC.[76] By analyzing this statement, a court would be able to determine whether the SEC had "rationally exercised its rule[-]making authority" to satisfy the mandate of NEPA and federal securities laws.[77]

After *National Resources Defense Council*, the SEC considered several rule-making proposals.[78] The SEC decided, however, not to adopt additional environmental disclosure requirements and concluded that the existing rules satisfied NEPA and the national environmental policy.[79]

On appeal, plaintiffs alleged that NEPA *mandated* that the SEC require additional corporate disclosure of environmental informa-

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73. *Id.* at 700.

74. *Id.* at 694. Plaintiffs unsuccessfully petitioned the SEC for over three years. The SEC's persistent refusal to adopt the disclosure regulations encouraged by NRDC revealed its own perspective of the role of environmental disclosure, that was, to provide investors with information and not to regulate corporate conduct with respect to the environment. Gerard A. Caron, *SEC Disclosure Requirements for Contingent Environmental Liability*, 14 B.C. ENVTL. AFF. L. REV. 729, 739 (1986-87).

75. *National Resources Defense Council*, 389 F. Supp. at 699.

76. *Id.*

77. *Id.*

78. The SEC held public hearings and considered five proposals for environmental disclosure rules. They were

(1) comprehensive disclosure of the environmental effect of corporate activities;

(2) disclosure of corporate noncompliance with applicable environmental standards;

(3) disclosure of all pending environmental litigation;

(4) disclosure of general corporate environmental policy; and

(5) disclosure of all capital expenditures and expenses for environmental purposes.

National Resources Defense Council, 432 F. Supp. at 1201.

79. *Id.* at 1200-04.

tion.[80] The district court rejected this view,[81] but held that the SEC's rejection of the proposed rules was "arbitrary and capricious."[82] Accordingly, the court ordered the SEC to reconsider environmental factors in deciding upon its new rules.[83]

This decision was reversed in a subsequent appeal to the United States Court of Appeals for the District of Columbia Circuit.[84] The court of appeals held that NEPA's mandate was "essentially procedural" and did not mandate the achievement of particular goals.[85] As long as the governmental agency in question, the SEC here, had given satisfactory consideration to the environmental issues contemplated by NEPA, then the court would find that the agency's burden had been satisfied.[86] Judicial review, stated the court, should serve only to ensure that this procedural mandate had been implemented;[87] it should not "impose undesirable substantive results on the agency."[88]

4. SEC Interpretive Releases, 1979-1987

After *National Resources Defense Council*, the SEC re-evaluated its rules regarding environmental disclosure.[89] One important point the SEC stressed throughout its investigation of the disclosure rules was that compliance with these rules did not necessarily constitute com-

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80. *Id.* at 1194, 1197.

81. *Id.* at 1197. NEPA did not *mandate* specific additional disclosures by corporations. *Id.*

82. *Id.* at 1199. The language "to the fullest extent possible" required that the SEC seriously consider options that would reduce any harm to the environment that the SEC's previous procedures might have allowed. *Id.* at 1198. Furthermore, the court stated that the SEC would not be permitted to strike an arbitrary balance in considering alternatives. *Id.* at 1198-99.

83. *Id.* at 1212.

84. National Resources Defense Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir. 1979).

85. *Id.* at 1044. *But see* Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776, 787, *reh'd denied*, 429 U.S. 875 (1976) (stating that the phrase "to the fullest extent possible" was a deliberate command that environmental factors not be "shunted aside in the bureaucratic shuffle").

86. *National Resources Defense Council*, 606 F.2d at 1045.

87. When the district court reconsidered *National Resources Defense Council*, the issue should have been whether the SEC, in evaluating disclosure rules, gave sufficient consideration to environmental factors to satisfy the NEPA mandate. *Id.* at 1044-45.

88. *Id.* at 1044.

89. The court directed the SEC to undertake further rule making. *Id.* at 1062. Pursuant to that order, the SEC decided to add a new provision requiring the disclosure of the effects of compliance with environmental laws. Exchange Act Release Nos. 33-6130, 34-16,224, 44 Fed. Reg. 56,924, 56,925 (1979) (citing Exchange Act Release No. 5704, at 15 (May 6, 1976)).

pliance with the general disclosure requirements of federal securities law.[90]

In 1979, the SEC further clarified its environmental disclosure requirements in an interpretive release following an administrative proceeding against U.S. Steel Corporation.[91] The release addressed the following issues: (1) the need to disclose total estimated costs of compliance with environmental regulations for more than two years in the future,[92] (2) the requirement to disclose particular types of proceedings,[93] and (3) the circumstances under which a corporation would be required to disclose its policy of environmental compliance.[94]

The U.S. Steel Release made several significant changes in environmental disclosure rules. First, if a corporation expected future environmental compliance costs to be significantly greater than current costs, then the company must formulate and disclose estimates of anticipated future costs.[95] Second, all proceedings in which the

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90. *Id.*

> In the context of its environmental releases, the Commission has interpreted these rules as requiring that *all* material information relating to environmental information must be disclosed. . . . This approach reflects the Commission's belief that omissions of *material* environmental information would render misleading the required disclosures concerning financial matters and the nature of a registrant's business.

Id. at 56,925 n.11.

91. *Id.* at 56,924. *See also In re* United States Steel Corp., Exchange Act Release No. 16,223 [1979-1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,319 (Sept. 27, 1979) (holding that U.S. Steel consented to an order finding it failed to make adequate disclosures of environmental matters). U.S. Steel spent $500 million on pollution control from 1974 to 1978. *Id.* at 82,380. For the period 1979 to 1983, the company estimated expenditures reaching $1.8 billion. *Id.* This information was not disclosed. *Id.* at 82,380 n.15. The SEC held that U.S. Steel should have disclosed the estimates. While they were not required to divulge estimated expenditures beyond two years, the SEC stated that once the material information became available it had to be disclosed. *Id.* at 82,383-82,384.

92. Exchange Act Release Nos. 33-6130, 34-16,224, 44 Fed. Reg. 56,924, 56,925 (1979).

93. *Id.* at 56,925-56,926.

94. *Id.* at 56,926. There is no "across-the-board requirement that all corporations disclose their general environmental policy." *Id.* Rather, two specific situations give rise to the duty to disclose policy. First, voluntary disclosures of policy must be accurate. *Id.* Second, if a corporation's policy is reasonably likely to cause the corporation to incur substantial fines, penalties, or other expenses, then the corporation may be required to disclose the potential amounts of such expenditures. *Id.*

95. U.S. Steel had already calculated estimates but failed to disclose them. The release imposed the affirmative duty to formulate estimates on companies that expect substantially increased future costs.

government would be a party, even those initiated by the company, must be disclosed.[96] Third, voluntary disclosures of environmental policy must be accurate, and any information which would prevent the disclosures from being misleading must also be disclosed.[97] Finally, the SEC again reminded companies that compliance with its specific environmental disclosure rules did not guarantee compliance with the general disclosure requirements under federal securities law.[98]

In 1980, the SEC adopted the provisions of the Management's Discussion and Analysis (MD & A) as a separate requirement.[99] The cornerstone of this new provision was its flexible approach to required disclosures. Recognizing that different situations might require different standards, the rules were intentionally left general.[100]

In 1982, the SEC adopted a comprehensive disclosure system and revised the rules and forms governing disclosure.[101] The major change affecting environmental disclosure was the addition of Instruction 5 to Item 103, regarding the disclosure of legal proceedings.[102] Instruction 5 was designed to establish a threshold for disclosure of environmental proceedings.[103]

Overall, there have been few SEC administrative proceedings or cases concerning the enforcement of the environmental disclosure

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96. *See* 17 C.F.R. § 229.303 (1990).

97. *See infra* notes 124-31 and accompanying text.

98. *See supra* note 90 and accompanying text.

99. 45 Fed. Reg. 63,630 (1980). The new provision required statements to include audited financial statements, financial data necessary for trend analysis, and a "meaningful description of the registrant's business and financial condition." *Id.* at 63,631.

100. *Id.* One of the SEC's primary concerns was the "readability" of the new reports as they were aware that increased disclosure often caused reports to become more difficult to read. *Id.* at 63,631-63,632. Therefore, a narrative description, rather than boilerplate legal language, was adopted for reports. *Id.*

101. Exchange Act Release Nos. 33-6383, 34-18,524, 35-22,407, 36-700 (Mar. 16, 1982), 47 Fed. Reg. 11,380 (1982). The new rules attempted to unify and simplify disclosure requirements. Under the 1933 Act, three registration forms were adopted. Under the 1934 Act, Regulation S-K was reorganized and expanded to encompass all of the reporting requirements thereunder. *Id.*

102. *Id.* at 11,388.

103. Clause (a) required the disclosure of *all* environmental proceedings material to the business. *Id.* Clause (b) required the disclosure of proceedings for damages generally. *Id.* It specifically required the disclosure of any government proceeding which might subject the company to sanctions or expenditures exceeding 10% of the company's assets. *Id.*

requirements. In *In re Occidental Petroleum Corp.*,[104] the SEC found disclosure deficiencies in reports which failed to disclose the total costs stemming from compliance with environmental standards as well as potential fines for prior environmental violations. Although most of the costs were related to the operation of a wholly-owned subsidiary, Hooker Chemical, the disclosure deficiencies were held attributable to Occidental Petroleum, the parent corporation.[105]

In *SEC v. Allied Chemical Corp.*,[106] the SEC alleged that Allied Chemical (Allied) committed securities violations as a result of its failure to disclose its potential liability for discharging pollutants into the environment. The complaint alleged that

> Allied was exposed to material potential financial liabilities from companies, individuals, and state and local governments (resulting from its dumping of kepone into adjacent waterways) . . . . Allied failed to disclose such potential material financial exposure in its reports to shareholders and the investing public in violation of the antifraud and reporting provisions of the securities laws.[107]

The case was settled by a consent injunction, under which Allied, without admitting or denying the allegations, agreed to the entry of a permanent injunction.[108] Allied agreed to (1) refrain from future violations of SEC reporting and disclosure requirements; (2) initiate investigations into other environmental abuses; (3) maintain, review, and provide information to the SEC regarding its environmental policies and practices; and (4) disclose all material environmental risks and uncertainties known to its officers, directors, or division presidents.[109]

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104. Exchange Act Release No. 16,950 [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,622 (July 2, 1980).

105. *Id.* at 83,347-83,348 (company had no duty to disclose that its wholly-owned subsidiary was operating a facility in violation of state and federal environmental laws because such statements were immaterial). In Levine v. NL Indus., 926 F.2d 199 (2d Cir. 1991), the court found that NL's alleged failure to disclose violations of environmental laws was immaterial because the Department of Energy (DOE) agreed to indemnify NL for any losses or liability resulting from such violations. Moreover, DOE agreed to assume all future costs of compliance associated with bringing the facility up to standard. *Id.* at 203. In such a situation, the court held that "a reasonable investor would not consider NL's asserted violations of environmental law important information significantly altering the total mix of information made available to the investor." *Id.*

106. SEC v. Allied Chem. Corp., No. 77-373 (D.D.C. filed Mar. 4, 1977).

107. Excerpted in 396 Sec. Reg. & L. Rep. A-17 (BNA) (Mar. 9, 1977).

108. *Id.* at A-18.

109. *Id.* The SEC focused on the fact that Allied allegedly violated environ-

Complaints have been filed in two actions which concern the enforcement of environmental disclosure requirements. In *Steiner v. Baxter*,[110] a corporation was charged with selling stock at artificially inflated prices because it failed to disclose that asbestos was found in its property.[111] The theory was that, because disclosure would have reduced the stock value significantly, the company elected to sell shares without disclosing this information. Upon learning of this information, several shareholders sued the corporation, its officers, and directors.[112] Although this action is still pending, it deserves attention for the nature and theory of the shareholders' claim.

In *Grossman v. Waste Management Inc.*,[113] shareholders brought a class action alleging nondisclosure of material information regarding Waste Management's compliance with environmental regulations.[114] The case revolved around the company's nondisclosure of potential, unasserted claims for environmental damage, i.e., "contingent environmental liability."[115] The court held that shareholder recovery was not dependent upon "actual sanctions by environmental authorities" and, once the violations occurred, nondisclosure could subject the company to liability for securities fraud.[116]

The courts have developed clear standards for determining when a corporation may be liable for securities fraud based upon its failure

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mental laws and knew of the potentially serious adverse impact such actions could have had on the environment. *Id.* At that time, no proceedings were pending, nor had ever been threatened, for nondisclosure. *Id.* The duty to disclose, according to the SEC, was triggered by "[t]he violation of environmental laws coupled with an awareness of its high risk factor." Caron, *supra* note 74, at 754. Under such a standard, a company could be subject to a duty to disclose "the possibility of claims being brought against it" before the illegal conduct that gave rise to the claims is detected. *Id.*

110. No. 89-M-809 (D. Colo. filed May 9, 1989).

111. *See* James G. Archer & Thomas M. McMahon, *SEC Reporting of Environmental Liabilities*, 20 Envtl. L. Rep. 10,105, 10,106 n.21 (1989) (citing Steiner v. Baxter, No. 89-M-809 (D. Colo. filed May 9, 1989)).

112. *Id.*

113. 589 F. Supp. 395 (N.D. Ill. 1984).

114. The court acknowledged the viability of the "fraud on the market" theory with respect to proving liability in a Rule 10b-5 action. *Id.* at 403. *Compare id. with* Roeder v. Alpha Indus., Inc., 814 F.2d 22 (1st Cir. 1987) (information does not become material simply because it is illegal or antisocial). In *Roeder*, shareholders brought a Rule 10b-5 action for failure to disclose that Roeder paid an illegal bribe. The court held that there must be a duty to disclose material information before liability can attach. *Id.* at 26. The court stated that the duty to disclose could arise under a statute or a regulation requiring disclosure, through inaccurate or incomplete disclosures, or insider trading. *Id.* at 27.

115. *Grossman*, 589 F. Supp. at 399.

116. *See* Caron, *supra* note 74, at 757.

to disclose environmental liabilities.[117] By applying the traditional materiality/reasonable investor test to environmental disclosures, courts have created a mechanism to enforce environmental laws through the federal securities laws. While few cases have resulted in a court granting pecuniary relief or penalties for failure to disclose environmental liabilities, courts have stated the circumstances under which recovery will be appropriate.[118]

III. CURRENT ENVIRONMENTAL REPORTING

In 1987, the SEC issued a "Concept Release" to request comments on the possible revision of disclosure rules.[119] Members of the accounting profession had called for a "more specific approach to requiring disclosure of business risks and uncertainties."[120] The proposal called for the restructuring of Item 303 into three distinct sections: (1) an analysis of financial information; (2) future financial condition, an analysis of risk, and results of operations; and (3) management's representations.[121]

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117. *See id.* at 734-58 (providing a synopsis of SEC enforcement actions regarding environmental disclosure). Mr. Caron criticized the SEC's reliance on general materiality principles as a basis for liability for nondisclosure of contingent environmental liabilities. He stated that it created "an ominous burden" for corporate registrants, without a "stipulation that such corporate disclosures cannot be used as direct evidence of environmental violations." *Id.* at 758-59. Mr. Caron cited the negative effects of early reporting of noncompliance, including (1) the creation of friction between shareholders and management, (2) the loss of investors before the company has had the opportunity to correct the violations, and (3) the risk of "self-fulfilling prophecy." *Id.* at 759. Mr. Caron suggests that, if the SEC's goal is solely to provide information to investors, the environmental disclosure requirements would be too stringent. However, if the SEC has the additional objective of regulating corporate conduct in the area of environmental compliance, as this author suggests it does, then broad reporting obligations will only bolster corporate compliance with environmental laws.

118. *Id.* at 753-58.

119. *Concept Release on Management's Discussion and Analysis of Financial Condition and Operations*, 52 Fed. Reg. 13,715 (1987).

120. *Id.* at 13,716. Coopers & Lybrand submitted a proposal. After the Coopers' Proposal, seven accounting firms issued a joint recommendation (7 Firms Recommendations) calling for increased disclosure of risks. The seven firms were Arthur Anderson & Co.; Arthur Young; Coopers & Lybrand; Deloitte Haskins & Sells; Ernst & Whinney; Peat, Marwick, Mitchell & Co.; and Touche Ross & Co. *Id.* at 13,717 n.18.

121. *Id.* at 13,717 (Coopers' Proposal). The stated purpose of the MD & A would be furthered by the suggested changes:

> The Commission has long recognized the need for narrative explanation of the financial statements, because a numerical presentation and brief

After evaluating the responses received from the 1987 Concept Release, the SEC issued an interpretive release in May 1989.[122] This release focused on changes within Item 303 of Regulation S-K, MD & A. Specifically, the SEC determined that interpretive guidance was needed when providing prospective or forward-looking information required in MD & A disclosures.[123]

A. Disclosure of Prospective Information

For the first time, the SEC articulated the distinction between required prospective information and voluntary forward-looking discussions.[124] This distinction was crucial because the Securities Acts had specifically made "safe harbors" available for forward-looking information.[125] It was necessary to define exactly what information would be protected, and what information could give rise to liability if not disclosed.

> accompanying footnotes alone may be insufficient for an investor to judge the quality of earnings and the likelihood that past performance is indicative of future performance. MD & A is intended to give the investor an opportunity to look at the company through the eyes of management by providing both a short[-] and long-term analysis of the business of the company.

Id.

122. Exchange Act Release Nos. 33-6835, 34-26,831 (May 18, 1989), 54 Fed. Reg. 22,427 (1989).

123. *Id.* at 22,428. Other issues were also addressed in the release. These included the disclosure of long-term and short-term liquidity, capital-resources analysis, material changes in financial statement line items, interim period disclosures, high-yield financing, highly-leveraged transactions or non-investment grade loans, effects of federal financial assistance, and preliminary-merger negotiations. *Id.* However, requirements for the disclosure of prospective information directly affect environmental disclosures. The other issues would only have peripheral effects on environmental disclosures.

124. *Id.* at 22,429. The crucial distinction was described in the 1987 Concept Release and repeated in the Interpretive Release:

> Both required disclosure regarding the future impact of presently known trends, events, or uncertainties and optional forward-looking information may involve some prediction or projection. The distinction between the two rests with the nature of the prediction required. Required disclosure is based on currently known trends, events, and uncertainties that are reasonably expected to have material effects. . . . In contrast, optional forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend, or uncertainty.

52 Fed. Reg. at 13,717.

125. 17 C.F.R. § 240.3(b)-6 (1990) (safe harbor under 1934 Act); *id.* § 230.175(c) (safe harbor under the 1933 Act). *See supra* notes 39-41 and accompanying text.

Several provisions of Item 303 require the disclosure of forward-looking information.[126] The MD & A requires disclosure of "known trends or any known demands, commitments, events or uncertainties that will result in [changes in liquidity]."[127] In addition, corporations must disclose trends in the availability of capital resources and trends or uncertainties with expected effects on income and earnings.[128] Finally, any events or uncertainties that might cause reported information "not to be necessarily indicative of future operating results or of future financial condition" must also be disclosed.[129]

The interpretive release clearly indicated that the safe-harbor provisions applied *only* to optional forward-looking statements and to required statements concerning the possible *future effects* of "known trends, demands, commitments, events or uncertainties."[130] If such a trend was "presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operations," then disclosure would be required and not protected by the safe-harbor provision.[131]

B. Practical Effects of MD & A Changes

In order to illustrate the proper application of the disclosure principles, the SEC presented a hypothetical which addressed the proper standards for determining if disclosure is required when a corporation is designated as a potentially responsible party (PRP) by the Environmental Protection Agency (EPA).[132] In the hypothetical, there was no indication that the government had been

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126. *See supra* notes 28-37 and accompanying text.

127. 17 C.F.R. § 229.303(a)(1) (1990). If an uncertainty is identified, the registrant must indicate the cause of action contemplated to remedy the deficiency. *Id.* Thus, in an environmental context, a company may not only be required to identify potential environmental problems, but also any plans to effect cleanup and the associated costs.

128. *Id.* § 229.303(a)(2)(ii), (3)(iii).

129. 54 Fed. Reg. at 22,429. *See* 17 C.F.R. § 229.303(a), Instruction 3 (1990).

130. 54 Fed. Reg. at 22,429.

131. *Id.*

132. *Id.* at 22,430. Designation as a PRP is addressed under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 (1988). The hypothetical discussed in the interpretive release was a common disclosure issue brought up throughout the evaluation of prospective disclosures. 54 Fed. Reg. at 22,430.

contemplating any action.[133] To answer the question of whether disclosure would be required, and to what extent it would be required, the SEC analyzed the information given and determined that designation as a PRP alone would not trigger disclosure.[134] However, the SEC did state that disclosure of the *effects* of PRP status was required.[135] Furthermore, if the registrant is designated as a PRP, and if the registrant's particular circumstances are such that it should know that the government is contemplating a proceeding, disclosure would then be required under Item 103.

Joint and several liability under CERCLA can impose staggering clean-up costs upon a broad spectrum of participants in a business endeavor.[136] Moreover, clean-up costs for hazardous waste sites often exceed $30 million.[137] In the past, corporations have failed to disclose these liabilities, claiming an uncertainty of occurrence or prematurity

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133. The facts of the hypothetical were as follows:

> A registrant has been correctly designated a PRP by the EPA with respect to cleanup of hazardous waste at three sites. No statutory defenses are available. The registrant is in the process of preliminary investigations of the sites to determine the nature of its potential liability and the amount of remedial costs necessary to clean up the sites. Other PRPs also have been designated, but the ability to obtain contribution is unclear, as is the extent of insurance coverage, if any. Management is unable to determine that a material effect on future financial condition or results of operations is not reasonably likely to occur.

54 Fed. Reg. at 22,430.

134. *Id.* at 22,430 n.30. This is because PRP status does not, without more, indicate that the government will initiate a proceeding. *Id.*

135. The SEC stated that the effects of PRP status must be disclosed to the extent it is reasonably practical to quantify them. *Id.* For example, potential aggregate clean-up costs, weighed against the possibility of joint or several liability, should be disclosed once they are known. *Id.* The key to this type of prospective disclosure seems to be that disclosure will be required once the corporation has actual knowledge of the estimated costs. While the SEC does recognize that a PRP can consider the availability of insurance and contribution in making disclosure decisions, it does not establish a clear means for determining how to factor such amounts into a decision. Environmental insurance coverage and liability for contribution are often litigated issues and it is extremely difficult to predict the outcome of this type of litigation. This fact complicates the determination of whether the information is material. Archer & McMahon, *supra* note 111, at 10,109. *See, e.g.*, United States v. Chem-Dyne Corp., 572 F. Supp. 802, 804 (S.D. Ohio 1983) (all defendant companies moved for early determination that they were not jointly and severally liable for clean-up costs).

136. David E. Dearing, *SEC Disclosure Requirements for PRPs*, 18 CHEMICAL WASTE LITIG. REP. 422, 423 (1989). "[D]esignation as a PRP clearly has the potential to decrease the liquidity of many corporations in a material way." *Id.*

137. *Id.* In 1989, average estimated clean-up costs for designated hazardous waste sites on the National Printing List were $21 million to $30 million. *Id.*

of disclosure.[138] The SEC no longer condones such evasive practices.

In the final analysis, if management knows of a potentially material environmental problem, then "it must disclose [the problem] unless it can determine that the problem is not reasonably likely to cause a material effect, either because the event is not likely to happen or because if it does happen, the effect is not likely to be material."[139] This policy can create additional problems. For example, if there are several PRPs in a particular site and all are required to disclose the full amount of a clean-up cost because the amount or availability of contribution and insurance are not yet known, then the total disclosure may far exceed each PRP's net worth.[140]

Disclosure of extraordinary liability could have two extreme results. Either the massive amount disclosed would frighten investors away unnecessarily or investors would simply ignore the disclosures because of their inherent unreliability.[141] Neither scenario satisfies

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138. Uncertainty may be caused by a corporation's attempt to turn a clean-up bill over to its insurance carriers. In fact, many site owners spend millions of dollars in legal costs to "lay off the cost [of environmental compliance] on their insurers." Amal Naj, *See No Evil: Can $100 Billion Have "No Material Effect" on Balance Sheets?*, Wall St. J., May 11, 1988, at 1, col. 6.

139. Archer & McMahon, *supra* note 111, at 10,107. *See also* Levine v. NL Indus., Inc., 926 F.2d 199 (2d Cir. 1991) (liability was immaterial because of indemnity provision). One of the most confusing aspects of the disclosure requirements for prospective information is the need to prove a negative. In order to avoid the disclosure obligation, a registrant must investigate and determine that a known environmental problem is neither reasonably likely to occur nor likely to have a material effect on the company's financial position. Archer & McMahon, *supra* note 111, at 10,107. It is important to remember that when disclosures are made, all estimates must be reliable and made in good faith in order to trigger the safe-harbor protection.

140. Letter, *supra* note 17, at 2. Nevertheless, the SEC has stated that there can be no "netting" of insurance or contributions from other PRPs in determining the amount of information a PRP must disclose. The SEC also interprets "sanctions," as it appears in Instruction 5(C) of Item 103, to include all clean-up costs of sites for which a party is a PRP. Although the SEC is sensitive to the fact that predicting clean-up costs can be difficult, the requirement is clear that "where it is reasonably likely that these costs will be material, a known uncertainty contemplated by Item 303 of Regulation S-K exists, requiring disclosure in response to such Item. Similarly, the disclosure requirement of Item 101(c)(1)(xii) or Item 103, Instruction 5(A) or (B) also may be triggered." *Id.*

141. Investors should always be informed when extreme liability is imminent so that they can make investment decisions wisely. The fact that shareholders may choose not to invest in an environmentally irresponsible corporation is neither an excessive nor an unwarranted result. Investors have the power to force businesses to treat the environment with respect. *Cf.* Caron, *supra* note 74, at 758-60 (duty to disclose unasserted contingent environmental claims is excessive and unnecessarily burdens the corporation).

the purpose of requiring these disclosures, that is, to provide investors with reasonable access to material information. One possible solution for an issuer would be to address environmental liability and to state the unresolved issues.[142] It is unclear, however, how realistic this proposition is under the current interpretations of disclosure requirements.[143]

IV. TRENDS IN ENVIRONMENTAL DISCLOSURE

Courts have already started to establish the standards for determining when the failure to disclose environmental liabilities can give rise to a successful securities fraud action.[144] In addition, the

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142. The following is a sample MD & A disclosure for a company confronted with significant unquantifiable potential environmental liabilities:

> [The corporation] faces significant exposure from actual and potential claims and lawsuits involving environmental matters. These matters involve alleged soil and water contamination and air pollution, and personal injuries or property damage allegedly caused by exposure to toxic materials manufactured, handled or used by [the corporation. The corporation's] policy is to accrue environmental and clean-up costs when it is probable that a liability has been incurred and the amount of the liability is reasonably estimable. However, future environmental related expenditures cannot be reasonably quantified in many circumstances due to the speculative nature of remediation and clean-up cost estimates and methods, the imprecise and conflicting data regarding the characteristics of various types of waste, the unknown number of other potentially responsible parties involved, the extent to which such costs may be recoverable from insurance, and changing environmental laws and interpretations. As a result, [the corporation] believes environmental related expenditures will continue to be substantial, but the amounts are uncertain at this time.

Thomas Gilroy & Sharon Landerman, *Preparing the Management's Discussion and Analysis*, *in* PREPARATION OF ANNUAL DISCLOSURE DOCUMENTS 1991, at 48, 55 (1991).

143. If a corporation cannot or does not wish to quantify its possible liability, it can always disclose the general liability with an explanation of why estimated costs are not available. *See id.* However, this type of vague disclosure may prove to be a red flag, warning investors and the SEC that further investigation is warranted. Archer & McMahon, *supra* note 111, at 10,110. A company may undermine itself by opting for the type of general disclosure seen *supra* in note 142. A serious corporate problem arises if a registrant has knowledge of material information regarding liability, but no means of quantifying it. Then, general disclosure may be its only option.

144. *See supra* notes 91-118 and accompanying text. *See, e.g.*, *In re* Union Carbide Class Action Sec. Litig., 648 F. Supp. 1322 (S.D.N.Y. 1986) (holding that shareholders could recover in a securities fraud class action if an omission from a registration statement or prospectus rendered any statement therein misleading). *See also* Grossman v. Waste Management Inc., 589 F. Supp. 395 (N.D. Ill. 1984) (holding that a shareholder/plaintiff could recover against a corporation and its officers for misrepresentation or withholding material information about the company's violations of environmental laws).

SEC has increased the burdens associated with making disclosures.[145] Since the passage of NEPA, corporations have become much more aware of the impact of their practices upon the environment, and many are engaged in extensive self-regulation and monitoring.[146]

Unfortunately, many corporations still pursue environmentally detrimental business activities without disclosing the damage these

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145. These burdens can include in-house or outside environmental investigations, cost estimates of sanctions, appraisals of clean-up costs, and litigation to contest the assignment of joint and several liability.

As part of its settlements in three enforcement actions (*In re* Occidental Petroleum Corp., Exchange Act Release No. 16,950 [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,622 (July 2, 1980); Exchange Act Release Nos. 33-6130, 34-16,224 (Sept. 27, 1979), 44 Fed. Reg. 56,924 (1979) (U.S. Steel Release); and SEC v. Allied Chem. Corp., No. 77-373 (D.D.C. filed Mar. 4, 1977)), the SEC required the corporations to begin environmental auditing. *See supra* notes 91-118 and accompanying text. Since these decisions, numerous corporations have voluntarily adopted environmental auditing programs. *See also* William N. Farran III & Thomas L. Adams, Jr., *Environmental Regulatory Objective: Auditing and Compliance or Crime and Punishment*, 21 Envtl. L. Rep. 10,239 (1991); Courtney M. Price & Allen J. Danzig, *Environmental Auditing: Developing a "Preventative Medicine" Approach to Environmental Compliance*, 19 LOY. L.A. L. REV. 1189 (1986); Phillip D. Reed, *Environmental Audits and Confidentiality: Can What You Know Hurt You as Much as What You Don't Know?*, 13 Envtl. L. Rep. 10,303 (1986).

Environmental auditing "as defined by EPA, is 'a systematic, documented, periodic and objective review by regulated entities of faulty operations and practices related to meeting environmental requirements.'" Farran & Adams, *supra*, at 10,239 (quoting Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004 (1986)). Though extremely costly, environmental auditing programs are highly effective in monitoring compliance.

An additional cost associated with environmental auditing is the potentiality of government agencies (either the SEC or the EPA) instituting civil or criminal actions based upon the information gained through the audit. "Through the course of the environmental compliance and audit programs, admissible documentary evidence of noncompliance can be generated. What was designed to be a shield may transform itself into the government's sword." Mary Jo Gilsdorf & Joseph M. Manko, *Shield Becomes a Sword*, 205 Legal Intelligencer 2790, 2791 (Oct. 24, 1991). This exposes a corporation to additional contingent environmental liabilities. Many commentators have suggested that the government provide a "safe harbor" to companies that voluntarily audit and modify their environmental policies and practices. *See* Farran & Adams, *supra*, at 10,240; Gilsdorf & Manko, *supra*, at 2791. To date, the government has declined to adopt such a policy.

146. "Environmental auditing is no longer a trendy management tool, but rather [it] has become an acknowledged part of professional business planning." Farran & Adams, *supra* note 145, at 10,242. Businesses now recognize the inherent advantages of self-regulation. Such benefits range from saving money by assessing risks before acting to improving a firm's relationship with government regulatory agencies and the investing public. Price & Danzig, *supra* note 145, at 1192-95. The hallmark of a responsible corporation is that it polices its own environmental practices, whatever its ultimate motivation may be.

activities cause.[147] The SEC is in a position to enforce securities laws in order to achieve several important results in this area. First, the SEC can effectively deter environmentally harmful behavior by strictly enforcing environmental disclosure requirements. When violations become so costly—in both dollars and public opinion—that an actor can no longer generate profits from its activities, the violations should cease. Second, by compelling corporations to disclose relevant information relating to environmental liabilities, the SEC can provide investors with relevant information which may influence their investment decisions. Ethical investors will not invest in companies whose environmental policies contribute to the general destruction of our environment. By galvanizing interest in environmental issues, these groups can also have a deterring effect on corporate conduct.

The debate over the social responsibility of corporations will continue.[148] One traditional view is that a corporation organized for profit has no duty to act in the best interest of society. A corporation's duties rest with its shareholders. However, the overwhelming mandate of NEPA and the current condition of our environment and natural resources require that all entities and individuals take part in the effort to preserve (or at least not to destroy) it. These goals must take precedence over the traditional profit motive that has guided modern corporations for decades.

A. Disclosure as a Deterrent

As early as 1932, Justice Brandeis commented on the role of corporate disclosure in serving societal needs. "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight

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147. There are some corporate entities that neither disclose nor monitor their environmental practices for fear that such activity will alert government agencies to their misconduct. *See supra* note 144. Still others may not disclose because they do not plan to take any corrective action and do not want to notify the public of the havoc they wreak in the environment.

148. *See supra* notes 3-5 and accompanying text. In other words, does a corporation have a social responsibility or should it be accountable only to shareholders? This author believes that in modern society the corporation has, at least, a minimum duty not to destroy or damage the environment. Accordingly, corporate conduct that harms the environment must be disclosed.

Notwithstanding the philosophical arguments for and against corporate social responsibility, securities laws clearly require disclosure of specific environmental practices and policy, as well as general material information which includes the environmental issues discussed throughout this note.

is said to be the best of disinfectants; electric light is the most efficient policeman . . . ."[149] The more corporate actions are subject to public scrutiny, the more likely that businesses will avoid borderline or questionable environmental practices.[150]

In 1971, after Congress promulgated NEPA, two SEC attorneys co-authored an article concerning the role of the SEC in enforcing the new national policy.[151] They advocated the use of disclosure rules to effectuate the SEC's responsibilities in connection to NEPA.[152] By compelling disclosure of environmentally detrimental practices, policies, and liabilities, the SEC could actually limit their occurrences. Disclosure could be very effective as a deterrent of conduct that the public will not accept.[153]

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149. Sonde & Pitt, *supra* note 54, at 844 (citing LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1932)). Justice Brandeis believed that corporate responsibility went beyond simply earning a profit. He believed that corporations, as agents of the public, have a duty to protect all members of the public who are affected by corporate actions. The corporation has, in effect, an obligation to promote the general welfare. *Id.*

150. Schoenbaum, *supra* note 2, at 577-78.

151. Sonde & Pitt, *supra* note 54, at 844. The SEC expressly disclaimed any responsibility for the opinions contained in the article (more as a matter of policy than anything else). In their conclusion, the authors noted that the SEC was faced with the "challenge of keeping federal securities laws meaningful for and relevant to the problems of the 1970's [sic]." *Id.* at 906. The SEC's rules and regulations regarding environmental disclosure appear to have, over the years, adopted the framework in the article. As a result of the May 1989 Interpretive Release, the SEC is in a position to effectuate a disclosure system that will truly protect both investors and the public. As environmental problems take their place in the public consciousness in the 1990s, the SEC may, once again, be looked to for support in the public effort to ensure corporate responsibility.

152. The SEC should require corporations to disclose what they do to the environment. Disclosure would serve as a "weapon in the federal arsenal directed at environmental problems and hopefully will serve as another aid in remedying this 'social and industrial disease.'" *Id.* at 850. Another role of disclosure could be to prevent environmentally dangerous practices. Clearly, the SEC does not have the authority to force corporations to stop particular practices. However, by forcing the disclosure of these potentially dangerous practices, the SEC can render them less profitable. "Many practices safely pursued in private lose their justification in public." *Id.*

153. *See* Eric D. Roiter, *Illegal Corporate Practices and the Disclosure Requirements of the Federal Securities Laws*, 50 FORDHAM L. REV. 781, 785 (1982) (citing STAFF OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., REPORT OF THE ADVISORY COMM. ON CORPORATE DISCLOSURE TO THE SEC 565 (Comm. Print 1977)). Disclosure was considered to be:

> [A] particularly versatile regulatory concept that, with a minimum of governmental interference to honest business, could be used to improve the fiduciary relationship between those in control of publicly held business

Over the years, various commentators have observed that the SEC's environmental disclosure requirements reflect a clear trend towards adopting this policy. As corrective costs and penalties under environmental laws skyrocket, the SEC may find itself in the unique position of being able to eliminate, rather than expose and punish, environmental noncompliance.[154]

In recent cases arising under environmental laws, courts have expressed dissatisfaction with the effectiveness of civil penalties as deterrents of environmentally dangerous conduct by corporations. In *PIRG v. Powell Duffryn Terminals, Inc.*,[155] the court's opinion opened with the statement:

> The case before this Court presents another chapter in the never ending American environmental tragedy. A recalcitrant company in the private sector of the economy combined with the lethargic enforcement of the applicable statutes and regulations . . . has caused a continuing . . . contribution to the pollution of the [body of water at issue]. It is indeed sad that none of the participants cared sufficiently about the public trust—the environment—to take meaningful steps to avert the tragedy. This Court will not stand idly by to either, explicitly or tacitly, condone such inaction . . . significant monetary penalties are necessary.[156]

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enterprises and the investing public by indirectly deterring fraud and other more subtle forms of unethical behavior.

Id.

154. Many companies liquidate themselves when the costs of environmental clean-up are assessed. *See* Naj, *supra* note 138, at 1, col. 6. Rather than permit companies to engage in misconduct to a point where they cannot afford either the penalties or remedial costs, the SEC might intervene at an earlier stage. By requiring early disclosure, the SEC can prevent further escalation of environmental noncompliance.

155. 720 F. Supp. 1158 (D.N.J. 1989), *aff'd in part*, 913 F.2d 64 (3d Cir. 1990). The Public Interest Research Group (PIRG) of New Jersey, a non-profit public interest corporation, and Friends of the Earth, were devoted to environmental issues. Because the defendant oil company committed 386 violations of the Clean Water Act, the court found it reasonable to conclude that the violations would continue. The company demonstrated no effort to modify operations so as to prevent pollution. *Id.* at 1162.

156. *Id.* at 1159-60. The question at issue was the amount of civil penalties to be assessed for the company's continual pollution violations. In determining the appropriate penalty, the court focused on the profit the defendant derived from its permit violations. *Id.* Later in the court's analysis, it stated:

This case is a tragedy in many respects. It demonstrates that private

In order to effectively deter violations of environmental laws, penalties must be high enough to ensure that polluters cannot absorb the penalty and continue doing business profitably. Additionally, the risk of a penalty being imposed must be high so that companies would not want to assume such an imminent risk. These are the best ways to effectively deter violations of environmental regulations.[157]

In another case arising under environmental laws,[158] the court chastised a company for its "lackadaisical approach in correcting a problem that posed risks—albeit not 'imminent' ones—to both human health and aquatic life. . . . One may speculate how long [the company] would have taken to repair a machine the faulty operation of which would have halted production."[159] To determine appropriate penalties, this court looked to deterrence value, the primary goal of the EPA Penalty Policy. Accordingly, the court assessed a penalty designed to revoke any benefit the company had gained from noncompliance and included an additional amount to accomplish general deterrence.[160]

By enforcing environmental disclosure requirements, the SEC can encourage companies to cease their violations of environmental laws. If the failure to disclose a violation, or liabilities arising there-

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> industry, left to its own initiative, will procrastinate indefinately [sic], even at the expense of the environment, any efforts to remedy an obviously poor situation. It further demonstrates that the government agencies empowered with protecting the environment are far from diligent in that regard.

Id. at 1163.

157. *Id.* at 1163. If in addition to civil penalties under environmental laws, corporations were also subject to penalties or damage suits for violations of securities laws resulting from the nondisclosure of their environmental violations, then the potential impact of the total penalty would soar.

158. Chesapeake Bay Found. v. Gwaltney of Smithfield, 611 F. Supp. 1542 (E.D. Va. 1985).

159. *Id.* at 1561.

160. *Id.* at 1556-57. The EPA Penalty Policy has two general goals: (1) deterrence and (2) fair treatment of all regulated entities. *Id.* To deter repeated conduct, the penalty should include any benefit earned by noncompliance and a "gravity component," which focuses on the seriousness of the violation. *Id.* The first element is directed at "specific deterrence," or the deterrence of future violations by the particular company. *Id.* The second component is directed at "general deterrence" or the deterrence of other similar companies from engaging in similar violations. *Id.* Then, in order to satisfy the second EPA Penalty Policy, an additional penalty should be assessed based upon several factors, including willfulness of the violation, negligence, history of violations, level of cooperation, and whether such a penalty would force the violator out of business. *Id.*

from, will give rise to additional penalties under securities laws, then the conduct would become even less profitable.

As the basis for environmental liability becomes broader, investors will insist that companies in which they invest money behave responsibly toward the environment.[161] When investors learn that they, too, may be subject to liability for the actions of a corporation in which they invest,[162] they will be less likely to close their eyes to environmentally dangerous practices.

B. The "Ethical Investor"

There are many so-called "ethical investors" in this country who want to invest their assets in firms which are concerned

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161. Courts are increasingly establishing rules that render participants in a business liable for the environmental damage the business causes. *See, e.g.*, United States v. Fleet Factors Corp., 901 F.2d 1550, *reh'g denied*, 911 F.2d 742 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991) (secured creditor with interest in facility subject to CERCLA may be liable under CERCLA as an operator or owner); Smith Land & Improvement Corp. v. Celotex, 851 F.2d 86 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989) (holding that under CERCLA, if a corporation has merged or consolidated with another deemed a PRP, then liability may be imposed upon both); State of N.Y. v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985) (stockholder and officer of property can be liable as operator under CERCLA); Kelley v. ARCO Indus. Corp., 723 F. Supp. 1214 (W.D. Mich. 1989) (corporate officers and directors may be held personally liable under CERCLA if they could have prevented the hazardous waste disposal problems); Joslyn Corp. v. T.L. James & Co., 696 F. Supp. 222 (W.D. La. 1988), *aff'd*, 893 F.2d 80 (5th Cir. 1990) (when a parent corporation completely dominates the finances, policies, and practices of a subsidiary, the court may pierce the corporate veil to impose liability upon the parent and its officers for the subsidiary's CERCLA violations); Louisiana-Pacific Corp. v. ASARCO, Inc., 20 Envtl. L. Rep. 21,079 (9th Cir. 1990) (successor liability exists under CERCLA in the context of an asset purchase).

162. Perry E. Wallace, *Liability of Corporations and Corporate Officers, Directors, and Shareholders Under Superfund: Should Corporate and Agency Law Concepts Apply?*, 17 J. CORP. L. 839 (1989). The provisions regarding PRPs under CERCLA have been interpreted broadly by the courts. The result is that liability can attach to either one who participates in any way in hazardous waste disposal decisions or one who maintains control, authority, or indirect ownership of a facility in violation of environmental regulations. *Id.* at 863. This policy aims to impose liability on those who benefit from corporate noncompliance with CERCLA. *Id.* at 863. Because the scope of liability is judicially fashioned, however, there is a risk that others, even shareholders with no participatory role in the company, may be held liable for clean-up or damages. *Id.* at 863-64. While this result would thwart CERCLA's objectives, it is nonetheless a possible outcome of the broad judicial interpretation given to CERCLA by the courts. *Id.* at 864. *See also* United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984), *aff'd in part, rev'd in part*, 810 F.2d 726 (8th Cir. 1986) (imposing individual liability upon officers/stockholders of defendant corporation).

> about and acting on environmental problems of the nation. This attitude may be based purely upon a concern for the environment; but it may also proceed from the recognition that awareness of and sensitivity to environmental problems is the mark of intelligent management.[163]

For the ethical investor, investment decisions are based upon the best interests of society.[164] To make socially responsible decisions, an investor needs information about the behavior and policies of a corporation. One of the areas that has generated a great deal of interest for socially responsible investors is the way a company treats the environment.[165]

Investors may not want to associate themselves with companies that behave irresponsibly towards the environment.[166] In *National Resources Defense Council*, the fact that the plaintiffs wanted information on environmental issues to aid in their decision making gave them standing to assert their claim against the SEC.[167] So far, however, the notion of the ethical investor has not substantially changed securities laws regarding materiality.

Shareholders, however, are making their concerns known. Following the Exxon Valdez oil spill in Alaska, shareholders of numerous corporations submitted proposals that would have required extensive corporate disclosure of environmental policies and practices.[168] In

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163. *National Resources Defense Council*, 389 F. Supp. at 700.

164. *Id.* Many universities and foundations have enormous funds to invest, and they wish to invest in corporations involved in businesses whose actions and policies do not violate their principles. *Id.* at 693.

165. Infomation dealing with the way a company treats the environment can be considered material because there are reasonable investors (i.e., the ethical investor) to whom such information is very important in making investment decisions. *See supra* notes 2-5, 69-74, & 147-48 and accompanying text.

166. *See Roeder*, 814 F.2d at 25 (investors may not want to be associated with corporations involved in bribery or other illegal activities).

167. *See supra* text accompanying notes 65-77. *See National Resources Defense Council*, 606 F.2d at 1042. The allegation that the members of plaintiffs' groups wanted to vote in a "financially prudent and ethically sound manner" was sufficient to establish their standing to sue. *Id.* The court stated that their right to do so was impaired by the lack of information about environmental issues. *Id.*

168. Letter to Michael H. Rudy, Senior Attorney, Texaco, Inc., 1991 SEC NO-Act. LEXIS 500 (Mar. 28, 1991) [hereinafter Rudy Letter]; Letter to Amoco Corporation, 1991 SEC NO-Act. LEXIS 384 (Mar. 1, 1991) [hereinafter Amoco Letter]; Waste Management, Inc., Proxy Statement (May 10, 1991) at 20 (management included a stockholder proposal in 1991 proxy statement which requested that the corporation become a signatory to the Valdez Principles).

response to these proposals, many corporations have been forced to disclose their practices and policies to the public.

For example, Texaco shareholders submitted a proposal that the corporation adopt the "Valdez Principles," which related to environmental disclosure, policies, and practices.[169] Texaco sought the SEC's advice as to Texaco's duty to include the proposal in its 1991 proxy materials. To be able to exclude the proposal, Texaco had the burden of showing that it had already adopted a substantially similar program.[170] Attempting to satisfy this burden, counsel for Texaco detailed the corporation's extensive disclosure program, and the SEC concurred that Texaco's policies and procedures for monitoring environmental compliance addressed all of the SEC's and the shareholder's concerns.[171] Other corporations, faced with similar shareholder proposals, have not been so well received by the SEC.[172]

As shareholders continue to demand that the companies in which they invest devote substantial resources to environmental protection, underlying notions of materiality must evolve. If individual and institutional investors demand socially responsible behavior from corporations, then the SEC will be in a stronger position to regulate corporate conduct for the benefit of shareholders and, ultimately, the public.

V. CONCLUSION

As the SEC continues to expand environmental disclosure requirements and the courts continue to broaden the bases of liability,

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169. *See* Rudy Letter, *supra* note 168, at 3. The Valdez Principles, announced in 1989 by a group of institutional investors and environmental organizations, call for corporations to support "a set of standards for environmental excellence" that far exceed accepted industry codes of "environmental conduct." Waste Management Proxy Statement, *supra* note 168, at 19-20. The Valdez Principles refer to corporate standards affecting (1) protection of the environment, (2) sustained use of natural resources, (3) waste disposal and reduction, (4) wise energy use, (5) risk reduction, (6) marketing safe products and services, (7) damage compensation, (8) environmental disclosure, (9) environmental directors and managers, and (10) environmental auditing. *Id.*

170. Rudy Letter, *supra* note 168, at 1. A shareholder proposal may be excluded if the registrant has "substantially implemented" the proposed action. *Id.*

171. "Texaco is confident that it has one of and perhaps the most comprehensive program for disclosure of its environmental policies and practices in the industry, a program which goes even further than do the Valdez Principles." *Id.* at 4. The letter went on to list the components of Texaco's environmental compliance and disclosure programs.

172. *See, e.g.*, Amoco Letter, *supra* note 168, at 1. The SEC found that Amoco had not implemented the proposals the shareholders were requesting. *Id.* at 2.

companies will be required to report more information about their environmental liabilities. The trend in Congress is to expand requirements for disclosure of environmental liabilities so that investors and the public have relevant information about how particular businesses treat the environment and any particular problems they have created. The trend in the courts is to bring environmental compliance to the level of importance of corporate financial matters. Environmental laws contain their own reporting requirements, and enforcement of those laws can impose harsh penalties for violations. Throughout the nineties, we may see the SEC and the courts begin to apply these same principles to the enforcement of securities laws with respect to environmental disclosures.

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