ENVIRONMENTAL DISCLOSURES: INCREASING SEC DISCLOSURE REQUIREMENTS IS NOT THE ANSWER

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I. Introduction

On July 14, 2004, the United States Government Accountability Office ("GAO") released a report to the Committee on Environment and Public Works.[2] The Committee originally requested that the GAO determine: (1) key stakeholders' views on how well the Securities and Exchange Commission ("SEC") has defined the requirements for environmental disclosure, (2) the extent to which companies are disclosing environmental information in their filings with the SEC, (3) the adequacy of the SEC's efforts to monitor and enforce compliance with the disclosure requirements, and (4) what actions experts suggest for increasing environmental disclosure.[3] This note rekindles the heavily debated topic concerning the adequacy of environmental disclosures.

After a sixteen-month study,[4] the GAO essentially determined that, without more evidence, it could not be certain the current environmental disclosure requirements were inadequate.[5] However, the agency proceeded to make three recommendations concerning environmental disclosure monitoring and enforcement: (1) the SEC should use its powers of oversight and provide guidance where needed, (2) the SEC should use its web site to make information concerning corporate environmental disclosures more easily available to the general public, and (3) the SEC should ensure it is utilizing all available information from the Environmental Protection Agency ("EPA").[6]

This note will offer a discussion on environmental disclosure requirements within securities laws and explain why additional requirements, as suggested by the GAO report, are no longer necessary. Part II provides a survey of historical environmental disclosure requirements to provide context for the GAO's proposal. Part III outlines current environmental disclosure requirements as they pertain to SEC filings. Part IV discusses the proposal provided by the GAO report and other organizations. Part V concerns the impact of these proposals on corporations and their officers, including the potential exposure to securities litigation. This note concludes that the recommendations made by the GAO and other organizations are not the most ideal solutions, because recent developments—specifically the launch of the Enforcement and Compliance History Online ("ECHO") program and enactment of the Sarbanes-Oxley Act of 2002—are sufficient measures to enforce environmental disclosures.

II. Historical Environmental Disclosure Requirements

A brief history of environmental disclosure requirements is warranted to provide the framework for a discussion on why the GAO recommendations and other proposals should not be implemented. An examination of the policy driving environmental disclosures provides the base from which the environmental law was developed. From there, background on relevant

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[2] GAO Report to Congressional Requesters, *Environmental Disclosure— SEC Should Explore Ways to Improve Tracking and Transparency of Information*, GAO Doc. No. 04-808, *at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d04808.pdf (July 2004) [hereinafter GAO Report].
[3] *Id.* at 2.
[4] The study was conducted from February 2003 through June 2004.
[5] GAO Report, *supra* note 2, at 36.
[6] *See generally id.* at 36 (providing a brief synopsis of these recommendations).

securities laws provides a context for the requirements imposed upon corporations by the SEC. Lastly, the historic case involving the Natural Resources Defense Council[7] provides insight into current SEC actions in the arena of environmental disclosure requirements. The reader should note that many of these requirements have state counterparts; however, the state statutes will not be explored in this note.

A. Background on Environmental Law

The modern environmental movement was spurred by two cultural developments in the United States: [8] first, as part of the response to rising standards of living, people began to examine life beyond its necessities; second, an increase in the overall quality and level of education fostered values of creativity and self-development. The combination of these abstract societal changes had a practical effect, as individuals started to think more about their surroundings, their habitat and their effect on the general environment.[9]

By the 1960s, people began to link the destruction of the environment to a combination of growing industry, burgeoning technology, and increased political and economic entanglement and power.[10] This followed from a number of environmental catastrophes, including the 1965 power blackouts and garbage strikes that hit New York,[11] the 1969 burning of the Ohio River along the banks of the industrial sections of Cleveland,[12] and the 1969 Santa Barbara, California, oil spill.[13] This prompted government to enact some of the first legislative acts targeted at environmental protection: the Wild and Scenic Rivers Act (WSRA) in 1968;[14] the National Trails System Act in 1968;[15] and the National Environmental Policy Act of 1969 (NEPA).[16]

In 1970, President Richard Nixon created the Environmental Protection Agency ("EPA").[17] The 1970s saw further environmental disasters; in particular, polychlorinated biphenyls (PCBs) in the

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[7] Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031 (D.C. Cir 1979).
[8] *See, e.g.,* Stacy J. Silveira, Note, *The American Environmental Movement: Surviving Through Diversity*, 28 B.C. ENVTL. AFF. L. REV. 497 (2001), *available at* http://www.bc.edu/bc_org/avp/law/lwsch/journals/bcealr/28_2-3/07_TXT.htm (last accessed Apr. 25, 2005).
[9] *Id.*
[10] *See generally* ROBERT GOTTLIEB, FORCING THE SPRING: THE TRANSFORMATION OF THE AMERICAN ENVIRONMENTAL MOVEMENT (1993).
[11] Silveira, *supra* note 8, at 506. *See generally* http://www.morpc.org/web/departments/publicpolicy/policypapers/Environment.pdf.
[12] Silveira, *supra* note 8, at 506. *See generally* Environmental Protection Agency, *Great Lakes Areas of Concern: Cuyahoga River*, *available at* http://www.epa.gov/glnpo/aoc/cuyahoga.html (Apr. 9, 2003).
[13] Silveira, *supra* note 8, at 506. *See generally* Keith C. Clarke & Jeffrey J. Hemphill, *The Santa Barbara Oil Spill: A Retrospective*, *in* 64 YEARBOOK OF THE ASSOCIATION OF PACIFIC COAST GEOGRAPHERS 157-62 (Darrick Danta ed., 2002), *available at* http://www.geog.ucsb.edu/~kclarke/Papers/SBOilSpill1969.pdf.
[14] 16 U.S.C. §§ 1271-1287 (2000).
[15] 16 U.S.C. §§ 1241-1251 (2000).
[16] 42 U.S.C. §§ 4321-4347 (2000).
[17] In July 1970, the White House and Congress worked together to establish the EPA in response to the growing public demand for cleaner water, air and land. Prior to the establishment of the EPA, the federal government was not structured to make a coordinated attack on the pollutants that harm human health and degrade the environment. The EPA was assigned the daunting task of repairing the damage already done to the natural environment and establishing new criteria to guide Americans toward the reality of a cleaner environment. *See* Environmental Protection Agency, *About EPA*, *at* http://www.epa.gov/epahome/aboutepa.htm. (last updated Apr. 26, 2005).

Hudson River[18] and chemical dumping grounds near Louisville, Kentucky.[19] These events, among others from that decade, and coupled with the events from the 1960s, spurred the government to enact additional environmental legislation: the Resource Conservation and Recovery Act of 1976 (RCRA);[20] the Clean Air Act Amendments and the Clean Water Act of 1977[21]; and the Toxic Substances Control Act of 1977 (TSCA).[22]

The RCRA regulates the handling and disposal of hazardous materials and toxic wastes by corporations. The thrust of the RCRA is extensive record keeping by companies that use hazardous or toxic substances. The EPA has access to this library of information, and can impose mandatory clean-up requirements. Companies that fail to comply with such mandates are subject to substantial civil and criminal penalties.

The Clean Air Act Amendments and Clean Water Act of 1977 focus on preventing or reducing emissions of hazardous materials and toxic substances. Companies that produce such hazardous materials must plan for significant expenditures and provide an accounting of items on their financial statements. As with other environmental disclosures, the issue of exactly what items must be disclosed on the financial statements, and to what extent, has plagued companies and government agencies. Similar to the RCRA, penalties for violation of these provisions can result in substantial civil and criminal penalties.

In the 1980s, "mainstream environmentalism", as we have today, surfaced as a result of the deregulation of environmental policies of President Reagan.[23] One of the most important Acts passed by Congress was the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, also known as the Superfund Act).[24] CERCLA made operators of properties where hazardous materials or toxic wastes were disposed responsible for removal of the waste and clean-up costs. Strict liability applies to CERCLA cases, as well as joint and several liability.[25] The Act provides that in the event the responsible parties fail in their duties, the EPA has the authority to initiate procedures to remove the contamination. The costs incurred by the EPA during this removal may be recuperated from the operator of the property.[26]

B. Background on Securities Law

Securities regulations are based on two important acts: the Securities Act of 1933 ("'33 Act")[27] and the Securities Exchange Act of 1934 ("'34 Act").[28] The general requirement in both Acts is

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[18] Silveira, *supra* note 8, at 507. *See generally* Environmental Protection Agency, *Hudson River PCBs: Actions Prior to EPA's February 2002 Record of Decision (ROD)*, *at* http://www.epa.gov/hudson/actions.htm (last updated October 16, 2003).
[19] Silveira, *supra* note 8, at 507.
[20] 42 U.S.C. §§ 6901-6981 (2000).
[21] Clean Air Act Amendments of 1977, 42 U.S.C. §§ 7419-7626 (2000); Clean Water Act of 1977, 42 U.S.C. §§ 1294-1297 (2000).
[22] 15 U.S.C. §§ 2601-2692 (2000).
[23] *See* MARK DOWIE, LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY 68 (1995).
[24] 42 U.S.C. §§ 9601-9675 (2000).
[25] 42 U.S.C. § 9607 (2000).
[26] 42 U.S.C. § 9623 (2000).
[27] 15 U.S.C. §§ 77a-77aa. (2000).

that when a security is issued to the public, it must be registered with the SEC. Similar to the federal environmental disclosure requirements, securities are regulated at the state level by "Blue Sky Laws"; however, these laws are outside the scope of this note and will not be explored at this time.[29]

The '33 Act applies to securities sold by the issuer, and regulates the registration of securities prior to the company's initial public offering. The Act requires a company that issues securities to the public to make a full disclosure of information that would be material to an investor. The company provides a registration statement and prospectus containing all material information to the SEC.[30] After obtaining approval from the SEC, the prospectus becomes the vehicle by which the company communicates its securities offerings to the public.

By contrast, the '34 Act applies to securities sold in the secondary market, and regulates companies that have already registered their securities under the '33 Act. These reporting companies are usually listed on national securities exchanges[31] and have more than five hundred shareholders and more than ten million in total assets.[32] The Act requires periodic reports disclosing information that would be material to investment decisions. The specific reports required under the '34 Act include Form 10-K (annual reporting), Form 10-Q (quarterly reporting), and Form 8-K (material event reporting).

The '34 Act contains many important provisions. Specifically, two sections of this Act have made a significant impact on the regulation of securities and securities disclosures. Section 10(b)[33] and Rule 10b-5[34] forbid any deceptive devices or omissions of material fact relating to the issue of securities. Rule 10b-5 provides:

> It shall be unlawful for any person directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (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 in connection with the purchase or sale of any security.[35]

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[28] 15 U.S.C. §§ 78a-78mm. (2000).
[29] *See generally* Francis J. Facciolo & Richard L. Stone, *Avoiding the Inevitable: The Continuing Viability of State Law Claims In The Face Of Primary Jurisdiction And Preemption Challenges Under The Securities Exchange Act of 1934*, 1995 COLUM. BUS. L. REV. 525 (1995).
[30] 15 U.S.C. § 77e (2000).
[31] Those exchanges include but are not limited to the New York Stock Exchange (NYSE), the National Association of Securities Dealers Automated Quotation System (NASDAQ), and the American Stock Exchange (ASE).
[32] 15 U.S.C. § 781(g)(1) (2000).
[33] 15 U.S.C. § 78j(b) (2000).
[34] 17 C.F.R. § 240.10b-5 (2000).
[35] § 240.10b-5

Thus, a Rule 10b-5 cause of action has four basic requirements: (i) the defendant must knowingly fail to disclose or misstate material facts (scienter), (ii) that the plaintiff relied upon, (iii) causing damage or causing the plaintiff to suffer a loss, (iv) in connection with the sale or purchase of a security. Under Rule 10b-5, courts have applied the "probability-magnitude test" for evaluating what items are material.[36]

These provisions are broad enough to cover even private sale of stock in a company that is not listed on a publicly traded exchange.[37] Additionally, Rule 10b-5 can impose liability on a registrant even when mandatory disclosure is not required under Regulation S-K, thus encompassing issues surrounding environmental disclosures.

C. Natural Resources Defense Council, Inc. v. SEC

Completing the historical context of environmental disclosures is the 1979 Natural Resources Defense Council ("NRDC") case.[38] This case formed the basis for the SEC's outlook on and reaction to incorporating specific environmental disclosures in securities registration statements.[39] The NRDC litigation concerned the NRDC's perception that the SEC did not incorporate sufficient environmental concerns into its decision-making policies. The National Environmental Policy Act ("NEPA") provided that federal agencies must consider the impact of their actions and regulatory requirements upon the environment.[40] The NRDC petitioned the SEC to increase its regulatory requirements to include more environmental disclosure.[41] When the SEC chose to adopt only minimal environmental disclosure requirements, NRDC challenged with litigation, stating that the SEC should have done more.[42] The United States Court of Appeals held that, although NEPA applied to SEC actions, the SEC was not acting in an arbitrary or capricious manner, and therefore had behaved appropriately. Clearly, the SEC has a large amount of discretion on *how* to comply with the statutory requirements.[43] The effect of the NRDC case can be gleaned from the three SEC releases following the Court's decision.[44] In those releases, the SEC stated that corporate responsibility issues are probably outside the legal scope of its charter, signaling its reticence toward imposing disclosure requirements to promote social agendas.[45]

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[36] *See* Basic Inc. v. Levinson, 485 U.S. 224 (1988) (balancing the probability that the event would occur and the anticipated magnitude of the event in proportion to all the company's activities).
[37] *See*, *e.g.*, Landreth Timber Co. v. Landreth, 471 U.S. 681 (1985).
[38] 606 F.2d 1031.
[39] *See* Robert H. Feller, Note, *Environmental Disclosure and the Securities Laws*, 22 B.C. ENVTL. AFF. L. REV. 225, 255-59 (1995). Section II.C. is based upon Mr. Feller's Note.
[40] 42 U.S.C. §§ 4321-4307d (2000).
[41] Feller, *supra* note 39, n.162.
[42] *Id.* n.163.
[43] 606 F.2d at 1044-45.
[44] Feller, *supra* note 39, at 256.
[45] *Id.* at 257.

III. Current SEC Environmental Disclosure Requirements

The statutory basis for the SEC's disclosure requirements of environmental liabilities are primarily found in Regulation S-K Items 101, 103 and 303.[46] Quarterly reporting of Items 101 and 103 are required on either Form 10-Q or 10-K.[47] Reporting of Item 303 is done annually, on Form 10-K.[48] Following a review of these provisions is an examination of disclosures in corporate financial statements and a discussion of the impact of Sarbanes-Oxley. Finally, the section concludes with a brief look at the consequences for those companies failing to meet the various disclosure requirements.

A. Regulation S-K: Items 101, 103, and 303

Item 101, which outlines the first SEC environmental reporting requirement, states that the registrant must provide a general description of their business.[49] Specifically, Item 101(c)(xii) requires that

> "[A]ppropriate disclosure also shall be made as to 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 related to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries."[50]

The issue of materiality is central to the determination of what items to disclose. The United State Supreme Court has interpreted the term to mean that a company must disclose information if "there is a substantial likelihood that a reasonable investor would have found the omitted information important or that the missing facts would have altered the 'total mix' of information available to the investor."[51]

Item 103 mandates the disclosure of pending material legal proceedings that are not ordinary, routine litigation incidental to the business.[52] The instructions to Item 103 provide that litigation involving the discharge of materials into the environment or protection of the environment shall not be deemed "ordinary routine litigation incidental to the business." In addition, the registrant company shall disclose legal proceedings if:

- Such proceedings are material to the business or financial condition of the registrant; or

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[46] 17 C.F.R. §§ 229.101, 229.103, 229.303 (2004).
[47] *See* Form 10-Q, Part I, Item 2 and Part II, Item 1 of the '34 Act, *available at* http://www.sec.gov/about/forms/form10-q.pdf (last accessed Apr. 26, 2005) (expires Jan. 31, 2008); Form 10-K, Part I, Item 3 and Part II, Item 7 of the '34 Act, *available at* http://www.sec.gov/about/forms/form10-k.pdf (last accessed Apr. 26, 2005) (expires Jan. 31, 2008).
[48] *See* Form 10-K, Part I, Item I of the Securities Exchange Act of 1934.
[49] 17 C.F.R. § 229.101 (2004).
[50] § 229.101(c)(xii).
[51] TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976). This application of the materiality standard has also been applied in the context of Rule 10b-5 disclosures. *See* Basic Inc., 485 U.S. 224 (1988).
[52] 17 C.F.R. § 229.103 (2004).

- Such proceedings involve primarily a claim for damages, or involve potential monetary sanction, capital expenditures, deferred charges or charges to income, and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrants and it subsidiaries on a consolidated basis; or
- A governmental authority is a party to such proceedings and such proceedings involve potential monetary sanctions, unless the registrant reasonably believes that such proceedings will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000, provided, however, that such proceedings which are similar in nature may be grouped and described generically.[53]

Item 303 requires the registrant to prepare a narrative report discussing liquidity, capital resources and operational results, in a section titled Management's Discussion and Analysis.[54] Unlike Items 101 and 103, Item 303 does not explicitly require disclosure of environmental impacts. However, the SEC has stated that disclosure of contingencies, including environmental ones, that may reasonably have a material impact on the company's financial statements, must be included in Item 303.[55] As with Item 103, the issue of materiality is central to what environmental contingencies must be disclosed in the report. A detailed analysis of materiality as it pertains to Item 303 is outside the scope of this note; however, it is important to recognize that the most current SEC interpretations provide that disclosure is required when an event or uncertainty is both known by management and reasonably likely to materially effect the registrant's financial condition.[56]

B. Related Disclosures in Corporate Financial Statements

In addition to the required disclosures of environmental issues in SEC filings, accounting standards boards have developed methods and accountability suggestions to assist companies in the formation of their financial statements. The Financial Accounting Standards Board ("FASB")[57] has adopted calculating and accounting standards for environmental contingencies on a company's financial statements. Importantly, FASB standards for estimating environmental contingencies are different than the required disclosures required by SEC regulations. As previously noted, the SEC requires disclosure of environmental compliance costs, legal proceedings, and other contingent events that are likely to affect future operations if those items are "material." The SEC requires these material disclosures without regard to whether occurrence of the environmental event is likely, probable, or reasonably estimable.

Under Financial Accounting Standard Number 5 ("FAS No. 5"), all loss contingencies should be accrued on the financial statements if it is probable that the liability will be incurred and the

[53] § 229.103, Instruction 5.
[54] 17 C.F.R. § 229.303 (2004).
[55] *See* Securities Act, Release No. 6349 (Sept. 29, 1981).
[56] See Michael Gollub, *Reducing Uncertainty in Environmental Disclosure: Why the Securities and Exchange Commission Should Return to the Basics*, 4 ENVTL. LAW. 311, 364-377 (1998) (offering a detailed analysis of materiality as it pertains to Item 303).
[57] The Financial Accounting Standards Board ("FASB") is the organization in the private sector that establishes standards of financial accounting and reporting. These standards are officially recognized by the SEC and the American Institute of Certified Public Accountants ("AICPA").

amount of the loss can be reasonably estimated.[58] For these purposes, a loss contingency is an existing "condition, situation, or set of circumstances involving uncertainty as to possible gain … or loss … that will ultimately be resolved when one or more future events occur or fail to occur. Resolution of the uncertainty may confirm the … loss or impairment of an asset or the incurrence of a liability."[59]

FAS No. 5 created problems because of its flexibility.[60] Since FAS No. 5 required accruals only if costs could be reasonably estimated and liability were probable, many companies chose to accrue as little as possible.[61] In an attempt to correct this situation, the FASB issued Financial Interpretation Number 14 ("FIN 14").[62] FIN 14 stated it was inappropriate to delay accrual of a loss until only a single amount could be reasonably estimated.[63] Thus, if the particular loss contingency and the reasonable estimate of the loss fell within a certain range, then the company should recognize the amount which represented the better estimate. If there were no better estimate, then the minimum amount should be accrued.[64] However, these additional accounting requirements were still insufficient.[65]

Based on a need for more guidance, the SEC issued Staff Accounting Bulletin 92 ("SAB 92").[66] With its question and answer format, SAB 92 provides guidance regarding the accounting and disclosure obligations for contingent environmental liabilities. The focus of SAB 92 was to ensure that corporate registrants provide the market with important disclosures.[67] Specifically, a registrant should discuss the following events, if material: (1) any recurring costs associated with managing toxic substances and some pollutants that result from operations; (2) capital expenditures allocated to monitor hazardous substances or pollutants; (3) expenditures mandated by a court or administrative agency for contaminated sites; and (4) other nonrecurring cleanup expenses that can reasonably be anticipated, but are not yet required by the governing agencies.[68] Additionally, SAB 92 outlined that the following assumptions must be disclosed:

- Circumstances affecting the reliability and accuracy of loss estimates;
- The extent that unasserted claims are reflected in accruals or may affect the magnitude of the contingency;

[58] Financial Accounting Standards Board, Statement of Financial Accounting Standards No. 5, *Accounting for Contingencies* (Mar. 1975) [hereinafter FAS No. 5], *available at* http://www.fasb.org/pdf/fas5.pdf (last accessed Apr. 25, 2005).
[59] *Id.* at 1.
[60] Marie Leone, *The Greening of GAAP: Are corporations being forthright about their environmental liabilities?* (Sept. 9, 2004), *at* http://www.cfo.com/printable/article.cfm/3124349?f=options (last accessed Apr. 26, 2005).
[61] *Id.*
[62] Financial Accounting Standards Board, FASB Interpretation No. 14 (Sept. 1976) [hereinafter FASB No. 14], *available at* http://www.fasb.org/pdf/fin%2014.pdf (last accessed Apr. 26, 2005).
[63] *Id.*
[64] *Id.*
[65] Leone, *supra* note 60.
[66] Quantification of Environmental Loss Contingency, 58 Fed. Reg. 32,843-01, 32,844 (June 14, 1993) (codified at 17 C.F.R. pt. 211)
[67] *See* LARRY SCHNAPF, ENVIRONMENTAL LIABILITY: MANAGING ENVIRONMENTAL RISKS IN CORPORATE, REAL ESTATE AND BROWNFIELD TRANSACTIONS 7 (1999)
[68] *Id.*

- Uncertainties regarding joint and several liability that may affect the magnitude of the contingency (the aggregate remedial costs for sites that are individually material should be disclosed if the likelihood of contribution cannot be established);
- Nature and terms of any PRP cost-sharing arrangements;
- The extent that disclosed but unrecognized contingent losses may be offset through insurance, indemnification or other sources and any material limitations on those recoveries;
- Uncertainties regarding sufficiency of insurance coverage or solvency of insurance carriers;
- Time frames for the payment of accrued or presently recognized losses;
- Material components of any accruals and significant assumptions made when deriving the underlying estimates. These disclosures should be specific enough to enable a reader to completely understand the scope of the contingencies that may affect the registrants.[69]

C. The Impact of the Sarbanes-Oxley Act of 2002

The SEC has required disclosure of environmental costs and liabilities for the past twenty years. However, recent high-profile financial crises have prompted Congress to adopt the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley").[70] Sarbanes-Oxley does not contain provisions that directly address environmental disclosure, but the heightened financial disclosure requirements and corporate governance issues have resulted in greater scrutiny of all disclosures, including those measures focused on environmental issues and liability reporting. In addition to the increased scrutiny of financial disclosures, Sarbanes-Oxley increases the personal accountability of corporate officers and directors for omissions, misstatements or inaccurate information.

The following are important provisions relating to environmental disclosures required by Sarbanes-Oxley:[71]

- Officers are now required to furnish as an exhibit, included with all filing documents given to the SEC, a certification that essentially states the officer has complied with all the requirements of internal controls and disclosures.[72]
- Various certification, attestation and disclosure requirements have been implemented; existing ones have been heightened. Additionally, the penalties and statute of limitations for failure to comply with this section were increased.[73]
- New sanctions for CEOs and CFOs have been established, including disgorgement of bonuses and income from equity-based incentives in connection with certain financial transactions. Also, the SEC now has the power to freeze a corporate executive's compensation in certain situations. The SEC also has an increased power to bar persons from future service as officers or directors of public companies.

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[69] Quantification of Environmental Loss Contingency, 58 Fed. Reg. at 32,845.
[70] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in various sections of 11, 15, 18, 28 and 29 U.S.C.).
[71] Chris Locke and Andrew W. Ingersoll, *Environmental Liability Disclosure and the Sarbanes-Oxley Act*, *at* http://library.findlaw.com/2003/Sep/17/133167.html (Sept. 17, 2003).
[72] 15 U.S.C. § 7241 (2002).
[73] 18 U.S.C. § 1350 (2002).

- New requirements for ethics, codes of conduct, and codes of corporate responsibility have been created.
- Corporate whistleblowers are now given better protection. Companies must have internal procedures which allow for whistleblowers to report their findings directly to the audit committees. Penalties for those who retaliate against whistleblowers, and criminal and civil legal protections for whistleblowers, have been enhanced.[74]
- Considerable monetary and criminal penalties have been set for attempting to influence, coerce, manipulate, or mislead an accountant or auditor engaged in an audit into producing or issuing financial statements that are misleading.[75]
- Corporations now face additional requirements for disclosing any material changes or adjustments, including off-balance sheet transactions.[76]

D. The Consequences of Failing to Disclose Material Information

Section 10(b) of the '34 Act and Rule 10b-5 of the '33 Act prohibit registrants from making materially false disclosures or omitting material information in connection with the purchase or sale of securities.[77] Rule 10b-5 applies to most communications that can reach investors, including disclosures to analysts, press releases, corporate statements regarding environmental policy, and financial statements. Generally, Rule 10b-5 imposes no duty to voluntarily disclose regarding environmental matters.[78] The SEC is empowered to enforce this prohibition by investigating any person or company suspected of violating federal securities laws or SEC rules.

Additionally, with the passage of Sarbanes-Oxley, the U.S. Department of Justice ("DOJ") stated how it plans to implement the criminal enforcement portions. The DOJ is encouraging cooperation between itself, the U.S. Attorney's Office, and the Federal Bureau of Investigation to bolster the prosecution of major securities crimes.[79] Shortly after the passage of Sarbanes-Oxley, the U.S. Sentencing Commission issued a new set of sentencing guidelines that severely stiffened fines and prison sentences for individuals and companies convicted of white-collar crimes. The new mandatory guidelines severely restricted the use of plea bargains, increased prison sentences, nearly doubled previous fines, increased the protection for whistleblowers and expanded the scope of obstruction of justice charges.[80] Additionally, the EPA released an Enforcement Alert after analyzing a 1998 SEC study that found that many companies were underreporting or not reporting the existence of environmental disclosures.[81] This pre-Sarbanes-Oxley document provided companies with a reminder of several key things: that they had a duty

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[74] 15 U.S.C. § 7241 (2002).
[75] 15 U.S.C. § 7242 (2002)
[76] 15 U.S.C. § 7261 (2002).
[77] 17 C.F.R. § 240.10b-5.
[78] *See* John W. Bagby et al., *Show Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225, 315-16 (1995).
[79] Field Guidance on New Criminal Authorities Enacted in the Sarbanes-Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability, *at* http://www.usdoj.gov/ag/readingroom/sarox1.htm (Aug. 1, 2002) (last accessed Apr. 26, 2005).
[80] 18 U.S.C. §§ 1513(e), 1519 (2000).
[81] Office of Enforcement and Compliance Assurance, Office of Regulatory Enforcement, Enforcement Alert, Volume 4, No. 3, *U.S. EPA Notifying Defendants of Securities and Exchange Commission's Environmental Disclosure Requirements* (Oct. 2001) [hereinafter Enforcement Alert], *at* http://www.epa.gov/oeca/ore/enfalert/ (last accessed Apr. 25, 2005)

to disclose material environmental issues and legal proceedings on their registration statements to the SEC; that there was the potential for incurring fines and penalties for noncompliance with these disclosure requirements; and that the EPA had the intention to start working more closely with the SEC to monitor these disclosures by individuals and companies.[82] The message at that time was clear: parties who were not complying with environmental disclosure requirements should expect civil and/or criminal enforcement actions, and perhaps DOJ general obstruction of justice charges, and could be subject to liability stemming from both SEC violations and environmental violations.[83]

Years later, in March 2003, the DOJ, EPA and National Association of Attorneys General released guidelines specifically addressing environmental disclosure issues.[84] These guidelines provide companies and the public with an outline of how the federal government and the individual states will conduct joint environmental enforcement litigation.[85] Additionally, the guidelines explain the priorities for the DOJ in promoting the inter-departmental cooperation effort, and provide a foundational tool for joint enforcement litigation.[86] Since environmental enforcement actions tend to be large scale and very complex and can involve claims under numerous environmental and securities law statutes, the importance of joint enforcement with interdepartmental cooperation is stressed in the guidelines.[87] Enforcing and litigating these complex issues is greatly benefited by the overlapping experience of multiple government agencies and their respective attorneys.[88]

In summary, the consequences for failing to disclose or underreporting environmental disclosures on SEC registrations can encompass the following:

- Delayed approval of registration filings that the company needs for raising capital via securities offerings.
- Sanctions by the SEC against not only companies but also the corporate officers individually for misrepresentation or omission of important information in civil or administrative proceedings.
- Monetary penalties sought by the SEC from those individuals who violate cease-and-desist orders or securities laws. More recently under Sarbanes-Oxley, these monetary penalties can reach five million dollars.[89]
- Criminal sanctions by the DOJ under Sarbanes-Oxley, including fines and prison sentences.

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[82] *Id.*
[83] *See* Ann R. Barker, *Environmental Management Systems After Sarbanes-Oxley*, at 13 (2003), *at* http://ipec.utulsa.edu/Ipec/Conf2003/Papers/barker_27.pdf (last accessed Apr. 25, 2005).
[84] *See* National Association of Attorneys General & United States Department of Justice Environmental & Natural Resources Division, *Guidelines for Joint State/Federal Civil Environmental Enforcement Litigation* (Mar. 2003), *at* http://www.naag.org/issues/pdf/env-joint_enf_guidelines-full.pdf (last accessed Apr. 25, 2005).
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] Barker, *supra* note 83.
[89] 18 U.S.C. § 1350 (2002).

IV. Proposals to Increase Environmental Disclosures

Recently, numerous environmental groups, socially conscious investors, various administrative agencies and Congress have been calling for a fundamental shift in current environmental regulation, because there is a general belief that the EPA's current regime is inadequate to handle current and future issues. This section will discuss a few proposals that have been submitted by these organizations.

A. Reasons for Increasing Environmental Disclosures

The current environmental regulatory system has remained relatively unchanged in the past thirty years.[90] As the history shows, the system was developed to address problems that, at the time, consisted of large industrial sources of pollution that were unregulated. It often provided little flexibility for the regulated companies to achieve their goals and, at the same time, provided no incentive for the companies to go beyond mere compliance with the regulations. No one doubts that the regulations imposed by the EPA and other agencies dramatically improved air quality, water quality, and the handling of toxic waste; however, many of the current environmental problems are different than those originally encountered.[91]

The proponents for increased environmental disclosure also cite a growing link between environmental and financial performance. Specifically, those companies that comply with environmental regulations and disclosures will outperform in the stock market other companies that do not comply.[92] Empirical evidence supports this assertion. First, the Alliance for Environmental Innovation reviewed seventy research studies in 1998,[93] all of which found a positive relationship between environmental compliance and disclosure and financial performance, to the extent that those companies that outperformed their counterparts in environmental compliance also outperformed their counterparts in the stock market by two percent.[94] Second, the Storebrand Scudder Environmental Value Fund,[95] comprised of companies that rank in the top third in environmental performance, outperformed comparable Morgan Stanley International World Indexes by eight percent during 1996 though 1998.[96] Third,

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[90] *See supra* Section II.B.
[91] *See* Nicholas C. Franco, *Corporate Environmental Disclosure: Opportunities to Harness Market Forces to Improve Corporate Environmental Performance*, ABA Section on Environment, Energy, and Resources, Conference on Environmental Law (Mar. 8-11, 2001), *at* http://www.corporatesunshine.org/epaaba.pdf (last accessed Apr. 26, 2005).
[92] *See* Jerald Blumberg et al., *Environmental Performance and Shareholder Value*, World Business Council for Sustainable Development (1997), *at* http://www.wbcsd.ch/DocRoot/sYaaFnxau62YUu3vIaOP/epsvalue.pdf (last accessed Apr. 25, 2005).
[93] Alliance for Environmental Innovation is a Boston based non-profit organization created through a partnership between Environmental Defense and the Pew Charitable Trusts. Their mission is to implement innovative environmental strategies as it pertains to the fast food industry. *See generally* The Alliance for Environmental Innovation, *About the Alliance for Environmental Innovation*, *at* http://www.environmentaldefense.org/alliance/aboutus.html (last accessed Apr. 25, 2005).
[94] Blumberg, *supra* note 92.
[95] Currently, the Fund is known as the Storebrand Principal Global Fund, and includes social criteria in addition to environmental criteria. *See generally* Chao Lou & John Ganzi, *2001 Performance Review: Profit-Driven Sustainability Funds*, at 26 (Aug. 2002), *at* http://fiesta.bren.ucsb.edu/~alloret/epacapmkts/John%20Ganzi%20report%2026.doc (last accessed Apr. 25, 2005)
[96] Blumberg, *supra* note 92.

the ICF Kaiser Consulting Group, in a 1996 study in which it looked at over three hundred S&P 500 firms, found that companies could increase their stock price by five percent by improving their environmental performance and disclosure.[97]

Other empirical studies have been conducted on corporate performance and its relationship to environmental disclosures. In 1998, the EPA conducted a study through its Office of Enforcement and Compliance Assurance. The study found that:

- Seventy-four percent of publicly traded companies failed to adequately disclose environmental legal proceedings under Regulation S-K, Item 103.
- Only twenty-six percent of civil and administrative actions involving penalties were adequately and correctly reported on the company's annual 10-K report.
- Only sixteen percent of civil and administration actions involving court ordered Supplemental Environmental Projects were correctly disclosed.
- Only four percent of the Resource Conservation and Recovery Act ("RCRA") actions were correctly disclosed. [98]

Five years prior to the EPA's 1998 report, the GAO found that insurance company disclosure of Superfund liabilities was poor and posed a risk for investors.[99] The report looked at the practices at the top sixteen public traded property and casualty insurance companies. In 1990, only two of the sixteen companies disclosed environmental claims in their annual reports for 1990, although five of these companies stated they were involved in environmental litigation that might negatively impact their financial condition. Similarly, in 1991, only three of the sixteen companies disclosed environmental claims in their annual reports for 1991, although eight of these companies stated they were involved in environmental litigation that might negatively impact their financial condition.[100]

The GAO determined that the problem was two-fold. First, companies claimed they could not sufficiently estimate the cost of the claims.[101] Second, a loophole exists under the current piecemeal system: arguably, no single litigation might be material to a company. However, environmental litigation involving a single site usually involves many different aspects and many different cases. When a company evaluates each case, the individual "pieces" do not separately surpass a reporting threshold. However, if the company were to aggregate the effects of related cases with the costs of clean-up and other claims, the liability would be more reflective of the situation.[102]

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[97] *Id.*

[98] Enforcement Alert, *supra* note 81.

[99] General Accounting Office, Report to the Chairman, Committee on Energy and Commerce, House of Representatives, *Environmental Liability: Property and Casualty Insurer Disclosure of Environmental Liabilities* (June 1993), *at* http://archive.gao.gov/t2pbat5/149533.pdf (last accessed Apr. 25, 2005).

[100] *Id.*

[101] *Id.*

[102] *Id.* This state of affairs is what led to the development of the American Society for Testing and Materials International (ASTM) guidelines. *See infra* Section IV.B.

One of the more active proponents of increasing environmental disclosures is The Rose Foundation for Communities and the Environment ("Foundation").[103] In a recent report completed as part of its Environmental Fiduciary Project,[104] the Foundation outlined two main problems with existing corporate financial reporting of environmental costs and liabilities.[105] First, GAAP only requires companies to report a minimum of a range of possible environmental liabilities. As previously mentioned,[106] SEC registrants are required to disclose environmental contingencies that are material to the company on their financial statements.[107] Additionally, those companies that register with the SEC are required to accrue an estimation of environmental liabilities when it is probable that the liability has been incurred at the date of the financial statements and the loss can be reasonably estimated.[108] These regulations give companies the discretion on how to develop internal estimates for their environmental liabilities, but they do not require them to specify which estimate is more likely; thus, a company can lawfully disclose only the minimum estimate of environmental contingencies, even though that might reflect a most unlikely possibility.[109] Second, the current disclosure approach, which looks at each potential environmental contingency as a discrete event, can be misleading. Since the environmental laws and the securities disclosure requirements laws tend to focus on events, the broader picture is often overlooked. This piecemeal, rather than aggregate, approach, gives the company an opportunity to underreport environmental liabilities while still making technically legal disclosures to the EPA and SEC.[110]

A final force pushing for increased environmental disclosure is the socially responsible investment movement, which does seem to have gained traction in the past decade. Proponents of this movement evaluate investment choices by the social records of the companies, including environmental compliance and performance, when making decisions on which companies in which to invest money.[111] In the year 2000, a Gallup poll found that nine percent of investors had purchased or sold their stocks based on issues surrounding environmental records of the companies.[112] Additionally, professional organizations holding approximately 2.16 trillion dollars in assets made investment decisions based on corporate social records.[113]

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[103] The non-profit Foundation was founded in 1992 on the principle that environmental protection and community regeneration are inseparable. *See* The Rose Foundation for Communities and the Environment, *at* http://www.rosefdn.org (last accessed Apr. 26, 2005).
[104] The Environmental Fiduciary Project is one of the major projects run by The Rose Foundation. The goal for this project is to "encourage trustees who are responsible for pension funds, foundation endowments and other pools of capital managed on behalf of specific beneficiaries or society at large to respond to the increasing evidence that environmental performance is an economic value driver." *See* The Rose Foundation, About Us, Environmental Fiduciary Project, *at* http://www.rosefdn.org/aboutus.html (last accessed Apr. 25, 2005).
[105] *See* Susannah Blake Goodman & Tim Little, *The Gap in GAAP: An Examination of Environmental Accounting Loopholes* (Dec. 16, 2003), *at* http://www.rosefdn.org/images/GAPinGAAP.pdf (last accessed Apr. 25, 2005).
[106] *See infra* Part III.B.
[107] 17 C.F.R. §§ 229.101, 229.103, 229.303 (2004).
[108] FAS No. 5, *supra* note 58.
[109] Goodman, *supra* note 105, at 4.
[110] *Id.*
[111] *See* Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight,* 55 ALA. L. REV. 775, 806-807 (2004).
[112] *See id.* at 807 (citing DEBORAH LYNN GUBER, THE GRASSROOTS OF A GREEN REVOLUTION: POLLING AMERICA ON THE ENVIRONMENT 50 (2003).
[113] The Social Investment Forum, *2003 Report on Socially Repsonsible Investing Trends in the United States*, at i-ii (Dec. 2003), *available at* http://www.socialinvest.org/areas/research/trends/sri_trends_report_2003.pdf (last

B. Promoting Market-Based Environmentalism

As previously mentioned, the Rose Foundation is the one of the leading advocates for increasing environmental compliance and disclosures. In 2002, the Foundation's President[114] sent a petition to Jonathan Katz, Secretary to the SEC.[115] In her petition, she asked the SEC "to promulgate two new rules to clarify the intent of the Commission's material disclosure requirements with respect to financially significant environmental liabilities and help ensure compliance with existing material financial disclosure requirements."[116] The two new rules are based on guidelines set forth by the American Society for Testing and Materials International ("ASTM").[117]

The petition asks the SEC to incorporate modified versions of two ASTM guidelines,[118] and cites poor corporate understanding and disclosure of corporate environmental liabilities, which jeopardizes financial risk analysis and threatens shareholder value. ASTM E 2173-01 outlines a set of options and instructions for environmental liability disclosures accompanying both audited and unaudited financial statements;[119] it is a guide to assist companies in determining which environmental conditions warrant disclosure and what should be disclosed. ASTM E 2137-01 provides a standard designed to provide companies with a methodology to accurately estimate environmental liabilities.[120] Both guidelines provide assistance to companies to estimate costs and liabilities of environmental issues, environmental compliance, response actions, costs of defending actions, and damages arising from these issues.

As previously mentioned, the ASTM guidelines are voluntary measures. The proposal within the petition to the Secretary to the SEC sought to make these voluntary guidelines mandatory and to elect the "expected value" estimation method as the preferred method.[121] The preference for the

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accessed Apr. 25, 2005). According to the Social Investment Forum, assets in socially-screened portfolios increased by 7% from 2001 to 2003, while assets in all professionally managed portfolios fell 4%.

[114] Jill Ratner is President of The Rose Foundation.

[115] *See* Petition by Jill Ratner, President of the Rose Foundation for Communities and the Environment, to Jonathan G. Katz, Secretary to the U.S. Securities and Exchange Commission (September 20, 2002) [hereinafter Ratner Petition], *available at* http://www.sec.gov/rules/petitions/petn4-463.htm.

[116] *Id.* at 1.

[117] The ASTM is a not-for-profit organization that provides a forum for the development and publication of voluntary consensus standards for materials, products, systems and services. More than 32,000 members representing producers, users, ultimate consumers and representatives of government and academia from over 100 countries develop documents that serve as a basis for manufacturing, procurement and regulatory activities. *See generally* http://www.astm.org (last accessed Apr. 24, 2005). The specific guidelines addressed by the Ratner Petition were ASTM E 2173-01: Standard Guide for Estimating Monetary Costs and Liabilities, and ASTM E 2137-01: Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters.

[118] Ratner Petition, *supra* note 115, at 4. The specific guidelines addressed by the Ratner Petition were ASTM E 2173-01: Standard Guide for Estimating Monetary Costs and Liabilities, and ASTM E 2137-01: Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters.

[119] The specific guidelines addressed by the Ratner Petition were ASTM E 2173-01: Standard Guide for Estimating Monetary Costs and Liabilities, and ASTM E 2137-01: Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters.

[120] ASTM E 2137-01

[121] *See* Ratner Petition, *supra* note 115, at 4. "For example, section 6.2.1 of E 2173-01 reads 'Disclosure should be made when an entity believes its environmental liability for an individual circumstance or its environmental liability in the aggregate is material.' The proposed rule would read 'Disclosure shall be made when an entity believes its environmental liability for an individual circumstance or its environmental liability in the aggregate is material.'" *Id.* "Add the following sentence at the beginning of Section 5.4.1.1 of E 2137-01: 'The expected value is the preferred method of estimation.'" *Id.*

expected value method of estimating is advocated because it is comprehensive and instructs companies to aggregate all environmental liabilities for reporting and disclosure purposes.[122]

On the governmental end of the spectrum, the EPA consistently develops compliance incentive programs. These incentive programs usually proceed as follows: (1) the EPA notifies an organization that it may be subject to environmental regulations; (2) the notified organization is given an opportunity to disclose the situation and correct any violations; and (3) organizations who properly disclose violations within the given timeframe and commit to compliance receive greatly reduced penalties (in some cases, even a full waiver of certain penalties).[123] These programs were originally centered more on compliance issues, rather than disclosure issues. However, in 1992 the EPA launched a market-based incentive program, Environmental Compliance History Online ("ECHO"), which publicly lists on its website all those companies that allegedly have violated certain environmental laws.[124] This web-based tool allows anyone to access the environmental compliance and enforcement information for over 800,000 regulated facilities.[125] Additionally, the list provides information about whether the company was notified of its pending inclusion on the list, and includes remedial steps taken by the company. The purpose of this public disclosure of environmental enforcement is a form of "regulation by information," described as the "government's practice of collecting and making public various types of information on private business activity… in pursuit of a particular government policy, with express intent that resulting public and political pressures will force desired changes in private sector behavior."[126] It is too early to measure the results of this new EPA initiative; however, based upon empirical data previously collected concerning the relationship between stock price performance and historical environmental compliance, the results should presumably yield lower stock performance for those companies that make the ECHO list.

C. Increasing Sharing of Information Between the SEC and EPA

The GAO report[127] recommends that the SEC and EPA should exchange information regarding companies and issues of compliance. However, the report does not address the fact that the SEC and EPA are already working together by exchanging information. The EPA has been sending the SEC a list of companies that are barred from government contracts for violations of the Clean Air or Clean Water Acts.[128] Other proponents of increased sharing claim this degree of communication is insufficient to persuade companies to disclose their liabilities, especially in light of promoting market-based incentives.[129] The reason stated for the inadequacy in the current system is the lack of public access to the information from the EPA to the SEC and the irregularity of the information transfer.[130]

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[122] *Id.* at 5.
[123] *See* Environmental Protection Agency, Compliance Incentives and Auditing, *Compliance Incentive Programs*, *at* http://www.epa.gov/compliance/incentives/programs/incentiveprog.html (last updated Apr. 26, 2005).
[124] *See* EPA, Compliance and Enforcement, ECHO, *at* http://www.epa.gov/echo/
[125] Compliance Incentive Programs, *supra* note 123.
[126] The Center for Regulatory Effectiveness, *Regulation by Information*, *at* http://www.thecre.com/information/index.html (last accessed Apr. 26, 2005).
[127] GAO Report, *supra* note 2.
[128] *See* Bagby, *supra* note 78, at 233.
[129] *Id*. at 232.
[130] *Id.*

V. Impact of Proposals on Corporations

These proposals have a multi-faceted effect on the corporate environment. Within each organization, significant changes would be required to handle the increased compliance and disclosure requirements. Externally, corporations will face increased exposure to both public and private party litigation if these new proposals to SEC disclosures are required. With the recent launch of the new EPA ECHO system and passage of Sarbanes-Oxley, the better alternative is to leave environmental disclosures within securities laws in their newly enhanced state.

A. Corporate Governance

Because the environmental disclosure requirements will likely differ by corporation, the impact on corporate governance will correspondingly vary. However, to accommodate for these proposals, any given company, presuming it has not already done so, will be forced to expend significant resources to implement internal systems specifically designed to collect relevant environmental data, analyze that data, and provide estimates based on the heightened standards. The expense of creating these new systems is unnecessary in the wake of today's already heightened requirements under Sarbanes-Oxley.

Previously mentioned proposals have recommended that corporations create special environmental audit groups. The purpose of these audit groups would be to regularly monitor environmental compliance within the organization and ensure that disclosure requirements are met. However, under Sarbanes-Oxley, public companies are already required to design and implement enhanced disclosure controls and procedures, thereby ensuring that these companies establish collection, processing, and disclosure systems to comply with SEC regulations.[131] Additionally, the proponents of creating these environmental audit groups cite to studies that found that companies are not adequately complying with the disclosure requirements,[132] specifically pointing to the reporting deficiencies in the Regulation S-K filings.[133] However, these studies were conducted prior to both the EPA's launch of ECHO and the passage of Sarbanes-Oxley. The Act's enhanced penalties and disclosure requirements directly impact Regulation S-K filings. Companies will be especially careful in today's climate when evaluating environmental trends and uncertainties before completing Item 303 of Registration S-K. Likewise, the incentive is now greater for companies to apply liberal disclosure principles when identifying environmental enforcement actions in their discussion of legal proceedings under Item 103 of Regulation S-K. Companies will also tend to employ a more liberal approach when revealing contingent liabilities, including environmental liabilities; failure to recognize a potential loss on the income statement, or failure to mention these contingencies in management discussion, could expose the company executives and board of the directors to civil and criminal penalties under Sarbanes-Oxley.

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[131] *See* Certification of Disclosure in Companies' Quarterly and Annual Reports, 67 Fed. Reg 57,276 (Sept. 9, 2002) (codified at 17 C.F.R. pts. 228, 229, 232, 240, 249, 270, 274).
[132] *See supra* Section IV.A.
[133] William J. Walsh et al., BNA, Inc., Daily Environment Report, *New Initiatives to Encourage Disclosure of Environmental Costs and Liabilities*, at 4 (Jan. 23, 2003).

Environmental disclosures already impact company financial statements and SEC registration documents, and, therefore, were amply addressed in the passage of the 2002 Sarbanes-Oxley Act. Clearly, the creation of another audit group would be unduly cumulative and costly, and would detract resources from the operational goals of the organization.

B. Expanding Disclosure Requirements Unnecessarily Increases Exposure to Litigation; Enforcing Current Disclosure Requirements Is the Solution

Expanding environmental liability disclosures in securities laws has little probative value, while increasing a company's exposure to litigation as the boundaries of the new requirements are tested and the opportunity for error rises under a plethora of new rules. For example, suppose a public company's executives determine after a thorough, good-faith investigation that the aggregate of their environmental liabilities is not material; therefore, they do not accrue liabilities or disclose these potential liabilities on their SEC Regulation S-K filings. However two years later, with the benefit of hindsight, the SEC determines that the aggregate of those liabilities was material, even though individually each situation was not material. Under the proposals, this company's Regulation S-K filings for the past two years could be deemed to have been materially misstated or to have contained a material omission. This company is now potentially exposed to substantial litigation stemming from Rule 10b-5,[134] section 20(a) of the '34 Act,[135] sections 11(a),[136] 12(a),[137] and 17[138] of the '33 Act, and section 906 of Sarbanes-Oxley.[139] An example of this can be found in a situation involving the General Electric Company.[140] General Electric operated an energy plant adjacent to the Housatonic River in Massachusetts. The river became contaminated due to PCBs from the plant, and General Electric was ordered by the EPA to clean it. The EPA and General Electric developed a clean-up plan and estimated the cost to General Electric at 150-250 million dollars. General Electric disclosed the estimation within its "catch-all" liabilities estimates. However, it never included the amount as an individual item on the disclosures. Technically, this method of disclosure did not violate Regulation S-K; therefore, the corporation was not subject to an SEC action. However, this method of disclosure could be subject to private party litigation under Rule 10b-5 or section 20(a).

The proposed solutions seek to pile additional bureaucratic requirements on corporations to ensure compliance with EPA disclosures and to provide the public with adequate information about the corporations in which they invest. These proposals might have been effective in 2001; however, they no longer have merit. ECHO provides instantly accessible environmental compliance information to any member of the public. More importantly, Sarbanes-Oxley directly impacts the financial reporting issues at the heart of the proposals. Proponents cite to inefficiencies in GAAP and the disparity between the requirements of disclosure and the desire to make financial statements as attractive as possible. But this disparity has largely been

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[134] 17 C.F.R. § 240.10b-5 (2004).
[135] 15 U.S.C. § 78t (2000).
[136] 15 U.S.C. § 77k(a) (2000). Section 11(a) provides that a person who purchases a security based on a registration statement has a cause of action against enumerated defendants if the registration statement contains material misstatements or omissions.
[137] 15 U.S.C. § 77l (2000)
[138] 15 U.S.C. § 77q (2000).
[139] 18 U.S.C. § 1350 (2000).
[140] *See* Walsh, *supra* note 133, at 7 (offering an in-depth discussion of the General Electric situation).

addressed through specific provisions in Sarbanes-Oxley. The issue lies with enforcing these provisions to ensure real ramifications for those who are in violation.

VI. Conclusion

The basic purpose of the securities laws is to protect the investor. Securities laws are neither designed nor implemented to promote a social agenda or act as an instrument of corporate change. However, the environmental disclosure issues identified by the GAO and the other organizations can be addressed through more stringent enforcement of existing securities laws, and the successful growth of already-implemented government programs, such as ECHO. The solution is not additional burdensome legislation and regulation, but rather a consistent enforcement of the current law.