

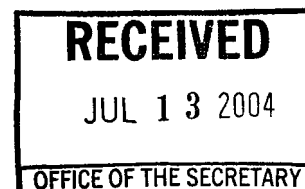
# CEEC

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## Corporate Environmental Enforcement Council, Inc.

July 12, 2004

Jonathan G. Katz  
Secretary  
Securities & Exchange Commission  
450 Fifth Street, N.W.  
Washington, DC 20549-0609



RE: Comments of the Corporate Environmental Enforcement Council  
SEC File #4-463  
*"Clarification of Material Disclosures With Respect to Financially Significant  
Environmental Liabilities and Compliance with Existing Material Financial  
Disclosures"*

Dear Mr. Katz:

The Corporate Environmental Enforcement Council ("CEEC") appreciates the opportunity to submit these comments to the U. S. Securities and Exchange Commission ("SEC") regarding the pending Rulemaking Petition filed September 20, 2002, SEC File #4-463 ("Petition").

Founded in 1995, CEEC is the only cross-industry business coalition where legal, environmental and governmental affairs professionals work together and benchmark environmental enforcement issues and policies that impact each of us on a daily basis. CEEC is a coalition of 30 major companies that is currently addressing a number of regulatory, legislative and judicial activities relating to civil and criminal environmental compliance and enforcement matters.

Many of CEEC's member companies are subject to and have extensive experience with the myriad of disclosure requirements implemented by the SEC, including those applicable to contingent environmental liabilities. Based on that experience, we respectfully disagree with the position taken in the Petition that a fundamental overhaul of environmental disclosure requirements is warranted, and we oppose the rulemaking proposal set forth in the Petition.

It is the collective experience of the CEEC member companies that the current SEC regulatory scheme provides a workable framework for the reporting of environmental liabilities, including contingent liabilities. To the extent that the Commission believes that individual companies' disclosure does not meet the regulatory requirements, we urge the SEC to use its traditional tools to address those circumstances; an overhaul of the relevant regulations and guidance as suggested in the Petition is neither necessary nor warranted.

Further, CEEC respectfully submits that the course of action suggested in the Petition is not appropriate, either substantively or procedurally, and is of questionable legality. The ASTM

Standards that are the subject of the Petition were not designed to take the place of the existing regulatory program, nor were they developed through a notice and comment process that fostered the participation of the general public.

The Petition makes the following allegation: “[S]ignificant environmental liabilities are often misstated or underreported in corporate filings and communications with shareholders.” To address this perceived problem, the Petition requests that the SEC undertake a rulemaking to “clarify” requirements for reporting and disclosure of financially significant environmental liabilities. The Petition further requests that the SEC promulgate two new regulations that directly reference and incorporate two ASTM standards adopted in 2001: Standard E 2137-01 (Standard Guide for Estimating Monetary Costs and Liability for Environmental Matters), and Standard E 2173-01 (Standard Guide for Disclosure of Environmental Liabilities).<sup>1</sup>

CEEC and its members are committed to full, accurate and complete reporting of environmental liabilities as currently required pursuant to, and in accordance with, the Securities Act of 1933,<sup>2</sup> the rules and regulations promulgated thereunder,<sup>3</sup> and relevant guidance and policies.<sup>4</sup> We also believe that these laws and regulations provide sufficiently clear guidance to allow public companies to disclose material environmental liabilities in a manner that allows an investor to fully assess the reporting corporation’s financial position.

If the SEC believes that disclosure of contingent environmental liabilities by individual companies may be inadequate to meet that standard, we suggest that the appropriate remedy is enforcement of the existing laws, rather than initiation of a rulemaking to fundamentally overhaul the reporting requirement scheme itself. The current laws and regulations provide the SEC with sufficient enforcement mechanisms to address inadequate disclosure. We further believe that if the SEC were to modify the disclosure requirements in the manner requested, companies’ disclosure would contain such an overwhelming volume of information, much of which would be trivial in the context of an investment decision, as to render the overall disclosure meaningless from the perspective of the investing public.

We have the following specific comments with respect to the Petition:

1. The Petition claims that its call for disclosure of aggregate environmental liabilities will serve to drive companies’ environmental and social behavior. We submit, however, that petitioner’s claim does not serve the goals of the securities laws, which is to ensure that the disclosure adequately reflects the companies’ financial condition and business practices in a manner that helps investors make informed investment decisions. Indeed, when the SEC first sought to adopt disclosure requirements specifically addressing environmental matters it explicitly recognized the appropriate parameters of such requirements:

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<sup>1</sup> ASTM International is a voluntary standards development organization that develops technical standards for materials, products, systems and services. For more information regarding ASTM see [www.astm.org](http://www.astm.org).

<sup>2</sup> 15 U.S.C. §§77a-77aa (2000).

<sup>3</sup> Items 101, 103 and 303 of Regulation S-K (17 C.F.R. §§ 229.101(c)(1)(xii), 229.103, and 229.303).

<sup>4</sup> Including Securities Act Release (SAR) 6835 (54 Fed. Reg. 22427 (May 24, 1989)); Financial Accounting Standards Board, Rule No. 5, “Accounting for Contingencies” (March 1975); Financial Accounting Standards Board, Interpretation No. 14, “Reasonable Estimation of the Amount of Loss” (September 1976); SEC Staff Accounting Bulletin No. 92. 58 Fed. Reg. 32843 (June 14, 1993)(codified at 17 C.F.R. Part 211 (SAB-92)).

The discretion vested in the Commission under the Securities Act and the Securities Exchange Act to require disclosure which is necessary or appropriate “in the public interest” does not generally permit the Commission to require disclosure for the sole purpose of promoting social goals unrelated to the those underlying these Acts.<sup>5</sup>

CEEC believes that, consistent with its 1975 finding cited above, the distribution of material information to the investing public should be the focus of the SEC’s efforts. In addition, it is our belief that information regarding aggregate environmental liabilities is also potentially misleading, as it could overwhelm the average investor with trivial information.<sup>6</sup> CEEC urges that the SEC ensure that its regulations serve the underlying purpose of the Commission and the statutes that give the Commission its authority.

2. ASTM standards are fundamentally different from regulatory standards, and are developed through a process that is unique and bears no relation to a rulemaking process. In this case, by their own terms the ASTM standards were “not intended” to supersede or replace disclosure requirements or accounting or actuarial standards, including those of FASB and the SEC.<sup>7</sup> If the SEC were to revise its regulations in the manner suggested in the Petition, however, they would do exactly that. Despite assertions in the Petition to the contrary, the ASTM standard setting process should not be viewed as similar to or a substitute for the notice and comment rulemaking process that is required for setting regulatory standards. Standards developed by ASTM are “voluntary,” and thus are not subject to the same degree of scrutiny that would be appropriate for prescriptive regulatory requirements. Further, the general public is not involved in the development of ASTM standards; only ASTM members are permitted to participate in the process. In addition, there is no “public notice” or opportunity for the general public to comment on a draft standard. Indeed, the rulemaking process envisioned in the Petition would not allow for substantive discussion of (or amendment to) the individual elements included in the Standards; rather, the notice and comment process required pursuant to the Administrative Procedure Act (“APA”) would be limited to the broader issue of whether to adopt the ASTM Standards as SEC regulations. The substance of individual changes to regulatory disclosure requirements would thus have not been subject to the requisite APA notice and comment procedures.
3. Both of the ASTM standards that the Petition seeks to have the SEC adopt as mandatory reporting requirements contain laundry lists of issues that underscore the subjective nature of the Standards and guidance contained therein. The standards were developed with a broad range of objectives in mind, as evidenced by the following use disclaimer:

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<sup>5</sup> Notice of Commission Conclusions and Rule-Making Proposals, Securities Act Release No. 5627, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,310, at 85,713 (Oct. 14, 1975).

<sup>6</sup> “Materiality should not be so expansive as to result in shareholders being bur[ie]d in an avalanche of trivial information.” *TSC Industries Inc. v. Northway Inc.*, 426 U.S. 438, 448 (1976). Indeed, ASTM explicitly acknowledged this concept by citing to this case in Standard E 2173; requiring disclosure of materiality of environmental liabilities in the aggregate would result in this exact scenario.

<sup>7</sup> ASTM Standard E 2137-01; *Standard Guide for Estimating Monetary Costs and Liabilities for Environmental Matters*; Section 1.1 (2001).

“This guide is intended for use on a voluntary basis by a reporting entity that provides disclosure in their financial statements regarding environmental liabilities. The degree and type of disclosure depends on the scope and objective of the financial statements.”<sup>8</sup> If the Commission were to adopt the Standards as regulatory requirements, the flexibility that was built into the Standards disappears, and they become one size fits all disclosure requirements that would neither be practicable for the regulated community nor further the principle mission of the SEC.

4. The Petition includes the following proposition: financial performance follows social and environmental performance. While some correlation between these indicators may be recognized, such a correlation still fails to justify the Petition’s expanded disclosure requirements. Further, there is no reason to believe that it would apply in a given industry or to a given company. In addition, in an area where compliance with the law can be somewhat difficult to ascertain, the softness of the data points (i.e., how is “environmental performance” measured?) calls the validity of any alleged correlation into question. The purpose of our comments is not to challenge this assertion; however, we suggest that the basis for the Petition has more to do with driving environmental performance of public companies and less to do with ensuring that investors have sufficiently accurate and complete information to allow an informed investment decision.

In conclusion, CEEC believes that the current disclosure requirements applicable to environmental liabilities are both workable and sufficient to ensure that the Commission’s statutory mandate is met. If the SEC does determine that amending the disclosure requirements is appropriate and warranted, CEEC suggests that it undertake a careful and detailed analysis to identify the elements of the program that need to be amended, and that it do so in the traditional notice and comment rulemaking process. CEEC would be willing to work with the SEC in this effort.

Please contact me at 202/289-1365 or Ken Meade, CEEC’s Counsel, Wilmer Cutler Pickering Hale and Dorr at 202/942-8431 if you have any questions regarding these comments.

Sincerely,



Steven B. Hellem  
Executive Director

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<sup>8</sup> ASTM Standard E 2173-01; *Standard Guide for Disclosure of Environmental Liabilities*; Section 4.1 (2001).