

ELR

NEWS & ANALYSIS

Green Business: Should We Revoke Corporate Charters for Environmental Violations?

by Mitchell F. Crusto

Recent corporate financial scandals involving Enron, Worldcom, Arthur Andersen, and others have led to the passage of significant legislation effecting, inter alia, corporate financial disclosure.¹ These recent financial reporting scandals raise red flags concerning corporate accountability generally. This is an appropriate time to reconsider corporate accountability for environmental protection.² Additionally, environmental challenges continue in the form of climate change. Industry and government continue to fail to achieve corporate self-regulation. One radical proposal recently surfacing is to revoke corporate charters for environmental violations.³

Mitchell F. Crusto is a former law clerk to the Hon. John Minor Wisdom, U.S. Court of Appeals for the Fifth Circuit. He is currently a Professor at Loyola University New Orleans School of Law and a Visiting Professor at Vermont Law School. Formerly, Member, President William J. Clinton's Transition Team for U.S. Environmental Protection Agency; Senior Manager, Arthur Andersen's Worldwide Environmental Management Consulting Group; Director, Corporate Environmental Policy, Monsanto Corporation; Member, Industry Working Group, Environmental Management Principles, American Standards; Associate Deputy Administrator, Finance, Investment, and Procurement, U.S. Small Business Administration, 1989-1991, President George W. Bush Appointee. Yale Law School, J.D. 1981; Oxford University, England, B.A. 1980, M.A. 1985; Yale University, B.A. 1975. Special thanks to those who have contributed to this Article, including the faculty, research assistants, administrative assistants, students, and staff at the Loyola University School of Law and at Vermont Law School. The author gratefully thanks the research assistance provided through the generosity of the Alfred T. Bonomo Sr. Family and the Rosario Sarah LaNasa Memorial Fund. A version of this Article was originally published at 63 LA. L. REV. 175 (2003), and is reprinted with permission.

1. Sarbanes-Oxley Act of 2002, 15 U.S.C. §§7201-7266.

2. See Margaret Graham Tebo, *Fertile Water*, A.B.A. J., Feb. 2001, at 36-42 (noting that "conditions are good for environmental lawsuits due to the success of Big Tobacco litigation, favorable law and new science"). See also *Activist Investor Says Climate Change Is a Governance Issue*, BUSINESS & THE ENV'T [hereinafter BATE], June 2002, at 1-4 (claiming that Exxon-Mobil Corporation executives are losing a chance to increase equity value in setting climate change policies). See also *id.*, Sept. 2002, at 16 (noting that an investor filed a derivative lawsuit against Massey Energy Company, involving the sale of stock based upon insider information and mismanagement of environmental policies that caused violations and declines in the company's stock price).

3. In September 1998, a group of citizens filed a "Complaint Lodged With the Attorney General of California Under California Code of Civil Procedure §803, California Corporations Code §1801 to Revoke the Corporate Charter of the Union Oil Company of California (UNOCAL)." ROBERT BENSON, CHALLENGING CORPORATE RULE, THE PETITION TO REVOKE UNOCAL'S CHARTER AS A GUIDE TO CITIZEN ACTION (1999). For early works on the issue of revoking corporate charters, see Thomas Linzey, *Awakening a Sleeping Giant: Creating a Quasi-Private Cause of Action for Revoking Corporate Charters in Response to Environmental Violations*, 13 PACE ENVTL. L. REV. 219 (1995); and Thomas Linzey, *Killing Goliath: Defending Our Sovereignty and Environmental Sustainability Through Corporate Charter Revocation in Pennsylvania and Delaware*, 6 DICK. J. ENVTL. L. & POL'Y 31 (1997). Compare JAN WITOLD BARAN, THE ELECTION LAW PRIMER FOR CORPORATIONS (3d ed.

The environment, particularly climate changes, is still a major global concern. At the World Economic Forum, both business and government leaders voted climate change the greatest challenge facing the world at the beginning of the century.⁴ Indeed, recent statistics show that pollution of air, water and land has been increasing in many areas.⁵

Two major sources are attributable to the rising levels of pollution: the lack of governmental enforcement⁶ and the inability of corporations to effectively self-regulate.⁷ Relative

2002) (analyzing the recently enacted Bipartisan Campaign Reform Act and providing insight into a different, less radical approach to corporate reform, that of campaign finance).

4. "Climate change was recently . . . voted the 'greatest challenge facing the world at the beginning of the century' by hundreds of business and government leaders" attending a meeting of the World Economic Forum. ROBERT HORNING & MATTHEW BRAMLEY, FIVE YEARS OF FAILURE: FEDERAL AND PROVINCIAL GOVERNMENT INACTION ON CLIMATE CHANGE DURING A PERIOD OF RISING INDUSTRIAL EMISSIONS 2 (2000), available at <http://www.pembina.org/pdf/publications/fiveyears.pdf>. (last visited July 20, 2003).

5. For example, a recent study has found that as many as one billion people are regularly exposed to indoor air pollution. See, e.g., *One Billion Exposed to Excessive Indoor Pollution*, Edie Weekly Summaries, at http://www.edie.net/gf.cfm?L=left_frame.html&R=http://www.edie.net/climatechange/index.asp (last visited July 20, 2003). Moreover, in 1995, there were 3,522 closings and advisories at ocean, bay, and Great Lakes beaches due to water pollution; this was a 50% increase compared to closings of the previous year. See *Effects of the Ultimate Problem*, at <http://www.srsd.org/search/studentprojects/june97/ocean/effects.htm> (last visited July 20, 2003). The U.S. Department of Energy has recorded steadily rising levels of low-level nuclear waste shipped for disposal since 1965, increasing percentages of pesticide residues in food samples since 1978, and increasing levels of municipal solid waste discarded to landfills since 1960. See U.S. Department of Energy Reports, at <http://ceq.eh.doe.gov/reports/statistics/tab8x1.html> (last visited July 20, 2003). These reports also show reduced levels of radioactive low- and high-level nuclear waste and a steadily reducing level of released toxics. See *id.* Moreover, the total number of oil spills is up since 1988. U.S. Coast Guard, *Polluting Incident Compendium, Cumulative Data and Graphics for Oil Spills 1973-2000*, at <http://www.uscg.mil/hq/gm/nmc/response/stats/Summary.htm> (last visited July 20, 2003). See also COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE 1997 REPORT ON THE COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT (1997), available at <http://www.whitehouse.gov/ceq/> (last visited July 20, 2003).

6. See Roger Strelow, *Environmental Compliance: Is the System Working? Corporate Compliance With Environmental Regulation: Striking a Balance*, 20 ELR 10529 (Oct. 1989) (arguing that while EPA "has made improvements in recent years . . . it is still the case that enforcement is not as rigorous as it should be"); John Helprin, *Government Faulted on Wetlands*, Associated Press, available at <http://forests.org/archive/america/gofawetl.htm> (last visited July 20, 2003) (recognizing that government failure to enforce laws requiring developers who fill in wetlands to restore old ones or create new ones in return).

7. Compare Roger Strelow, *Minimizing Corporate Toxic Tort Liability*, 3 NAT. RESOURCES & ENV'T 6, 47 (1988) (arguing that "current tort systems do not effectively respond to, or create incentives for, . . . behavior that minimizes toxic harms . . ."); compare Peter M. Gillon &

to U.S. Environmental Protection Agency (EPA) enforcement, there has been a recent paradigm shift toward promoting corporate self-regulation.⁸ Relative to corporate environmental behavior, there is a growing gap between societal expectation and corporate behavior.⁹ Taken together, the rising levels of pollution and the demand for greater corporate environmental responsibility raise the essential question: does U.S. corporate law promote environmental protection?

This Article explores the interdisciplinary dimensions of corporate law and analyzes and describes their shortcomings relative to environmental matters. Part I describes the benefits and the requirements of corporate law. Part II proposes a model corporate self-regulating code, namely, corporate environmental principles (CEP). Part III makes the case for a voluntary code of corporate environmental principles and reviews existing efforts to change corporate environmental behavior. Part IV describes the sources of change in corporate behavior, analyzes how corporate law has limited means for effectuating change in corporate environmental behavior, and evaluates how corporations react to change. Additionally, it analyzes how various government and nongovernment efforts have failed. The author concludes that, in conjunction with the American Law Institute

(ALI), corporations should voluntarily adopt CEP as an effective means of addressing Sarbanes-Oxley corporate accountability scrutiny, heightened Securities and Exchange Commission (SEC) environmental disclosure issues, and radical proponents of corporate charter revocation.

I. Corporate Law Is a Shell That Does Not Address Environmental Protection

A. Are Corporations Accountable for the Environment?

Now we turn to analyzing the nature of corporate law relative to environmental accountability. From the start, corporate law was a creature of law and therefore is subject to its rules. The following discussion evaluates whether corporate law fails to promote environmental protection.

Our discussion begins with perhaps the largest recorded corporate environment single event disaster, the *Valdez* oil spill.¹⁰ On March 24, 1989, an Exxon oil tanker, the *USS Valdez*, ran aground in Alaska near Prince William Sound, spilling 11 million gallons of crude oil, creating the largest oil spill in North America.¹¹ In total, Exxon suffered approximately \$3.4 billion in losses due to the oil spill, including “the casualty losses on the vessel and cargo (approximately \$2.1 billion), the fines and restitution (approximately \$125 million), settlement with the government entities (approximately \$900 million), settlements with private parties (approximately \$300 million), and the net compensatory damages (approximately \$19.6 million).”¹² The U.S. Court of Appeals for the Ninth Circuit ruled that while North America’s largest oil spill should be accompanied with the largest punitive damages award in U.S. history, the \$5 billion punitive damages awarded was too high and, therefore, was vacated.¹³

The Exxon *Valdez* oil spill was clearly an environmental catastrophe that violated environmental law.¹⁴ But was there a violation of corporate law? This major corporate environmental “disaster” arguably impacted corporate environmental behavior.¹⁵ But did it change corporate responsibility

Steven L. Humphreys, *Corporate Officer Liability Under Clean Air Act May Create Disincentives*, 6 *INSIDE LITIG.* n.p. (1992) (arguing that the enforcement of civil and criminal fines on corporate directors and officers will cause qualified persons to avoid such positions, will require corporations to provide extra compensation to attract and retain responsible environmental managers, and will create disincentive to responsible corporate environmental management by causing managers to avoid innovation).

8. EPA has promoted several initiatives such as the Environmental Leadership Program (ELP), Project XL, and its Environmental Auditing Policy, *discussed in* Frank B. Friedman, in *PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT* 66-71 (Env’t. L. Inst. 8th ed. 2000) [hereinafter *FRIEDMAN*]. See also EPA’s Partner for the Environment Initiative, described at <http://www.epa.gov/partners/boosting> (last visited July 20, 2003) or at <http://www.epa.gov/opei> (last visited July 20, 2003). Compare PERC, *THE CENTER FOR FREE MARKET ENVIRONMENTALISM, GOVERNMENT VERSUS ENVIRONMENT* (Donald R. Leal & Roger E. Meiners eds., 2002), sharply pointing out the shortcomings of government environmental policy and promoting the need for government to regulate itself. See also James L. Huffman, *The Past and Future of Environmental Law*, 30 *ENVTL. L.* 23 (2000). (“Continued reliance on command and control regulation should also be expected because of the crisis mentality that often characterizes our environmental politics. When the sky is falling, we are all the more impatient.”) *Id.* See also U.S. EPA, Office of Pollution Protection & Toxics, *P2 Policy*, at <http://www.epa.gov/p2/p2policy/index.htm> (last visited July 20, 2003) (discussing the importance of educating consumers on how to prevent pollution in their communities, e.g., auto waste disposal).
9. Societal expectations of changes within corporate environmental behavior appear to be rising. First, there is the public’s awareness of corporate-generated pollution. Second, there is greater demand from institutional investors for corporate environmental protection. Third, there is increased demand for federal laws effecting change in corporate behavior. See generally FRANCIS CAIRNCROSS, GREEN, INC.: A GUIDE TO BUSINESS AND THE ENVIRONMENT (1995) (promoting the “polluter-pays” principle) and GREENING ENVIRONMENTAL POLICY: THE POLITICS OF A SUSTAINABLE FUTURE 207-08 (Frank Fischer & Michael Black eds., 1995) (strategic management must take into consideration competitive and ecological environments and societal concerns and political maneuvering). Recently, the Property and Environment Research Center (PERC) predicted that protest will take a back seat to local, innovative ventures as those showcased in its report on “Enviro-Capitalists for the 21st Century.” PERC REPORTS (THE CENTER FOR FREE MARKET ENVIRONMENTALISM), ENVIRO-CAPITALIST FOR THE 21ST CENTURY (2001). Some environmental activists have proposed that a corporation should lose its corporate status and its benefits of incorporation if it violates environmental laws. See *supra* note 3.

10. See generally *Legacy of an Oil Spill 10 Years After Exxon Valdez: 10-Year Report*, at <http://www.oilspill.state.ak.us/history/history.htm> (last visited Feb. 21, 2002).

11. In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001), *on remand*, 236 F. Supp. 2d 1043 (D. Alaska).

12. *Id.* at 1244.

13. *Id.* at 1246 (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001)). The district court did not review the award under the standards announced by *BMW* and *Cooper Industries* because neither case had been decided at that time. After those pivotal decisions were handed down by the U.S. Supreme Court, the Exxon case was remanded to the district court to decide the constitutionality under the *BMW* standards. *Id.* at 1239.

14. See generally Klingon, *Justice Department Pulls Out All the Stops*, ENV’T, HEALTH & SAFETY MGMT., Aug. 31, 1992, at 1, 3 (noting that the Exxon *Valdez* prosecution resulted in the largest criminal fine in American history), as cited in *FRIEDMAN*, *supra* note 8, at 40-41.

15. Following the Exxon *Valdez* oil spill, the Social Investment Forum and the Coalition for Environmentally Responsible Economics (CERES) developed the CERES or “*Valdez Principles*,” as created in 1989 and amended on April 28, 1992. These were created by socially concerned investors, environmentalists, and church groups. CERES, 711 Atlantic Ave., Boston MA 02111, or at <http://www.ceres.org> (last visited Aug. 21, 2000).

16. U.S. environmental law has adopted the “Responsible Corporate Officer” doctrine to attempt to hold senior managers responsible for environmental law infractions throughout an organization. See George

ties under corporate law?¹⁶ This raises a pivotal question: does U.S. corporate law promote corporate environmental protection?¹⁷

In one way, corporate law is environment-neutral. It allows environmental protections, and many corporations do, in fact, promote environmental protection.¹⁸ Particularly, large corporations, by the availability of capital, talent, and other resources, can present many advantages that benefit the environment.¹⁹ These include the utilization of qualified environmental professionals,²⁰ the need to keep a positive public profile,²¹ a concentration of capital and reserves,²² greater sensitivity to shareholders concerns,²³ the importance of competitive advantage,²⁴ and the possibility of

piercing the corporate veil.²⁵ Additionally, large corporations often promote environmental protection through EPA's Superfund cleanup and by generally complying with federal and state environmental laws.²⁶ Yet, there still remains the need to analyze how U.S. corporate law operates to hinder or promote environmental protection.

*B. Corporations Are Creatures of the State: The Regulatory View of Corporate Law*²⁷

Early in U.S. history, Justice John Marshall commented that, "[c]orporate status came to be viewed as something that must be conferred by permission of the state . . . Under the first corporation statutes, firms secured this permission by buying 'special charters' from state legislatures."²⁸ Arguably, states lost real control over corporations when businesses were permitted to choose their state of incorporation regardless of where their business is located.²⁹ This led to a "race to the bottom," corporations incorporating in a state with the least regulatory corporate duties.³⁰

Many corporate promoters and directors choose Delaware because its corporation and tax laws are clearly and concisely structured. These regulations afford certain advantages sometimes lacking in other jurisdictions. The issue of corporate status is often very important, and incorporation can provide a business with many advantages.

Van Cleve, *The Changing Intersection of Environmental Auditing, Environmental Law, and Enforcement Policy*, 12 CARDOZO L. REV. 1215, 1226-27 (1991); Judson W. Starr & Thomas J. Kelly Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come and It Is Hard Time*, 20 ELR 10096, 10101-04 (Mar. 1990).

17. *Playboy Magazine* asked world-recognized economist, Milton Friedman, this very question, as a matter of corporate social responsibility. *Playboy Interview: Milton Friedman*, PLAYBOY MAG., Feb. 1973, at 59.

Friedman presented first, a principle: "A corporate executive's responsibility is to make as much money for the stockholders as possible, as long as he operates within the rules of the game." Implicitly, a corporation has a duty to its shareholders to spend the least amount of money on all things, including environmental protection.

The only way corporate management can justify spending money on the environment is where it can be shown to maximize profits. Friedman gave the following example of where social responsibility and maximizing corporate profits meet: "If, on the other hand, the executives of U.S. Steel undertake to reduce pollution in Gary[, Indiana,] for purposes of making the town attractive to employees and thus lower labor costs, than they are doing the stockholders' bidding." Cited in ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 607-08 (7th ed. 2001) [hereinafter HAMILTON]. Some critics might say that this issue is as fanciful as the airbrushed, body-perfect photographs in *Playboy Magazine*, and yet this discussion is as real as hard bodies.

18. See generally GRANT LEDGERWOOD & ARLENE IDOL BROADHURST, ENVIRONMENT, ETHICS, AND THE CORPORATION (2000) (especially Chapter 2, surveying the local and national focus of business thinking about corporate environmental strategy). See also Kathleen M. Victory, *Case Studies in Corporate Environmentalism*, BATE, *supra* note 2, 1993.
19. See generally <http://members.ozemail.com.au/~pscrook/benefits.html> (benefits of an effectively implemented environmental management system (EMS)) (last visited July 31, 2001).
20. See generally FRIEDMAN, *supra* note 8, at 117-45.
21. See generally R. EDWARD FREEMAN ET AL., ENVIRONMENTALISM AND THE NEW LOGIC OF BUSINESS: HOW CAN FIRMS BE PROFITABLE AND LEAVE OUR CHILDREN A LIVING PLANET (2000) (discussing "the four shades of green" that can measure a company's environmental commitment).
22. See generally FRIEDMAN, *supra* note 8, at 147-87.
23. See generally 4th Annual Conference for Private and Institutional Investors, *Making a Profit While Making a Difference: How to Reduce Risk in Your Investment Portfolio* (May 10-12, 2000), available at <http://www.capitalmissions.com/conference/2000conference/index.html> (last visited July 20, 2003) (featuring socially responsible investing, including "environmentally progressive companies outperforming their peers" and update on corporate governance). See also Interfaith Center on Corporate Responsibility (ICCR), *Inspired by Faith Committed to Action, 1998-1999 Annual Report*, CORPORATE EXAMINER, Oct. 22, 1999.
24. See generally IAN CHRISTIE ET AL., CLEANER PRODUCTION IN INDUSTRY: INTEGRATING BUSINESS GOALS AND ENVIRONMENTAL MANAGEMENT (1995) (presenting how to redesign production processes, products, and management systems to promote environmentally sustainable developments).
25. There is an apparent conflict in piercing between limited liability under state law and federal legislation obligations to clean up natural resources under federal laws. CHARLES R.T. O'KELLEY & ROBERT

B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 626, 636 (3d ed. 1999) [hereinafter O'KELLEY] (citing *United States v. Bestfoods*, 524 U.S. 51, 28 ELR 21225 (1998)). See also Lynda J. Oswald & Cindy A. Schipani, *CERCLA and the "Erosion" of Traditional Corporate Law Doctrine*, 86 NW. U. L. REV. 259 (1992). Compare *United States v. Pitrani*, 646 F.2d 83 (3d Cir. 1981).

26. See generally Thomas J. Schoenbaum et al., *Superfund and Hazardous Waste Liability*, in ENVIRONMENTAL POLICY LAW 583-706 (4th ed. 2002).
27. See generally Larry E. Ribstein & Peter V. Letson, *The Role of the Law*, in BUSINESS ASSOCIATIONS §1.06, at 15-20 (3d ed. 1996) [hereinafter Ribstein]. "The 'true nature' of a corporation has been the subject of a great deal of modern debate." HAMILTON, *supra* note 17, at 18.

On the one hand, a corporation has been described as an "entity," reified so as to be given some constitutional protections provided to individuals. See *Browning-Ferris Indus. of Vt., Inc. v. Kelso Disposal, Inc.*, 492 U.S. 257, 284-85 (1989).

On the other hand, a "realist" approach sees a corporation as a fiction, merely as an association of individuals. W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 197 (1923).

More recently, so-called contractarians view a corporation as a "nexus of contracts," a complex set of contractual relationships between various inputs like employers, creditors, shareholders, etc. See, e.g., FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (1991). For a general critique of the usefulness of the "nexus of contracts" theory to direct public policy, see HAMILTON, *supra* note 17, §8.6.

28. See generally Ribstein, *supra* note 27, §1.06, at 10-11 (citing significant case law supporting this observation including: *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) wherein the Court described the corporation as "the mere creation of law" and more recently in *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) wherein the Court reiterated the *Dartmouth College* view to support state authority to pass anti-takeover statutes). See also JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION 1780-1970 (1970).
29. *Paul v. Virginia*, 75 U.S. 168 (1869), Henry N. Butler, *Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129 (1985).
30. William Cary, *Federalism and Corporate Law Reflections Upon Delaware*, 13 YALE L.J. 663 (1974); S. Samuel Aisht, *A History of Delaware Corporation Law*, 1 DEL. J. CORP. L. 1 (1976).

C. Corporate Law Provides Businesses With Many Advantages

What is the value of corporate status? The benefits of incorporation include the right to operate,³¹ limited liability for shareholders,³² perpetual life,³³ centralized management,³⁴ and certain tax advantages.³⁵ Another great benefit of incorporation is capital formation: access to U.S. capital markets.³⁶ Most importantly, incorporation provides owners the ability to avoid broad and personal liability for business liabilities.³⁷ By contrast, partners in general partnerships and unincorporated sole proprietors are not so fortunate: they are personally exposed to their businesses' liabilities.³⁸

31. See REV. MODEL BUS. CORP. ACT §3.01 (1984) ("Every corporation incorporated under this Act has the purpose of engaging in any lawful business unless a more limited purpose is set forth in the articles of incorporation.") and *id.* §3.02(15) ("every corporation has . . . the . . . powers . . . to make payments or donations, or to do any other act, not inconsistent with law, that furthers the business and affairs of the corporation"); DEL. CODE ANN. tit. 8, §§101, 121, 122 (2002).

32. REV. MODEL BUS. CORP. ACT §6.22:

A purchaser from a corporation of its own shares is not liable to the corporation or its creditors with respect to the shares except to pay the consideration [for the shares] a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he may become personally liable by reason of his own acts or conduct.

But see id. §2.02(b) ("The articles of incorporation may set forth: . . . (v) the imposition of personal liability on shareholders for the debt of the corporation to a specified extent and upon specified conditions . . .").

33. *Id.* §3.02 ("Unless the articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name . . .").

34. *Id.* §8.01(b) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors . . .").

35. A corporation is a separate legal entity and its income is subject to taxation separately from that of its shareholders. Hence, corporate income is taxed twice. Ribstein, *supra* note 27, at 14. Yet there is still Subchapter S selection wherein with some restrictions, a closely held corporation's income and losses "flow through" to the shareholders. Burton W. Kanter, *To Elect or Not to Elect Subchapter S—That Is a Question*, 60 TAXES 882 (1982). And then whether a C or an S corporation, a corporation has other tax advantages, such as being able to offset business income by business expenses, with some limitations.

36. O'KELLEY, *supra* note 25, at 166-74 (describing how the national marketing system for corporate securities reduces transaction costs to nearly zero).

37. Limited liability "is one of the most important corporate features . . . it can result in a lower cost of capital than personal liability, all things considered." Ribstein, *supra* note 27, at 61-66 ("limited liability (in the case of smaller, closely held companies) allows owners to shift part of the risk of their business to tort victims who are not in a position to demand extra compensation for the extra risks they undertake when businesses are run by limited liability owners . . ."). *Id.* at 65. See also FRANK H. ESTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* ch. 2 (1992); LARRY E. RIBSTEIN, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991); ROBERT B. THOMPSON, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1 (1994).

38. See MITCHELL F. CRUSTO, *Extending the Veil, a Proposed Limited Liability Sole Proprietorship Statute*, 2001 COLUM. BUS. L. REV. 381 (2001).

D. Corporate Law Requires Little Compliance With Laws Generally

State law grants corporate status easily and with minimal requirements.³⁹ Equally, there is little required to retain corporate status.⁴⁰ A survey of corporate law in all 50 states shows that no corporate statute requires that a corporation comply with the laws of the state or the nation, other than the incorporation statute itself, in order to receive and maintain the benefits of incorporation.⁴¹ Regarding this shortcoming, it has been suggested that corporate law be "federalized" to ensure minimum requirements⁴² and to raise the standards of management conduct.

When it comes to compliance with environmental laws, corporations face a difficult challenge. In a survey of corporate legal officers, 70% said they did not believe that full compliance with the matrix of state and federal environmental requirements was possible.⁴³ It is difficult to go beyond compliance, when merely defining compliance, and then maintaining compliance, is extremely challenging.⁴⁴

E. Corporate Law Forfeits Benefits in Certain Limited Instances

It could be said that once a business is incorporated it stays incorporated. It does not typically lose corporate status for violating other laws. One scholar has stated that, "state corporate laws typically do not regulate corporate conduct to protect investors, creditors, employers, customers, or the general public."⁴⁵

In rare instances, a corporation may fail to obtain or may lose the benefits of incorporation. This may occur when a business fails to comply with the mandatory formalities of a state's incorporation statute, and as such violates Revised Model Business Corporation Act §2.04.⁴⁶ The penalty for operating a "defective corporation" is to impose liability on all who contract "knowing" that no corporation exists and on "active" participants in the firm.⁴⁷ Courts have ruled that

39. MELVIN ARON EISENBERG, *CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS* 107-08 (8th ed. 2000) [hereinafter EISENBERG]; REV. MODEL BUS. CORP. ACT §§2.01, 2.02, 2.03, 2.05, and 2.06. See also HAMILTON, *supra* note 17, at 243-46 (detailing how to incorporate).

40. REV. MODEL BUS. CORP. ACT §§2.01, 2.02, 2.03, 2.05, and 2.06. See also DEL. CODE ANN. tit. 8, §§101-109.

41. See West Statutes on Westlaw, wherein the author conducted an extensive review of each state incorporation statute. None of those statutes requires compliance with any laws (except the incorporation statute itself).

42. William L. Cary, *A Proposed Federal Corporate Minimum Standards Act*, 29 BUS. L. 1101 (1975).

43. Marianne Lavelle, *Environmental Vise: Law, Compliance*, NAT'L L.J., Aug. 30, 1993, at S1, S2, cited in FRIEDMAN, *supra* note 8, at 59, 108.

44. *Id.* Whether or not corporate law requires compliance, commentators generally agree that it is very difficult to actually achieve.

45. Mark J. Loewenstein, *Delaware as Demon: Twenty-Five Years After Professor Cary's Polemic*, 71 U. COLO. L. REV. 497, 503-07 (2000).

46. REV. MODEL BUS. CORP. ACT §2.04 explicitly imposes liability on parties who purport to act on behalf of a corporation without incorporating. See also *Booker Custom Packing Co. v. Salloni*, 716 P.2d 1061 (Ariz. Ct. App. 1986); *T-K Distribs., Inc. v. Soldeve*, 704 P.2d 280 (Ariz. Ct. App. 1985); *Minich v. Gem State Developers, Inc.*, 591 P.2d 1078 (Idaho 1979); *Thompson & Green Mach. Co. v. Music City Lumber Co.*, 683 S.W.2d 340 (Tenn. Ct. App. 1984).

47. REV. MODEL BUS. CORP. ACT §2.04 (official comments, citing *Timberlane Equip. Co. v. Davenport*, 514 P.2d 1109 (Or. 1973)).

this default rule is often viewed as a “reversion” to a partnership, resulting in personal, joint, and several liability for those knowing or intentionally participating.⁴⁸

Another instance wherein a corporation can lose its corporate status is when a court “pierces the corporate veil,” and thereby imposes corporate liabilities on individual shareholders. Piercing occurs for a variety of reasons, including a combination of factors such as misrepresentation, undercapitalization, commingling of funds, and failure to follow corporate formalities.⁴⁹ There is limited case law on the books wherein a court may pierce the veil to enforce specific statutory policies. For example, a court pierced when a parent used a subsidiary to avoid a law requiring closing on alternate weekends.⁵⁰

Closer to environmental matters, there are some unique “piercing” cases involving federal programs.⁵¹ One such environmental case concerns the effect on a parent-subsidiary relationship in the interpretation of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980.⁵² In *United States v. Bestfoods*,⁵³ the U.S. Supreme Court recognized two conflicting corporate-law principles: on the one hand, a parent corporation is not liable for its subsidiary’s acts⁵⁴; on the other hand, the corporate veil may be pierced and the shareholder liable, “when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder’s behalf.”⁵⁵ Justice David H. Souter, speaking for the majority, stated that “parent liability would depend on its direct involvement in the operation of the violating facility,” and not on the parent’s participation and control over the subsidiary.⁵⁶ This adds credence to the proposition that the key issue often amounts to the level of control authorized, rather than the amount of control actually exercised by the parent. Additionally, even absent a parent corporation’s liability, if there are brother-sister corporations under the umbrella, enterprise liability may then attach. Hence, in extremely limited instances a corporation will lose its corporate status for violating environmental laws.

F. Corporate Charters Are Rarely Revoked

Over the last 30 years, there have been a lot of changes in the area of corporate law.⁵⁷ Corporate-law scholarship has gone

from the pronounced death of corporation law⁵⁸ to new developments described herein. Recently, corporate status has been challenged and thought to be contingent upon corporate environmental compliance.⁵⁹ This radical approach argues that a more direct approach to managing corporate behavior is needed. It is argued that corporate liability for environmental violations, even when it causes extensive damages, may not cause actual financial harm to the corporation. A company is often able to pass the totality of the overall cost on to the consumer. The proposed answer is to have the state attorney general revoke a corporate charter, thereby ending the “corporate” existence. Arguably, this approach may be the only effective deterrent for corporate polluters.⁶⁰ This requires that there be a review of revocation of corporate charters.

As previously stated, an issuing state may revoke or dissolve a corporate charter for failure to fulfill state requirements for existence, such as the nonpayment of taxes and/or fees, failure to file an annual report with the secretary of state, or failure to give timely notice of a change in its registered agent.⁶¹ In regulated industries, the failure to follow certain statutes or administrative regulations may also cause the corporate charter to be suspended.⁶² Depending on the state statute, the attorney general may be required in certain circumstances to bring an action to dissolve the corporation.⁶³ Or the statute may have a provision for automatic dissolution.⁶⁴ Ironically, a state will typically not revoke a corporation’s charter for a tortious action of the corporation, but rather would revoke a charter for a failure to comply with mere administrative procedures required by the secretary of state.

There is a division among states regarding the liability of the corporation for tortious acts that occur once the state has revoked its charter.⁶⁵ Arguably, according to the case law in

48. See *State ex rel. Carlton v. Triplett*, 517 P.2d 136 (Kan. 1973).

49. Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036 (1991) (offering an extensive empirical study of piercing cases and the courts’ reasons for piercing the veil).

50. *Sundaco, Inc. v. State*, 463 S.W.2d 528 (Tex. Ct. App. 1970).

51. HAMILTON, *supra* note 17, at 337-47.

52. 42 U.S.C. §§9601-9628, ELR STAT. CERCLA §§101-128.

53. 524 U.S. 51, 28 ELR 21225 (1998).

54. *Id.* at 61.

55. *Id.* at 62 (citing *Anderson v. Abbott*, 321 U.S. 349, 362 (1944) and P. BLUMBERG, LAW OF CORPORATE GROUPS: TORT, CONTRACT, AND OTHER COMMON-LAW PROBLEMS IN THE SUBSTANTIVE LAW OF PARENT AND SUBSIDIARY CORPORATIONS §§6.01-6.06 (1987 & 1996 Supp.)).

56. *Id.* at 68.

57. See Melvin A. Eisenberg, *The Modernization of Corporate Law: An Essay for Bill Cary*, 37 U. MIAMI L. REV. 187, 209-10 (1983).

58. Bayless Manning, *The Shareholder’s Appraisal Rights: An Essay for Frank Coker*, 72 YALE L.J. 223, 245 n.7 (1962).

59. See generally BENSON, *supra* note 3.

60. *Id.* at 135.

61. See JAMES D. COX ET AL., CORPORATIONS §26.4 (1943).

62. *Asbestos Workers Local 32 & Asbestos Workers Local 32 Fringe Benefit Funds v. Shaughnessy*, 703 A.2d 276, 277 (N.J. Super. Ct. App. Div. 1997).

63. *Id.* See, e.g., ARIZ. REV. STAT. ANN. §10-094 (1990); DEL. CODE ANN. tit. 8, §283 (1991); MODEL BUS. CORP. ACT §94 (1969); REV. MODEL BUS. CORP. ACT §14.20.

64. See, e.g., MICH. COMP. LAWS ANN. §459.2922 (West 1990).

65. See, e.g., *Mayflower Restaurant Co. v. Griego*, 741 P.2d 1106, 1111 (Wyo. 1987) (holding that the revocation of the corporate charter for failure to pay taxes did not terminate the corporation, but only suspended its power until it complied with the provisions of the state, therefore the corporation was liable for the defendant’s injuries caused by the negligent acts of the plaintiff’s employees), and *Bergy Bros., Inc. v. Zeeland Feeder Pig, Inc.*, 327 N.W. 305, 309 (Mich. 1982) (stating that when the statute provides for reinstatement by the corporation, the actions performed in the name of the corporation during revocation are binding upon the corporation and not individual members). Compare *Bullington v. Palangio*, 45 S.W.3d 834, 837-38 (Ark. 2001) (declaring that well-established case law recognizes that in order to exempt individuals from personal liability for the debts of a corporation, they must comply fully with the act under which the corporation was created); *H.T. Larzelere v. Reed*, 816 S.W.2d 614 (Ark. Ct. App. 1991) (denying an officer of a corporation’s claim that he was not personally liable for the injury to an employee when the injury occurred during the time when the state revoked the corporate charter, stating that, “officers and directors of a corporation who actively participate in its operation during the time when the corporate charter is revoked for failure to pay corporate franchise taxes are individually liable for debts incurred during the period of revocation”). *Id.* at 616.

this area, a corporation that creates an environmental danger will not be subject to a revocation of its charter. However, if its charter is revoked for an administrative reason, such as failure to pay franchise taxes, depending upon the state, the individuals of the corporation may be personally liable for torts, such as those created by the environmental danger. Having now reviewed the general corporate revocation statutes and case law, how does it apply to the present a unique and potentially profound experiment in corporate law: the concerted effort to revoke the corporate charter of a major transnational corporation, Unocal?⁶⁶

The proposal to revoke Unocal's corporate charter relies on the proposition that the citizens of every state, acting through their attorney general, have, and have always had, the legal authority to go to court to revoke the charters of corporations that violate the law. Through this proposition, lawbreaking corporations can be dissolved, put out of business, their assets sold to others under a judge's order that will protect jobs, the environment, and the public interest.⁶⁷

The Unocal proposal is not totally novel. There are other efforts, including action taken in Alabama to revoke tobacco companies' corporate charters and an instance wherein the state of New York's attorney general revoked the charter of the Council for Tobacco Research (ordered its assets donated to state education and health institutions).⁶⁸

One notable business law professor at the University of Texas expresses doubt over such a revocation strategy. He believes that revocation occurs today in very rare instances, such as in an administrative state attorney general's action to revoke a charter for nonpayment of franchise taxes, corporate inactivity, or the illegality of a corporation's purpose, such as "hit men" (Murder Inc., whose purpose was killing people for hire).⁶⁹

If revocation is not available, what about dissolution? (This discussion assumes that revocation and dissolution are not the same.) This requires us to evaluate the question: when is a corporation terminated or "dissolved?" Similar to revocation (and perhaps identical) a corporation may be dissolved voluntarily,⁷⁰ administratively,⁷¹ or

judicially.⁷² "Dissolution" is a technical or specialized term and "does not terminate the corporate existence but simply requires the corporation thereafter to devote itself to winding up its affairs and liquidating its assets . . ." ⁷³ This statutory definition compares to "common law dissolution, which treated corporate dissolution as analogous to the death of a natural person and abated lawsuits, vested equitable title to corporate property in the shareholders, imposed fiduciary duty of trustees on directors who had custody of corporate assets, and revoked the authority of the registered agent."⁷⁴ Most instances of dissolution require judicial supervision. A review of corporate statutes shows that a corporation may be dissolved for limited reasons, similar to those for revocation. These include failure to pay franchise fees,⁷⁵ failure to follow formalities,⁷⁶ and ultra vires.⁷⁷

Lest one believes that corporations have a license to break laws, it is important to discuss briefly the realities of permitting. Short of revoking a corporate charter but still detrimental to a corporation's profitable operation involves the siting and permitting process. Recently, a major international corporation, Shintech, Inc. failed to obtain a permit to site a new \$700 million polyvinyl chloride manufacturing plant in Louisiana.⁷⁸ This is important because even when a corporation maintains its charter, its ability to operate still depends on its ability to get an operating permit.⁷⁹

G. Does Corporate Law Promote Environmental Protection?

Having reviewed key features of corporate law, the question remains: does corporate law promote environmental protec-

66. See generally BENSON, *supra* note 3.

67. *Id.* at 1.

68. *Id.* at 1-2, 7-8.

69. E-mail from Prof. Robert W. Hamilton to Mitchell F. Crusto (Mar. 15, 2002), printed with Professor Hamilton's permission (on file with author).

70. A corporation may voluntarily dissolve, if a corporation "has not issued shares or has not commenced business," REV. MODEL BUS. CORP. ACT §14.01, or when proposed by the board of directors and approved by the shareholders. *Id.* §14.02.

71. The Secretary of State may seek dissolution if:

1. the corporation does not pay within 60 days after they are due any franchise taxes or penalties imposed by the Act or other law;
2. the corporation does not deliver its annual report to the secretary of state within 60 days after it is due;
3. the corporation is without a registered agent or registered office in this state for 60 days or more;
4. the corporation does not notify the secretary of state within 60 days that its registered agent or registered office has been changed, that its registered agent has resigned, or that its registered office has been discontinued; or
5. the corporation's period of duration stated in its articles of incorporation expires.

Id. §14.20.

72. The attorney general can seek dissolution, if "the corporation obtained its articles of incorporation through fraud"; or "has continued to exceed or abuse the authority conferred upon it by law . . ." *Id.* §14.30. A shareholder may seek dissolution for directors' deadlock, if directors act illegally, oppressively or fraudulently, for shareholder deadlock, or for misapplied or wasted corporate assets. *Id.* A creditor may seek dissolution if its claim becomes an uncollectible judgment due or owed, and the corporation is insolvent. *Id.*

73. *Id.* §14.05 and official comments.

74. *Id.*

75. See Ribstein, *supra* note 27, at 74-76 (noting that as state governments levy franchise fees on corporations as a revenue source, states would be less willing to grant limited liability without a formal incorporation procedure).

76. *Id.* at 74-76, 81-88.

77. *Id.* at 78-99. See also Thompson, *supra* note 49 (for an intriguing study of piercing cases). Piercing the corporate veil to hold "shareholders" personally liable for corporate wrongs becomes more complicated when the shareholder is another corporation. See O'KELLEY, *supra* note 25, at 616-32 (citing *Craig v. Lake Asbestos*, 843 F.2d 145 (Pa. C.A. 3 1988) (liability for personal injury for asbestos fibers) and *Bestfoods* (concerning parent corporation's CERCLA liability for subsidiary's liabilities)). See generally SIDLEY & AUSTIN AND ENSR CORP., SUPERFUND HANDBOOK: A GUIDE TO MANAGING RESPONSES TO TOXIC RELEASES UNDER SUPERFUND 95 (3d ed. 1989) (parent corporation may be liable under CERCLA for cleanup costs under "piercing the corporate veil" and "under CERCLA . . . if the court determines that the parent acted as an operator or arranged for the disposal of hazardous substances"). *Id.*

78. See generally Exec. Order No. 12898, ELR ADMIN. MAT. 45075 (Feb. 11, 1994).

79. Over the last few years, as a result of environmental justice-based regulations, EPA has increased public input into the permit process. See Terry L. Schnell & Kathleen J. Davies, *The Increased Significance of Environmental Justice in Facility Siting, Permitting, 29 Env't Rep.* (BNA) 528 (July 3, 1998).

tion? Apparently not. But a complete answer requires an analysis of the status of corporate governance.⁸⁰ The corporate governance movement is a less radical approach to changing corporate behavior. The ALI, through its Corporate Governance Project, published in 1994 its *Principles of Corporate Governance: Analysis and Recommendations*.⁸¹ While it was expected that the *Principles of Corporate Governance* would have a profound effect on corporate law, in fact, “its influence on the long-term development of corporation law is still unclear.”⁸²

A review of the *Principles of Corporate Governance* illuminates some shortcomings in state corporate law. For example, state corporate law allows for “any lawful purpose.” Both the state statutes and the ALI principles recognize the corporate goal as enhancing corporate profits and shareholder gain. Yet, the ALI principles require much more: Section 2.01 states that a “corporation, in the conduct of its business: (1) Is obliged, to the same extent as a natural person, to act within the boundaries set by law.”⁸³ According to ALI, this principle and others apply “whether or not they enhance such returns, that is, even if the conduct either yields no economic return or entails a net economic loss.”⁸⁴ Hence, the ALI principles deviate from the traditional view that legal compliance is an option, depending on “a kind of cost-benefit analysis, in which probable corporate gains are weighed against either probable social costs, measured by the dollar liability imposed for engaging in such conduct, or probable corporate losses, measured by potential dollar liability discounted for likelihood of detection.”⁸⁵

Instead, the ALI principles make legal compliance an obligation, mandating that the cost-benefit calculation should not be *the* deciding factor in the decision of whether or not to follow the law.⁸⁶ Its authors believe that it is the

place of the state legislature to determine cost-benefit of conduct, and once the legislation has made that determination, “the resulting legal rule normally represents a community decision that the conduct is wrongful as such, so that cost-benefit analysis whether to obey the rule is out of place”⁸⁷ Additionally, the ALI principles provide that a corporation *may* account for ethical considerations and may devote reasonable resources to public welfare and humanitarian, educational, and philanthropic purposes.⁸⁸ Therefore, the ALI principles requires corporations to act legally and permits them to act ethically. Arguably, and to the contrary, in order to achieve societal demands, corporations should be allowed and encouraged to account only to shareholders’ interests.⁸⁹

Another recent development that may dramatically change the basic ground rules of corporate governance⁹⁰ is the emergence of “other constituency” or “alternative constituency” statutes. These have been passed in a majority of states and allow corporate management (directors and officers) to consider the interests of employees, suppliers, customers, and communities as a part of their decisionmaking process.⁹¹ At best, this statutory development may eventually lead to significant changes in corporate governance.⁹²

In conclusion, corporate law is arguably a creature of the state. It provides business and especially its shareholders many advantages, including limited liability. It practically demands little from its shareholders beyond their financial investment. Recently, numerous developments support greater input into corporate decisionmaking, including the ALI’s principles, “other constituency” statutes, and shareholder activism. Can these changes be effectively applied to promote corporate environmental protection?

Specifically, when it comes to promoting environmental protection, U.S. corporate law apparently provides lit-

80. See generally HAMILTON, *supra* note 17, at 603-18 (providing an overview and excerpts of leading discussion of the corporate social responsibility debate). See also Elizabeth G. Geltman & Andrew E. Skroback, *Environmental Law and Business in the 21st Century: Environmental Activism and the Ethical Investor*, 22 IOWA J. CORP. L. 465 (1997) (pointing out that as 76% of Americans consider themselves environmentalists (Gallup poll), environmental concerns run throughout the corporation, and are not just a concern for management). See also Robert W. Hamilton, *Corporate Governance in America 1950-2000: Major Changes but Uncertain Benefits*, 25 J. CORP. L. 349 (1999). Compare Michael D. Goldman & Eileen M. Filliben, *Corporate Governance: Current Trends and Likely Developments for the 21st Century*, 25 DEL. J. CORP. L. 683 (2000).

81. See generally CHARLES HANSEN, A GUIDE TO THE ALI CORPORATE GOVERNANCE PROJECT (1995). For a critique of the principles, see DOUGLAS M. BRANSON, CORPORATE GOVERNANCE (1993).

82. HAMILTON, *supra* note 17, at 237 (noting that as of the summer of 2000, the principles had been cited only 58 times by state appellate courts and 23 times by federal appellate courts).

83. ALI, *Principles of Corporate Governance* §2.01(b)(1) (1993) [hereinafter ALI, *Principles of Corporate Governance*].

84. *Id.* §2.01(b)(1), cmt. (g).

85. *Id.*

86. On the other hand, the principles are not definite on the corporate board of directors’ duty to comply with the law. See *id.* §3.02(a) (stating five mandatory functions of a board of a publicly held corporation oddly does not include ensuring compliance with the law). Compare JAY W. LORSCH, POWERS OR POTENTIALS: THE REALITY OF AMERICA’S CORPORATE BOARDS 75-80 (1989) (identifying two roles of directors in “normalcy” situations: consideration of long-term strategic planning and efforts to make sure that the corporation “does the right thing”—corporate affairs are conducted in ethical, legal, and socially responsible ways, especially through the audit committee or compliance programs). See generally AMERICAN BAR ASS’N, CORPORATE DIRECTORS GUIDEBOOK (2d ed. 1994).

87. See ALI, *Principles of Corporate Governance*, *supra* note 83, §3.02(a), cmt. (g).

88. *Id.* §2.01(b)(2), (3).

89. Compare Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001):

All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society. The point is simply how . . . there is convergence on a consensus that the best means to this end . . . is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.

Id. at 441-42. Another approach is for corporate executives to proactively attend to corporate governance and social consciousness issues. See, e.g., RICHARD J. MAHONEY, A COMMITMENT TO GREATNESS 27-77 (1988) (the then-chairman and chief executive officer presented his vision for Monsanto Company including commitments to socially conscious values). See also MONSANTO 1977 REPORT ON SUSTAINABLE DEVELOPMENT INCLUDING ENVIRONMENTAL, SAFETY, AND HEALTH PERFORMANCE (1998), available at <http://www.monsanto.com>. (last visited July 20, 2003). See generally TERRY L. ANDERSON & DONALD R. LEAL, FREE MARKET ENVIRONMENTALISM (rev. ed. 2001) (providing an enviro-capitalist vision of a “pragmatic alternative to political environmentalism,” including an extensive bibliography).

90. HAMILTON, *supra* note 17, at 615.

91. See, e.g., ILL. BUS. CORP. ACT, 805 ILL. COMP. STAT. 5/885 (1983) (Discharge of Duties—Consideration).

92. See Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085 (2000).

tle to no incentives. First, no state's corporate law requires compliance with the law other than the corporate statute itself. Second, no corporation has ever lost its corporate charter due to a violation of federal or state environmental statutes. (This is true of both closely held corporations and publicly traded companies.) Third, there has been no successful shareholder movement forcing corporate America to change its articles or bylaws requiring environmental protection.

In addressing the gap between corporate and societal expectations, one recent "model" approach is the creation and voluntary adoption of corporate codes of conduct.⁹³ This approach is represented by the ALI's Principles of Corporate Governance, and the Organization for Economic Cooperation and Development's (OECD's) Principles of Corporate Governance. Such codes of conduct are currently being followed by several U.S. and foreign corporations, as companies themselves increasingly recognize that adoption of voluntary corporate codes of management have numerous benefits.

The next section of this Article applies the model code of conduct approach to corporate environmental issues. It presents an environmental code of conduct, namely, CEP. It recommends that the ALI adopt CEP as part of its Principles of Corporate Governance. Further, the Article presents and analyzes CEP's benefits and features.

As an incentive for adoption, it is clear that corporate America needs to address environmental concerns. Failing to effectively do so would invite outside forces to press for extreme means. Such means could include corporate charter revocation, institutional investors' revolt, or more intrusive federal legislation.

II. Proposed Model: CEP⁹⁴

A. Overview

What can be done to make corporations more environmentally responsible? These proposed CEP begin with certain guiding overriding principles: first, they emphasize legal compliance over public relations pronouncements, making

legal compliance an absolute requirement, not an option. Second, they promote transparency—encouraging input from all stakeholders, plant communities, and other constituents. And third, they raise environmental management to a new height in corporate priorities, making directors and officers more accountable for environmental matters.

This model code proposes a "bottom-up" emphasis on environmental management, focusing on compliance at the operating level first, while also holding senior management accountable for failures in compliance. The author believes that this represents an important change in the focus of many corporate environmental codes that take a "top-down" approach. The "top-down" approach overemphasizes senior management's responsibility for taking a company "beyond compliance" and using the environment as a "competitive advantage." It falsely presumes that compliance with all relevant laws and regulations has already been achieved. It consciously or unconsciously appears to minimize the importance of actual compliance with laws and regulations.⁹⁵ It is a flawed approach because actual full compliance is nearly impossible to achieve as environmental laws and regulations are voluminous, extremely technical, often unclear and constantly changing.

This following Code of Environmental Principles relies heavily on the Coalition for Environmentally Responsible Economics (CERES) Principles, the International Chamber of Commerce Principles, the Chemical Manufacturers Association (CMA) Responsible Care® initiative, and the International Organization for Standardization (ISO) 14000.⁹⁶ The code is as follows:

Part I. Environmental Objective and Corporate Conduct

1.01. When it comes to environmental matters, the corporation, in the conduct of its business, is obliged, to the same extent as a natural person, to act within the boundaries set by law, and may take into account ethical considerations that are reasonably regarded as appropriate to the environmentally responsible conduct of business, and may devote a reasonable amount of resources to environmental purposes.

93. EISENBERG, *supra* note 39, at 583. One environmental management scholar, Frank B. Friedman, expresses skepticism over corporate codes of conduct as pulling companies in too many directions:

There are a variety of corporate codes of conduct which you do an excellent job in discussing in detail. However, the problem that companies face is someone else always has a "wish list" to add to whatever disclosure, etc. that a company makes. I usually do not advocate signing any of these charters, but rather tailor disclosures, etc. to what makes sense for the company. However, I also advocate an internal "compliance assurance letter" that requires considerable due diligence to assure the corporation that a business unit or division is in compliance not only with law, but with company policies and procedures. This is analogous to Sarbanes-Oxley.

E-mail from Frank B. Friedman to Mitchell F. Crusto (Aug. 29, 2002), printed with Mr. Friedman's permission (on file with author).

94. CEP follows the format of the ALI's Principles of Corporate Governance.

95. The "bottom-up" approach is supported by the statement of Eric Schaeffer, former Director of Enforcement for EPA: "EPA's docket is full of cases involving prominent companies that have sophisticated management systems and terrific codes of behavior written into their corporate policies and posted on their walls." Eric V. Schaeffer, EPA Director of Regulatory Enforcement, Address at the 29th Conference of the ABA Section of Environment, Energy & Resources, Enforcement in the Next Millennium—21st Century Approaches to Noncompliance (Mar. 9-12, 2000), reported in FRIEDMAN, *supra* note 8, at 58, 103. Compare BRUCE W. PIASECHI ET AL., ENVIRONMENTAL MANAGEMENT AND BUSINESS STRATEGY: LEADERSHIP SKILLS FOR THE 21ST CENTURY 118-19 (1999) (noting the importance of executive leadership in achieving environmental business goals).

96. See Mitchell F. Crusto, *All That Glitters Is Not Gold: The Pending Demise of Congressionally Driven Environmental Policy*, 11 GEO. INT'L ENVTL. L. REV. 499, 519 (1999) (proposing a Global Environmental Protection Act featuring pollution prevention, performance measurements, and integrating the environment into business operations). See also Carl E. Bruch & Roman Czebiniak, *Globalizing Environmental Governance: Making the Leap From Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters*, 32 ELR 10428 (Apr. 2002) (detailing analysis on developing a global framework to advance public access to information, participation, and justice in environmental matters). It should be noted that the CMA is now the American Chemistry Council.

Part II. Principles of Corporate Environmental Management

A. Legal Compliance

2.01. Compliance. Comply with relevant jurisdictions' environmental laws and regulations. Become highly knowledgeable as to the laws and their applicability, including its direct and indirect operations (including joint venturing and supply and consumer chain) over the life cycle of products and services and comply with same. Responsively interface with government regulators and promote responsible legislation. Have human health and safety as a top priority.

2.02. Auditing. Conduct annual environmental audits and assessments of compliance with laws and regulations, procedures, policies, and principles, and conduct periodic audits on new legal requirements, problematic areas of operation, and developing regulatory trends.

2.03. Reporting. Publish and publicly disseminate (a) an annual audited environmental report on the results of the environmental audit (see Principal #2 above), (b) quarterly reports on new legal requirements, problematic areas of operation, and developing regulatory trends, and (c) regular, timely, uniform monthly environmental reports from operating facilities.

2.04. Operations Outside the United States (U.S.). Understand and comply with each country's environmental laws and regulations, using the U.S. laws as a guiding standard to be strived for where possible. Where a country's standards are higher than U.S. standards, then comply with that standard in that country, and use that higher standard as a guiding standard to be strived for in the United States.

Comment: Frank B. Friedman, an environmental management lawyer and expert, raises the problem of corporate management often facing inconsistent laws and regulations when operating in several countries.⁹⁷ For example, a highly developed country like Germany may have stringent environmental laws and enforcement while a less developed one may not. He suggests the adoption of "functional equivalent," using high U.S. health and environmental standards as the basic standard of operation even when countries require less.⁹⁸ The adoption of worldwide industrial environmental management standards is particularly useful in international oil and gas production where there are a multitude of joint ventures, "making for transparency, not only inside the industry, but also with the host countries and local [nongovernmental organizations (NGOs)]."⁹⁹ One such set

97. FRIEDMAN, *supra* note 8, at 89.

98. *Id.*

Where existing or proposed control requirements or procedures would be inconsistent with those followed in the United States or the European Union, it is critical that a responsible expert, either in-house or outside, documents in the corporation's permanent records the basis for the conclusion that these requirements or procedures afford equivalent protection compatible with the policy's intent.

Id.

99. *Id.* at 90.

of standards is the *Environmental Management in Oil and Gas Exploration and Production*.¹⁰⁰ In 1991, the International Chamber of Commerce (ICC) created a "charter for sustainable development, a 16-point list of principles including making environmental management among the highest corporate priorities" through regular environmental audits and compliance.¹⁰¹

B. Community/Employee Safety/Right-to-Know/Emergency Preparedness

2.05. Community Involvement and Safety. Empower host communities to address their concerns of actual and potential impacts of operations, products, waste, or services, and respond responsibly to those concerns whether real or perceived. (This includes transboundary or global concerns.) Conduct and respond to ongoing medical monitoring of impacts. Create community panels and meet regularly with them.

2.06. Employee Involvement and Safety. Empower and motivate employees and consultants to address their concerns of actual and potential impacts, and respond responsibly to those concerns whether real or perceived through education, training, and motivation. Conduct and respond to ongoing medical monitoring of impacts. Encourage whistle-blowing of environmental violations and dangers. Conduct on-going environmental training.

2.07. Emergency Preparedness. Develop and maintain emergency preparedness plans with emergency services, relevant authorities, and the local community, recognizing transboundary impacts and work responsibly with suppliers, transporters, and consumers on same.

2.08. Risk Reduction Goals. Minimize environmental health and safety risks to employees and host communities through safe technologies, facilities, and operating procedures by being prepared for emergencies. Establish risk reduction goals and integrate safety and risk engineering functions, including Occupational Safety and Health Act (OSHA).¹⁰²

C. Information Collection and Management

2.09. Information System. Establish an effective, computerized, user-friendly system for the collection and dissemination of timely environmental data with monthly analysis and make the information available to operational and senior management staffs. Use such system to monitor, improve, and plan for improved environmental compliance and performance.

D. Facilities Assessment

2.10. Emergency Preparedness. Develop and monitor, where significant hazards exist, emergency preparedness

100. *Id.* at 96. Also available at <http://www.ogp.org.uk/pubs/254.pdf> (last visited July 20, 2003).

101. FRIEDMAN, *supra* note 8, at 115.

102. See the Occupational Safety and Health Administration's final processing and management regulations. 57 Fed. Reg. 6356 (Feb. 24, 1992) (codified as amended at 29 C.F.R. pt. 1910 (1996)).

plans in conjunction with the emergency services, relevant authorities, and the local community, recognizing potential transboundary impacts.¹⁰³

2.11. Preventative Plan and Program. Assess environmental impacts before starting a new activity or project and before decommissioning a facility or leaving a site.

2.12. Design and Operation. Develop, design, and operate facilities and conduct activities in consideration of the efficient use of renewable resources, the management of adverse environmental impacts and waste generation, and the safe and responsible disposal of residual waste.

E. Waste Disposal and Pollution Prevention

2.13. Reduction and Disposal of Waste. Reduce and where possible eliminate waste through source reduction and recycling. Handle and dispose of all waste through safe and responsible methods.¹⁰⁴

2.14. Pollution Prevention Plan and Programs. Identify and analyze waste streams, production formulas, mass balances and the like. Recognize opportunities to reduce pollution and waste at the source and throughout manufacturing processes. And improve processes so as to reduce, and/or eliminate pollution and waste.

2.15. Toxic Use Reduction. Identify and analyze use of toxic chemicals and toxic processes, recognize opportunities to reduce use of said toxins, and minimize or eliminate the use of said toxins.

2.16. Objectives and Timetables. Establish and report on performance targets and goals and timetables, e.g., reduce leaks and spill incidents by 90% by 2004.

F. Product and Service Safety

2.17. Environmental Business Strategy. Integrate environmental principles and goals into each aspect of the operations of businesses and seek corporate strategic advantage and competitive business advantages through promoting environmental protection.

2.18. Product Impact. Reduce and where possible eliminate the use, manufacture, and/or sale of products and services that cause environmental damage or health or safety hazards. Inform customers of the environmental impacts of products and services and try to correct unsafe use.¹⁰⁵

2.19. Product Development. Develop and provide products or services that have no undue environmental impact and are safe in their intended use, that are efficient in their consump-

tion of energy and natural resources, and that can be recycled, reused, or disposed of safely.¹⁰⁶

2.20. Precautionary Approach. Modify manufacture marketing, or use of products or services or the conduct of activities, consistent with scientific and technical understanding, to prevent serious or irreversible environmental degradation.¹⁰⁷

G. Public Disclosure

2.21. Public Disclosure. Inform in a timely manner everyone who may be affected by conditions that might endanger health, safety, or the environment. Regularly seek advice and counsel through dialogue with persons in communities near company facilities.¹⁰⁸ Encourage and protect employees and host residents for reporting dangerous incidents or conditions to management or to appropriate authorities.

H. Capital Expenditures

2.22. Capital Expenditures. Provide a capital budget adequate to comfortably address environmental compliance programs, remediation, product safety, waste disposal, and these corporate environmental principles.

I. Long-Range Planning Program

2.23. Long-Range Planning Program. Identify, analyze, and develop long-range environmental concerns and integrate these into long-range planning so as to move ahead of compliance requirements and to guide effective regulatory development.

J. Environmental Restoration

2.24. Environmental Restoration. Promptly and responsibly correct conditions that endanger health, safety, or the environment. To the extent feasible, redress injuries to persons or damage caused to the environment and restore the environment.¹⁰⁹

K. Sustainable Use of Biosphere/Natural Resources

2.25. Sustainable Use of Biosphere/Natural Resources. Make sustainable risk of renewable natural resources such as water, soil, and forests. Conserve nonrenewable natural resources through efficient use and careful planning.¹¹⁰

L. Protection of Biosphere

2.26. Protection of Biosphere. Reduce and make continual progress toward eliminating the release of any substance that may cause environmental damage to the air, water, or the earth or its inhabitants. Safeguard all habitats affected by

103. See ICC, *Principles for Environmental Management*, at http://www.iccwbo.org/home/environment_and_energy/environment/charter.asp (last visited July 21, 2003).

104. CERES Principles, formerly the "Valdez Principles," were established in 1989, as a project of the Social Investment Forum, as amended in 1992. The principles are on file with CERES, 711 Atlantic Ave., Boston MA 02111, or at <http://www.ceres.org> (last visited Aug. 21, 2003), *supra* note 15.

105. See ICC, *Principles for Environmental Management*, *supra* note 103.

106. *Id.*

107. *Id.*

108. See CERES, *The CERES Principles*, at http://www.ceres.org/our_work/principles.htm (last visited July 21, 2003).

109. *Id.*

110. *Id.*

operations and protect open spaces and wilderness, while preserving biodiversity.¹¹¹

M. Energy Conservation

2.27. Energy Conservation. Conserve energy and improve the energy efficiency of internal operations and the goods and services sold or provided. Make every effort to use environmentally safe and sustainable energy sources.¹¹²

N. Environmental Management System (EMS)

2.28. EMS. (1) Use financial and promotion incentives to reward environmental activism among employees and site residents. (2) Communicate successes and failures and best practices in a monthly newsletter. (3) Create and convene monthly an environmental committee representing major components of the company. (4) Adopt ISO 9000 and 14000 standards.¹¹³

O. Senior Management Commitment/Responsibility

2.29. Senior Management Commitment/Responsibility. Ensure that the Board of Directors and the Chief Executive Officer are fully informed about pertinent environmental issues and are fully responsible for environmental protection. Consider demonstrated environmental commitment as a factor in selecting Directors and Chief Executives. Create an Environmental Committee of the Board of Directors.¹¹⁴

P. Shareholder Commitment/Responsibility

2.29. Shareholder Commitment/Responsibility. Encourage shareholder activism in protecting the environment by disclosing in environmental reports compliance information, legal exposure, potential environmental impacts, and risk assessments. Encourage shareholder communication and encourage open discussion of shareholder concerns on environmental issues.

Q. Total Quality Management (TQM)

2.31. TQM. Continue to improve corporate policies, programs, and environmental performance, taking into account technical developments, scientific understanding, consumer needs, and community expectations, with legal regulations as a starting point; and apply the same environmental criteria internationally.¹¹⁵

R. Contractors and Suppliers

2.32. Contractors and Suppliers. Demand that contractors, suppliers, and joint ventures follow these Corporate Environmental Principles as a condition precedent to this contractual relationship, acting on the company's behalf.

Where appropriate, require improvement in their environmental practices.¹¹⁶

S. Consumer Advice

2.33. Consumer Advice. Advise, and where relevant educate, customers, distributors, and the public in the safe use, transportation, storage, and disposal of products provided and apply similar considerations to the provision of services.¹¹⁷

T. Research

2.34. Research. Conduct or support research on the environmental impacts of raw materials, products, processes, emissions, and water associated with the enterprise and on the means of minimizing such adverse impacts.¹¹⁸

U. Transfer of Technology

2.35. Transfer of Technology. Contribute to the transfer of environmentally sound technology and management methods through the industrial and public sectors.¹¹⁹

V. Contributing to the Common Effort

2.36. Contributing to the Common Effort. Contribute to the development of public policy and to business, governmental, and intergovernmental programs and educational institutions that will enhance environmental awareness and protection.¹²⁰

W. Security

2.37. Security. Take active measures to safeguard facilities, property, products, and information from terrorist or criminal attack and sabotage.

Part III. Corporate Structure: Functions and Powers of Directors and Officers: Environmental Audit Committee in Large Publicly Held Corporations

3.01. Environmental Audit Committee. Establish an Environmental Audit Committee composed of members of the Board of Directors, controlled by independent directors. Said committee will be primarily responsible for ensuring environmental compliance and reporting environmental performance to the shareholders, operating communities, and the public.

3.02. Environmental Operating Committee. Each publicly traded corporation must establish and operate a broadly based Environmental Operating Committee to meet regularly and address environmental concerns.

111. *Id.*

112. *Id.*

113. For a detailed analysis of ISO, see JOSEPH CASCIO, *THE ISO 14000 HANDBOOK* (1996).

114. See CERES, *The CERES Principles*, *supra* note 108.

115. See ICC, *Principles for Environmental Management*, *supra* note 103.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

Part IV. Incentives and Penalties

4.01. Incentives and Penalties. Establish and communicate a clear system of employee incentives and penalties to reinforce these principles.

Part V. Development of an Effective Corporate Environmental Management Program

In addition to the Model Corporate Environmental Principles contained herein, each company has internal factors that influence the development and enhance environmental management programs. Some factors include strategy and mission, risks, corporate culture, customer expectations, and available resources. These should be considered in developing and achieving these principles through an effective environmental management program.¹²¹

1. Strategy and Mission

The first order of business with regard to creation of an environmental management program is that senior management should first develop an environmental management strategy.¹²² This strategy should be developed in parallel with those existing strategies such as marketing, financing, research and development, and total quality management, so that its integration does not produce conflicts. Ideally, the environmental strategy will benefit from those existing strategies and vice versa.

An integral part of a management strategy should be its environmental policy, or principles utilizing the CEP laid out above. This policy should be written to communicate management's strategy vis-à-vis the general public as well as those personnel affiliated with the company. The policy should take into consideration the public expectations as well as those of the customers, employees, the board of directors, and shareholders. Additionally, management should be aware that this policy will shape future expectations by those same groups. Many companies either publish environmental policies or include them as part of their annual reports.¹²³ Such policies are an integral part of the corporate mission.

Each company should create a unique environmental policy that it can call its own. It has long been recognized in the marketing industry that effective brand labeling can and most certainly does contribute to successful marketing and

sales. So too can this principle be employed in the management framework. By creating a "labeling scheme" that customers use to identify the product, i.e., the environmental and management policy which end up in the form of product or services to the customer, those involved with a corporation ultimately identify the strategy with the corporation, thereby perpetuating the policy's existence, such as the "Monsanto Pledge."

There are certain key areas that management should consider in developing its policy and principles. The specific issues addressed in the policy vary and will depend on the nature of the organization. For example, management should ensure that its policy is initiated, developed and actively supported by management at the highest levels. Management's environmental policy should be relevant to its activities, products, and services and their environmental effects. Its policy must be understood, implemented, and maintained at all levels in the organization and be publicly available. Furthermore, it should include a commitment to continual improvement of environmental performance, and provide for the setting of environmental objectives. At a minimum, the policy will commit the organization to meet relevant regulatory, legislative, and organizational requirements. Management needs to get "buy-in" from all parts of the business operations, looking to and utilizing the culture of the organization.

The following additional factors should be considered and are conducive to corporate success. Once established, management needs to evaluate its success.¹²⁴ And it needs to adjust its program to reach maximum effectiveness.¹²⁵

2. Risks

Another factor important to a successful environmental program is the attendant risk involved. Certain industries, because of the nature of the business, either generate more wastes, or have the potential to do greater harm to the environment than other industries. In addition, some industries are more heavily regulated than others. As such, it becomes imperative to devote more time, effort, and money to effectively manage environmental risks and exposures. It comes as no surprise that these companies tend to have more so-

124. For example, management should consider that its policy:

1. Is initiated, developed, and actively supported by management at the highest level;
2. Is relevant to its activities, products and services, and their environmental effects;
3. Is understood, implemented, and maintained at all levels in the organization;
4. Is publicly available;
5. Includes a commitment to continual improvement of environmental performance;
6. Provides for the setting of environmental objectives; and
7. At a minimum, will commit the organization to meet relevant regulatory, legislative, and company requirements.

125. A policy may, for example, state commitments to:

1. Reduce waste and consumption of resources (materials, fuel, and energy);
2. Reduce or eliminate the production of polluting releases to the environment;
3. Design products in such a way as to minimize their environmental effects of raw material sourcing, e.g., on habitats, on species diversity, and on natural beauty;
4. Minimize the environmental effects of new developments through strategic planning.

121. A company should develop a green strategy consistent with its business goals, including green marketing. See generally PATRICK CAISON & JULIA MOULDER, GREEN IS GOLD: BUSINESS TALKING TO BUSINESS ABOUT THE ENVIRONMENTAL REVOLUTION 107-38 (1991) (includes a bibliography on green business and a list of environmental organizations interested in working with the corporate community). See also Engineering News-Record (ENR), 2001 ENR Top Environmental Firms, at http://www.enr.construction.com/people/toplists/topenvdesign/topenv_a-z.asp (last visited July 27, 2003) (ranking the top 100 environmental consulting firms based on gross revenue for a list of consulting firms that can assist a corporation develop and operate an environmental management program).

122. See generally ROSEMARY O'LEARY ET AL., MANAGING FOR THE ENVIRONMENT: UNDERSTANDING THE LEGAL, ORGANIZATIONAL, AND POLICY CHALLENGES (1999) (showing business managers how to integrate environmental management into business strategies, structures, and information systems).

123. See, e.g., SUNOCO, INC., 1998 HEALTH, ENVIRONMENTAL, AND SAFETY REVIEW AND CERES REPORT (1998) and their website, available at <http://www.sunocoinc.com> (last visited July 27, 2003).

sophisticated environmental management programs.¹²⁶ Therefore, it is important to prioritize policies so as to address the greatest risk to human health and safety.

3. Corporate Culture

Corporate culture should set the tone for operations, policies, and procedures. Several key areas should be considered when evaluating a corporate culture. The leadership style of the corporate executives, their visions, and goals are primary sources. The organization structure, ethics, and outside industry influences should also be considered. Problems may result even if there is a good fit between the existing culture and the proposed strategy, regardless of whether or not the environment strategy is strong. For example, a company with a decentralized management structure may face significant challenges if the environmental management program is designed with a centralized approach. As a result, customer expectations may be greatly realized.

4. Customer Expectations

Customer expectations are also essential to developing a successful environmental management program. A corporate supplier can facilitate a customer's needs by developing environmental-friendly products. Therefore, those expectations ultimately have a direct impact on corporate success over all.

III. The Case for CEP

There are many reasons why a corporation would want to adopt an environmental code of conduct such as CEP.¹²⁷ The first two are legally driven, the second two are investor driven, and the third two are business driven. The last reason is a moral or ethical one. First, adopting CEP is an essential aspect of an effective environmental compliance program.¹²⁸ Second, CEP may lessen a criminal fine or penalty should an environmental violation occur.¹²⁹ Third, many institutional investors want corporations to disclose their environmental vulnerabilities to guide their investments.¹³⁰ Fourth, socially responsible investors demand that corporations perform their societal duty to promote sustainable developments and protect the environment.¹³¹ Fifth, CEP may

add to a corporation's goodwill in dealing with constituent groups, including consumers,¹³² suppliers,¹³³ site communities,¹³⁴ and environmental activists.¹³⁵ Sixth, CEP might provide a competitive business advantage.¹³⁶ These factors play an integral part in the structure of a corporate compliance program.¹³⁷ And seventh, CEP is, ethically, the right thing to do.¹³⁸

A. CEP Is Essential to an Effective Compliance Program

Assume, arguendo, that a corporation is not interested in going "beyond compliance." Perhaps it believes that its real and sole social responsibility is to maximize shareholder profits. (Perhaps it lacks the capital necessary to develop and operate an outstanding environmental management program.) There is still ample reason to adopt CEP as essential to operating an effective compliance program. No matter the motive, a corporation's compliance with environmental laws and regulations is one of the most challenging tasks for any business.¹³⁹

The benefits to a corporation that adopts CEP may include the following: first, CEP provides uniform rules for environmental management and ethical behavior. Second, CEP promotes greater corporate accountability at the manager, officer, and director levels. Third, CEP could decrease the level of governmental monitoring, because it promotes self-regulation. And fourth, CEP encourages the education of ordinary citizens on environmental management and eth-

visited July 27, 2003). See also *Shareholders Set Records Voting for Environmental Resolutions*, BATE, *supra* note 2, Aug. 2002 (reporting on IRRC analysis showing greater support for environmental shareholder resolutions).

126. See generally W.B. Johnson, *Construction and Application of Pollution Exclusion Clause in Liability Insurance Policy*, 39 A.L.R. 4th 1047 (1985) (noting that while insurance is an important risk-shifting strategy, there is a split in the judicial decisions on the effect that the pollution exclusion clause has on barring coverage).

127. See generally ENVIRONMENTAL LAW INSTITUTE ET AL., DRIVERS, DESIGNS, AND THE CONSEQUENCES OF ENVIRONMENTAL MANAGEMENT SYSTEMS (2001), available at <http://www.63.241.172.178/isopilots/NDEMS2000Compendium.pdf> (last visited Mar. 12, 2001) and <http://www.eli.org>. (last visited Mar. 12, 2001) [hereinafter DRIVERS] (seeking to evaluate actual effects of implementation of an EMS).

128. See FRIEDMAN, *supra* note 8, at 51-115.

129. Federal sentencing guidelines for environmental crimes propose a reduction in criminal penalty if a company has an EMS. See Kenneth S. Woodrow, *The Proposed Environmental Sentencing Guidelines: A Model for Corporate Environmental Compliance Programs*, 25 Env't Rep. (BNA) 325 (June 17, 1994).

130. In Great Britain, the Associating British Insurance adopted new guidelines requiring corporations to disclose environmental issues in their annual report. See BATE, *supra* note 2, Aug. 2002.

131. For example, the Investor Responsibility Research Center (IRRC) is a socially conscious investor group. See <http://www.irrc.org> (last

132. See, e.g., COUNCIL ON ECONOMIC PRIORITIES, MOBIL OIL CORPORATION: A REPORT ON THE COMPANY'S ENVIRONMENTAL POLICIES AND PRACTICES, CORPORATE ENVIRONMENTAL DATA CLEARINGHOUSE (1991). See generally THE COUNCIL ON ECONOMIC PRIORITIES, SHOPPING FOR A BETTER WORLD (1969) (consumer report on socially responsible compliance and their products). See also WALTER CODDINGTON, ENVIRONMENTAL MARKETING: POSITIVE STRATEGIES FOR REACHING THE GREEN CONSUMER (1993).

133. Some suppliers and purchasers are requiring compliance with ISO standards, including 14000 (environment management), as a prerequisite to purchasing or supplying product and/or services.

134. Site communities' view of a corporation's environmental conduct has become more significant with the environmental equity or environmental racism movement. See generally FRIEDMAN, *supra* note 8, at 314-16.

135. Environmental activists or organizations or NGOs are sophisticated in raising public awareness of environmental performance.

136. See Harvard Business School Case Studies and the Monsanto Pledge. See generally JOSEPH FIKSEL, COMPETITIVE ADVANTAGE THROUGH ENVIRONMENTAL EXCELLENCE 4 (1996).

137. See DRIVERS, *supra* note 127, at 7-8, wherein the main motivations found as incentives for facilities to implement an EMS include the premise that "corporate policies matter," anticipation of regulatory benefits, desire to improve compliance, the recognition that market forces are important in terms of consumer pressures from both domestic and international buyers, the recognition that government assistance matters, and cost reduction benefits.

138. For a valuable analysis of the ethical dimensions of environmental conscience, our attitudes toward nature and the problems of "distributional justice—i.e., sharing environmental burdens across racial, economic, and intergenerational categories," see *Ethical Dimensions*, in ENVIRONMENTAL LAW ANTHOLOGY ch. 1 (Robert L. Fischman et al., eds. 1996).

139. The federal government has also recognized the importance of developing EMS. Exec. Order No. 13148, 3 C.F.R. §241 (2000), ADMIN. MAT. 45117, requiring, inter alia, that federal agencies create and implement EMS.

ical behavior. Hence, CEP could provide a means of reducing the regulatory burdens of facilities.¹⁴⁰

B. CEP May Lessen a Criminal Fine or Penalty

On March 5, 1993, an advisory group to the U.S. Sentencing Commission presented a working draft of recommended sentencing guidelines setting forth criminal penalties for organizations convicted of federal environmental crimes. The proposal outlined five steps to follow when considering an offending organization for sentencing. The topics covered are: determining a base fine, aggravating and mitigating factors, factors for environmental compliance, general limitations, and probation.¹⁴¹ Establishment of an environmental management program would be a mitigating factor. Therefore, CEP would likely be a "mitigating factor" that might lessen a criminal penalty for a corporate environmental crime.¹⁴² This is very important as corporate environmental crimes may not require a scienter showing.¹⁴³

C. CEP Follows a Newly Developed Scholarly Discipline

There is, emerging in the boardrooms and in the classrooms across the nation, a new scholarly discipline, employing principles of strategic corporate environmental management. CEP addresses this developing discipline of strategic environmental management. Although environmental management is not yet being viewed as a "science," its reputation has earned it the mark of a discipline, one in which many business schools are embracing and adding to their curricula.¹⁴⁴

Environmental management should be viewed broadly through a multi-disciplinary telescope. It takes into account

legal compliance, governmental and community relations, and business management principles.¹⁴⁵ It incorporates principles of risk-reduction, auditing, public accountability, planning, business practices, community and employee involvement, and cost management. Some of its tools include life-cycle analysis,¹⁴⁶ environmental or full cost accounting,¹⁴⁷ international environmental standards such as the ISO's ISO 14000,¹⁴⁸ sustainable manufacturing,¹⁴⁹ pollution prevention strategies,¹⁵⁰ and total quality management.¹⁵¹ A successful integration of all these into one single business strategy is "strategic environmental management," or "the pursuit of competitive advantage through environmental management strategies."¹⁵²

D. CEP Follows a Market-Driven, Self-Regulatory Approach

A developing trend in environmental protection is a market-driven approach. For example, under the Clean Water Act (CWA), mitigation banks may satisfy the §404 permit program and the Food Security Act wetland conservation provisions, allowing "credits" traded to offset wetland losses or "debits."¹⁵³ Environmental regulations are often viewed from a free market perspective. This development seeks to link market forces and self-regulation. It follows then, that the self-regulation within the environmental scheme may be the nexus between CEP and the goal of environmental protection. When organizations employ compli-

140. DRIVERS, *supra* note 127, at 3.

141. *See id.* Aggravating factors include:

1. Management involvement;
2. Threat to the environment;
3. Threat to human life and safety;
4. Scienter (reckless indifference to legal requirements);
5. Prior criminal compliance history;
6. Prior civil compliance history;
7. Concealment;
8. Violation of an order;
9. Absence of compliance program or other organized effort; and
10. Absence of a permit.

Mitigating factors include:

1. Commitment to environmental compliance such as:
 - Line management attention to compliance;
 - Measuring, maintaining and improving compliance;
 - Integration of environmental policies, standards and procedures;
 - Auditing, monitoring, reporting, and tracking system;
 - Regulatory expertise, training and evaluation;
 - Incentives for compliance;
 - Disciplinary procedures;
 - Continuing evaluation and improvement;
2. Cooperation and self-reporting;
3. Absence of scienter; and
4. Remedial assistance.

142. EISENBERG, *supra* note 39, at 581-83.

143. *See* environmental scienter requirement, described in FRIEDMAN, *supra* note 8, at 25-26.

144. *Id.* at 51 n.1 (referring to a report that "as of May 1995, up to 50 business schools and 100 other schools included 'environmental business' courses in their curricula." ENV'T TODAY, May 1995, at 1).

145. These observations result from my profession as a pioneer of strategic environmental management at Monsanto Company in St. Louis and at Arthur Andersen's Worldwide Environmental Management Consulting Group in Chicago.

146. "Product life-cycle analysis" is "a detailed balance sheet of the energy and material inputs and outputs of a carefully defined system, such as a product, activity, or set of processes. . . . encompasses everything from raw material production to end-of-life alternatives such as incineration . . . to better understand the full environmental cost of production" FRIEDMAN, *supra* note 8, at 82 nn.127-28.

147. "Activity-based costing" or "full cost accounting" or the "Eco-Audit" is an attempt to take an accounting-based strategy to environmental management by first adding a cost to environmental expenses and activities and then making sound management decisions using a cost-based analysis. (The author participated in 1993 in the creation and development of Arthur Andersen's "Eco-Audit.")

148. *See* JOSEPH CASCIO, THE ISO 14000 HANDBOOK (1996).

149. "Sustainable manufacturing 'applies the sustainable development concept to manufacturing. . . . and address material selection, production, Market and After-Market,' and full cost accounting." FRIEDMAN, *supra* note 8, at 84, 111-12.

150. *See, e.g.*, New Jersey's Pollution Prevention Act, N.J. ADMIN. CODE tit. 7, §1K-4.3(b)(6) (1993), seeking to encourage companies to substitute pollution prevention for costly waste management strategies.

151. *See generally* Global Environmental Management Initiative, Proceedings—Corporate Quality/Environmental Management: The First Conference (Washington, D.C., Jan. 9-10, 1991) (referred to in FRIEDMAN, *supra* note 8, at 76-79 and n.108).

152. FRIEDMAN, *supra* note 8, at 73. *See also* BRADEN R. ALLENBY, INDUSTRIAL ECOLOGY: POLICY FRAMEWORK AND IMPLEMENTATION (1999); Susan J. Colby et al., *The Real Green Issue: Debunking the Myths of Environmental Management*, 2 MCKINSEY Q. 133 (1995).

153. CWA, 33 U.S.C. §1311(a), ELR STAT. FWPCA §404(a); U.S. Army Corps of Engineers & U.S. EPA, Mitigation Memorandum of Agreement, 55 Fed. Reg. 9210, 9210-12 (1990) (addressing mitigation with a three-part sequencing approach of avoidance, minimization, and compensatory mitigation phases); U.S. EPA et al., Federal Guidelines for the Establishment, Use, and Operation of Mitigation Banks, 60 Fed. Reg. 58605 (Nov. 28, 1995). *See also* ENVIRONMENTAL LAW INSTITUTE, WETLAND MITIGATION BANKING 53-55 (1993).

ance as their mainline strategy and then try to “step beyond compliance” in search of their own, new, and improved policy, the end result, namely the protection of the environment as low cost, is thereby attainable. CEP employs both internal and external influences. Hence, a major benefit of CEP is a company maximizing its resources, thereby enhancing its economic performance while reducing its impacts on the environment.¹⁵⁴

*E. CEP Internalized External Influences Moving Companies “Beyond Compliance”*¹⁵⁵

Many external organizations and groups have used “environmental management programs” to challenge corporate behavior. As environmental management programs evolve and environmental standards develop, a company can look to a number of external sources for expectations and guidance on how to enhance existing programs. The following are some brief descriptions of predominant influences that potentially affect companies. Although this list is not exhaustive, it covers the predominant influences of the past several years. These influences and standards include: ISO 14000, British Standard (BS) 7750, American National Standards Institute (ANSI)/American Society for Quality Control (ASQC) E4, and Community Eco-Management and Audit Scheme. CEP would effectively internalize these external influences and channel them for positive societal purposes. The following describes some of the most significant external developments in the environmental area.

1. ISO 14000¹⁵⁶

The ISO 14000 series has roots traceable to Geneva, Switzerland in 1947. The Global Environmental Initiative in Rio de Janeiro has set the standards by which companies conduct business in other countries.¹⁵⁷ It should be noted that ISO standards, which are better seen as systems, are voluntary. They do not, in any way, replace or increase existing legal requirements. Conformity to the systems may be either self-declared or confirmed by a third party evaluator. Although voluntary at this time, compliance with these systems may eventually become a requirement as they become the standard for environmental conformance. This is especially true in emerging markets that may include these systems in their environmental laws.

The latest development in standardization and EMS is the ISO 14000, the new series of voluntary consensus environmental management standards. It is likely that ISO 14000 information will be used both internally to improve EMS and externally by financial institutions including insurance companies. Most commentators have stated that ISO 14000 is more than an extension of ISO 9000, the well-known quality management standard series. In late 1996, the ISO published the final version of an EMS called ISO 14001.

Moreover, the United Nations’ (U.N.’s) endorsement of ISO 14000 may lead to uniform adoption of rules for environmentally safe behavior.¹⁵⁸ However, the true motivating factor for adoption and compliance with the ISO rules may well be the risk of criminal and civil fines for violation of the ISO 14000 regulations.¹⁵⁹ In adopting ISO 14000, a facility may expect to see increased employee involvement in environmental management, improved document control and manufacturing efficiency, and increased focus on nonregulated impacts.¹⁶⁰ External benefits may include improved vendor contracts, increased customer satisfaction, increased ability to market products domestically, increased access to international markets, and some regulatory benefits.¹⁶¹ EPA has sponsored a demonstration project involving the implementation of ISO 14000 standards in the United States.¹⁶²

Furthermore, there have been conflicts over different accreditation programs for the emerging national environmental management accreditation program by two different standards groups, the Registrar Accreditation Board (RAB) and the ANSI.

2. BS 7750

The British Standards Institute (BSI) developed and published the BS 7750 environmental management systems standard in 1992.¹⁶³ It parallels ISO 9000 mainly by describing a similar type generic model for a management system. Both ISO 9000 and BS 7750 have similar requirements in the areas of management commitment and involvement, internal auditing, the foundation of company policies, and the continual review of audit results versus those policies to encourage continuous improvement.¹⁶⁴

158. Donald A. Carr & William L. Thomas, *Devising a Compliance Strategy Under the ISO 14000 International Environmental Management Standards*, 15 PACE ENVTL. L. REV. 85 (1997) (examining development and adoption of corporate compliance programs and explaining role of ISO 14000 to future corporate environmental management programs); Craig D. Galli, *ISO 14000 and Environmental Management Systems in a Nutshell*, 9 UTAH B.J. 15 (1996) (describing origin and mechanics of ISO 14000).

159. See Carr & Thomas, *supra* note 158.

160. *ISO 14001: Greening Management Systems*, in GREENER MANUFACTURING AND OPERATIONS ch. 12 (J. Sarkis ed., 2001). Also found in DRIVERS, *supra* note 127, at 91.

161. *Greening Management Systems*, *supra* note 160. Compare NSF INTERNATIONAL, ENVIRONMENTAL MANAGEMENT SYSTEMS: AN IMPLEMENTATION GUIDE FOR SMALL AND MEDIUM SIZED ORGANIZATIONS (2d ed. 2001).

162. CRAIG P. DIAMOND, ENVIRONMENTAL MANAGEMENT SYSTEM DEMONSTRATION PROJECT: FINAL REPORT 7 (1996).

163. The BS is available from the BSI, 2 Park St., London UK W1A 2BS.

164. The components of an environmental management program as outlined in BS 7750 include the following:

1. Responsibility, authority, and resources;
2. Verification resources and personnel;
3. Management representative;
4. Personnel, communication, and training;
5. Register of legislative, regulatory, and other policy requirements;
6. Communications;
7. Environmental effects evaluation and register;
8. Environmental management manual and documentation;
9. Verification, measurement, and testing;
10. Noncompliance and corrective action;
11. Environmental management records;
12. Environmental management audits; and
13. Environmental management reviews.

154. DRIVERS, *supra* note 127, at 2.

155. Mitchell F. Crusto & Joseph J. Egan, *Creating Environmental Management Programs: A Model for the 1990s*, Presentation at the Environmental Law Institute’s Practical Environmental Management Conference (June 25-29, 1993).

156. For an update on ISO 14000 development, see BATE, *supra* note 2, Aug. 2002, at 1-4. See also <http://www.iso.ch/iso/en/ISOOnline>. frontpage (last visited July 27, 2003).

157. See FRIEDMAN, *supra* note 8, at 237-43, 256-58.

In addition, BS 7750 requires “upstream” evaluation, i.e., of vendors and suppliers, and “downstream” assessment, i.e., fate of products and wastes. BS 7750 has been piloted in the United Kingdom by 10 companies in the chemical industry. BSI is also working on a management system standard for safety and health to be called BS 8750.

3. ANSI/ASQC¹⁶⁵

ANSI/ASQC E4 is a management standard that is intended to guide the user in preparing detailed implementation requirements and performance specifications for a quality program integral to environmental activities. The standard provides the framework and criteria for establishing a program that encompasses quality management aspects of environmental programs, as well as the quality assurance and quality control of technical activities. This standard endorses and embraces the management philosophy that one must first plan what is to be done, implement what is planned, and then assess how well the results meet the needs of the user. This plan, implementation, and assessment approach are embedded in the standard. ANSI/ASQC E4 is intended to be a guide for the preparation of a quality program that satisfies the unique mission of the organization using the standard. It is not intended to be used as a checklist for compliance with a set of requirements. Three types of programs are identified: Management Systems; Collection and Evaluation of Environmental Data; and Design, Construction, and Operation of Engineered Environmental Systems.¹⁶⁶

4. Community Eco-Management and Audit Scheme (previously named Eco-Audit)

The European Parliament approved this voluntary system for industrial eco-audits in January 1993, which took effect in 1994. The scheme was previously called Eco-Audit and

165. Gary L. Johnson, *ANSI/ASQC E4: Unified Management Standard for Quality Assurance of Environmental Programs*, TOTAL QUALITY MGMT., Summer 1992.

166. The elements contained in the EMS are:

1. Quality management and organization;
2. Quality program and description;
3. Personnel qualification and training;
4. Procurement of items and services;
5. Quality documents and records;
6. Use of computer hardware and software;
7. Quality planning;
8. Quality implementation;
9. Quality assessment and response; and
10. Quality improvement.

The program elements contained in the collection and evaluation of environmental data are:

1. Planning and scoping;
2. Design of data collection systems;
3. Implementation of planned operations;
4. Quality assessment and response; and
5. Assessment of data usability.

The program elements contained in the design, construction, and operation of engineered environmental systems are:

1. Planning;
2. Design of systems;
3. Construction/fabrication of systems and components;
4. Operation of systems;
5. Quality assessment and response; and
6. Verification and acceptance of systems.

eliminated all mandatory components, including the provision requiring external verification of self-audits but retained publication of periodic environmental statements detailing a company's activities and assessing important environmental issues. The Economic and Social Committee of the European Community (EC) believed that the program should be mandatory for “high environmental risk” businesses and prefers to retain the approach of the external auditor approach. There are supplemental proposals of eco-audits for small and medium sized companies.¹⁶⁷

This system applies to anyone trading with a member of the EC. Some countries may prohibit trade with organizations known to use certain hazardous materials. The EC's program calls for the accreditation of auditors and effective, ongoing environmental compliance. Companies meeting the proposed standards are encouraged to use a special logo on their correspondence and advertising. The logo is believed to be important to consumer acceptance of products.¹⁶⁸

5. Comité Européen de Normalisation (CEN)¹⁶⁹

This European standards body is made up of national standards organizations of the 12 EC and 6 European Free Trade Association countries. CEN outlines European standards sought to be developed by consensus and adopted by the votes of a weighted majority. CEN identifies the following activities for itself: environmental management tools; environmental measurement methods; measurement methods for environmental properties of chemical substances and chemical products; pollution control methods and equipment; and methods for evaluation of environmental effects of products.

*F. CEP Promotes Shareholders' Relations*¹⁷⁰

Perhaps more effective in bringing about corporate change are the actions of the investing community. Ethical investing is not a new concept but became widespread in the 1990s.¹⁷¹ For example, the CERES Principles were originally introduced as the Valdez Principles in 1989 as a project of the Social Investment Forum. An amended version was adopted by the CERES Board of Directors on April 28, 1992. In March and April, respectively, “the Body Shop and the Timberland Company join[ed] the roster of 50 signatories; they follow the Sun Company, which became the first Fortune 500 company to endorse the CERES Principles in

167. See FRIEDMAN, *supra* note 8, at 234-37, 256.

168. See Rebecca P. Thompson et al., *Environmental Auditing*, INTERNAL AUDITOR, Apr. 1993.

169. TURNER T. SMITH, UNDERSTANDING EUROPEAN ENVIRONMENTAL REGULATION, NY: THE CONFERENCE BOARD, INC. (1993).

170. See generally O'KELLEY, *supra* note 25, at 220-25 (reviewing socially significant and governance-related shareholder proposals).

171. See *supra* notes 15, 104. See also Elizabeth Glass Geltman & Andrew E. Skrobback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465 (1997) (wherein the observation was made that “voluntary disclosure is increasing because it allows corporations to tap into powerful public sentiment. Shareholder concerns for the environment have also increasingly influenced corporate boards through investors' use of shareholder proposals”). See Natural Resources Defense Council v. Securities & Exchange Comm'n, 389 F. Supp. 689, 5 ELR 20074 (D.D.C. 1974). See Levine v. NL Indus., 926 F.2d 199, 21 ELR 20556 (2d Cir. 1991) (involving litigation for environmental disclosure by a shareholder against a public company).

February.”¹⁷² The annual completion of the CERES report is intended to affect the overall reallocation of funds to socially responsible companies. Mutual funds and investors are the typical recipients of the CERES report.¹⁷³ CEP recognizes and responds to shareholders’ demand for accurate financial reporting and, sometimes, environmental progressive corporate actions.

G. CEP Promotes Free Trade

The EC realizes that to facilitate free trade, environmental issues must be managed. The Strategic Advisory Group for

172. *The Body Shop, Timberland Sign CERES Principles*, BATE, *supra* note 2, May 1993.

173. The principles are:

1. Protection of the Biosphere

We will reduce and make continual progress toward eliminating the release of any substance that may cause environmental damage to the air, water, or the earth or its inhabitants. We will safeguard all habitats affected by our operations and will protect open spaces and wilderness, while preserving biodiversity.

2. Sustainable Use of Natural Resources

We will make sustainable use of renewable natural resources, such as water, soils and forests. We will conserve nonrenewable natural resources through efficient use and careful planning.

3. Reduction and Disposal of Wastes

We will reduce and, where possible, eliminate waste through source reduction and recycling. All waste will be handled and disposed of through safe and responsible methods.

4. Energy Conservation

We will conserve energy and improve the energy efficiency of our internal operations and of the goods and services we sell. We will make every effort to use environmentally safe and sustainable energy sources.

5. Risk Reduction

We will strive to minimize the environmental, health and safety risks to our employees and the communities in which we operate through safe technologies, facilities and operating procedures, and by being prepared for emergencies.

6. Safe Products and Services

We will reduce and, where possible, eliminate the use, manufacturing or sale of products and services that cause environmental damage or health or safety hazards. We will inform our customers of the environmental impacts of our products or services and try to correct unsafe use.

7. Environmental Restoration

We will promptly and responsibly correct conditions we have caused that endanger health, safety, or the environment. To the extent feasible, we will redress injuries we have caused to persons or damage we have caused to the environment and will restore the environment.

8. Informing the Public

We will inform in a timely manner everyone who may be affected by conditions caused by our company that might endanger health, safety, or the environment. We will regularly seek advice and counsel through dialogue with persons in communities near our facilities. We will not take any action against employees for reporting dangerous incidents or conditions to management or to appropriate authorities.

9. Management Commitment

We will implement these Principles and sustain a process that ensures that the Board of Directors and Chief Executive Officer are responsible for environmental policy. In selecting our Board of Directors, we will consider demonstrated environmental commitment as a factor.

10. Audits and Reports

We will conduct an annual self-evaluation of our progress in implementing these Principles. We will support the timely creation of generally accepted environmental audit procedures. We will annually complete the CERES Report, which will be made available to the public.

the Environment (SAGE)¹⁷⁴ was established by the ISO, along with the International Electrotechnical Committee, in 1991 to make recommendations regarding international standards for the environment. SAGE concluded that an EMS was a critical element in achieving environmental excellence and in meeting future environmental needs worldwide. SAGE recommended that a technical committee develop an international EMS standard.¹⁷⁵ In addition to the above listing of the CERES Principles, SAGE recommended that application guides be written when needed for specific industries. CEP recognizes and responds to the importance of environmental protection and its use as a door-opener to potential trade barriers raised to promote environmental protection.

H. CEP Follows Good Management Principles

Increasingly, the TQM philosophy and customer-oriented principles are being teamed with industry’s concern for environmental quality and responsibility. The goal of a TQM program is to move an organization toward continuous improvement of quality. As such, many of the practices of TQM can be applied to environmental management—specifically, the elimination of waste.

I. CEP Protects Against Losing Corporate Status

This section supports the proposition that the adoption of CEP is of great benefit to businesses operating in today’s regulated environment, especially internationally. Furthermore, CEP addresses the unlikely but menacing proposal that a corporation lose its corporate status for environmental violations. What happens if a corporation loses corporate status? In the few instances where this has happened, the corporation “defaults” to a general partnership if two or more owners¹⁷⁶ or to an unincorporated sole proprietorship if one owner exists.¹⁷⁷ In either case, the result is *unlimited* personal liability for the business’ liability. The “shareholder” loses limited liability protection and is personally liable beyond the extent of his/her investment. General partners are jointly and severally liable for the business liabilities and those of the other “partners.” Imagine an instance

174. Susan L. Jackson, *Certification of Environmental Management Systems—For ISO 9000 and Competitive Advantage*, TOTAL QUALITY ENVTL. MGMT., Spring 1993.

175. This generic system should:

1. Fit with existing management system standards, i.e., ISO 9000.
2. Describe best practices in environment management.
3. Provide consistency worldwide.
4. Provide a model for elements of an effective EMS.
5. Not include performance criteria (these should be left to regulatory bodies).
6. Include requirements for leadership commitment.
7. Be voluntary.
8. Add value to an organization when applied.
9. Be challenging, yet available to and within the capability of any business worldwide.
10. Include requirements for communication to stakeholders.
11. Link to ISO 9000 and other management systems standards through the use of common language to enable a single cohesive management system.
12. Be flexible.

176. See generally Crusto, *supra* note 38.

177. *Id.*

where due to environmental violations, the shareholders of Exxon are held, jointly and severally, personally liable for Exxon's past, present, and future environmental liabilities (and other business liabilities).

IV. The Need for CEP: Shortcomings in the Existing Efforts to Promote Corporate Environmental Accountability

Returning to the earlier analysis of corporate law, it appears that there are many features of U.S. corporate law that hinder environment protection. First, corporate purpose is too narrowly focused on enhancing shareholder value. Legal compliance is, therefore, considered an option and not a mandate. Second, shareholders are shielded from environmental liability by the limited liability doctrine. Third, environmental reporting is insufficient and often inaccurate, and shareholder activism is greatly discouraged. Fourth, directors are generally unaccountable and management too independent. Fifth, corporations wield a big political and economic stick; and, as a result, government is unable or unwilling to enforce the laws or selectively enforce them. And sixth, corporations can utilize liberal bankruptcy laws to avoid past environmental infractions.¹⁷⁸ Hence, as U.S. corporate law hinders environmental protection, there is a great need to adopt CEP.

Despite corporate law's failure to promote environmental protection, corporations are still influenced by more than just corporate law. What are noncorporate law sources of influence on corporate environmental behavior? Do they have an effect on corporate environmental behavior?

Many corporate constituents have made various attempts to change corporate environmental behavior.¹⁷⁹ These include three major sources of influence: the first are government regulators, such as EPA. The second are large, influential shareholders, commonly referred to as institutional investors, such as the California Teachers Retirement Fund. And, the third is the SEC, which regulates investments in larger, publicly traded companies. These external influences have, in recent years, expanded their grip upon the corporate infrastructure. An examination of their effect on corporate environmental behavior is appropriate and follows.

A. Outside Forces Fail to Change Corporate Environmental Behavior

1. EPA

In the last century, the federal government has forced business to promote environmental protection. Founded in 1970, EPA is the federal agency primarily responsible for protecting human health and the environment. The Agency enforces air, water, and land laws. It also ensures that designated health standards are met and oversees a number of offices to effectuate this result. While EPA has been effective in its enforcement of environmental laws and regulations, it has been suggested that such enforcement is not as rigorous as it should be.¹⁸⁰ Despite these allegations, it has been sug-

gested that enforcement of environmental laws may create disincentives, and thus, liability for violations of these laws should be limited, especially for the corporate director, officer, or employee.¹⁸¹

One large-scale negative effect of the "command-and-control" approach of governmental regulations is one of "corporate avoidance," whereby qualified individuals will not do the work or take on the risk that their actions could result in liability. Big business is then forced to respond with high-dollar compensation packages to attract and retain competent professionals, possibly at a price, such that there is less money for capital outlays. Moreover, some believe that in the future, America's goals of environmental quality will be increasingly accomplished through a self-regulatory process supported by the background threat of the traditional enforcement model.¹⁸² However, history has shown that actual enforcement, as opposed to mere threats, is what is necessary to get actual results.¹⁸³

Civil fines have unsuccessfully penetrated corporate structure. They have not brought about systematic corporate environmental improvements. Mindful that corporations may treat even massive civil environmental penalties as simply "a cost of doing business," the U.S. Congress has classified numerous violations of environmental statutes as felonies.¹⁸⁴ Under the "responsible corporate officer" doctrine,¹⁸⁵ "corporate management can, in certain circumstances, be held criminally liable as individuals for environmental violations even though those managers did not personally participate in or direct each of the actions which gave rise to criminal liability."¹⁸⁶ On November 16, 1993, the U.S. Sentencing Commission released draft sentencing guidelines for corporate environmental crimes.¹⁸⁷

Despite both civil and criminal attempts, EPA recognizes the need to systemically change corporate environmental behavior. As a result, EPA has experimented with programs as an alternative to regulatory programs.

One such experiment is EPA's Environmental Leadership Program. Introducing this program on January 15, 1993, EPA stated that its goal of developing an environmental leadership program was "to encourage and publicly recognize environmental leadership and promote pollution pre-

181. See *supra* note 7.

182. See STEPHEN SCHMIDHEINY, CHANGING COURSE: A GLOBAL PERSPECTIVE ON DEVELOPMENT AND THE ENVIRONMENT 19 (1992) (discussing the regulatory shift away from command-and-control toward the self-regulatory model). See U.S. EPA, 25 Facilities Selected for Their Outstanding Environmental Performance, at http://www.epa.gov/newsroom/headline_082203.htm (last visited Aug. 27, 2003).

183. See, e.g., recent enforcement activities at EPA, "Compliance and Enforcement, Newsroom Latest Headlines," at <http://www.epa.gov/newsroom/>.

184. See Richard J. Lazarus, *Assimilating Environmental Protection Into Legal Rules and the Problem With Environmental Crime*, 27 LOY. L.A. L. REV. 867, 878-82 (1994).

185. Judson W. Starr & Thomas J. Kelly Jr., *Environmental Crimes and the Sentencing Guidelines: The Time Has Come and It Is Hard Time*, 20 ELR 10096, 10101-04 (Mar. 1990).

186. See *United States v. Dotterweich*, 320 U.S. 277 (1943); *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558 (1971); *United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 14 ELR 20634 (3d Cir. 1984), cited in George Van Cleve, *The Changing Intersection of Environmental Auditing, Environmental Law, and Enforcement Policy*, 12 CARDOZO L. REV. 1215, 1226-27.

187. U.S. Sentencing Commission, *Federal Sentencing Guidelines*, ch. 2, pf. Q, reprinted in 18 U.S.C. §2Q1.1 to .6 (1996).

178. See Jenny B. Davis, *The Enron Factor*, A.B.A. J., Apr. 2002, at 40, 42-43.

179. EISENBERG, *supra* note 39, at 313-27.

180. See *supra* note 6.

vention.”¹⁸⁸ The program is voluntary, aimed at the manufacturing industry, and consists of two sections—a Corporate Statement of Environmental Principles and a Model Facility Program. Companies would publicly subscribe to the Corporate Statement of Environmental Principles and commit to specific goals. Six criteria exist for both the Corporate Statement of Environmental Principles and the Model Facility Program: Risk Reduction Goals; Measures and Public Accountability; Planning; Environmentally Sound Business Practices; Community and Employee Involvement; and Compliance. EPA would not evaluate or certify the company’s performance but may try to incorporate various elements that allow the public to monitor progress. Under the Model Facility Program, EPA publicly designates select manufacturing facilities that meet its criteria as “model facilities.” The model facilities submit applications to EPA and a verification process occurs that includes screening for compliance. A pilot was planned in one or more states to determine feasibility on a national scope. EPA noted that it did not want to duplicate efforts of private sector organizations but wishes to enhance them.

2. Institutional Investors

Another very influential external source of corporate environmental change is the investment community. Shareholders recognize flaws in corporate laws and have attempted reforms in corporate governance,¹⁸⁹ including self-policing policies.¹⁹⁰ Institutional shareholders have actively promoted principles of corporate governance generally.¹⁹¹ Other specialty investors, those with “socially responsible” clients, have promoted socially responsible corporate principles, including environmental protection.¹⁹²

Investors are concerned with environmental “surprises,” undisclosed liabilities that can deflate stock trading values. As corporate investors have limited liability, their true risk is trading risk, that is risk based upon the disclosures of the financial value of the company (unless there is piercing of the corporate veil or equitable subordination in bankruptcy, per the Deep Rock doctrine). Shareholders demand full financial disclosure. Consequently, investors want more disclosure on environmental policies, because environmental compliance is expensive and companies are exposed to fines and penalties. Additionally, many investors interested in the environment want more environmental disclosure in order to protect the environment.

The history of corporate environmental investor demands began with the CERES or “Valdez” Principles.¹⁹³ The pressures of ethical investors either to nudge or force corporations to act in an environmentally friendly manner appear to have shaped the present trend of self-regulation by corporations and other business entities. Over time, shareholder

proposals have evolved from general requests that companies subscribe to broad environmental principles to demands for increasingly specific environmentally friendly behavior.¹⁹⁴ Recent examples of such proposals include: voluntarily adopting a toxic release inventory form in a foreign country¹⁹⁵; phasing out the production and sale of halons and methyl bromide¹⁹⁶; requiring the company to develop a plan to reduce toxic emissions¹⁹⁷; allocating a portion of the corporation’s charitable contributions to environmental concerns¹⁹⁸; accelerating phaseout of certain environmentally harmful chemicals¹⁹⁹; requesting reports from management detailing research and development efforts on environmentally safe chlorofluorocarbon substitutes²⁰⁰; responding to green “extremists”²⁰¹; and requesting subscription to the CERES Principles.²⁰²

Despite these continuing shareholder interests and demand for corporate environmental change, such proposals mainly fail to win full shareholder approval. Typically this is due to safeguards against “marginal” change provided by both the corporate law and the securities laws.²⁰³

As a matter of general corporate-law principles, investors and shareholders have not been successful in restructuring policies within the corporate blueprint, including environmental matters.²⁰⁴ Yet there is increasing pressure on corporations to respect the views of its vocal, socially conscious shareholders.

3. The SEC

The third source of outside government influence on corporate environmental behavior combines the federal government with the investment community. It is the SEC. U.S. federal securities law consists of six separate statutes and corresponding regulations enacted between 1933 and 1940.²⁰⁵

188. 58 Fed. Reg. 4802 (Jan. 15, 1993). EPA has established other initiatives for changing corporate environmental behavior, including Project XL, Energy Star, and other “partnership” projects. See <http://www.epa.gov/epahome/industry.htm> (last visited Aug. 22, 2003).

189. See generally EISENBERG, *supra* note 39, at 313-27.

190. See IRRC, available at <http://www.irrc.org> (last visited Aug. 3, 2003).

191. See generally HAMILTON, *supra* note 17, at 623-33.

192. *Id.*

193. See EISENBERG, *supra* note 39, at 313-27. See also *supra* notes 15, 104.

194. See generally ELIZABETH GLASS GELTMAN, SECURITIES DISCLOSURE OF CONTINGENT ENVIRONMENTAL LIABILITIES (1995); ELIZABETH GLASS GELTMAN, ENVIRONMENTAL ISSUES IN BUSINESS TRANSACTIONS 235-322 (1994 & Supp. 1997); [hereinafter GELTMAN, ENVIRONMENTAL ISSUES]; ELIZABETH GLASS GELTMAN, SECURITIES: ENVIRONMENTAL CASES AND MATERIALS (1994).

195. E.I. Du Pont de Nemours & Co., 1993 SEC No-Action Letter LEXIS 272 (Feb. 19, 1993).

196. Great Lakes Chem. Corp., 1992 SEC No-Action Letter LEXIS 477 (Mar. 24, 1992).

197. Amoco Corp., 1991 SEC No-Action Letter LEXIS 424 (Mar. 8 1991).

198. Pacific Gas & Elec., 1991 SEC No-Action Letter LEXIS 75 (Jan. 18, 1991).

199. E.I. Du Pont de Nemours & Co., 1991 SEC No-Action Letter LEXIS 1061 (Sept. 11, 1991).

200. Roosevelt v. E.I. Du Pont de Nemours & Co., 958 F.2d 416 (D.C. Cir. 1992).

201. E.I. Du Pont de Nemours & Co., 1993 SEC No-Action Letter LEXIS 298 (Feb. 23, 1993).

202. David F. Sand & E. Ariane Van Buren, *Environmental Disclosure and Performance: The Benefits of Standardization*, 12 CARDOZO L. REV. 1347 (1991) (describing emergence and development of Valdez Principles).

203. See EISENBERG, *supra* note 39, at 325-27.

204. See *id.* at 623-33.

205. Securities Act of 1933, 15 U.S.C. §§77a-77aa (1994); the Securities Exchange Act of 1934, 15 U.S.C. §§78a-78ll (1994); the Public Utility Holding Company Act of 1935, 15 U.S.C. §§79-79z(6) (1994); the Trust Indenture Act of 1939, 15 U.S.C. §§77aaa-77bbb (1994);

Along with the creation of EPA in 1970 and the subsequent flood of federal environmental legislation came increased corporate environmental liability and costs. The greatest source of corporate environmental liability has been the 1980 CERCLA or "Superfund" law.²⁰⁶ Under CERCLA, companies are often held liable retroactively and required to remediate hazardous waste sites.²⁰⁷ For the year 2000, total annual pollution control waste in the United States was approximately \$250 billion.²⁰⁸ The projected cost of complying with the 1990 provisions of the Clean Air Act (CAA) will be \$24 billion (in 1990 dollars), and the yearly costs of complying with hazardous waste regulations for 2000 was \$32 billion.²⁰⁹

How is corporate America accounting for these environmental expenses and liabilities? The SEC has become increasingly concerned about whether and how corporations are accounting for environmental matters. Its concern is certainly heightened by the passage of the Sarbanes-Oxley Act.

The Securities Exchange Act of 1934 authorizes the SEC to enact rules governing corporate disclosures.²¹⁰ Resulting from the increased federal role in environmental protection, the SEC's focus on corporate environmental disclosures has evolved over the last 30 years. Corporate environmental disclosure followed the passage of the National Environmental Policy Act (NEPA),²¹¹ which required all governmental agencies to evaluate their policies and amend them to promote environmental protection. The SEC responded to NEPA by issuing Release No. 5170, requiring all registrants to disclose information on any material effects of compliance with environmental regulations or laws.²¹² On June 7, 1971, the Natural Resources Defense Council, Inc. petitioned the SEC to expand environmental (and civil rights) disclosure requirements.²¹³ Two years later, the SEC low-

ered the threshold of environmental litigation from 15 to 10% of the company's total assets, determined that environmental litigation would not be presumed to be ordinary litigation in the course of business, required that all environmental litigation between the company and the government be disclosed, and required that the company provide a description of economic costs of compliance if the costs are material.²¹⁴

In 1979, the SEC issued an interpretive Release No. 16223, clarifying its environmental disclosure requirements.²¹⁵ The release clarified that companies are required to disclose all material estimated or expected costs associated with environmental compliance for the current year and in coming years.²¹⁶ Companies must also disclose all proceedings related to environmental compliance initiated by either the government or the company and disclose the amount sought by the government if that amount is material.²¹⁷

In 1989, the SEC clarified its position on potentially responsible parties (PRPs) under the CERCLA legislation.²¹⁸ The SEC ruled that designation as a PRP would not necessarily mean a party was obligated to disclose that designation.²¹⁹ The commission reasoned that designation as a PRP does not necessarily mean that the government will initiate action against the company.²²⁰ The SEC did leave open for prosecution businesses that were not only designated as PRP's, but who also have special knowledge that the government is considering initiating a proceeding or will in fact initiate a proceeding.²²¹

In 1991, the University of Tennessee issued a startling report that hazardous waste in America would cost between \$500 billion and \$1 trillion to contain and/or clean up.²²² Responding to this major source of corporate (and governmental) liability, the chairman of the SEC stated that corporate

the Investment Company Act of 1940, 15 U.S.C. §§80a(1)-80a(64) (1994); and the Investment Advisers Act of 1940, 15 U.S.C. §§80b(1)-80b(21) (1994).

206. Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§9601-9675, ELR STAT. CERCLA §§101-405).

207. *United States v. Olin Corp.*, 107 F.3d 1506, 27 ELR 20778 (11th Cir. 1997). CERCLA also imposes joint and several liability on "potentially responsible parties." *United States v. Monsanto Co.*, 858 F.2d 160, 19 ELR 20085 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

208. See FRIEDMAN, *supra* note 8, at 52.

209. See *id.* at 52-53, 99.

210. 15 U.S.C. §§78a-78ll.

211. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209; *Natural Resources Defense Council v. Securities & Exchange Comm'n*, 606 F.2d 1031, 9 ELR 20367 (D.C. Cir. 1979). See generally FRIEDMAN, *supra* note 8, at 192-95, Robert H. Feller, *Environmental Disclosure and the Securities Laws*, 22 B.C. ENVTL. AFF. L. REV. 225 (1995) (discussing in detail Regulation S-K Items 101 and 103, the two provisions of the 1934 Act directly addressing environmental disclosure). See also Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Transparency*, 112 HARV. L. REV. 197 (1999); Jill Evans, *The Lawyer as Enlightened Citizen: Toward a New Regulatory Model in Environmental Law*, 24 VT. L. REV. 229 (2000).

212. *Disclosures Pertaining to the Environment and Civil Rights*, Securities Act Release No. 5170, Fed. Sec. L. Rep. (CCH) & 78150 (July 19, 1971). (Specifically, the release requires disclosure if compliance with environmental regulations may involve "significant capital outlays," may "materially affect" the corporations profits, or cause material changes in the conduct or intended conduct of the corporation's affairs. Additionally, the release requires disclosure of "material" proceedings against the business to enforce environmental regulations.)

213. Williams, *supra* note 211, at 1247.

214. *Id.* at 1249 (citing Notice of Adoption of Amendments to Registration and Report Forms to Require Disclosure With Respect to Compliance With Environmental Requirements and Other Matters, Securities Act Release No. 5386, Exchange Act Release No. 10116, 1 SEC Docket 1, *passim* (Apr. 20, 1973)).

215. See *In re U.S. Steel Corp.*, Exchange Act Release No. 16223 [1979-1980 transfer binder] Fed. Sec. L. Rep. (CCH) §23507B, at 17203-4 (Sept. 27, 1979). The release was issued as part of a settlement agreement with U.S. Steel Company, see Tracy Soehle, *SEC Disclosure Requirements for Environmental Liabilities*, 8 TUL. ENVTL. L.J. 527, 531 n.25 (1995) (discussing the release and its history).

216. *Environmental Disclosure Requirements*, Securities Exchange Act Release Nos. 33-6130 and 34-16224, 3 Fed. Sec. L. Rep. (CCH) §23507B, at 17203-4 (Sept. 27, 1979).

217. *Environmental Disclosure Requirements*, Securities Exchange Act Release Nos. 33-6130 and 34-16224, 3 Fed. Sec. L. Rep. (CCH) §23507B, at 17203-6.

218. See *Management's Discussions and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, Securities and Exchange Acts Release Nos. 33-6835, 34-26831, IC-16961, FR-36, 17 C.F.R. §§211, 231, 241, 271 (May 24, 1989).

219. *Id.* at 22430 n.30.

220. See Elizabeth Glass Geltman, *The Pendulum Swings Back: Why the SEC Should Rethink Its Policies on Disclosure of Environmental Liabilities*, 5 VILL. ENVTL. L.J. 323, 355 (1994) (explaining the 1989 interpretive release and subsequent case history).

221. *Id.*

222. See MILTON RUSSELL ET AL., *HAZARDOUS WASTE REMEDIATION: THE TASK AHEAD* (University of Tennessee 1991) (noting "that the nation's remediation task represents a major allocation of its resources over the next 30 years").

America needed to account for their environmental liabilities and more aggressively move to clean up this waste.²²³ In response to SEC Chairman Richard Y. Robert's concern that corporate America was grossly underreporting its environmental remediation liabilities, the SEC issued Staff Accounting Bulletin No. 92 (SAB 92).²²⁴

The release of SAB 92 was one attempt by the SEC to curtail environmental liability disclosure inadequacies.²²⁵ SAB 92 attempts to clarify accounting principles at the center of the full disclosure policy of federal securities laws.²²⁶ The SEC has found that, generally, companies have not had difficulty in determining whether a loss is probable. Yet, the SEC found environmental disclosure inadequate. The SEC believed that the source of the problem was related to the determination of whether a loss can be reasonably estimated and what that estimate should be.²²⁷

SAB 92 is a useful tool in sorting out the accounting issues relating to contingent liabilities. As stated in the *Federal Register* summary, the purpose of SAB 92 is "to promote timely recognition of contingent losses and to address the diversity in practice concerning accounting and disclosures in this area."²²⁸ SAB 92 attempts to accomplish this goal by reconciling the opinion of the SEC staff with the Financial Accounting Standards Board's Emerging Issues Task Force regarding the requirement that companies recognize contingent liabilities and offset contingent recovery claims separately.²²⁹ The SEC staff believed these requirements are needed in order to prevent the misrepresentation of the possibility and timing of recoveries from insurance policies.²³⁰

SAB 92 deals with the treatment of joint and several liability, evaluation of uncertainties in the estimation process, and accounting for the time value of money. SAB 92 also imposes a duty to report on sites with environmental problems on a case-by-case basis in order to assure full understanding of the contingencies relevant to a particular site. The SEC hoped that SAB 92 would bring greater uniformity to the process of accounting for environmental contingent liabilities in corporate financial statements.²³¹

SAB 92 addresses the issue of when companies must make additional disclosures in the appendix notes in their financial statements.²³² The SEC staff stated that environmental liabilities typically are so significant that detailed disclosures regarding the judgments and assumptions un-

derlying the recognition and measurement of the liabilities are necessary to prevent the financial statements from being misleading.²³³ According to the SEC, these disclosures are also needed to fully "inform investors of the range of reasonably possible outcomes that would have a material effect on the registrant's financial condition, results of operations, and liquidity."²³⁴

SAB 92 gives examples of situations that would require companies to make additional disclosures in the notes to their financial statements. Disclosure in the notes to the financial statements is only necessary where the particular contingent liability that is being recognized is found to be material.²³⁵ Finally, the SEC has shown increasing concern that the financial statements, and, in particular, the notes to those statements, must present a picture consistent with disclosure made outside of those statements.²³⁶

SAB 92 answers a series of specific questions pertaining to accounting and disclosure obligations by public companies of their contingent environmental liabilities. Given the growing importance of environmental disclosures, it is important that companies understand SAB 92, which has also influenced the narrative disclosure for environmental contingencies and obligations.²³⁷

Whereas the aforementioned Federal Disclosure Regulations dictated what and to what extent disclosure is required in the area of contingent environmental liability, SAB 92 spells out the method for reporting these potential items. The bulletin accomplishes this by answering a series of accounting questions that were in need of clarification.

The first question addressed by SAB 92 is whether it is appropriate to offset in the balance sheet a claim for recovery from insurance proceeds that is probable of realization against a probable contingent liability and report only the difference as a net amount in the company's balance sheet.²³⁸ This is probably the most controversial aspect of SAB 92.²³⁹

The second question concerns a situation where the reporting company is jointly and severally liable as a PRP, but there is a reasonable basis for distribution of costs among the other PRPs. The issue is whether the reporting company must recognize a liability with respect to costs apportioned to the other responsible parties.²⁴⁰ The third question deals with how uncertainties, e.g., estimates regarding the extent of liability and amounts of related costs, affect the recognition and measurement of liability.

The fourth question answered by SAB 92 is whether an environmental liability may be discounted to its present value taking into account the time value of money and the fact that a great number of these liabilities are paid over time. Because the ultimate settlement of environmental lia-

223. *Roberts Predicts Widespread Concern With Disclosing Environmental Liabilities*, 25 Sec. Reg. & L. Rep. (BNA) 1620 (Dec. 3, 1993).

224. Staff Accounting Bulletin No. 92, 58 Fed. Reg. 32843 (1993); see generally Peter N. Ching & Brian M. Diglio, *Staff Accounting Bulletin 92: A Paradigmatic Shift in Disclosure Standards*, 7 FORDHAM ENVTL. L.J. 75 (1995).

225. See Geltman, *supra* note 220, at 330.

226. *Id.* at 361-63.

227. Richard Y. Roberts, Commissioner of the U.S. Securities and Exchange Commission, *Environmental Liability Disclosure, Staff Accounting Bulletin No. 92, and Shareholder Proposals*, Remarks at the Law Education Institute and the Bureau of National Affairs, National CLE Conference 8 (Mar. 6, 1994).

228. 58 Fed. Reg. at 32843.

229. *Id.*

230. See Geltman, *supra* note 220.

231. See Robert H. Feller, *Environmental Disclosure and the Securities Laws*, 22 B.C. ENVTL. AFF. L. REV. 225, 236 (1995).

232. *Id.*

233. 58 Fed. Reg. at 32845.

234. *Id.*

235. *Id.*

236. See Feller, *supra* note 231.

237. Keith M. Casto & Tiffany Billingsley Potter, *Environmental Audits: Barriers, Opportunities, and a Recommendation*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 233, 248 (1999).

238. Herbert S. Wander, *Developments in Securities Law Disclosure*, 1285 PLI/Corp 659, 878 (Feb. 2002).

239. Richard Y. Roberts & Kurt R. Hohl, *Environmental Liability Disclosure and Staff Accounting Bulletin No. 92*, SB18 ALI-ABA 505 (Oct. 1996).

240. See Wander, *supra* note 238.

bilities may not occur for many years, the effect of discounting the liability to reflect the time value of money may be material to some registrants.²⁴¹ The fifth question outlines the financial statement disclosures that should be furnished with respect to recorded and unrecorded environmental liabilities.²⁴² The sixth question discusses disclosures outside of the financial statements. SAB 92 notes that registrants should consider the requirements of Regulation S-K and S-B (governing small business), Items 101, 103, and 303 as mentioned above. Disclosures made pursuant to these provisions should be specific enough to enable a reader to understand the scope of the contingency. Case-by-case disclosure that describes accrued and reasonably likely losses with respect to particular claims may be necessary if they are individually material.²⁴³

The seventh question addressed in SAB 92 dictates that material liabilities for “site restoration, post closure, and monetary commitments, or other exit costs that may occur on the sale, disposal, or abandonment of a property should be disclosed in the notes to the financial statements.”²⁴⁴ These disclosures should include the nature of the costs involved, the total anticipated cost, the total costs to date, the balance sheet classification of accrued amounts, and the range and amount of reasonably possible additional losses.²⁴⁵

The staff recognized that where a reporting company expects to incur site restoration costs, post-closure and monitoring costs, or other environmental exit costs at the end of the useful life of an asset, these costs can be accrued over the useful life of the asset. The accrual of the liability would be recognized as an expense.²⁴⁶

The SEC has continued to refine its environmental disclosure requirements. Supplementing environmental disclosures required by federal environmental statute,²⁴⁷ the SEC published rules requiring public corporations to disclose “national” environmental liabilities.²⁴⁸ In order to maximize SEC review of disclosures, the SEC has established with EPA a cooperative arrangement to share information.²⁴⁹

The accounting industry has developed environmental accounting standards. On June 30, 1995, the American Institute of Certified Public Accountants (AICPA) presented “Environmental Remediation Liabilities” for public companies as an audit CERCLA guide. On October 10, 1996, AICPA published its final statement of position on environmental liabilities,²⁵⁰ which the Financial Accounting Stan-

dards Board approved effective for fiscal years beginning December 1, 1996.²⁵¹

The SEC must also be suspicious of another source of corporate environmental disclosure, the corporate “green reports.” In addition to statutory reporting and financial reporting, many companies are issuing voluntary annual environmental reports or “green reports.”²⁵² Many of these reports need to be critically evaluated and are self-promotional, public relations pieces. The Council on Economic Priorities²⁵³ and another major U.S. investor group, the Investor Responsibility Research Center, have attempted to provide independent assessments of corporate environmental performance.²⁵⁴ In addition, there is a growing awareness that corporate voluntary environmental audits should be publicly disclosed, to inform existing and would-be investors.²⁵⁵

Federal efforts to effectuate corporate environmental accountability have been substantial. Yet, the federal securities laws do little to promote corporate environmental protection. The federal securities laws are based upon corporate disclosure and investor sophistication. But the “materiality” standard has proved to be a limiting standard for environmental disclosure. Hence, environmental liabilities and performance are generally absent from corporate environmental reports. Despite this, corporations recognize that it is in their best interest to disclose to the public some aspects of their environmental performance and, therefore, to issue “green reports.”

In summary, relative to the SEC and corporate environmental disclosure, the Sarbanes-Oxley Act heightens federal scrutiny of corporate financial reporting and arguably will add greater pressure on environmental reporting. One has to question the current accuracy of reporting of environmental expenditures. Voluntary corporate green reports are often informative but are suspect and usually unaudited. It is predictable that shortly corporate environmental financial reporting will be a very hot topic of regulatory and investor concern.

B. Corporate Environmental Leadership Fails to Change Corporate Environmental Behavior

If outside forces such as the government, investors, and the SEC have failed to systemically change corporate environmental behavior, what about the corporate community’s ef-

241. Roberts & Hohl, *supra* note 239, at 518.

242. See Wander, *supra* note 238.

243. *Id.* at 879.

244. *Id.*

245. *Id.*

246. *Id.*

247. See, e.g., Toxic Release Inventory under the Emergency Planning and Community Right-To-Know Act §313.

248. 17 C.F.R. §229.103(5)(A) 1996; interpretative release on Management’s Discussion and Analysis of Financial Condition and Results of Operations in 54 Fed. Reg. 22427 (May 24, 1989); SEC, Staff Accounting Bulletin No. 92, June 8, 1993, at 6.

249. Harrelson, *EPA Agrees to Information Exchange With SEC*, INSIDE EPA SUPERFUND REP., Mar. 28, 1990, at 2.

250. SOP 96-1. See generally Elizabeth A. Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Law*, 16 HARV. ENVTL. L. REV. 129 (1992); Tracy Soehle, *SEC Disclosure Requirements for Environmental Liabilities*, 8 TUL. ENVTL. L.J. 527 (1995).

251. *Id.*

252. Many major companies voluntarily publish an annual environmental report, so-called green reports. See David W. Case, *Legal Considerations in Voluntary Corporate Environmental Reporting*, 30 ELR 10375 (May 2000); Elizabeth Glass Geltman, *Minimizing Stockholder Liability for Environmental Cleanup*, 2 J. ASSET PROTECTION 24 (1996); Elizabeth Glass Geltman, *Shareholder Liability for Improper Disposal of Hazardous Waste*, 95 COM. L.J. 385 (1990); GELTMAN, ENVIRONMENTAL ISSUES, *supra* note 194, §§11, 12, 19.

253. Council on Economic Priorities is a socially responsible corporate watchdog who has over the years issued detailed, sometimes inaccurate environmental reports on corporations. Council on Economic Priorities, 30 Irving Pl., New York NY 15003, at <http://www.cepnyc.org/ccawin2000.htm> (last visited Mar. 12, 2001). FRIEDMAN, *supra* note 8, at 156, 185.

254. See <http://www.ircr.org>; see also ICCR, *Corporate Responsibility Challenges 2000*, CORPORATE EXAMINER, Mar. 9, 2000 (profiling socially interested shareholder resolutions).

255. Clifford Rechtschaffen, *Deterrence Versus Cooperation and the Evolving Theory of Environmental Enforcement*, 71 S. CAL. L. REV. 1181 (1998).

forts at self-improvement? Is there a self-imposed, corporate leadership model of corporate environmental behavior? Is corporate-led, self-regulation the future paradigm for environmental protection?

In recent years, many corporations have recognized the need for implementing environmental management strategies.²⁵⁶ They see the benefit of environmental performance that goes “beyond compliance.” They have developed codes of conduct to lend support to environmental protection. Corporate-led environmental initiatives have begun to emerge in efforts to develop a new paradigm in the environmental protection arena. The following are some examples of corporate-led environmental initiatives.

1. The ICC

The ICC was founded in 1920, following a decision of the International Trade Conference in Atlantic City to establish a permanent organization of world business. The ICC represents economic factors of international business and promotes world trade and investment based on free and fair competition.²⁵⁷

Relative to environmental protection, the ICC encourages businesses to use its 16 Principles for Environmental Management as a basis for pursuing improved environmental performance and publicly expresses its support for them. Furthermore, it encourages companies to measure and report their progress both internally and externally.²⁵⁸

256. See B. SMART, *BEYOND COMPLIANCE—A NEW INDUSTRY VIEW OF THE ENVIRONMENT* 188 (1992); GLOBAL ENVIRONMENTAL MANAGEMENT INST., *ENVIRONMENT: VALUE TO BUSINESS* (1998); BRUCE W. PIASECKI ET AL., *ENVIRONMENTAL MANAGEMENT AND BUSINESS STRATEGY: LEADERSHIP SKILLS FOR THE 21ST CENTURY* (1999).

257. 1 *YEARBOOK OF INTERNATIONAL ORGANIZATIONS* (25th ed., Union of International Ass'ns ed., 1988).

258. The principles cover the following areas:

1. Corporate Priority: To recognize environmental management as among the highest corporate priorities and as a key determinant to sustainable development; to establish policies, programs, and practices for conducting operations in an environmentally sound matter.

2. Integrated Management: To integrate these policies, programs, and practices fully into each business as an essential element of management in all its functions.

3. Process of Improvement: To continue to improve corporate policies, programs, and environmental performance, taking into account technical developments, scientific understanding, consumer needs, and community expectations, with legal requirements as a starting point; and to apply the same environmental criteria internationally.

4. Employee Education: To educate, train, and motivate employees to conduct their activities in an environmentally responsible manner.

5. Prior Assessment: To assess environmental impacts before starting a new activity and before decommissioning a facility or leaving a site.

6. Products and Services: To develop and provide products and services that have no undue environmental impact and are safe in their intended use, that are efficient in their consumption of energy and natural resources, and that can be recycled, reused, or disposed of safely.

7. Customer Advice: To advise, and where relevant, educate customers, distributors, and the public in the safe use, transportation, storage, and disposal of products provided; and to apply similar considerations to the provision of services.

8. Facilities and Operation: To develop, design, and operate facilities and conduct activities taking into consideration the efficient use of energy and materials, the sustainable use

The ICC principles cover the following areas. The first eight include: corporate priorities (recognizing environmental management as a top priority and a key determinant in sustainable development); integrated management (implementing environmentally sound practices within management); process of improvement (applying similar criteria internationally, with the goal of improving corporate conduct—using law as the starting point); employee education (employing education, training, and motivation as key elements); prior assessment (properly assessing environmental impacts before starting new projects, or decommissioning a facility); product and services (designing and developing environmentally safe products and services, instituting recycling, energy-use, and consumption of natural resources); customer advice (providing important information to the public about environmental practices); facilities and operation (implementing facility development, design, and operation that takes into account efficient energy and materials use, and renewable energy sources and environmentally friendly disposal of residual waste).

The remaining eight principles employed by the ICC are: research (supporting and continuing research on environmental impact upon raw materials, products, processes, emissions, and waste associated with the enterprise); precautionary approach (modifying the manufacturing, marketing, or use of the products and services, which is consistent with technology, thereby preventing environmental harm); contractors and suppliers (promoting the adoption of these principles upon authorized agents acting on behalf of

of renewable resources, the minimization of adverse environmental impact and waste generation, and the safe and responsible disposal of residual wastes.

9. Research: To conduct or support research on the environmental impacts of raw materials, products, processes, emissions, and wastes associated with the enterprise and on the means of minimizing such adverse impacts.

10. Precautionary Approach: To modify the manufacture, marketing, or use of products or services or the conduct of activities, consistent with scientific and technical understanding, to prevent serious or irreversible environmental degradation.

11. Contractors and Suppliers: To promote the adoption of these principles by contractors acting on the behalf of the enterprise, encouraging, and, where appropriate, requiring improvements in their practices to make them consistent with those of the enterprise; and to encourage the wider adoption of these principles by suppliers.

12. Emergency Preparedness: To develop and maintain, where significant hazards exist, emergency preparedness plans in conjunction with the emergency services, relevant authorities, and local communities, recognizing potential transboundary impacts.

13. Transfer of Technology: To contribute to the transfer of environmentally sound technology and management methods throughout the industrial and public sectors.

14. Contributing to the Common Effort: To contribute to the development of public policy and to business, governmental, and intergovernmental programs and educational initiatives that will enhance environmental awareness and protection.

15. Openness to Concerns: To foster openness and dialogue with employees and the public, anticipating and responding to their concerns about the potential hazards and impacts of operation, products, wastes, or services, including those of a transboundary or global significance.

16. Compliance and Reporting: To measure environmental performance; to conduct regular environmental audits and assessments of compliance with company requirements, legal requirements, and these principles; and periodically to provide appropriate information to the board of directors, shareholders, employees, the authorities, and the public.

the enterprise, requiring environmental and legal compliance, and thereby encouraging similar compliance by suppliers); emergency preparedness (developing and maintaining the areas where significant hazards exist, emergency plans in conjunction with state and local authorities, in efforts to recognize transboundary impacts); transfer of technology (contributing to the transfer of environmentally sound technology and management methodology throughout the industrial and public sectors); contribution to the common effort (contributing to the development of public policy, business, government, and the environment); openness to concerns (creating and maintaining dialogue with both the public and employees, and anticipating and responding to concerns about hazards and impacts of operation, products, wastes, and services); and finally, compliance and reporting (measuring environmental performance, conducting regular audits, and providing relevant information to all interested parties). By May 1992, over 800 companies and national business organizations had pledged to support the principles, including over one-quarter of the Fortune 500 companies.²⁵⁹

2. The Global Environmental Management Initiative (GEMI)

GEMI is a project sponsored by the International Chamber of Commerce and the U.N. Environmental Program. It developed environmental guidelines for international business. More than 20 U.S.-based companies have adopted ICC's Principles for Environmental Management. The voluntary principles are similar to those advocated by CERES (see above) and in Japan's Keidanre Global Environment Charter of 1991, both of which emphasize community involvement and corporate citizenship. In 1992, GEMI published an Environmental Self-Assessment Program that addresses environmental performance on four levels including: compliance; systems development and implementation; integration into general business functions; and total quality approach.²⁶⁰

3. CMA Responsible Care® Program

Under Responsible Care®,²⁶¹ member companies voluntarily subscribe to the Guiding Principles which focus on the industry's responsible management of chemicals. These member companies have signed a statement to that effect.²⁶²

259. Chris FitzGerald, *Environmental Quality—Strategies, Tactics, Logistics*, TOTAL QUALITY ENVTL. MGMT., Autumn 1992.

260. FRIEDMAN, *supra* note 8, at 96-99. See also GLOBAL ENVIRONMENTAL MANAGEMENT INITIATIVE (GEMI), VALUE TO BUSINESS (1998), cited in FRIEDMAN, *supra* note 8 at 58. GEMI is located at 2000 L St., NW, Ste. 710, Washington DC 20036, (202) 296-7449, at <http://www.gemi.org> (last visited Aug. 21, 2003).

261. CMA, RESPONSIBLE CARE: A PUBLIC COMMITMENT (now known as the American Chemistry Council, 1300 Wilson Blvd., Arlington VA 22209, (703) 741-5000, or at <http://www.americanchemistry.com>).

262. The principles pledge:

1. To recognize and respond to community concerns about chemicals and our operations.
2. To develop and produce chemicals that can be manufactured, transported, used, and disposed of safely.
3. To make health, safety, and environmental considerations a priority in our planning for all existing and new products and processes.

The signed statement is considered an obligation of membership in the CMA. To complement the principles and address public concerns, CMA committees began developing Codes of Management Practices in 1989. Each code includes a self-evaluation form which is reviewed annually to measure the company's improved use of management practices. CMA uses these evaluations as part of progress reports to the public.

The Public Advisory Panel, made up of environmental, health, and safety leaders, assist the chemical industry in developing programs responsive to public concerns. Also, Executive Leadership Groups are regional groups that provide a forum for corporate leaders to meet once or twice a year to share their experiences with implementing the elements of Responsible Care®, which includes discussion of any codes under development. The member company must meet all of the obligations of membership throughout its chemical business practices. The CMA represents North American manufacturers and assists them in the United States. Additionally, the initiative has also been adopted in Australia, England, France, Germany, the Netherlands, and New Zealand.

C. CEP Supports Enforcement of the Rule of Law

Now we come to a third consideration, after external influences and self-regulation, in analyzing how or why corporations apparently are failing to promote environmental accountability. This raises a discussion of the role of environmental litigation and the rule of law.

Mere corporate structure is not why corporations pollute. Some pollute because it is cheaper than compliance. This reality puts the corporate "bottomline" before the "earthly line," causing damage that is costly to undo. To protect the environment, it is necessary to modify business behavior. One way to change business behavior is through regulations. Unfortunately, even with existing regulations, environmental protection is lacking.²⁶³ The rule of law cannot just rely on regulatory enforcement alone. There is a need to incorporate an environmental ethic into corporate culture. This is difficult because corporations are generally required

4. To report promptly to officials, employees, customers and the public, information on chemical-related health or environmental hazards and to recommend protective measures.

5. To counsel customers on the safe use, transportation, and disposal of chemical products.

6. To operate our plants and facilities in a manner that protects the environment and the health and safety of our employees and the public.

7. To extend knowledge by conducting or supporting research on the health, safety, and environmental effects of our products, processes, and waste materials.

8. To work with others to resolve problems created by past handling and disposal of hazardous substances.

9. To participate with government and others in creating responsible laws, regulations, and standards to safeguard the community, workplace, and environment.

10. To promote the principles and practices of Responsible Care® by sharing experiences and offering assistance to others who produce, handle, use, transport, or dispose of chemicals.

263. For example, in March 2002, a state auditor of the Louisiana Department of Environmental Quality (LDEQ) reported that LDEQ failed to collect 75% of environmental penalties assessed, and is allowing facilities to operate without current permits. LDEQ, *Performance Audit Report, Audit Control #02300457*, at <http://www.lla.state.la.us/perform.htm> (last visited Aug. 2, 2003).

to maximize shareholder profit even if it means breaching the law in doing so.

Corporations are governed via their corporate officers and directors. The fiduciary duty that rests with the managing staff includes both the duty of loyalty and the duty of care. The corporate director must always use his or her best judgment in exercising the appropriate level of care in his business. Additionally, because of the loyalty requirement, the director cannot self-deal or engage in any transaction that may be in conflict with the corporate interest. These duties arguably do not require that a corporation protect the environment.

Due to the constant pressures of regulation, government intrusion, and economic viability, the corporate director must invariably engage in a constant war of priorities to maximize financial returns and comply with legal requirements while engaging in good management practices. There are deficiencies in our social order that have failed to effectively protect the environment. These include the failure of outside forces, failure of corporate leadership, and failure of the rule of law. As a result, we need to consider another approach to corporate environmental protection, one that considers legal compliance, corporate culture, and efficacy.

When corporate behavior falls short of society's expectations, litigation becomes a viable tool to enforce the rule of law. The American legal system operates through an adversarial system of litigation. In February 2001, the largest most significant lawyers organization, the American Bar Association, announced to its members that the waters are "fertile" for environmental lawsuits by private citizens.²⁶⁴ It was reported that "because of new scientific studies that provide better proof of the effects of some pollutants on human health, as well as somewhat broader rules on standing, environmental attorneys expect that more courts will allow these pollution suits to go forward."²⁶⁵ Following the first wave of environment litigation where the government and corporations sued each other to determine Superfund liability, the new and current wave of litigation seeks to use state tort law.²⁶⁶ Using successful tobacco litigation strategies, environmental plaintiff lawyers are looking to target entire industries for failing to admit to governmental authorities and the public the potential harms of their products.²⁶⁷

In *Playboy Magazine*,²⁶⁸ Milton Friedman once commented that a corporation may choose to reduce pollution if it benefits shareholders financially in the long term. One John Hopkins Medical Center study shows that in spending \$27 billion to comply with the CAA, American companies would save up to \$10 billion in health care costs.²⁶⁹ This cost-benefit analysis might convince companies that it is cheaper to protect people from pollution than to pay the health care cost of pollution. The rising costs of healthcare and the ever-changing realm of pollutants potentially causing harm to human health assist policymakers with the task

of forming business and management practices conducive to the protection of health and the environment.

"Command-and-control" legislation no longer works, effectively or efficiently. Environmental management programs continue to evolve and change. Most companies today have some structured program to address environmental matters and risks. There are a myriad of factors affecting the evolution of environmental management programs. Some of the factors are external to the company and some are internal. External influences include regulators, special interest groups and activists, communities, investment communities, industry associations, and standards organizations. Some of the internal factors include, but are not limited to, a company's corporate culture and overall business strategy, available resources, management commitment, and inherent risks.

V. Conclusion

Corporate law provides business with many advantages, but requires little from its primary beneficiaries, the shareholders. Is the corporate form a shield to protect shareholders from illegal behavior? Many corporate constituents and investors agree that corporate structure promotes social and environmental irresponsibility. They demand that corporations be more environmentally sensitive. Past attempts by the government to penetrate the corporate structure regarding environmental matters have been widely ineffective. Many institutional investors believe that better corporate environmental performance will mean greater corporate profits. Some companies themselves believe that integrating environmental concerns into their business strategy makes good business sense, leading to competitive advantage.

One radical approach to corporate environmental irresponsibility raises the corporate law question: should a state revoke a corporation's charter for environmental violations? Academically, there are many reasons for a state to do so. First, it sends a strong compliance message. Second, it makes shareholders personally liable for environmental violations. Third, it puts corporate assets in a state's hands. In reality, revocation of a corporation's charter is extremely rare. And if it were used, corporations would likely dissolve their U.S. corporate charters and choose to incorporate in a country more tolerant of corporate misbehavior.

Faced with heightened corporate visibility following Sarbanes-Oxley's passage, U.S. corporations are well advised to seek and employ a proactive approach to environmental protection and disclosure. One recommended approach is the adoption of a Model Code of Corporate Environmental Principles, as a supplement to the ALI's Principles of Corporate Governance. CEP are an important attempt to create a model code of conduct, one driven by legal compliance and responsive to shareholders concerns. Its voluntary nature will allow companies to experiment and find the right mix. Its specific principles and the involvement of directors can assure its systemic impact on corporate environmental behavior. It quiets environmental critics who wish to strip the corporations and its shareholders of the benefits of corporate status due to environmental violations. Finally, it avoids general shareholder exposure for corporate environmental liabilities should corporate status be taken away.

264. Tebo, *supra* note 2, at cover story and at 36-42.

265. *Id.* at 37-38 (referencing *Friends of the Earth v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 30 ELR 20246 (2000) (wherein the Court found "that a citizens' group had standing to seek civil penalties under the CWA against a company alleged to be discharging mercury into a navigable waterway").

266. *Id.*

267. *Id.*

268. *See supra* note 17.

269. Tebo, *supra* note 2 (referencing John Hopkins study, at 40-41).