



CHAPTER SEVEN

INFORMATION REGULATION

INTRODUCTION

This chapter introduces a selection of the best literature on the public's right to government information and information held by private firms. Environmental compliance and enforcement have for some time benefited from information disclosure laws that address information *under the control of government agencies*. The public's right to government-held information is a human right,¹ and is now further operationalized through the Aarhus Convention and an increasing number of national laws.² Citizens and NGOs have used this right both as an accountability mechanism for government programs and as part of their strategy to pressure private polluters or those otherwise harming the environment.

More recently, new information rights have been established providing citizens and NGOs with access to information *held by private sector firms*. Regulation by information alerts the public to the environmental track records of businesses and industries, particularly those that deal in hazardous chemicals.³ This type of regulation aims to empower civil

¹ The right to information is a human right, as well as an environmental right. See DAVID HUNTER, JAMES SALZMAN, & DURWOOD ZAEKE, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY*, 1316-1317 (2nd ed. 2002) (referencing in particular, Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10(1) of the European Convention, and Article 13 of the American Convention).

² See Svetlana Kravchenko, *Strengthening Implementation of MEAs: The Innovative Aarhus Compliance Mechanism*, excerpted in Chapter Three: Multilateral Environmental Agreements in Action.

³ One of the first such forms of information regulation was the Emergency Planning and Community Right To Know Act (EPCRA), 42 U.S.C. 11001, et. seq., which was also known as the "Bhopal Bill" when it was passed by the U.S. Congress in 1986 to reduce the likelihood that the Union Carbide chemical disaster that killed thousands in Bhopal, India, in 1984 would be repeated in the U.S. Among other things, the EPCRA requires the regulator to publish an inventory (Toxics Release Inventory, or TRI) of certain chemicals released by certain firms. See Joseph A. Davis, *Bye Bye TRI? Reform or Revolution in the Mother of Environmental Databases* (2003), available at http://environmentwriter.org/resources/articles/0904_tri.htm. See also Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm*, 89 GEO. L.J. 257 (2001).



society, enlisting their resources and creativity to press for improved environmental performance.⁴ In an age where environmental agencies in both developed and developing countries face limited budgets and constrained resources that hinder their effectiveness, information regulation represents the latest in a series of strategies to enlist external forces to pressure polluters to change their behavior.

Information regulation may be defined as the disclosure of a polluter's environmental performance to the general public, to be used by consumers, shareholders, workers, competitors, NGOs, and the media. The disclosure of a polluter's poor environmental performance can act as a sanction, especially when it empowers third parties to take action against the polluter.⁵ This is the cornerstone of "information regulation."⁶ The disclosure of environmental performance data functions by harnessing social and market forces to pressure polluters to change their behavior. For example, armed with environmental information about a firm's compliance record, consumers may choose not to buy the firm's products. Moreover, disclosure of such information may adversely impact a firm's business-to-business sales, stock value, and its ability to hire or retain employees. In addition, NGOs can use the disclosed information to pursue polluters in court through tort suits and citizen-enforcement actions, to organize boycotts, and to galvanize support for stricter emissions standards and higher penalties.

Disclosure can take a variety of forms. The government, either through voluntary or mandatory programs, can collect and disseminate information. For instance, the U.S. Environmental Protection Agency's Toxics Release Inventory (TRI) requires the disclosure of specified chemical emissions by private firms under threat of stiff fines.⁷ Other

⁴ See Chapter Six: NGO Compliance Strategies.

⁵ It can also act as a reward, where affirmative information about a firm's environmental performance can draw positive attention, including from consumers. Environmentally sensitive consumers are the heart of the \$226.8 billion U.S. market for goods and services that appeal to consumers who value health, the environment, social justice, personal development, and sustainable living. LOHAS stands for Lifestyles of Health and Sustainability and includes approximately 30 percent of adults, or 63 million consumers, in the U.S. See *The Lohas Journal*, at <http://www.lohasjournal.com>. See also STEPHEN O. ANDERSEN & DURWOOD ZAELEKE, *INDUSTRY GENIUS: INVENTIONS AND PEOPLE PROTECTING THE CLIMATE AND FRAGILE OZONE LAYER* (2003) (discussing the U.S. EPA's EnergyStar certification program that identifies energy-efficient household appliances). See related discussion on certification systems in Chapter Nine: Compliance Assistance and "Beyond Compliance".

⁶ David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 ELR 10773 (citing Tom Tietenberg, *Disclosure Strategies for Pollution Control*, 11 ENVTL. & RES. ECON. 587 (1998)). See also Daniel C. Esty, *Environmental Protection in the Information Age*, 79

continued



mandatory government programs include efforts in Indonesia and China to rate industrial facilities according to their level of environmental performance, with low-rated facilities given one year to improve before their rating is released to the public. Regulators also can encourage the media to report negative environmental news, such as industrial accidents, governmental investigations, and fines.

Environmental management systems (EMS) represent another strategy that utilizes information to help firms manage their environmental performance. The International Organization for Standardization's ISO 14000 program is a leading example. EMS programs do not necessarily result in the public disclosure of environmental performance information, but rather signal that a firm is following specified environmental management practices.⁸

This chapter begins with an article by Peter H. Sand describing initiatives to establish the public's "right to know" through mandatory disclosure of industry-held environmental risk data.⁹

In the next article, Annette Killmer discusses methods to design and implement mandatory disclosure policies to maximize effective civil society participation.¹⁰ Jérôme Foulon, Paul Lanoie, and Benoît Laplante, in an article published by the World Bank, then discuss the impact of public disclosure programs compared to traditional monitoring and enforcement practices.¹¹

N.Y.U. L. REV. 115 (2004); Neil Gunningham, Martin Phillipson & Peter Grabosky, *Harnessing Third Parties as Surrogate Regulators: Achieving Environmental Outcomes by Alternative Means*, 8 BUS. STRATEGY & ENV'T 211 (1999) (focusing on the "need to design innovative strategies ... [that are] complementary to that of government regulation").

⁷ Firms that fail to disclose required information face fines of up to US\$27,500 per day for each substance requiring disclosure. See EPCRA Section 313 Questions and Answers, at http://www.epa.gov/tri/guide_docs/1998/1998qa.pdf.

⁸ Similarly, regulators can encourage the media to report superior performance that goes beyond compliance. See discussion of certification systems, audits, and EMS in Chapter Nine: Compliance Assistance & "Beyond Compliance".

⁹ Peter H. Sand, *The Right to Know: Environmental Information Disclosure by Government and Industry*, Revised version of a paper presented to the 2nd Transatlantic Dialogue on "The Reality of Precaution: Comparing Approaches to Risk and Regulation" (Warrenton/VA, June 15, 2002) and the Conference on "Human Dimensions of Global Environmental Change: Knowledge for the Sustainability Transition" (Berlin, December 7, 2002).

¹⁰ Annette B. Killmer, *Designing Mandatory Disclosure to Promote Synergies Between Public and Private Enforcement*, INECE 7th International Conference Proceedings (forthcoming 2005).

¹¹ Jérôme Foulon, Paul Lanoie, and Benoît Laplante, *Incentives for Pollution Control: Regulation or Information?* 44 J. ENVTL ECON. & MGMT, 169 (2002).



In another World Bank article, Shakeb Afsah, Benoit Laplante, and David Wheeler describe Indonesia's information regulation program.¹² The fifth article in this chapter, by Hua Wang, Jinnan Bi, David Wheeler, Jinnan Wang, Dong Cao, Genfa Lu, and Yuan Wang describes a similar program implemented in China that publicly discloses environmental performance of industrial firms.¹³ Finally, Susmita Dasgupta and Benoit Laplante discuss how capital markets in Argentina, Chile, Mexico, and the Philippines react to announcements of environmental events, including good news such as superior environmental performance and bad news such as citizen complaints.¹⁴

¹² Shakeb Afsah, Benoit Laplante, & David Wheeler, *Regulation in the Information Age: Indonesian Public Information Program for Environmental Management* (1997), available at http://www.worldbank.org/nipr/work_paper/govern/.

¹³ Hua Wang, Jinnan Bi, David Wheeler, Jinnan Wang, Dong Cao, Genfa Lu, and Yuan Wang, *Public Ratings of Industry's Environmental Performance: China's Greenwatch Program*, INECE 6th International Conference Proceedings, vol. 2 (2002), available at <http://www.inece.org>.

¹⁴ Susmita Dasgupta and Benoit Laplante, *Pollution and Capital Markets in Developing Countries*, 42 J. ENVTL ECON. & MGMT, 310 (2001).