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THE SEC AS ENVIRONMENTALIST: THE RELUCTANT CHAMPION

I. Introduction

Corporations raise capital through the issuance of securities. Corporations, at times, also pollute the environment. The interaction of these two simple facts has created considerable difficulty for corporations, investors, those concerned with the environment, the SEC, and the court. This note examines how environmentalists have tried to use the federal securities laws as a means of controlling corporate environmental behavior, and how a reluctant SEC has been induced to assist in this endeavor. The following situations illustrate some possible interactions between securities law and environmental concerns.

Situation 1. Professor Sandpiper of the Natural Resources Coalition describes in a speech to concerned environmentalists how his organization raises money for environmental litigation through an investment plan which purchases only securities of "environmentally responsible" corporations. A young chemical engineer informs Professor Sandpiper, in the presence of the large audience, that two of the corporations in which the Natural Resources Coalition has heavily invested are major polluters of Tonquish Creek, a particularly wild and scenic river. Professor Sandpiper sputters that he had "read the stock prospectus of each corporation" prior to buying any stock and that he "had no idea..."2

Situation 2. The Matilda Johnson Trust invests heavily in the United Chemical Corporation, the manufacturer of floor care products. United Chemical, while experimenting with a new floor wax that would also serve as an insecticide, discharges waste into Saginaw Bay killing vast numbers of perch, the mainstay of several commercial fishing fleets. The Matilda Johnson Trust had no knowledge that United Chemical had such potential liabilities from their discharges. As the owners of the fishing fleets file their actions the stock of United Chemical becomes virtually worthless.3

Situation 3. United Chemical Corporation and its attorneys have done a thorough job of disclosing all pending civil actions based on environmental claims in order to comply with the requirements adopted by the Securities and Exchange Commission (SEC) in 1980,4 which mandate such disclosure in an issuer's prospectus and registration statement. Three days prior to the registration statement's effective date,5 the Hickory Creek Association, a litigious environmental group, informs United Chemical that it intends to file an environmental suit in the local federal court. Counsel for Hickory Creek realizes that this action

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2 Professor Sandpiper and the Natural Resources Coalition are both fictional. Sandpiper introduces the concept of the "ethical investor." See text accompanying notes 11-13, 96 infra.
3 Although this too is a hypothetical, the situation is similar to an actual event. See note 13 infra.
4 This is a purely fictional requirement, but very similar to rules proposed to the SEC by several environmentalists. See text accompanying notes 107-08 infra.
5 Before sales and purchases of certain securities can be made, a registration statement filed with the SEC must become "effective." See text accompanying notes 32-35 infra.
could very well cause the SEC to “deny acceleration” until appropriate disclosure of this new suit is made. After expressing his sympathy for United Chemical’s plight, counsel for Hickory Creek suggests that, perhaps, “an arrangement” could be made that would remove the danger of a suit and the SEC’s possible denial of acceleration.7

II. Overview

There are a variety of ways in which corporate environmental pollution can be controlled. The corporation itself, through its directors, officers, and shareholders8 can plan, monitor, and alter the effect that corporate operations have on the environment. Traditional tort law has for some time provided rights of action for injuries caused by environmental pollution.9 Also, a variety of federal, state, and local statutes grant rights of action to governments and private citizens as a remedy for corporate pollution.10

Tort law and anti-pollution statutes, however, are not entirely satisfactory solutions to many of the problems occasioned by corporate pollution. First, the remedies provided by these means are primarily retrospective in application (i.e., the pollution must occur before the cause of action arises). These devices are, thus, not primarily preventive in nature. Moreover, any litigation would necessarily be on a case-by-case basis, involving specific facts for a specific situation. Although a case-by-case approach might be a desirable method for the development of a judicial doctrine, it is a rather ineffective device for preventive or planning purposes.

A second problem not reached by tort law or anti-pollution statutes is the strong interest potential investors, shareholders, and the general public have in knowing of, and influencing, corporate environmental policies and practices.11 For example, Situation 1, above, presents the problem of the “ethical investor.”12 A potential investor often wishes to know a corporation’s policy on a particular social issue prior to investing in that corporation, whose policies and practices might be antithetical to the personal persuasion of the investor. Besides potential

6 “Acceleration” refers to the SEC’s discretionary power to grant an early effective date for the registration statement in lieu of the statutorily prescribed twenty-day waiting period. See 15 U.S.C. § 77h (a) (1970) and text accompanying notes 50-54 infra.

7 This hypothetical introduces the concept of “effective date blackmail.” Because the consequence of a denial of acceleration is usually the failure of a particular issuance of securities, any threat to acceleration can serve as an effective motivator of corporate behavior. See also Friedlob & Sanderson, infra note 17.

8 Shareholders can have an effect on corporate behavior only if they are informed of relevant issues. The problem of the informed shareholders is addressed later in this note.


11 Whether this interest is a legally protected one and under what authority it might be protected is an open question. See Scientists’ Institute for Public Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973).

investors, present shareholders also have an interest in knowing corporate policy, to enable them to vote in corporate matters in a manner consistent with the shareholder's personal interests.

Potential investors and shareholders have an additional financial interest in knowing the corporation's environmental behavior, as Situation 2, above, demonstrates. Advance notice of corporate policies and practice might serve to warn an investor or shareholder of the risks to which the corporation is exposing itself through its activities.13

Furthermore, shareholders and the general public have a common informational interest14 in corporate environmental behavior. Before any pressure can be exerted on a corporation, either by its shareholders or the general public, to change its environmental policies and practices, the policies and practices must be known.

As early as 1971 it was recognized that the disclosure requirements of the Securities Act of 193315 (1933 Act) and the Securities Exchange Act16 (1934 Act) might provide a method of controlling corporate environmental behavior and a means of reaching some of the problems left unsolved by tort law and anti-pollution statutes.17 The 1933 Act and the 1934 Act were adopted as a means of disclosing a variety of corporate behavior in an effort to protect investors and shareholders.18 The theory has often been advanced that, in addition to protecting investors, the disclosure requirements serve as stimuli to change undesirable corporate practices.19

Environmentalists, and others, now seek to use these functions of the 1933 Act and 1934 Act to exert pressure on corporations whose environmental practices are seen as undesirable. A brief look at the SEC's written thoughts on the matter,20 however, demonstrates that the SEC has been reluctant to assume the environmental advocacy role by adopting wide disclosure requirements.

If the SEC had total discretion over which disclosure requirements to adopt there would be little profit in debating which requirements the SEC should adopt once the decision had been made. But, as with other federal administrative agencies, the decision of the SEC to adopt particular disclosure requirements pursuant to its rulemaking power21 is subject to the procedural requirements of

13 A graphic and recent example is SEC v. Allied Chemical Corp., Civil Action No. 77-373 (D.D.C. filed March 4, 1977) in which the SEC alleged that Allied omitted "to state in public announcements and in filings with the Commission that Allied was subject to material potential financial exposure resulting, in part, from directly and indirectly discharging toxic chemicals into the environment [specifically, discharging Kepone into the James River in Virginia] from its own facilities and from the facilities of others." Complaint ¶ 7.
14 See note 11 supra.
19 The classic statement of this view is contained in BRANDEIS, OTHER PEOPLE'S MONEY 92 (1932 ed.). "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; the electric light the most efficient policeman."
20 See text accompanying notes 61-70, 91-118 infra.
the Administrative Procedure Act\textsuperscript{22} (APA).

The APA provides methods for public input in the exercise of rule-making power by administrative agencies. The public input can range from the suggestion of new rules\textsuperscript{23} to judicial review of rulemaking at the request of those adversely affected by the adoption or non-adoption of administrative rules.\textsuperscript{24} The APA has been one of the wedges used by environmental groups in their attempts to force the reluctant SEC to adopt broader environmental disclosure requirements.\textsuperscript{25}

The SEC’s rulemaking in relation to environmental matters presents a sufficiently complex issue when just the SEC, environmental disclosure proponents, and the APA are considered. The issue acquired further complexity, however, with the enactment of the National Environmental Policy Act of 1969\textsuperscript{26} (NEPA). The NEPA, in part, provides that: “The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and the public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter. . .”\textsuperscript{27} The NEPA policies referred to above are sweeping statements of the intention to make federal actions compatible with the limitations of the environment.\textsuperscript{28} In the context of this note, the question which arises is the applicability of this requirement to SEC rulemaking.

These three variables (SEC disclosure requirements, the APA, and the NEPA) have interacted to produce potentially significant litigation. One environmental group (the Natural Resources Defense Council (NRDC)) and the SEC have, for several years, been disputing exactly what the NEPA requires the SEC to consider when it makes disclosure rules.\textsuperscript{29} That controversy and its ramifications form the central focus of this note.

III. The SEC as a Point of Intervention

At first glance, one might wonder why an environmental group, whose primary dispute is with polluting corporations, would spend great amounts of time and money in disputes with the SEC. A brief look at the pervasive and powerful nature of the SEC’s regulatory function, however, shows the potential reward for the environmentalists. Given the appropriate disclosure requirements, the securities laws could be an effective tool for changing corporate behavior. This point becomes clearer after an examination of the SEC’s regulatory scheme.

The most important pieces of securities regulation, for the purposes of this

\textsuperscript{25} See Natural Resources Defense Council v. SEC, supra note 7.
\textsuperscript{28} See 42 U.S.C. § 4331(a) (1970), which provides in part: The Congress . . . declares that it is the continuing policy of the Federal Government, . . . to use all practicable means and measures, . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.
\textsuperscript{29} See text accompanying note 7 supra and notes 72-96, 119-132 infra.
note, are the 1933 Act and the 1934 Act. Both acts were designed primarily to safeguard investors from inadequate disclosure of corporate matters that could materially affect the investor's interest. They differ in that the 1933 Act was designed to regulate the initial offering of securities while the 1934 Act regulates the trading of securities after the initial offering. The framework of the Acts is easiest to understand if it is viewed as consisting of three parts; A. Registration and Reporting Requirements, B. Registration and Report Content, and C. Sanctions.

A. Registration and Reporting Requirements

The 1933 Act starts with the basic premise that before any person can offer to buy or sell any security through interstate commerce, a registration statement must be filed with the SEC. Before an actual sale or purchase of securities can be made through interstate commerce, the registration statement must become "effective." In addition to the initial registration requirement of the 1933 Act, the 1934 Act requires the registration of securities traded on national securities exchanges and of the securities of certain issuers. The major significance of registration under the 1934 Act is that it requires the submission of periodic reports as long as the security retains its registered status, a necessity if the security is to be traded.

B. Registration and Report Content

The central function of registration under the 1933 Act is the disclosure of corporate matters required by the registration forms. In addition to the registration statement, the issuer is also required to supply a prospectus, which discloses to potential investors much of the information contained in the registration statement. The 1934 Act performs its disclosure function through report forms.

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30 The term "materially affect the investor's interest" is used here in its conversational sense. See 17 C.F.R. § 230-405 (1977) for the SEC's definition of the much litigated term, "material."
32 15 U.S.C. § 77e (a) (1970). There are, however, a number of exceptions to the general registration requirement. In the 1933 Act 15 U.S.C. §§ 77c, 77d (1970), are the exceptions for certain transactions and certain types of securities. For examples of specific exceptions to the registration requirement, see 15 U.S.C. § 77c (11) (1970) which exempts securities sold only in an intrastate offering, and 15 U.S.C. § 77d (1) which exempts transaction by persons who are not issuers, underwriters or dealers. The exceptions and the definitions of critical terms are a constant source of litigation.
34 Issuers engaged in interstate commerce having total assets of more than $1,000,000 and a class of equity security held by more than 500 record shareholders must register under the 1934 Act if their securities are traded through interstate commerce. 15 U.S.C. § 781 (g) (1970).
36 15 U.S.C. § 77h (1970), Schedule A, and Form S-1 of the Securities Act are the generally used authorities to determine what items must be disclosed.
and a requirement of disclosure of certain corporate matters prior to the solicitation of proxies and certain tender offers.

As to what corporate matters must be disclosed, the 1933 Act and the 1934 Act require disclosure of information that "... the Commission may be rules or regulations require as being necessary or appropriate in the public interest or for the protection of investors." Given this broad authorization, the SEC has developed specific disclosure items, illustrated by headings in the required statements and forms such as "Description of Business," "Legal Proceedings," and "Remuneration of Directors and Officers." These items are, in turn, further augmented by "Instructions" which specify exact disclosure content.

C. Sanctions

The consequences arising from inadequate disclosure or failure to follow the registration and reporting requirements can assume a variety of forms. The SEC can, for some violations, transmit evidence of suspected illegal practices to the United States Attorney General who has the authority to institute criminal proceedings. The SEC can also seek injunctions in federal courts to prevent practices it considers to be in violation of its rules and regulations.

In addition to court action, the SEC can prevent a registration statement from becoming effective, which would prevent the sale or purchase of the affected securities, if it believes there is inadequate disclosure in the registration statement. The SEC can also suspend a registration statement that has already become effective.

One of the more effective sanctions the SEC has is the denial of "acceleration." This device, which is not a formalized, statutory sanction, developed through Commission practice. A large issuance of securities is a complex and carefully timed endeavor. Because the securities market fluctuates, the actual price asked for the new securities cannot be set until just prior to the date the securities are allowed to be sold. The usual practice is to set the price the day prior to the registration statement's effectiveness date. The price, however, is a material part of the disclosure requirements of the 1933 Act and therefore should

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45 See, e.g., Securities Act, Form S-1, Item 12, Instruction 4 which describes certain reporting requirements for actions pending that are based on environmental claims.
50 See 15 U.S.C. § 77h (a) (1970), which provides in part, "the effective date of a registration statement shall be the twentieth day after the filing thereof or such earlier date as the Commission may determine..." See also Woodside, Development of SEC Practices in Processing Registration Statements and Proxy Statements, 24 Bus. Law. 375 (1969).
be disclosed in the registration statement and prospectus.\textsuperscript{51} Theoretically, after the price is set, there should be a twenty-day waiting period before the registration statement, now containing the price, would become effective.\textsuperscript{52} But at the end of twenty days the price would probably not reflect current market trends. Because the situation thus presented was impractical, the practice has developed whereby, once the registration statement is completed, the issuer requests an accelerated effectiveness date.\textsuperscript{53} This allows the issue to go effective shortly after the price is set. The SEC, however, retains the discretion to deny acceleration, especially if it believes there is inadequate disclosure. The denial of acceleration can destroy any market advantage of a new securities issuance. Hence, the sanction is a rather effective SEC tool.\textsuperscript{54}

In addition to the sanctions that can be administered by the SEC and the United States Attorney General, the 1933 Act and 1934 Act provide private rights of action for damages resulting from SEC law violations.\textsuperscript{55}

The importance of SEC law to environmentalists is obvious. The SEC and its regulation of securities touch virtually all corporate entities. The information that could be derived from broad environmental disclosure requirements could be of great use. Finally, the SEC’s sanctions could ensure corporate disclosure, thereby relieving environmentalists of the task of extracting the information at their own expense.

IV. The Development of Environmental Disclosure

A. Initial Developments

The National Environmental Policy Act of 1969 (NEPA) indicated that all federal agencies should consider the environmental consequences of all their regulatory activities, including rulemaking.\textsuperscript{56} Prior to 1971, however, there was no specific mention of environmental matters in SEC disclosure requirements.

In 1971, several sources considered the possible impact of the NEPA on SEC rulemaking. Two SEC attorneys, in a law review article,\textsuperscript{57} expressed the view that the NEPA mandated consideration by the SEC of environmental matters in its rulemaking, and suggested that

[The Commission can, and should, require corporate entities to disclose what they are doing to the environment. [S]uch disclosure could thus be used as an additional weapon in the federal arsenal directed at environmental problems and hopefully, will serve as another aid in remedying this "social and industrial disease."\textsuperscript{58}]

\textsuperscript{51} See Securities Act, Form S-1, Item 1.
\textsuperscript{53} See Woodside, supra note 50.
\textsuperscript{54} Id. See note 6 supra and Situation 3 for an example of how acceleration could be used for blackmail.
\textsuperscript{57} See Sonde & Pitt, supra note 17.
\textsuperscript{58} Id. at 849-50.
Also in 1971, the Natural Resources Defense Council (NRDC) filed a rulemaking petition\(^5\) with the SEC requesting that the Commission adopt certain detailed environmental disclosure rules.\(^6\) Before ruling on the petition, the SEC issued Release No. 5170\(^6\) which called attention to the requirement of "the disclosure of legal proceedings and the descriptions of the registrant's business as these requirements relate to material matters involving the environment and civil rights."\(^7\) The release did not suggest any new disclosure requirements but was apparently just a reminder of the preexisting requirement of material matters.

In late 1971, the SEC denied the NRDC's rulemaking petition\(^8\) but two months later announced that it was considering proposals that would "require the disclosure of the effect on the issuer's business of compliance with Federal, State, and local laws and regulations relating to the protection of the environment."\(^9\) In asking for public comment, the SEC noted that its actions were being taken pursuant to the NEPA.\(^10\)

Early in 1973, the SEC in Release No. 5386 finally adopted specific disclosure items relating to the environment.\(^11\) The new requirements further clarified the concept of materiality in regard to disclosure items relating to the description of the registrant's business\(^12\) and legal proceedings.\(^13\) The "description of business" items required the disclosure of the material effects that compliance with anti-pollution laws would have on capital expenditures, earnings, and the competitive position of the registrant.\(^14\) The "legal proceedings" items required the disclosure of proceedings initiated by governmental units under anti-pollution laws, and suits brought by private parties if material or if the claim alleged damages exceeding 10% of the current assets of the registrant.\(^15\)

Two weeks after the SEC's release, a disappointed NRDC brought an action against the SEC in the District Court of the District of Columbia. The complaint sought review of the SEC's denial of the NRDC's rulemaking petition and review of the new environmental disclosure rules.\(^16\)

B. Natural Resources Defense Council v. SEC I.

The NRDC, joined by other plaintiffs,\(^2\) brought its action against the SEC

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\(^7\) Id. at 36 Fed. Reg. 13,989 (1971).


\(^10\) Id.


\(^12\) Id. at 38 Fed. Reg. 12,101 (1973).

\(^13\) Id.

\(^14\) Id. at 38 Fed. Reg. 12,102 (1973).

\(^15\) Id.


\(^17\) Other plaintiffs were the Project on Corporate Responsibility, Inc. and the Center on Corporate Responsibility.
challenging the denial of the rulemaking petition of June, 1971, and asserting that the SEC did not follow the requirements of the APA and the NEPA when it adopted its disclosure requirements in Release No. 5386. The court, Judge Richey delivering the opinion, concluded that the SEC had failed to conform with the APA. Accordingly, it directed the SEC to undertake further rulemaking to bring "... the Commission’s corporate disclosure regulations into full compliance with the letter and spirit of NEPA."

To reach its decision, the court addressed three issues: 1. Jurisdiction and Standing, 2. NEPA Requirements, and 3. APA Requirements.

1. Jurisdiction and Standing

The court easily found a statutory basis for jurisdiction. In part the court relied on 28 U.S.C. § 1337, which grants jurisdiction to federal courts for actions arising under federal laws regulating interstate commerce, which would include the securities acts. Jurisdiction was also found under certain sections of the APA. 5 U.S.C. § 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." The court also found that Release No. 5386 was a final agency action, not committed to agency discretion, and was therefore subject to judicial review.

The court employed the test of standing articulated in Sierra Club v. Morton and United States v. S.C.R.A.P. and found that (1) there was "injury in fact" and (2) the injury was to an interest within the zone of interest protected by both the federal securities law and the NEPA.

NRDC, and the other plaintiffs, established standing to the court’s satisfaction by asserting primarily an informational interest in the items that would be discovered through broad disclosure requirements. The court found that: "... Plaintiffs have been deprived information necessary for their organizational purposes because of the SEC failure to adopt regulations requiring broader disclosure in the environmental and equal employment opportunity areas. The injury, though in part non-economic, is sufficient injury to support Plaintiffs' standing to sue."

The court also found that the plaintiffs' interests fell within the interest protected by the disclosure philosophy of the securities acts, not only because of the plaintiffs' role as public educators, but also because of their interest in making

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73 389 F. Supp. at 692-93.
74 Id.
75 Id. at 693.
76 Id. at 696.
77 28 U.S.C. § 1337 (1970) provides in part, "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating interstate commerce. . . ."
78 5 U.S.C. § 702 (1970). The "legal wrong" that the plaintiffs suffered was the SEC's failure to follow the procedural requirements of the APA in its rulemaking. See text accompanying notes 87-94 infra.
82 389 F. Supp. at 697.
83 Id. at 698.
socially responsible investment and voting decisions.84

The NEPA states, in part, that "all agencies of the Federal Government shall— . . . Make available to . . . institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment."85 The court concluded that the plaintiffs' interests were also protected by this statute.

2. NEPA Requirements

The court saw the NEPA as an overlay to the SEC's broad rulemaking authority. The question of the applicability of the NEPA's requirements to SEC rulemaking was answered in strong terms:

NEPA gives specific content to the SEC's authority under the securities laws to require disclosure of information "in the public interest." [T]hus, Congress has directed the SEC and this Court 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.86

The court, it appeared, was insisting that the SEC give more than a cursory acknowledgement to the NEPA.

3. APA Requirements

Under the APA, a federal agency must give general notice of proposed rulemaking, including reference to the legal authority under which the rule is proposed.87 The agency must also give notice of the terms or substance of the proposed rule or a description of the subjects and issues involved.88 The purpose is to give interested persons an opportunity to participate in the rulemaking. After consideration of the data received from those participating, the agency should include in the rules adopted a "concise general statement of their basis and purpose.89

Once a rule is adopted, or not adopted, a reviewing court can set aside the agency's action if it finds that the action was arbitrary and capricious or not in observance or procedure required by law.90

The primary thrust of the court's opinion in NRDC was that the SEC's rulemaking was in violation of the APA. Judge Richey concluded that the SEC had not "entered into a reasoned consideration of the changes it should effect in its disclosure rules and regulations as a result of NEPA's passage."91 The court also found inadequate the notice of proposed rulemaking in Release No. 5235,92

84 Id.
86 389 F. Supp. at 695 (emphasis supplied).
90 5 U.S.C. § 706(1)(A) and (D) (1970).
91 389 F. Supp. at 699.
stating: "Certainly the notice should have been calculated to elicit comment from legal scholars, public interest groups, foundations, colleges, universities, and other institutions and individuals who participate in the nation's capital markets and who may want to comment about what the SEC legally could and should do to fulfill NEPA."  

In addition to finding fault with the SEC's notice, the court found that the SEC did not give an adequate "concise general statement" of the new rules' basis and purpose.  

The court ordered the SEC to reconsider its environmental disclosure rules and to provide a more complete statement of its rulemaking rationale, so that the court could determine: "(1) the SEC's concept of the extent of its statutory obligation to the public under the securities acts and NEPA, (2) the alternatives which are considered, and (3) the reasons for excluding substantial alternatives which may be proposed by interested parties."  

The court also directed the SEC to develop a record and to resolve two factual issues: first, the extent of "ethical investor" interest in the type of disclosure information that had been sought by the plaintiffs, and, second, the actions that might be available to the plaintiffs or other "ethical investors" to eliminate the undesired corporate practices.  

C. The SEC Tries Again  

In February, 1975, the SEC gave notice[97] that public hearings were to be held concerning disclosure requirements dealing with environmental and other matters of primarily social rather than financial concern. The SEC said that it welcomed views on (1) the advisability of required disclosure of socially significant matters, (2) whether and on what basis these disclosures might be material in an economic sense, (3) the basis and extent of the SEC's authority to require disclosure of matters "primarily of social concern but of doubtful economic significance," and (4) the probable impact of such disclosure on corporate behavior. The SEC, however, made it clear that it took a rather dim view of such disclosure.  

In October, 1975, the Commission issued a release announcing its conclusions and proposals for further rulemaking concerning environmental disclosure.  

After stating that it had tried to ensure wide distribution of the notice of proposed rulemaking, the Commission noted that 19 days of hearings had been held, 54 oral and 353 written comments had been received, and a file of information of over 10,000 pages had been assembled. In the lengthy release, the SEC

93 389 F. Supp. at 700.  
94 Id. at 701.  
95 Id.  
96 Id.  
98 Id. at 40 Fed. Reg. 7,014 (1975).  
99 "The fact the Commission is conducting these proceedings should not be taken to indicate any view as to its authority to assist members of the investing public in matters of primarily social rather than financial concern." 40 Fed. Reg. 7,014 n.2.  
101 Id. at 40 Fed. Reg. 51,657 (1975).
concluded that it was not authorized to consider the promotion of social goals unrelated to the objectives of the federal securities laws,\footnote{Id. at 40 Fed. Reg. 51,660 (1975).} but that it was, nevertheless, required by NEPA to consider environmental matters.\footnote{Id. at 40 Fed. Reg. 51,662 (1975).} The Commission concluded that “NEPA authorizes and requires the Commission to consider the promotion of environmental protection ‘along with other considerations’ in determining whether to require affirmative disclosures . . . although the NEPA does not require any specific disclosures . . .”\footnote{Id.}

The SEC conceded that there was some indication of “ethical investor” interest in social disclosure, noting that most investors expressing an interest in such disclosure would use the information for voting decisions rather than investment decisions.\footnote{Id. at 40 Fed. Reg. 51,662 (1975).} The SEC also mentioned that investors did not have ready information concerning environmental practices and that such information, if disclosed, would probably be used to some effect by investors and shareholders.\footnote{Id. at 40 Fed. Reg. 51,663-65 (1975).}

According to the SEC, the major alternatives considered for rulemaking were: (1) comprehensive disclosure of the environmental effects of corporate activities, (2) disclosure of corporate noncompliance with 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.\footnote{Id. at 40 Fed. Reg. 51,665 (1975).} All of the alternatives except (2) were rejected. The reasons given were primarily those of costs, administrative burden, and that the requirements would not provide any additional “meaningful information to investors.”\footnote{Id. at 40 Fed. Reg. 51,662 (1975).}

The SEC then proposed amendments to its disclosure rules that would have required the registrant to provide the SEC, in the form of an exhibit attached to certain documents filed with the Commission,\footnote{Id. at 40 Fed. Reg. 51,663-65 (1975).} with “a list of the most recently filed environmental compliance reports, which indicate that the registrant had not met . . . any applicable environmental standard established pursuant to a federal statute.”\footnote{Id. at 40 Fed. Reg. 51,665 (1975).} These amendments were to be coupled with amendments that would have required a registrant to include in the various registration statements and reports a statement that the exhibit mentioned above had been filed with the SEC and was available at a reasonable cost.\footnote{Id. at 40 Fed. Reg. 51,667-70 (1975).}

In addition to these amendments, Release No. 5627 proposed amendments to the “description of business” items which would have required disclosure of material estimated capital expenditures for environmental control facilities.\footnote{Id. at 40 Fed. Reg. 51,667-70 (1975).}

In May, 1976, the Commission announced in Release No. 5704 its final conclusions and actions in regard to environmental disclosure.\footnote{Id. at 40 Fed. Reg. 51,668-70 (1975).} In doing so, the SEC retreated from the proposals offered in Release No. 5627. Noting that the

\begin{itemize}
\item \footnote{Id. at 40 Fed. Reg. 51,660 (1975).}
\item \footnote{Id. at 40 Fed. Reg. 51,662 (1975).}
\item \footnote{Id.}
\item \footnote{Id. at 40 Fed. Reg. 51,663-65 (1975).}
\item \footnote{Id. at 40 Fed. Reg. 51,665 (1975).}
\item \footnote{Id. at 40 Fed. Reg. 51,662 (1975).} “All” is an important distinction from “material.”
\item \footnote{Id. at 40 Fed. Reg. 51,663 (1975).}
\item \footnote{Id. at 40 Fed. Reg. 51,667 (1975).}
\item \footnote{Id.}
\item \footnote{Id. at 40 Fed. Reg. 51,667-70 (1975).}
\item \footnote{Id. at 40 Fed. Reg. 51,668-70 (1975).}
\end{itemize}
comments received on the proposal to require lists of registrants' environmental compliance reports were "almost unanimously opposed" to the requirement, the Commission withdrew that part of the proposed rules. The Commission also reasoned that the rejected proposal was too costly and provided little additional meaningful information for investors. Of the proposals in Release No. 5627, only the proposal relating to disclosure of material expenditures for environmental compliance purposes remained.

After Release No. 5704, the requirements for environmental disclosure consisted of three parts: (1) the rules requiring disclosure of material effects of compliance with environmental laws on capital expenditures, earnings and the competitive position of the registrants, (2) the requirement of disclosure of all known or contemplated environmental litigation brought by governments, and material litigation brought by non-governmental parties, and (3) the general securities law requirement of disclosure of all material information necessary to prevent filings from being false or misleading.

This structure, the SEC concluded, was sufficient to "satisfy the Commission's obligation under the federal securities laws and the National Environmental Policy Act of 1969 ("NEPA"). The NRDC and others did not agree.

D. Natural Resources Defense Council v. SEC II

Returning to the District Court for the District of Columbia, the NRDC again challenged the SEC's action on the basis of the APA and the NEPA. The plaintiffs conceded that the SEC had satisfied the procedural requirements of the APA and had made an adequate statement of the reasons for its rulemaking. This time, however, NRDC alleged that the SEC's final rulemaking was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As part of their argument that the SEC's actions were "otherwise not in accordance with law," the plaintiffs asserted that the NEPA required the SEC to compel substantial corporate environmental disclosure.

The district court, in its May, 1977, decision, rejected the plaintiffs' position that NEPA mandated substantial environmental disclosure rules. The court did, however, emphasize that the Commission must consider seriously, "to the fullest extent possible," alternatives which would reduce environmental damage. This, the court concluded, the SEC had not done. The court particularly

114 Id. at 41 Fed. Reg. 21,633 (1976).
115 Id. at 41 Fed. Reg. 21,635 (1976).
116 Id. at 41 Fed. Reg. 21,632 (1976).
117 Id. at 41 Fed. Reg. 21,635 (1976).
118 Id. at 41 Fed. Reg. 21,632 (1976).
119 The NRDC was now joined by the Project on Corporate Responsibility, Inc., the Center for Corporate Responsibility, Inc., 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.
122 432 F. Supp. at 1197.
123 Id. at 1198.
124 Id.
took issue with the SEC's position expressed in Release No. 5704,125 that other federal agencies had the necessary environmental expertise and should take the initiative to require disclosure.126 For this, and other reasons, the court found the SEC's action in violation of NEPA procedure.127

An alternative basis for the court's holding was that the SEC's actions were arbitrary and capricious. Judge Richey found fault with the SEC's apparent assumption that its environmental disclosure standards must necessarily be the same for each of the several different filings and disclosure documents.128 He stated that the Commission should have given more serious consideration to disclosure of information to shareholders via proxy solicitations and information statements, particularly in light of the SEC's findings in Release No. 5627129 that investors would use environmental information more in voting decisions than in investment decisions.130 The court also found that the SEC's findings of excessive cost, administrative burden, and the lack of feasibility of developing appropriate disclosure guidelines and standards were not supported by sufficient facts.131

The court ruled that "despite the fact that the proceeding has been ongoing for over six years"132 the SEC must undertake further rulemaking. The new proposals and rules have yet to be published.

V. Synthesis

What can be predicted for Professor Sandpiper, the Matilda Johnson Trust, United Chemical, the Natural Resources Defense Council and the SEC? Two issues are important in the analysis of the future of environmental disclosure. One is the question of what the NEPA really requires of the SEC. The other is what sort of disclosure rules could be made by the SEC that would satisfy the NEPA and environmentalists, and still not add significantly to the expense and complexity of the registration and reporting process.

A. NEPA Requirements

It is fairly clear that the NEPA does not absolutely require environmentally based decisions in federal rulemaking.133 A typical example of a court's explanation of the NEPA's impact on rulemaking is that in Calvert Cliffs Coordinating Comm. v. AEC.134 In that case the D.C. Circuit concluded that "Congress did not establish environmental protection as an exclusive goal. . . .

126 432 F. Supp. 1207.
127 Id.
128 Id. at 1205.
130 432 F. Supp. at 1205.
131 Id. at 1206.
132 Id. at 1212.
134 Calvert Cliffs Coordinating Comm. v. AEC, 449 F.2d 1109 (D.C. Cir. 1971).
The general substantive policy of the Act is a flexible one. It leaves room for a responsible exercise of discretion and may not require particular substantive results. . . . \textsuperscript{135}

Although the NEPA does not guarantee any particular rules, it does restrict the discretion of federal agencies. The Supreme Court in \textit{Flint Ridge Development Co. v. Scenic Rivers Association }\textsuperscript{136} recently recognized the nature of the duty imposed by the NEPA. Referring to language in the NEPA, \textsuperscript{137} the Court said that the phrase "to the fullest extent possible" is neither accidental nor hyperbolic. Rather, [it] is a deliberate command that the duty NEPA imposes upon the agencies to consider environmental factors not be shunted aside in the bureaucratic shuffle."\textsuperscript{138} It appears, then, that the duty the SEC has in regard to the NEPA is somewhere between mandatory adoption of substantial disclosure rules and a routine rejection of environmentally based disclosure.

\textbf{B. The Future of Environmental Disclosure}

The SEC has yet to formulate new disclosure rules pursuant to the order in \textit{Natural Resources Defense Council v. SEC. II}. It appears, however, in light of Judge Richey's two prior rejections of attempted SEC rulemaking, that greater environmental disclosure requirements will be required.

If additional environmental disclosure is necessary, the question arises as to its content and form. The consideration of new rules will necessarily involve a balancing of the competing factors of broad environmental disclosure and the additional expense and complexity such disclosure may entail.

The conflict between broad environmental disclosure and additional expense and complexity could, however, be more illusory than substantial. Solutions to the conflict are easier to reach if the consideration of new disclosure requirements starts with an analysis of two separate issues: (1) what kind of disclosure should be required; and (2) how should the disclosure be made.\textsuperscript{139} Brief reflection will show that the questions of what disclosure and how the disclosure should be made are separable.

There is nothing inherently unworkable with any of the five alternatives for environmental disclosure presented in Release No. 5627.\textsuperscript{140} The objections of cost, unreadable and lengthy registration statements and reports, etc., are not actually directed toward what disclosure is advisable, but are objections directed at how the disclosure will be made. For example, if comprehensive disclosure were required in all registration statements and 1934 Act reports, the cost, in terms of time and money, would probably be prohibitive. But if comprehensive disclosure were required only once a year, or once every two years, the cost would

\begin{itemize}
\item \textsuperscript{135} Id. at 1112.
\item \textsuperscript{136} 426 U.S. 776 (1976).
\item \textsuperscript{137} 42 U.S.C. § 4332 (1970).
\item \textsuperscript{138} 426 U.S. at 787.
\item \textsuperscript{139} See 432 F. Supp. at 1205. Here Judge Richey criticized the SEC's "across the board" theory of disclosure and stated that different disclosure requirements for different types of filings might be acceptable. This appears to be a recognition of the fact that how is a separate issue from what.
\item \textsuperscript{140} See text accompanying note 107 \textit{supra}.
\end{itemize}
be less. If the disclosure were not part of the registration statement or reporting requirements, the objection of complexity would be largely removed.

1. What Kind of Disclosure?

Starting from the proposition that the mechanical aspects of disclosure are distinct from the substance of the disclosure, the first issue is what kind of disclosure should be required. Comprehensive disclosure of the environmental effects of corporate activities, as in alternative (1) in Release No. 5627, is not a totally unworkable concept. The SEC has offered the objections of expense and complexity, but those objections are, as seen before, primarily directed at the mechanics of disclosure. They have little relevance to whether such information should be disclosed. The SEC has also taken the position, however, that the securities laws deal only with financial disclosure and that comprehensive environmental disclosure is a "social issue" beyond the scope of the SEC's function. This argument could be met, as it has been, by citing the NEPA and the provisions in the securities laws that allow disclosure rules to be made that require disclosure "in the public interest." Comprehensive disclosure would have the benefit of forcing corporations to monitor their effects on the environment more closely. Also, if such disclosure were made, the problem of the "ethical investor" would be addressed. Professor Sandpiper could invest and vote according to the dictates of his conscience without fear of later embarrassment.

Setting aside again the question of how, no particular difficulty arises with respect to the disclosure of corporate noncompliance with anti-pollution laws, corporate environmental policy, and of all capital expenditures and expenses for environmental purposes. None of this information is impossible to obtain and it could be quite useful to investors and shareholders.

Disclosure of all pending environmental litigation poses more serious difficulties. Suits can arise at any time and can range from the material to the insignificant and vexatious. The possibility of suits brought for the primary purpose of inclusion in a registrant's disclosure materials is a consideration as Situation 3, at the beginning of this note, demonstrates. The limitations on disclosure of environmental litigation adopted in Release No. 5704 are probably the best alternative.

In short, a variety of disclosure alternatives are possible if the questions of what and how are separated. The most complex question is really not what kind of disclosure should be made, but how the disclosure could be accomplished.

2. How Should Disclosure Be Made?

The mechanics of broad environmental disclosure present some difficult problems. These complications are more easily addressed if a distinction is made

141 Id.
142 See note 99 supra.
144 See text accompanying note 117 supra.
between financial disclosure and social disclosure. For the limited purposes of this discussion, this note will assume that broad environmental disclosure can be classified solely as “social issue” disclosure, although it should be noted that this proposition is not universally true.\footnote{The difference between social and financial matters is not always clear or mutually exclusive. See the Allied Chemical case in note 13 supra.}

Financial disclosure is particularly important in the initial decision to purchase and trade in securities. The information is also subject to fairly rapid change. Because of these features of financial information, disclosure requirements should emphasize accurate and current financial data.

Social disclosure, on the other hand, is different from financial disclosure in that the information on which it is based is more stable. Presumably a corporation’s policy in regard to environmental or equal employment opportunity matters does not change as dramatically as the financial market. Similarly, the corporation’s effect on the environment is probably more predictable and stable than is its financial situation.

In view of the differences between financial and social disclosure, the mechanics of disclosure for the two categories could also differ. Social disclosure, including broad environmental disclosure, is not restricted to the same format as financial disclosure. Accordingly, this note proposes a method for social disclosure, including environmental disclosure, that is not directly related to the methods now used under the 1933 Act and 1934 Act for essentially financially-related disclosure.

A registrant could, in conjunction with the annual reporting requirement under the 1934 Act,\footnote{Securities Exchange Act, Regulation 13A, Form 10-K.} submit a detailed report on a variety of social issues, including environmental issues. This disclosure would not have to be keyed to disclosure items already in existence. In fact, it might be easier for the SEC to construct a completely original “social disclosure” document rather than attempt to graft social disclosure items onto essentially financial items.

Once a social disclosure document were submitted to the SEC, it would acquire the status of a “filed” document, subject to liability for false and misleading statements.\footnote{"Filed” status is important. For example, the information included in a Form 10-K filed with the SEC is subject to the provisions of 15 U.S.C. § 78r (1970) which imposes liability for false or misleading statements. If the document did not have “filed” status, a claim could not be based on 15 U.S.C. § 78r (1970). See Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968).}

Actual disclosure to investors and shareholders could be made by referring to the social disclosure document in the various registration and reporting requirements of the 1933 Act and 1934 Act. The interested party could then obtain a copy of the document from the SEC. The party could also help defray the cost of this procedure by paying a reasonable fee for the document.

VI. Conclusion

It appears that the SEC will be required to adopt broader environmental disclosure rules. The task is complex, but it could be simplified by separating
the issue of what disclosure should be required from how the disclosure could be accomplished. The question of how the disclosure could be accomplished could be simplified by recognizing the differences between financial and social disclosure. The necessity of drawing such distinctions demonstrates that, in attempting to design the mechanics of workable environmental disclosure rules, the SEC will have to "imaginatively exercise its authority and expertise."\textsuperscript{148}

\textit{David A. York}