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Chapter 5

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Disclosure Obligations Under the Securities Laws Concerning Potential Environmental Liabilities

Francis J. Mellen, Jr.
Wyatt, Tarrant & Combs
Louisville, Kentucky

Synopsis

§ 5.01. Introduction.

There are very few business entities in the United States which do not have some operations which are subject to the environmental laws. This conclusion is, of course, particularly applicable to companies in the mineral industry. Likewise, many business entities in the United States are at least potentially subject to some degree of regulation under the securities laws. Even if a business entity does not issue publicly traded securities, the equity interests in the business may be classified as securities under the applicable securities laws — with the result that the purchase and sale of those equity interests, even in a private transaction, may be subject to at least the antifraud provisions of the securities laws.

Given this background, it is prudent for persons in the mineral industry to have at least a basic acquaintance with the requirements of the securities laws governing disclosure of potential environmental liabilities. This chapter will attempt to meet that goal. For a more detailed development of these issues, additional reading is suggested.[1]

§ 5.02 The Environmental Law Background.

The purpose of this chapter is to examine the disclosure requirements under the securities laws concerning potential environmental liabilities. Because most mineral law attorneys have had experience with the substantive requirements of the various environmental laws and regulations, an extensive discussion of the environmental laws referenced in this chapter should not be necessary. Nevertheless, a brief overview of at least the principal federal environmental statutes, and the principal financial liabilities that can arise under them, may help to place in context the securities law requirements that will be discussed. Of course, most states have a parallel system of environmental laws and regulations which can create similar financial liabilities.

[1] — The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA).

The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA, also commonly referred to as the "Superfund Act")[2] places certain responsibilities on current and former owners and operators of properties at which hazardous materials and toxic

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1 Law review articles that contain good discussions of these issues include Michael M. Meloy, "Disclosure of Environmental Liability in SEC Filings, Financial Statements, and Debt Instruments: An Introduction," 5 *Vill. Envtl. L. J.* 315 (1994); Richard Y. Roberts and Kurt R. Hohl, "Environmental Liability Disclosure and Staff Accounting Bulletin No. 92," 50 *Bus. Law.* 1 (1994); Tracy Soehle, "SEC Disclosure Requirements for Environmental Liabilities," 8 *Tul. Envtl. L. J.* 527 (Summer 1995); Mark A. Stach, "Disclosing Expenses and Liabilities Under the Clean Air Act Amendments of 1990 in Securities Filings," 5 *Vill. Envtl. L. J.* 415 (1994).

2 The Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9601-75 (1995), as amended by the Superfund Amendments and Reauthorization Act of 1986, Public Law No. 99-499, 100 Stat. 1613 (1986).