LETTER OF COMMENT NO. 117

CEEC

Corporate Environmental Enforcement Council

Technical Director
Financial Accounting Standards Board
of the Financial Accounting Foundation
401 Merritt 7
PO Box 5116
Norwalk, Connecticut 06856-5116

Re: Comments of the Corporate Environmental Enforcement Council on "*Exposure Draft -- Proposed Statement of Financial Accounting Standards -- Disclosure of Certain Loss Contingencies,*" FASB File Ref. No. 1600-100 (Jun. 2008)

Ladies and Gentlemen:

The Corporate Environmental Enforcement Council ("CEEC") appreciates the opportunity to submit these comments to the Financial Accounting Standards Board ("FASB" or "the Board") on the Board's June 5, 2008, "*Exposure Draft -- Proposed Statement of Financial Accounting Standards -- Disclosure of Certain Loss Contingencies*"[1] ("the Exposure Draft").

CEEC is an organization comprised of corporate counsel and environmental professionals from 30 companies representing a wide range of industrial sectors focusing on civil and criminal environmental enforcement policy issues. Many of CEEC's member companies are subject to and have extensive experience with the financial disclosure requirements of the U.S. Securities and Exchange Commission ("SEC") for public companies, and guidance issued by FASB, including specifically FASB Statement No. 5, *Accounting for Contingencies* ("FAS 5"). More specifically, many of the counsel and professionals at our member companies are frequently called upon to address the often difficult issues associated with disclosure of *environmental* loss contingencies in this context.

CEEC and its members are committed to full, accurate and complete reporting of environmental liabilities and contingencies as currently required the Securities Act of 1933[2] (where applicable) and relevant guidance and policies issued by the SEC and FASB. CEEC is concerned, however, that the Exposure Draft goes too far respecting both the circumstances when disclosure of an estimated value of an uncertain loss contingency must occur, *and* the significantly expanded array of qualitative information that would need to be disclosed. Changes that would compel disclosure of litigation strategy or other privileged information, or that would di-

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1 Financial Accounting Standards Board, Exposure Draft, Proposed Statement of Financial Accounting Standards, *Disclosure of Certain Loss Contingencies, an Amendment of FASB Statements No. 5 and 141(R),* Release No. 1600-100 (June 5, 208).

2 15 U.S.C. §§77a-77aa (2000) and Items 101, 103 and 303 of Regulation S-K (17 C.F.R. §§ 229.101(c)(1)(xii), 229.103, and 229.303).

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lute the *useful* information available to users of financial statements, are particularly problematic. We are concerned that these proposed changes will have significant adverse collateral consequences for reporting companies and their investors, and in many contexts may provide little additional benefit.

CEEC respectfully submits that the current framework as it has evolved provides a reasonable and workable approach for the meaningful disclosure of useful information concerning contingent and other environmental liabilities, and that there has been no showing that current standards and guidance are not adequate to provide sufficient information to investors, or that the changes outlined in the Exposure Draft would in practice correct any perceived shortcomings. To the extent that the Board or the SEC believe that companies' disclosures do not meet existing requirements, traditional remedial tools should be used, including issue-specific guidance or enforcement actions when warranted, rather than fundamentally overhauling the underlying disclosure requirements. If the Board does revise the provisions in FAS 5, any changes must be made in a manner that will provide additional meaningful information without adversely impacting the reporting company or investors, including allowing adequate transition time.

Quantitative Disclosure.

Particularly with respect to *environmental* loss contingencies, we believe certain of the quantitative "information" required to be disclosed under the Exposure Draft is problematic for a variety of reasons. For example, some of the proposed disclosure items – such as the amount of the *claimed* damages or assessment recited in a legal complaint or claim letter – may be completely arbitrary and bear no real relation to the actual extent of any risk of potential loss. Or, the required quantitative disclosure may be so highly speculative or temporal that neither the Company nor the investor should be make decisions based on it. CEEC is concerned that the elimination of the "reasonably estimable" standard as the basis for quantitative disclosures will result in dissemination of more data, but *little additional meaningful information* for reasoned decisionmaking. Indeed, we are concerned that users of financial statements will attribute unwarranted certainty and precision to the required "highly uncertain estimates" no matter how strong the qualitative disclaimers may be. This could be extremely prejudicial to a company's and its investors' interests.

CEEC questions whether users of financial statements really "prefer to have a highly uncertain estimate supplemented with a qualitative description than no quantification of a potential loss." Requiring a best estimate of a company's maximum exposure to loss when no such estimate is reasonably possible is likely to generate poor quality information that could, in fact, be detrimental to users that do not recognize or appreciate the universe of uncertainties that will be built into such an estimate. This is especially true in the environmental context, and specifically with respect to loss contingencies involving remediation liability, where the "maximum exposure" may be unknowable. The complexity of evaluating loss contingencies in the environmental context is well illustrated by AICPA SOP 96-1 ("Environmental Remediation Liabili-

ties"), which would be significantly modified by implementation of the Board's proposal.[3] Given this well-accepted, topical guidance, we think the Board is under a special obligation to demonstrate, with reference to this work, that existing practice concerning *environmental* loss contingences is nevertheless inadequate and that the proposed measures of the Exposure Draft would improve the quality of information available to investors.[4]

The Exposure Draft does contain provisions pursuant to which a reporting company may avail itself of the "opportunity to explain" why the potential for loss is unlikely to ever be realized. While this may be marginally helpful in minimizing risk of misinformation, it is not adequate to address all the issues associated with responding to potentially arbitrary claim figures (e.g., where the Company simply does not yet have enough information to put a potentially arbitrary claim amount into context). Moreover, a company seeking to avail itself of this option runs the real risk of opening the Pandora's box of issues relating to disclosure of litigation strategy, and privileged or otherwise protected materials, discussed in greater detail below.

Finally, there is also the issue of what happens if the "best estimate," which was developed at a particular point in time, and solely for the purposes of meeting the disclosure requirements, proves to be wrong in the end. Dependant as such estimates and assessments of probability are on emerging, uncertain and potentially highly variable facts, and/or on professional judgments about which reasonable people will reasonably differ, these quantitative loss estimates may be quite volatile period-to-period. This scenario at least appears to create significant potential for additional exposure to second guessing and derivative liability if the end result is significantly different from the "best estimate" of the loss that would be required pursuant to the Exposure Draft.

CEEC believes that the current standards and guidance for disclosure of environmental liabilities are adequate and respectfully suggests that FASB has failed to demonstrate any systemic inadequacies in the current system, nor demonstrated that the proposed revisions would provide additional reliable and meaningful information to investors at least in the environmental loss contingency context. The current standards appropriately balance the need for disclosing loss contingencies with the necessity for the investing community to receive *accurate, meaningful* and timely information.

Qualitative Disclosure

The Exposure Draft includes new, detailed disclosure requirements regarding the loss contingency designed to "enable users to understand the risks posed to the entity." CEEC believes that these new requirements are problematic from a number of different perspectives.

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[3] This is illustrated by the mark-up of SOP 96-1 presented in Appendix B of the Exposure Draft (pp. 30-37).

[4] Further, several of our members have specifically indicated their strong support of comments on the Exposure Draft submitted by the Superfund Settlements Project. and the RCRA Corrective Action. Project.

In many instances, Company's would face great difficulty in drafting disclosures meeting the proposed minimal requirements before its full analysis of the underlying issues is concluded. Further, the litany of information called for by these new requirements would, if disclosed, be a boon to an opposing party in litigation (or to potential plaintiffs in yet-to-be-filed litigation) as it arguably compels the disclosure of the fundamental elements of a reporting company's litigation strategy (and associated internal assessments of strengths and weaknesses). Indeed, the standard arguably calls for the disclosure of information that, in many instances, would otherwise be protected from disclosure by the attorney-client and/or work product privilege.

Disclosure of any of this information in the course of a dispute resolution process has the potential to distort the outcome of the underlying proceeding by significantly and unfairly prejudice the reporting company's litigation and /or settlement positions. Similarly, detailed disclosures arguably required by the Exposure Draft for some unasserted claims may serve as an invitation and 'road map' for claims that may or may not have merit, and or may not otherwise have been asserted. Indeed it is not difficult to see how claimants involved in disputes with reporting companies could manipulate their opponents' disclosures to gain advantage. Such outcomes put public companies -- and their shareholders -- at an unfair disadvantage.

While the Exposure Draft contains provisions to ameliorate its prejudicial effects — allowing some aggregation of certain contingencies and, in "rare" cases, permitting the omission of some information where mere aggregation would not prevent prejudice — it is unclear from the Exposure Draft how these aggregation and disclosure exemptions would work in practice, or how they would provide meaningful information to investors. For example, we are concerned that the "rare" circumstances where the "prejudicial information" exemption could appropriately be used under the standard is poorly defined and highly uncertain. This uncertainty, and the evident bias against use of this exemption, makes it more likely that companies will err on the side of providing disclosure of the prejudicial information to avoid potential exposure to claims of inadequate disclosure. Moreover, even where it applies the exemption is not broad enough to prevent prejudice as it appears companies would still need to disclose prejudicial quantitative information (e.g., expected timing of resolution and factors likely to affect the outcome). For these reasons, the prejudicial information exemption in its current form would provide little if any protection and would do nothing to alleviate the concerns expressed above.

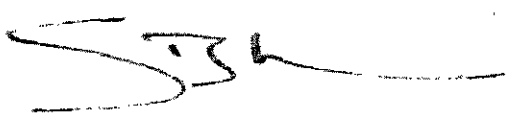
Conclusion.

CEEC believes that the disclosure requirements for loss contingencies under existing rules are both workable and sufficient to ensure that the goals of the disclosure provisions are met. We do not believe the Board yet has made the case that wholesale restructuring of contingent liability disclosure principles is warranted. We are deeply concerned that the changes contemplated by the Exposure Draft may compel companies to develop and disclose information of low analytical value for users of financial statements (particularly with respect to environmental loss contingencies), and that these changes otherwise have the potential to cause a variety of significant adverse and unintended consequences. If the Board believes disclosure changes are

needed, CEEC suggests that the Board not adopt the standard proposed in the Exposure Draft but rather develop additional guidance concerning application of the FAS 5 "reasonably estimable" standard generally, or with respect to particular circumstances where past disclosure has been viewed as chronically inadequate to meet user's legitimate needs. Such guidance also should clarify that legally privileged information does not have to be disclosed. In all circumstances, disclosure rules should balance the need to provide an appropriate level of quality information with the equally important need to ensure that the rules lead to disclosures that are accurate, meaningful and useful for decisionmaking. And while CEEC is opposed to the proposed changes to FAS 5, if changes are nevertheless made, the Board should allow a reasonably adequate period – at least one year – for companies to collect information, and adjust their systems and analysis to the new framework.

CEEC looks forward to working with FASB and other stakeholders to address these issues in a manner that results in workable and meaningful disclosure of loss contingencies, including those that arise in the environmental context. Please contact me or CEEC's legal counsel, Ken Meade of Wilmer Cutler Pickering Hale and Dorr LLP (202-663-6196) if you have any questions regarding these comments.

Sincerely,



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