



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

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OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Guidance on Distributing the "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" in EPA Administrative Enforcement Actions

FROM: Mary Kay Lynch, Director *Mary Kay Lynch*  
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TO: OECA Office Directors  
Office of Regional Counsel, Regions I-X  
Enforcement Division Directors, Regions I-X  
Enforcement Coordinators, Regions I-X

The purpose of this memorandum is to request Regional and Headquarters enforcement personnel to distribute the attached "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings" in EPA-initiated administrative enforcement actions.<sup>1</sup> As outlined below, distribution of the Notice has the potential to increase public access to corporate environmental information, and encourage improved corporate environmental performance.

Securities and Exchange Commission (SEC) Regulation S-K, Item 103 - Legal Proceedings (17 CFR 229.103) requires registrants with the SEC (e.g., publicly-traded companies) to periodically disclose a broad array of environmental legal proceedings in statements filed with the Commission.<sup>2</sup> Current literature suggests that environmental liabilities are not completely and accurately reported to the SEC. A 1992 survey of SEC registrants found that 62 percent of

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<sup>1</sup>This guidance does not address activities under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the provisions of the Resource Conservation and Recovery Act (RCRA) concerning corrective action and remediation of underground storage tanks, and the provisions of the Oil Pollution Act and Clean Water Act section 311 concerning remediation of oil and hazardous substance spills.

<sup>2</sup>Regulation S-K, Item 103 is only one of the SEC regulations that requires registrants to disclose environmental information. This guidance does not cover all SEC regulations that require disclosure of environmental information.

respondents had not accrued known environment-related exposures on their financial statements.<sup>3</sup> A 1996 study of environmental disclosure by companies involved in initial public offerings who were known CERCLA potentially responsible parties at one or more sites found a non-reporting rate of 54 percent, as compared to a non-reporting rate of 61 percent for currently registered companies.<sup>4</sup> Additionally, a 1998 study conducted by the Office of Enforcement and Compliance Assurance (OECA) on the disclosure of environmental legal proceedings in registrants' 10-K statements, pursuant to Regulation S-K, Item 103, Instruction 5(C), for the years 1996 and 1997, found a non-reporting rate of 74 percent.

Compliance with the requirement to disclose environmental legal proceedings is important because it increases public access to corporate environmental information. Increased scrutiny of corporate environmental information, particularly legal proceedings, by the public, shareholders, and investors will likely provide an incentive for companies to handle environmental problems in a more expeditious manner, and provide a deterrent to future noncompliance. Additionally, increased corporate environmental disclosure helps maintain a level playing field for environmentally responsible companies, helps to raise company awareness concerning environmental issues, and enables capital markets to more fully account for environmental matters. In an effort to increase awareness of this duty, and encourage greater disclosure of environmental legal proceedings, OECA is issuing this guidance and the attached "Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings."

### **Background on Regulation S-K, Item 103**

Item 103 mandates that registrants disclose information regarding certain "legal proceedings"<sup>5</sup> (*see* attached). The requirement covers not only proceedings that are pending but also those "known to be contemplated by governmental authorities." (As discussed below, this guidance focuses only on pending proceedings.) Instructions 5(A) - 5(C) to Item 103, delineate the criteria for the disclosure of environmental legal proceedings.<sup>6</sup> Environmental legal

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<sup>3</sup>Price Waterhouse (1992) Accounting for Environmental Compliance: Crossroads of GAAP, Engineering and Government – Second Survey of Corporate America's Accounting for Environmental Costs

<sup>4</sup>Freedman, Martin and A. J. Stagliano (1996) Environmental Disclosure by Companies Involved in Initial Public Offerings

<sup>5</sup>Regulation S-K, Item 103 - Legal Proceedings (17 CFR 229.103)

<sup>6</sup>Regulation S-K, Item 103, Instructions 5(A)-(C) - (17 CFR 229.103(5)(A)-(C)):

- A. Such proceeding is material to the business or financial condition of the registrant;
- B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, 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 registrant and its subsidiaries on a consolidated basis; or
- C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding 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

proceedings are those “arising under any Federal, State, or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary [*sic*] for the purpose of protecting the environment...”<sup>7</sup> An EPA-initiated enforcement action inherently meets the definition of environmental legal proceeding. Regional or Headquarters enforcement personnel, as appropriate, should distribute the attached Notice to companies that are parties to formal administrative enforcement actions in accordance with the terms set out below.

## **Application of this Guidance**

### Who Should Receive the Notice

Any enforcement action initiated by the EPA is potentially a “legal proceeding” that is subject to the SEC’s environmental disclosure requirements. However, SEC Regulation S-K applies only to companies that are SEC “registrants” within the meaning of the term as defined by the SEC. OECA does not expect EPA enforcement staff to make a determination of whether or not the party to an environmental legal proceeding is, indeed, an SEC registrant. Rather, the Notice seeks to inform recipients that they are *potentially* subject to Regulation S-K, Item 103 and should themselves determine its applicability to their company and the relevant legal proceeding. There is one exception. Because governmental entities (federal, state, or local) are not subject to SEC regulation, the Notice should not be distributed to them. However, if enforcement personnel have information that leads them to reasonably believe that a party to a legal proceeding is not an SEC registrant, then the Notice does not have to be distributed.

Additionally, the Notice only should be distributed to parties to an environmental legal proceedings when the EPA has initiated the enforcement action, and the Agency has the lead for prosecuting the case. The Notice should not be distributed if a case has been, or is expected to be, referred to the Department of Justice (DOJ).

### Timing of Distribution of the Notice

Enforcement personnel should distribute the Notice no later than the initiation of any formal administrative enforcement action brought by EPA. Solely for the purposes of this guidance the initiation of a formal administrative enforcement action is considered to be when a formal administrative complaint is filed, an administrative order is issued, or a letter demanding stipulated penalties is sent.<sup>8</sup>

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generically.

<sup>7</sup>Instruction 5, Regulation S-K, Item 103 - Legal Proceedings (17 CFR 229.103)

<sup>8</sup>SEC regulation S-K, Item 103 requires disclosure when an environmental legal proceeding is “known to be contemplated.” In the interest of administrative economy, this guidance recommends that the Region, or OECA office bringing the action, distribute the notice when a formal administrative complaint is filed, an administrative order is issued, or a letter demanding stipulated penalties is sent. However, it is possible that the registrants duty to disclose could arise before this juncture. The decision about when to distribute the Notice should not be interpreted as an Agency opinion on when a registrant would, or should, know that a legal proceeding is contemplated.

### Summary of Criteria for Distributing the “Notice”

- Company is involved in an administrative legal proceeding taken in response to violation(s) of federal, state, or local provisions having the primary purpose of environmental protection.
- The U.S. EPA is a party to the proceeding, and has the lead for prosecuting the case.
- The Notice should **not** be distributed if:
  - The party to receive the Notice is a federal, state, or local governmental entity.
  - The case has been, or is expected to be, referred to the Department of Justice.

If the above criteria are met, the Notice should be issued to an agent of the company when the complaint is filed, along with other documents related to the proceeding. Notwithstanding the above criteria, if the facts and circumstances of the administrative enforcement action at hand lead enforcement personnel bringing the action to reasonably believe that Item 103 does not apply, then the Notice need not be distributed. Thus, for example, the Notice will likely not need to be distributed in cases where EPA is merely issuing an administrative order for access or information.

### **Responding to Questions from Parties Involved in Environmental Legal Proceeding Concerning the Notice or SEC Regulations**

EPA enforcement staff should not provide explanations of SEC regulations in the general sense, or with respect to a specific case. All questions of this nature should be directed to the Securities and Exchange Commission; questioners should be referred to the SEC contact information provided at the bottom of the Notice.

### **Scope of Application**

The guidance contained in this document is only intended to provide instruction as to when the accompanying *Notice of Securities and Exchange Commission Registrants’ Duty to Disclose Environmental Legal Proceedings* should be distributed. It should not be used for purposes other than those explicitly mentioned in the document, nor does it alter any existing EPA policies or guidance.

EPA personnel with questions or comments about the guidance, or the underlying disclosure requirements under Regulation S-K, Item 103, should contact Nicholas Franco (202-564-0113) in OECA’s Office of Planning and Policy Analysis.

cc: Sylvia K. Lowrance, Deputy Assistant Administrator  
Office of Enforcement and Compliance Assurance, Environmental Protection Agency  
Mike Walker, Senior Enforcement Counsel  
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Shelley E. Parratt, Associate Director for Operations  
Division of Corporation Finance, Securities and Exchange Commission

Attachments: Notice of SEC Registrants' Duty to Disclose Environmental Legal Proceedings  
SEC Regulation S-K, Item 103 - Legal Proceedings

[Code of Federal Regulations]  
[Title 17, Volume 2, Parts 200 to 239]  
[Revised as of April 1, 1999]  
From the U.S. Government Printing Office via GPO Access  
[CITE: 17CFR229.103]

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TITLE 17--COMMODITY AND SECURITIES EXCHANGES

CHAPTER II--SECURITIES AND EXCHANGE COMMISSION

PART 229--STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933,  
SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975--  
REGULATION S-K--Table of Contents

Subpart 229.100--Business

Sec. 229.103 (Item 103) Legal proceedings.

Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

Instructions to Item 103:

1. If the business ordinarily results in actions for negligence or other claims, no such action or claim need be described unless it departs from the normal kind of such actions.
2. No information need be given with respect to any proceeding that involves primarily a claim for damages if the amount involved, exclusive of interest and costs, does not exceed 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis. However, if any proceeding presents in large degree the same legal and factual issues as other proceedings pending or known to be contemplated, the amount involved in such other proceedings shall be included in computing such percentage.
3. Notwithstanding Instructions 1 and 2, any material bankruptcy, receivership, or similar proceeding with respect to the registrant or any of its significant subsidiaries shall be described.
4. Any material proceedings to which any director, officer or affiliate of the registrant, any owner of record or beneficially of more than five percent of any class of voting securities of the registrant, or any associate of any such director, officer, affiliate of the registrant, or security holder is a party adverse to the registrant or any of its subsidiaries or has a material interest adverse to the registrant or any of its subsidiaries also shall be described.
5. Notwithstanding the foregoing, an administrative or judicial proceeding (including, for purposes of A and B of this Instruction, proceedings which present in large degree the same issues) arising under any Federal, State or local provisions that have been enacted or adopted regulating the discharge of materials into the environment or primary for the purpose of protecting the environment shall not be deemed "ordinary routine litigation incidental to the business" and shall be described if:
  - A. Such proceeding is material to the business or financial condition of the registrant;
  - B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, 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 registrant and its subsidiaries on a consolidated basis; or
  - C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding 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.

**NOTICE OF SECURITIES AND EXCHANGE COMMISSION REGISTRANTS' DUTY TO DISCLOSE ENVIRONMENTAL LEGAL PROCEEDINGS**

Securities and Exchange Commission regulations require companies registered with the SEC (e.g., publicly traded companies) to disclose, on at least a quarterly basis, the existence of certain administrative or judicial proceedings taken against them arising under Federal, State or local provisions that have the primary purpose of protecting the environment. Instruction 5 to Item 103 of the SEC's Regulation S-K (17 CFR 229.103) requires disclosure of these environmental legal proceedings. For those SEC registrants that use the SEC's "small business issuer" reporting system, Instructions 1-4 to Item 103 of the SEC's Regulation S-B (17 CFR 228.103) requires disclosure of these environmental legal proceedings.

If you are an SEC registrant, you have a duty to disclose the existence of pending or known to be contemplated environmental legal proceedings that meet any of the following criteria (17 CFR 229.103(5)(A)-(C)):

- A. Such proceeding is material to the business or financial condition of the registrant;
- B. Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, 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 registrant and its subsidiaries on a consolidated basis; or
- C. A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding 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.

Specific information regarding the environmental legal proceedings that must be disclosed is set forth in Item 103 of Regulation S-K or, for registrants using the "small business issuer" reporting system, Item 103(a)-(b) of Regulation S-B. If disclosure is required, it must briefly describe the proceeding, "including the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceedings and the relief sought."

You have been identified as a party to an environmental legal proceeding to which the United States government is, or was, a party. If you are an SEC registrant, this environmental legal proceeding may trigger, or may already have triggered, the disclosure obligation under the SEC regulations described above.

This notice is being provided to inform you of SEC registrants' duty to disclose any relevant environmental legal proceedings to the SEC. This notice does not create, modify or interpret any existing legal obligations, it is not intended to be an exhaustive description of the legally applicable requirements and it is not a substitute for regulations published in the Code of Federal Regulations. This notice has been issued to you for information purposes only. No determination of the applicability of this reporting requirement to your company has been made by any governmental entity. You should seek competent counsel in determining the applicability of these and other SEC requirements to the environmental legal proceeding at issue, as well as any other proceedings known to be contemplated by governmental authorities.

If you have any questions about the SEC's environmental disclosure requirements, please contact the SEC Office of the Special Senior Counsel for Disclosure Operations at (202) 942-1888.