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Clifford Rechtschaffen

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Shining the Spotlight on European Union Environmental Compliance

CLIFFORD RECHTSCHAFFEN*

The practical application of environmental provisions is the most serious problem that national, Community and international environmental law faces. Even a piece of national legislation that copies a directive word for word will remain a mere piece of paper unless it is applied.¹

European Union ("EU") environmental law has grown rapidly in size and complexity in recent years so that it now consists of at least 300 environmental directives and regulations. Indeed, in an increasing number of areas of environmental law, including greenhouse gases controls, toxic chemicals regulation, and extended producer responsibility regulations (known as "take-back" laws), EU law now is the world trendsetter, outpacing even U.S. environmental laws.²

At the same time that EU environmental laws are multiplying, however, implementation and enforcement of these laws is lagging. According to a 2004 survey of the European Commission, just under one one-third of all complaints and cases alleging non-compliance with EU law that were investigated by the Commis-

* Professor and Director of the Environmental Law Program, Golden Gate University School of Law. Professor Rechtschaffen can be reached at crechtschaffen@ggu.edu. Thanks to Elizabeth Kirk, Karen Kramer, and Eckhard Rehbinder for their comments on earlier drafts of this article, and to Golden Gate Law School students Jennifer Maier, Ashling McAnaney, and David Zizmor for their helpful research assistance.

1. LUDWIG KRÄMER, EC ENVIRONMENTAL LAW, § 12-12 (5th ed. 2003).

2. Theofanis Christoforou, *The Precautionary Principle, Risk Assessment, and the Comparative Role of Science in the European Community and the US Legal Systems*, in GREEN GIANTS? ENVIRONMENTAL POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION 17 (Norman J. Vig & Michael G. Faire eds., 2004) [hereinafter GREEN GIANTS?]. For a somewhat different view, see Jonathan Wiener, *Convergence, Divergence, and Complexity in US and European Risk Regulation*, in GREEN GIANTS?, *supra*, at 73, 90-93 (arguing that the United States and EU each are more precautionary in some areas, but less in other areas).

sion concerned noncompliance with environmental laws.³ Indeed, there is a greater lack of implementation and enforcement of EU environmental requirements than of any other area of EU regulation.

The challenges to ensuring that regulated entities comply with EU law are considerable, given the diversity of EU states and the highly limited enforcement tools possessed by institutions at the community-wide, EU level. EU laws, while adopted at the community level, are implemented and enforced by individual member states. EU institutions themselves lack any direct enforcement authority, and face considerable obstacles when even attempting to monitor compliance with EU requirements in any individual country. The challenge of achieving compliance will grow in the future as the number of environmental requirements increases, the EU embraces smaller and more varied regulated entities (such as small businesses, small municipalities, and agriculture), and EU membership grows.

For these reasons, new approaches to promoting compliance with EU environmental law are needed. This article argues that one promising regulatory tool that the EU could utilize is greater reliance on information disclosure requirements, particularly “spotlighting” the compliance records of regulated entities. The article first explains the difficulties that the EU is currently facing in enforcing its environmental laws. It then discusses how spotlighting has proven to be an effective environmental policy tool and how the EU has already embraced a spotlighting strategy in certain areas. Finally, it argues that the EU should use spotlighting as an enforcement strategy because it would provide a potent method of improving compliance with EU environmental laws.

I. THE CHALLENGE OF ENVIRONMENTAL ENFORCEMENT IN THE EU

There are a number of reasons—some institutional, some political, and some reflective of European legal culture—why achieving widespread compliance with EU environmental requirements has been so challenging.

3. See, e.g., *Commission Staff Working Paper, Sixth Annual Survey on the Implementation and Enforcement of Community Environmental Law 2004*, at 4 (Aug. 17, 2005), available at http://ec.europa.eu/environment/law/pdf/6th_en.pdf [hereinafter *Sixth Annual Survey*]. The Commission noted, however, that there were fewer environmental infringement cases in 2004 than in prior years. *Id.*

One is the federalist political structure of the EU. EU environmental laws are enacted at the community-wide level. Most EU environmental legislation is adopted in the form of directives, which bind member states to a certain result but leave the method of achieving the result to their individual discretion.⁴ Thus, even after enactment by the EU, directives must be formally transposed into national law before they can be actually enforced.⁵ (EU regulations, by contrast, are directly binding on member states without the need for implementing legislation.)⁶ The percentage of EU environmental directives transposed into national laws varies considerably.⁷ Further, after the directives are incorporated into national law, it is the member states and not the EU that largely bear the responsibility for ensuring that regulated entities comply with EU requirements. But the EU encompasses states with widely varying levels of enforcement resources, administrative and technical capacities, experience, and philosophical commitment to enforcement principles.⁸ Additionally, some countries, particularly those in southern Europe, believe that economic considerations should have priority over environmental protection.⁹ For these reasons, the degree to which EU environmental requirements are enforced in member states varies considerably. As one observer recently opined, "in some countries, the national commitment to compliance is questionable, so compliance by their industries, let alone individual facilities, has to be doubted."¹⁰

At the same time, the European Commission, which serves as an administrative, quasi-executive branch of the EU governing

4. Christopher Demmke, *Implementation of Environmental Policy and Law in the United States and the European Union*, in GREEN GIANTS?, *supra* note 2, at 135.

5. *Id.*

6. *Id.*

7. *See id.* at 138.

8. *See* KRÄMER, *supra* note 1, §1-21 ("[T]here is a wide gulf between the individual [m]ember [s]tates' national environmental policies and regulations.").

9. *See id.*

10. Ernie Rosenberg, *EU's Aspiration Trumped by U.S. Implementation*, 23 ENV'T. F. 51, 51 (Mar.-Apr. 2006) (also noting large differences among EU countries, particularly when comparing southern and northern European countries, as to the degree to which environmental requirements are enforced); *see also* Luke Goodrich, *Implementing Environmental Law in the European Union: Lessons from the Bathing Water Directive*, 16 GEO. INT'L ENVTL. L. REV. 301, 301 (2004) (noting the failure of member states to effectively implement EU law); Richard C. Visek, *Implementation and Enforcement of EC Environmental Law*, 7 GEO. INT'L ENVTL. L. REV. 377, 393, 400-02 (1995) (noting that member states lack resources, that member states are concerned about the economic impacts of regulation, and that EU laws will usurp traditional state powers).

structure, lacks any direct enforcement tools.¹¹ The Commission has no inspectorate and cannot inspect or monitor facilities. It cannot directly sue facilities within a member state, penalize individual facilities, issue compliance or other orders directed at regulated entities, or exercise criminal enforcement authority.¹² Efforts to enhance the Commission's enforcement authorities have been resisted as interfering with sovereignty and violative of the EU's principle of subsidiarity (providing, in general terms that the EU should only take action at the community level if the objectives of a proposed action cannot be sufficiently achieved by member states).¹³ Also as a result of federalist concerns, the European Environment Agency, which (in theory) was created to improve the EU's capacity for monitoring and enforcement of environmental requirements, has limited powers, and essentially only coordinates the information-gathering activities of member states.¹⁴ Thus, as Professor Christopher Demmke points out, implementation of EU law depends largely on cooperative, partnership-oriented approaches.¹⁵

The only sanction available to the Commission to remedy non-compliance with environmental laws is to institute "infringement" procedures against member states that have failed to implement or enforce EU laws. If that administrative process proves ineffective, the Commission may sue the states in the European Court of Justice ("ECJ").¹⁶ In recent years, the Commission has instituted more infringements against member states in the environmental sector than any other area of EU law.¹⁷ Nonetheless, the infringement process has substantial limits. The small staff of the Commission's Directorate General Environment legal unit is often "overwhelmed" by the number of complaints alleging environmental infringements¹⁸ (the Directorate General Environment only has a total staff of about 450 while in comparison the U.S. Envi-

11. See Demmke, *supra* note 4, at 139.

12. See *id.* at 140.

13. See KRÄMER, *supra* note 1, § 12-19

14. There is also an informal implementation network called the European Union Network for Implementation and Enforcement of Environmental Law ("IMPEL"), which consists of representatives of enforcement and monitoring bodies of member states as well as Commission representatives. IMPEL provides for the exchange of practical ideas and experiences among members. KRÄMER, *supra* note 1, § 12-21.

15. Demmke, *supra* note 4, at 140.

16. *Id.*

17. Demmke, *supra* note 4, at 141.

18. R. Daniel Kelemen, *Environmental Federalism in the United States and the European Union*, in GREEN GIANTS?, *supra* note 2, at 113, 123.

ronmental Protection Agency (“EPA”) has approximately 18,000 employees).¹⁹ On average, the Commission’s administrative process takes about three years,²⁰ and only about 10% of environmental cases are referred to the ECJ.²¹ The average time between the Commission’s decision to initiate an infringement procedure on an environmental matter and judgment by the ECJ is nearly five years.²²

Another important consideration—and point where EU law diverges considerably from U.S. environmental law—is that citizen enforcement of EU directives is possible only in highly circumscribed situations. EU citizens do not have a right to bring citizen enforcement actions against regulated entities who violate EU environmental requirements. Although private parties can file complaints with the European Commission,²³ they cannot challenge a Commission decision not to refer a particular matter to the ECJ (and in any case, the Commission can bring suit only against member states not private regulated entities).

The “direct effect” doctrine provides that in certain circumstances individuals may rely directly on provisions of EU law and sue member states in national courts for not implementing (or not correctly implementing) an EU directive, (even though, as noted above, directives normally first must be transposed into national law to be applicable).²⁴ The doctrine, however, can only be employed against a government body; it does not allow individuals to sue regulated entities directly. Moreover, restrictive standing rules in some member states may prevent environmental groups from bringing suits in national courts.²⁵ Individuals also can sue

19. Demmke, *supra* note 4, at 139. The economies of the EU and the United States are roughly comparable in size. The population of the EU, however, is about 1.5 times greater than the United States’ population, while the United States is about 2.5 times larger in physical size. *Id.*

20. KRÄMER, *supra* note 1, § 12-42.

21. *Id.* § 12-33.

22. Kelemen, *supra* note 18, at 123.

23. Demmke, *supra* note 4, at 143; European Comm’n, *European General Guides: Enforcing Your Rights in the Single European Market, Who Can Lodge a Complaint to the European Commission? What is the Procedure?* 9 (2005), available at http://ec.europa.eu/youreurope/nav/en/citizens/services/eu-guide/enforcing-rights/enforcing-rights_en.pdf.

24. KRÄMER, *supra* note 1, § 12-27; *see also* Goodrich, *supra* note 10, at 312-13 (noting that these actions play an increasingly important role in the implementation of EU directives).

25. Demmke, *supra* note 4, at 126; *see also* Sevine Ercmann, *Enforcement of Environmental Law in United States and European Law: Realities and Expectations*, 26 ENVTL. L. 1213, 1222 (1996) (noting divergent provisions of certain EU member states

member states for damages suffered as a direct result of a member state's "serious" breach of EU law, but these actions too are limited to lawsuits against a member state.²⁶ Finally, even if legal doctrines were more favorable towards citizen enforcement, as a practical matter, environmental organizations apparently lack the muscle of those in the United States. As Krämer maintains, "[e]nvironmental organisations in Western Europe are structurally and financially too weak to defend environmental interests effectively over a long period of time."²⁷

A final factor that may contribute to noncompliance with EU requirements is that the legal culture in most European countries is less adversarial than the legal culture in the United States.²⁸ Thus, tort liability is less developed and wide-ranging.²⁹ Moreover, many European countries traditionally have relied heavily on cooperative-oriented enforcement strategies rather than on the traditional deterrence-based enforcement model widely used in the United States. Although it is beyond the scope of this paper to examine the enforcement practices of individual European countries, at least some evidence suggests that enforcement in EU member states is not particularly effective.³⁰

The bottom line is that for a variety of reasons, noncompliance with its environmental laws has been and continues to be a major problem for the EU. As two recent scholars concluded, "[t]he biggest obstacle to environmental policy success in the EU

concerning the right of interested individuals and associations to bring actions before the national courts for noncompliance with EU environmental legislation).

26. Although there are few, if any, cases in which this has been done, scholars argue that some environmental directives provide rights that could be the basis of future liability actions. See R. Daniel Kelemen, *Regulatory Federalism: EU Environmental Regulation in Comparative Perspective*, 20 J. PUBL. POL. 133, 158 (2000) (arguing that when considering criteria for state liability, it is entirely possible that individuals will bring claims for damages relating to environmental directives in the future).

27. KRÄMER, *supra* note 1, § 12-13.

28. Wiener, *supra* note 2, at 76.

29. James A. Lofton, *Environmental Enforcement: The Impact of Cultural Values and Attitudes on Social Regulation*, 31 Env'tl. L. Rep. (Env'tl. Law Inst.) 10,906, 10,910 (2001); Steven Kelman, *Enforcement of Occupational Safety and Health Regulations—A Comparison of Swedish and American Practices*, in ENFORCING REGULATION 98, 104-15 (Keith Hawkins & John M. Thomas eds., 1984); see also KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 110-54 (1984) (describing a less adversarial enforcement approach by water pollution inspectors in Great Britain).

30. Demmke, *supra* note 4, at 143.

appears to be ensuring that environmental policy directives are carried out appropriately in the member states.”³¹

II. SPOTLIGHTING IS AN EFFECTIVE ENVIRONMENTAL POLICY TOOL

The concept of using information disclosure, or spotlighting, to achieve environmental objectives has become increasingly popular in the past two decades. This policy tool enjoys support across the political spectrum—economists like it because it relies on the efficiency of market forces, while environmental advocates favor it because it can promote citizen empowerment and create incentives for firms to reduce harmful activities.³² Moreover, governments like it because it does not require a lot of governmental resources, infrastructure, or personnel.

Spotlighting has also proven to be quite effective.³³ This is because it takes advantage of the basic fact that all companies desire to avoid negative publicity, including publicity regarding their environmental record. As the architects of the popular “Scorecard” website explain, “[b]y spotlighting the companies with the worst environmental records, we sought to create strong incentives for pollution reduction - no one enjoys holding the rank of top polluter in their community.”³⁴ Indeed, in one compliance study, managers at a pulp and paper mill told researchers that the sanctions the facility feared the most were the informal sanctions imposed by the public and the media and that “they were motivated less by avoiding regulatory violations per se than by avoiding ‘anything that could give you a bad name.’”³⁵

31. JANET R. HUNTER & ZACHARY A. SMITH, *PROTECTING OUR ENVIRONMENT: LESSONS FROM THE EUROPEAN UNION* 91 (2005).

32. See Michael Vandenberg, *From Smokestack to SUV: The Individual as Regulated Entity in the New Era of Environmental Law*, 57 VAND. L. REV. 515, 530 (2004) (noting that “information disclosure may be less expensive for regulators and regulated entities than command and control requirements, may be more flexible and efficient than command and control or market mechanisms, and may enhance deliberative democracy”).

33. David Case, *Corporate Environmental Reporting as Information Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 386 (2005) (“Empirical studies, though limited, demonstrate that information disclosure can be a powerful lever in motivating improved environmental performance by regulated firms.”).

34. About Scorecard: The History of Scorecard, <http://www.scorecard.org/about/txt/history.html> (last visited Feb. 11, 2007).

35. Neil Gunningham et al., *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 321 (2004). Another study found some, albeit mixed, evidence that past noncompliance by a commercial hazardous waste management facility led to a reduction in the quantity of waste sent

There is substantial evidence that a spotlighting approach to combating environmental problems achieves concrete results. The most well developed spotlighting programs are pollutant registries, such as the United States' Toxics Release Inventory ("TRI") program, which require firms to publicly disclose their releases and transfers of certain pollutants.³⁶ TRI covers 666 toxic chemicals used by industrial facilities in the United States in amounts above certain thresholds.³⁷ From 1988 to 2004, releases of chemicals subject to TRI reporting dropped by a remarkable 57%, or 1.71 billion pounds³⁸ (this figure covers those chemicals that have been on the list for this entire period).³⁹ EPA officials, as well as environmentalists and regulated entities, regularly tout TRI as one of the United States' most effective environmental laws.⁴⁰ Professor Bradley Karkkainen describes TRI as a "watershed" and argues that this program works because it establishes an objective, comparable, and broadly accessible performance metric.⁴¹ He notes that TRI compels firms to self-monitor and "confront disagreeable realities" concerning their performance, and that it subjects them to the scrutiny of a variety of external parties—including investors, community residents, and regulators—each of whom can exert powerful pressures to improve the firm's performance.⁴² A related state program, the Massachusetts Toxics Use Reduction Act ("TURA"), passed in 1989, requires industrial facilities to publicly report the quantities of toxic chemicals they use and generate as waste (as well as to prepare a toxics use reduction plan).⁴³ From 1990 to 2004, facilities subject to TURA

to that facility by generators of hazardous waste. Sarah Stafford, *Can Consumers Enforce Environmental Regulations? The Role of the Market in Hazardous Waste Compliance*, 10-11 (Coll. of William & Mary, Dep't of Econ., Working Paper No. 19, 2005).

36. Toxics Release Inventory (TRI) Program, <http://www.epa.gov/tri/> (last visited Feb. 11, 2007).

37. EPA TRI: TRI Chemicals, <http://www.epa.gov/tri/chemical/index.htm> (last visited Feb. 11, 2007).

38. ENVTL. PROT. AGENCY, 2004 TRI PUBLIC DATA RELEASE E-REPORT 16 (2006), available at <http://www.epa.gov/tri/tridata/tri04/ereport/2004eReport.pdf>.

39. *Id.*

40. See Addition of Reporting Elements; Toxic Chemical Release Reporting; Community Right-to-Know, 61 Fed. Reg. 51,322, 51,322 (Oct. 1, 1996) ("EPA considers Right-to-Know to be among its most effective strategies for improving environmental performance.").

41. Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 260, 295 (2001).

42. *Id.* at 295.

43. *Id.* at 354.

since the law's inception have decreased their toxic chemical use by 41%, reduced their generation of waste by 65% per unit of product, and slashed their releases of toxic chemicals by 91%.⁴⁴

Some observers, though, offer more mixed appraisals of the TRI program. Mary Graham and Catherine Miller, for example, find a core of positive trends but note that the rate of decline of toxic releases slowed markedly after the first five years of reporting, that the amount of toxic waste generated (as opposed to released) has continued to increase, and that few facilities have employed source reduction to cut releases.⁴⁵ Other critics argue that TRI data is inaccurate and unreliable and that it is misleading because it fails to convey information to the public about the risk of toxic releases.⁴⁶

Similar to the U.S. TRI program, Canada's pollutant registry, the National Pollutant Release Inventory ("NPRI"), established in 1992, requires companies to report environmental releases and transfers of approximately 270 chemicals.⁴⁷ The NPRI has sparked emission reductions in Canada, although not as dramatic as those reported in the United States under TRI. From 1995 to 2003, NPRI facilities reduced their releases and transfers by 10%.⁴⁸ (During this period, the number of facilities reporting increased by 67%. For firms that reported both in 1995 and 2003, the decrease in total releases and transfers was 20%.⁴⁹) One recent study found that Canadian firms with consumer market ex-

44. Massachusetts Toxic Use Reduction Institute, Results to Date, <http://www.turadata.turi.org/Success/ResultsToDate.html> (last visited Feb. 11, 2007).

45. Mary Graham & Catherine Miller, *Disclosure of Toxic Releases in the United States*, 43 ENV'T 8, 11-12 (Oct. 2001).

46. Kathryn E. Durham-Hammer, *Left to Wonder: Reevaluating, Reforming, and Implementing the Emergency Planning and Community Right-to-know Act of 1986*, 29 COLUM. J. ENVTL. L. 323, 336-41 (2004); Alexander Volokh, *The Pitfalls of the Environmental Right-to Know*, 2002 UTAH L. REV. 805, 814-24 (2002); Susan E. Dudley, *It is Time to Reevaluate the Toxic Release Inventory*, 12 MO. ENVTL. L. & POL'Y REV. 1, 11-15 (2004). For an overview of the TRI program's impact, see JAMES T. HAMILTON, REGULATION THROUGH REVELATION: THE ORIGIN, POLITICS, AND IMPACTS OF THE TOXICS RELEASE INVENTORY PROGRAM 208-51 (2005).

47. About the NPRI, http://www.ec.gc.ca/pdb/npri/npri_about_e.cfm (last visited Jan. 12, 2007); CEPA Environmental Registry: General Information, http://www.ec.gc.ca/CEPARegistry/gene_info/fs_1.cfm (last visited Jan. 12, 2007).

48. COMM'N FOR ENVTL. COOPERATION, TAKING STOCK: 2003 NORTH AMERICAN POLLUTANT RELEASES AND TRANSFERS 160 (2006).

49. *Id.* at 140. In the first seven years of the program (1993 to 1999), covered firms reduced their on-site releases by 27%. Two researchers have concluded that most of these reductions resulted from traditional command-and-control regulation, rather than voluntary reductions undertaken by firms in response to public pressure stemming from disclosure of their releases. Kathryn Harrison & Werner Antweiler,

posure reduced their emissions more than other firms subject to NPRI, although the effect was relatively small.⁵⁰ Other countries with similar versions of pollutant registries include Australia, Japan, Mexico, and Norway,⁵¹ and as discussed in more detail below, members states of the EU.

Environmental groups have used pollutant registries like the TRI and NPRI as a springboard to develop more detailed and personalized spotlighting tools. For example, the "Scorecard" website mentioned above, created by the environmental organization Environmental Defense, allows the public in the United States to analyze and compare TRI data and other environmental information by zip code or facility, and also provides estimates of the health risks posed by certain releases.⁵² Environmental groups in Canada have developed a similar website entitled "Pollution Watch."⁵³

Beyond pollutant registries like TRI and NPRI, other information disclosure programs have produced significant environmental benefits. For example, California's Proposition 65, which requires businesses to warn the public prior to exposing them to listed carcinogens or reproductive toxins, has generated substantial reductions in industrial air emissions and significant reformulations of consumer products containing toxic chemicals (including brass faucets, ceramic ware, calcium supplements, water meters, water filters, rain coats and other plastic clothing, wooden playground structures, and portable classrooms).⁵⁴ More generally, in the consumer products market, there is some evidence that awarding a positive environmental label to a product leads to a substantial increase in the market share of the product (and, conversely, some evidence of companies whose sales dropped sharply as a result of being labeled environmentally unfriendly).⁵⁵

Incentives for Pollution Abatement: Regulation, Regulatory Threats, and Non-Governmental Pressures, 33 J. POL'Y ANAL. & MAN. 361, 368-69 (2003).

50. Werner Antweiler & Kathryn Harrison, *Toxic Release Inventories and Green Consumerism: Empirical Evidence From Canada*, 36 CAN. J. ECON. 495, 517-18 (2003).

51. HAMILTON, *supra* note 46, at 239.

52. See Scorecard: The Pollution Information Site, <http://www.scorecard.org/> (last visited Dec. 1, 2006).

53. See PollutionWatch, <http://www.pollutionwatch.org> (last visited Dec. 1, 2006).

54. Clifford Rechtschaffen, *The Continued Success of Proposition 65 in Reducing Toxic Exposures*, 35 ENVTL. L. REP. (Envtl. Law Inst.) 10,850 (2005).

55. Clifford S. Russell et al., *Environment, Information and Consumer Behavior: An Introduction*, in ENVIRONMENT, INFORMATION AND CONSUMER BEHAVIOR 1, 8-9 (Signe Krarup & Clifford S. Russell eds., 2005); cf. Christopher D. Clark & Clifford S.

To date, there have been few formal programs that mandate disclosure of a firm's compliance or environmental performance records. In a number of instances where such information has been mandated, however, disclosure has stimulated improved environmental performance. For example, in Indonesia, the environmental agency developed a color-coded grading system to evaluate the environmental performance of industrial facilities.⁵⁶ Using this system, facility grades were then publicly disclosed, although there was a six-month delay in disclosing firms in the worst two categories to allow them an opportunity to improve their performance.⁵⁷ Rates of compliance among participating factories increased from 35% to 51%, and discharges on average declined by 43%.⁵⁸

In a very similar program, China's Environmental Protection Agency established "Greenwatch," a public disclosure program that rates industrial environmental performance from best to worst in five colors based on a firm's emissions, environmental management practices, public complaints, regulatory actions and penalties, and firm characteristics.⁵⁹ In a pilot project conducted in one Chinese city, the number of "superior" performing firms doubled (from 31% to 62%) in the first year after the firm rankings were publicly released; in a second city, the percentage of firms rated good or better increased from 24% to 62% of total firms, and

Russell, *Public Information Provision as a Tool of Environmental Policy*, in ENVIRONMENT, INFORMATION AND CONSUMER BEHAVIOR, *supra*, at 111, 112 (reporting some evidence that environmental labels have prompted consumers to change their behavior and chose eco-labeled products).

56. Shakeb Afsah & Jeffrey R. Vincent, *Putting Pressure on Polluters: Indonesia's PROPER Program* (1999) (on file with author). The colors were chosen because they had cultural connotations in Indonesia analogous to the environmental performance levels they signified.

57. Shakeb Afsah et al., *Regulation in the Information Age: Indonesian Public Information Program for Environmental Management* 7 (1997), available at <http://siteresources.worldbank.org/NIPRINT/Resources/RegulationInTheInformationAge.pdf>.

58. See *id.* at 9; Shakeb Afsah, *Proper Program for Pollution Control Environmental Evaluation and Rating: A Model for Promoting Environmental Compliance and Strengthening Transparency and Community Participation in Developing Countries* 18 (on file with author).

59. Hua Wang et al., *Public Ratings of Industry's Environmental Performance: China's Greenwatch Program*, Address at Seventh International Conference on Environmental Enforcement (April 15-19, 2002), in CONFERENCE PROCEEDINGS 2, 7 (Inspectorate of Housing, Spatial Planning and the Environment, The Netherlands, et al., San Jose, Costa Rica) (2002), available at <http://www.inece.org/conf/proceedings2/52-Public%20RatingsChina.pdf>.

the percentage of firms rated in the worst category decreased from 11% to 5%.⁶⁰

Likewise, in 1990 the regional environmental agency in British Columbia, Canada began publishing a list of firms that were significantly out of compliance with environmental requirements. Over the subsequent six-year period, publication of the list had positive impacts; firms that were included on the list significantly reduced their emissions, even more so than firms out of compliance that were subject to enforcement orders and penalties.⁶¹ In another (non-environmental disclosure) program, Los Angeles County in 1997 required restaurants to post in their windows government-determined letter grades, reflecting the results of county hygiene inspections. This local program resulted in revenue increases for restaurants with higher grades and revenue decreases for those with lower grades, as well as measurable increases in hygiene quality and a consequent significant drop in hospitalizations due to food-related illnesses.⁶²

Notably, moreover, negative publicity about a firm's poor environmental record—even though not necessarily as part of a government mandated program—also can translate into adverse economic impacts for the firm. Thus, public announcements about the initiation of enforcement actions against a firm, environmental spills, or high levels of emissions have been shown to result in significant reductions in the market value of the affected firm.⁶³ For example, a study of stock market reactions to 730 EPA judicial actions against publicly-traded firms from 1972-1991 found

60. *Id.* at 9-10.

61. Jérôme Foulon et al., *Incentives for Pollution Control: Regulation or Information?*, 44 J. ENVTL. ECON. & MGMT. 169, 170-71 (2002).

62. Archon Fung et al., *The Political Economy of Transparency: What Makes Disclosure Policies Effective?* 21 (Ash Inst. for Democratic Governance & Innovation, John F. Kennedy School of Gov't, Harvard Univ., Working Paper No. OP-03-04, 2004), available at <http://www.archonfung.net/papers/FGWEffectiveness.pdf>. Fung and his colleagues argue, however, that transparency programs have a mixed record of success. *See id.* at 22.

63. Paul Lanoie et al., *Can Capital Markets Create Incentives for Pollution Control?*, 26 ECOLOGICAL ECON. 1, 35-36 (1998) (discussing various studies that reach this conclusion). For example, Professor James Hamilton found that firms suffered statistically significant negative stock returns of between 0.2% and 0.3%, an average loss per firm of \$4.1 million in stock value, when TRI data was first disclosed in 1989. James T. Hamilton, *Pollution as News: Media and Stock Market Reactions to the Toxics Release Data*, 28 J. ENVTL. ECON. & MGMT. 98, 109 (1995). A later study looking at chemical firms reported similar results following disclosure of TRI data in the years 1990-1994. Madhu Khanna et al., *Toxics Release Information: A Policy Tool for Environmental Protection*, 36 J. ENVTL. ECON. & MGMT. 243, 245 (1998).

that the market value of “the average affected firm drop[ped] 0.43% during the week of settlement” of the enforcement action.⁶⁴ Likewise, another study found that public announcement of U.S. Occupational Safety and Health Administration (“OSHA”) penalties led to a significant drop in stock prices of the companies subject to those penalties.⁶⁵ Another investigation looked at the impact on stock prices of firms in three industrial sectors in India after a leading environmental group published ratings about their environmental performance, which generally showed poor performance.⁶⁶ It found that in two of the three sectors examined, stock prices declined significantly after the ratings were published.⁶⁷ The losses were more significant for firms with lower rankings.⁶⁸ Similar results were reported in an analysis of the reaction of capital markets to environmental performance disclosure in the Republic of Korea, where, since the mid 1980s, the Ministry of Environment has published a monthly list of facilities in violation of Korean environmental laws and enforcement actions undertaken by the Ministry.⁶⁹ During the period from 1993 to 2002, publication of this information, in a majority of instances, led to significant market reductions on the Korean Stock Exchange for the firms affected. The average percentage reduction in market value was 9.7%.⁷⁰

In sum, considerable experience to date shows that spotlighting a firm’s emissions, environmental performance, or record of violations can be a very effective means of motivating better firm performance and compliance.

64. S.G. Bandrinath & Paul J. Bolster, *The Role of Market Forces in EPA Enforcement Activity*, 10 J. REG. ECON. 165, 167 (1996).

65. Wallace N. Davidson, III et al., *The Effectiveness of OSHA Penalties: A Stock-Market-Based Test*, 33 INDUST. REL. 283 (1994).

66. Shreekant Gupta & Bishwanath Goldar, *Do Stock Markets Penalise Environment-Unfriendly Behaviour? Evidence from India* 12 (Ctr. for Dev. Econ., Working Paper No. 116, 2003), available at <http://www.cdedse.org/pdf/work116.pdf>.

67. *Id.* at 12-15.

68. *Id.* at 16-17. The declines were as high as 43% for those identified as the worst performers. *Id.* In a study of developing countries, other researchers found that stock values fell in response to citizen complaints about firms and rose when positive environmental performance was publicized by the government. See generally Susmita Dasgupta et al., *Pollution and Capital Markets in Developing Countries*, 42 J. ENVTL. ECON. & MANAG. 310 (2001).

69. Susmita Dasgupta et al., *Disclosure of Environmental Violations and Stock Market in the Republic of Korea*, 58 ECOL. ECON. 759 (2006).

70. *Id.*

III. THE EU HAS EMBRACED THE CONCEPT OF SPOTLIGHTING

The EU already has embraced the concept of spotlighting in a number of areas of environmental policy. Most directly, since 2001 the EU has required member states to publish an inventory of pollutant releases and transfers modeled after the TRI program—first as part of the European Pollution Emission Register (“EPER”) and then, beginning in 2007, under the European Pollutant Release and Transfer Register (“E-PRTR”) (established to implement a protocol on pollution registries signed by the EU).⁷¹ The original EPER program covers fifty pollutants and approximately 9,200 facilities; it requires member states to file reports on emissions of these pollutants within their jurisdiction every three years.⁷² The register is available on a website hosted by the European Environment Agency, thus allowing the public to see detailed data on individual facilities and rank them by the size of their emissions.⁷³ The first fully complete reporting year for EPER was 2004,⁷⁴ during which its website received over 240,000 visitors.⁷⁵ The new E-PRTR expands the number of pollutants covered (to over 90), as well as the type of releases, and sources covered by member state reports.⁷⁶ It also requires member states to report annually on releases and transfers.⁷⁷ Like the

71. See Commission Decision of 17 July 2000 on the Implementation of a European Pollutant Emission Register According to Article 15 of Council Directive 96/61/EC Concerning Integrated Pollution Prevention and Control, 2000 O.J. (L 192) 36, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_192/l_19220000728en00360043.pdf; see generally Parliament and Council Regulation (EC) No. 166/2006 of 18 January 2006 Concerning the Establishment of a European Pollutant Release and Transfer Register and Amending Council Directives 91/689/EEC and 96/61/EC, 2006 O.J. (L 33) 1, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_033/l_03320060204en00010017.pdf [hereinafter Parliament and Council Regulation No. 166/2006].

72. Welcome to EPER, <http://www.eper.cec.eu.int/eper/> (last visited Jan. 11, 2007); What is EPER, <http://www.eper.cec.eu.int/eper/introduction.asp?i=> (last visited Jan. 11, 2007).

73. See Questions to EPER, <http://www.eper.cec.eu.int/eper/faq.asp?i=> (last visited Jan. 11, 2007).

74. Roel Brand et al., EPER Review Report 8 (June 2004), available at <http://eper.ec.europa.eu/eper/documents/EPER%20Review%20report,%20final.pdf>.

75. Press Release, European Environmental Agency, Updated Industrial Emissions Register Reveals Mixed Results, (Nov. 23, 2006), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1618&format=HTML&aged=0&language=EN&guiLanguage=en>.

76. See Parliament and Council Regulation No. 166/2006, *supra* note 71, Annex I (increasing the number of pollutants covered to over ninety); see also *id.* Annex II.

77. *Id.* art. 5(1)(a)-(c).

EPER, the E-PRTR must be publicly accessible, user friendly, and provide information to the public free of charge.⁷⁸

In addition, to requiring publication of pollution registries by member states, the EU is a party to the Århus Convention, which provides a broad right of public access to environmental information (as well as participation in environmental decision-making, and access to justice to redress environmental violations).⁷⁹ Member states are required to make all environmental information that they possess accessible to the public and to prepare and publish a report on the state of the environment at least every four years, including information “on the quality of, and pressures on, the environment.”⁸⁰

The EU also has utilized spotlighting with success in its Bathing Waters Directive.⁸¹ This directive, originally adopted in 1975 and strengthened in 2006, establishes water quality standards for beaches used by swimmers.⁸² Although plagued by considerable noncompliance, this directive also resulted in significant improvements in water quality, in considerable part because of public disclosure about water quality at EU beaches.⁸³ Since 1991 the European Commission has published an annual report on beach water quality in member states (the only directive for which the European Commission has published such a report).⁸⁴ Probably even more significantly, since 1987 environmental groups have

78. *Id.* arts. 8(2), 10(1).

79. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice regarding Environmental Matters, June 25, 1998, 38. I.L.M. 517, available at <http://www.unece.org/env/pp/documents/cep43e.pdf> [hereinafter Århus Convention].

80. See generally Parliament and Council Directive 2003/4/EC, art. 7(3), 2003 O.J. (L 41/26) (EC), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_041/l_04120030214en00260032.pdf; see also John M. Ackerman & Irma E. Sandoval-Ballesteros, *The Global Explosion of Freedom of Information Laws*, 58 ADMIN. L. REV. 85, 86 (2006) (noting that as of 2005, sixty-six countries had passed laws guaranteeing citizens access to information).

81. See Council Directive 76/160/EEC, 1976 O.J. (L 31) 1 (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31976L0160:EN:HTML> [hereinafter Bathing Waters Directive].

82. See Parliament and Council Directive 2006/7/EC, art. 5, 2006 O.J. (L 64) 37 (EU), available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_064/l_06420060304en00370051.pdf [hereinafter Parliament and Council Directive 2006/7/EC]; see also *id.* Annex II; *Sixth Annual Survey*, *supra* note 3, at 12.

83. See *Sixth Annual Survey*, *supra* note 3, at 12 (“The Bathing Water Report 2003 shows that bathing water quality in fifteen ‘old’ [m]ember [s]tates (EU15) continues to improve.”).

84. Accurate Testing of Bathing Water, <http://ec.europa.eu/research/success/en/med/0012e.html> (last visited Jan. 12, 2007).

developed a complementary spotlighting campaign, known as the "Blue Flag Campaign."⁸⁵ This Campaign awards "Blue Flags" to beaches and marinas that meet water quality criteria set forth in the Bathing Waters Directive (or other national requirements for non-EU countries), as well as other detailed requirements relating to environmental management, safety and services on the beach and the provision of environmental education and information.⁸⁶ Beaches and marinas can display their Blue Flag designations, and information about participating areas is widely publicized. The Blue Flag is now a well-known and widely recognized eco-label for tourists, and localities vie to obtain certification under the program.⁸⁷ It operates in 36 countries, and in 2006, 2,599 beaches and 644 marinas were awarded the Blue Flag.⁸⁸ There are related award schemes in individual European countries including the Strandtafel Award in Germany (administered by the state of Schleswig-Holstein)⁸⁹ and the "Seaside Awards,"⁹⁰ "Good Beach Guide,"⁹¹ and "Green Coast" Awards⁹² in Great Britain administered by environmental groups. (The United States employs an approach similar to the EU's Bathing Water Directive. The "Beaches Bill," enacted by Congress in 2000, requires states to monitor the water quality of beaches and report this data to the EPA and the public.⁹³ The environmental group Natural Resources Defense Council publicizes local beach quality and clo-

85. KRÄMER, *supra* note 1, § 7-15; Blue Flag History, <http://www.blueflag.org/BlueFlagHistory> (last visited Jan. 12, 2007).

86. See Blue Flag Programme, <http://www.blueflag.org/> (last visited Jan. 8, 2007).

87. RÜDIGER K. W. WURZEL, ENVIRONMENTAL POLICY-MAKING IN BRITAIN, GERMANY, AND THE EUROPEAN UNION: THE EUROPEANISATION OF AIR AND WATER POLLUTION CONTROL 225 (2002) (noting that Blue Flag has become one of best known eco-labels in Europe).

88. Blue Flag Beaches/Marinas, <http://www.blueflag.org/blueflag> (last visited Jan. 10, 2007).

89. WURZEL, *supra* note 87, at 226-28.

90. See Seaside Awards, <http://www.seasideawards.org.uk/sea2.asp> (last visited Jan. 8, 2007) (criteria also focused on rural beaches and more emphasis on litter management).

91. See The Good Beach Guide, <http://www.goodbeachguide.co.uk/> (last visited Jan. 10, 2007).

92. See Green Coast Awards, <http://www.keepwalestidy.org/english/default.asp?Category=Tourism&NewsID=17&Menu=0.26.12.61> (last visited Jan. 10, 2007) (criteria also include unspoiled, natural character of beaches).

93. See Beaches Environmental Assessment and Coastal Health Act of 2000, Pub. L. No. 106-284, § 4, 114 Stat. 872 (2000) (codified as amended in scattered sections of 33 U.S.C.).

sures through its own annual reports.⁹⁴ According to the EPA, from 2002 to 2004 the percentage of days on which beaches were closed and had health advisories declined, despite an increase in the number of beaches monitored.⁹⁵

Amendments to the EU Bathing Waters Directive, adopted in 2006, build on the spotlighting approach to environmental regulation.⁹⁶ These amendments divide beaches into four classifications based on beach water quality: excellent, good, sufficient, and poor.⁹⁷ They require that information about a beach's quality classification, the results of water quality monitoring, the beach's management plan, and other relevant information, be made readily available to the public both through displays at the beach and through the media and the Internet.⁹⁸ The amendments also require the Commission to publish an annual report on bathing water quality, including classifications, within the EU.⁹⁹

The EU's voluntary Eco-Management and Auditing Scheme ("EMAS") also relies on information disclosure to prompt better environmental performance.¹⁰⁰ To achieve EMAS registration, a firm must follow certain requirements for adopting an environmental management system and prepare a public environmental report.¹⁰¹ The report must include a description of all firm activities resulting in significant environmental impacts, a statement of

94. See MARK DORFMAN, MSPH, *TESTING THE WATERS 2006: A GUIDE TO WATER QUALITY AT VACATION BEACHES, POLLUTION-RELATED BEACH CLOSINGS AND ADVISORIES CLIMB IN 2005* (2006), available at <http://www.nrdc.org/water/oceans/nttw.asp>.

95. William Yardley, *Beach Closings and Advisories Rose in 2005*, *Council Reports*, N.Y. TIMES, Aug. 14, 2006, at A12 (the EPA reported that the percentage of beaches with advisories declined from six percent to four percent from 2002 to 2004; the Natural Resources Defense Council, however, contends that the number of closings and advisories actually increased five percent from 2004 to 2005).

96. See Parliament and Council Directive 2006/7/EC, *supra* note 82.

97. *Id.* art. 5(1)(a)-(d).

98. *Id.* arts. 7, 13(4).

99. *Id.* art. 13.

100. Dialogue and Reporting, <http://www.emas.org.uk/aboutemas/mainframe.htm> (last visited Jan. 12, 2007).

101. Parliament and Council Regulation 761/2001, *Allowing Voluntary Participation by Organisations in a Community Eco-Management and Audit Scheme*, 2001 O.J. (L 114) 1, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_114/l_11420010424en00010029.pdf [hereinafter *Parliament and Council Regulation 761/2001*]. Specifically, firms must (1) conduct a review of all environmental aspects of the firm's activities; (2) establish an effective management system that, among other things, commits the firm to continuous improvement of its performance (since 2001, this system can be the International Organization for Standardization ("ISO") 14001 EMS, although EMAS also goes beyond ISO 14001 in several respects); (3) carry out an audit assessing the effectiveness of the firm's management system and compliance with regulatory requirements; and (4) prepare a public statement of environmental

the organization's performance as compared to its goals and improvement targets, and information on the organization's compliance with legal requirements.¹⁰² As Professor David Case argues, "public environmental information disclosure is the "prime objective" of the EMAS regulation."¹⁰³

The only tangible reward (other than the internal improvements that may result from adopting a management system) for entities that participate in EMAS is enhanced public reputation—facilities that are registered are entitled to display an "attractive" ("visible and recognizable") EMAS logo on their letterheads, environmental statements, and product advertisements. EMAS has engendered some, albeit limited, participation; at the start of 2005, more than 4,000 facilities representing more than 3,000 firms had obtained registration under EMAS. (The relatively limited participation in EMAS is likely due in part to it being overshadowed by International Organization for Standardization ("ISO") 14001, a competing environmental management standard. As of the end of 2005, over 111,000 firms worldwide had achieved certification under ISO 14001.¹⁰⁴)

The EU also has been moving toward requiring greater environmental information disclosure in annual corporate reports. Under its 2003 "Modernization Directive" (dealing with EU companies' financial reporting), for example, the EU requires large public corporations to include an analysis of their environmental performance necessary to understand the "company's development, performance or position" in their annual reports.¹⁰⁵ Professors Cynthia Williams and John Conley term this requirement an example of general "sustainability reporting."¹⁰⁶ An earlier set of recommendations adopted by the European Commission goes further, calling on EU companies to disclose specific environmental information such as the company's policy and programs; environmental improvements in key areas; resource, water, and energy

performance. In addition, an independent, accredited third party must verify that the firm has met all the requirements of the EMAS regulation. *Id.* art. 3(2)(a)-(d).

102. *Id.* at Annex III(3.2).

103. Case, *supra* note 33, at 404.

104. See Int'l Org. on Standardization, *The ISO Survey of Certifications 2005*, at 9, available at <http://www.iso.org/iso/en/iso9000-14000/pdf/survey2005.pdf>.

105. Parliament and Council Directive 2003/51, 2003 O.J. (L 178) 16, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2003/l_178/l_17820030717en00160022.pdf.

106. Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L. J. 493, 530 (2005).

use; emissions and waste disposal; material environmental liabilities; significant fines and payments resulting from noncompliance with environmental regulations or tort liability; and government environmental incentives received by the firm in their annual reports.¹⁰⁷

A number of EU countries, Denmark, Holland, Norway, Sweden, and Spain also require companies to provide expanded environmental information in their annual reports.¹⁰⁸ Most expansively, France requires each company that trades on the French stock exchange to provide extremely detailed environmental and other social information in its annual report to shareholders, including resource use, emissions, environmental management systems, and sanctions paid because of environmental damage.¹⁰⁹ Similarly, in 2005 the British government promulgated regulations that would have required 1,300 British-based companies listed on the London Stock Exchange and the two major U.S. exchanges to publish an annual report identifying material social and environmental risk and disclose information about those risks.¹¹⁰ These regulations were unexpectedly withdrawn in late 2005, but some observers expect them to be reinstated.¹¹¹

Large corporations also have begun to voluntarily prepare formal corporate environmental reports in response to the growing socially responsible investment movement in Europe (and the United States). This movement evaluates the social records of companies, including their record of environmental compliance and performance, when making investment decisions in the stock market.¹¹² In Europe, the socially responsible investment market in 2003 was estimated at approximately €12.2 billion for individ-

107. Commission Recommendation of 30 May 2001 on the Recognition, Measurement and Disclosure of Environmental Issues in the Annual Accounts and Annual Reports of Companies, 2001 O.J. (L 156) 33, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2001/l_156/l_15620010613en00330042.pdf.

108. Williams & Conley, *supra* note 106, at 504.

109. *Id.* at 504-05.

110. John M. Conley & Cynthia A. Williams, *Engage, EMBED, and Embellish: Theory vs. Practice in the Corporate Social Responsibility Movement*, 31 J. CORP. L. 1, 3 (2005).

111. *Id.* at 3-4.

112. See generally CSR Europe et al., *Investing in Responsible Business: The 2003 Survey of European Fund Managers, Financial Analysts and Investor Relations Officers*, available at http://www.deloitte.com/dtt/cda/doc/content/dtt_gfsi_CSRweb2_110603.pdf [hereinafter *Investing in Responsible Business*]; Soc. Inv. Forum, *2005 Report on Socially Responsible Investing Trends in the United States: 10 Year Review* (2006), available at http://www.socialinvest.org/areas/research/trends/sri_trends_report_2005.pdf [hereinafter *2005 Report*].

ual investors and €336 billion for institutional investors.¹¹³ Today, 68% of large companies in Western Europe report on their economic, social and environmental performance.¹¹⁴

Lastly, the EU has adopted a voluntary “eco-labeling” program to promote a reliable market for environmentally friendly products and services.¹¹⁵ Firms that wish to display the EU’s “eco-label” must demonstrate to government agencies that they meet detailed environmental criteria, which focus on reductions in the environmental impacts of a product or service throughout its life-cycle (from raw material through extraction, production, distribution and disposal).¹¹⁶ As of August 2006, 339 eco-label licenses had been granted, covering several hundred products.¹¹⁷ The EU also has directives that set requirements for labels on organic foods, genetically modified organisms, and household appliances (requiring information about energy consumption, noise, water use, and power).¹¹⁸ Moreover, there are other non-governmental voluntary labeling schemes in the EU, such as the marine stewardship scheme for fisheries.¹¹⁹

Thus, in a variety of contexts, EU policymakers and others recognize the value of spotlighting to motivate better environmental performance. It’s time to expand the spotlighting concept to the enforcement context to promote more widespread compliance with EU environmental law.

113. *Investing in Responsible Business*, *supra* note 112, at 9. In the United States, approximately \$2.29 trillion of professionally managed assets are invested according to social criteria—approximately 9.4% of such assets. 2005 *Report*, *supra* note 121, at iv.

114. *Investing in Responsible Business*, *supra* note 112, at 20.

115. See Welcome to the European Union Eco-label Homepage, http://ec.europa.eu/environment/ecolabel/index_en.htm (last visited Jan. 30, 2007).

116. Parliament and Council Regulation 1980/2000, On a Revised Community Eco-label Award Scheme, 2000 O.J. (L 237) 1, available at http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_237/l_23720000921en00010012.pdf.

117. The Use of the European Eco-Label Criteria in Green Public Procurement Approaches, http://ec.europa.eu/environment/ecolabel/pdf/marketing/management_group/eu_ecolabel_criteria_in_gpp_helpdesk.pdf (last visited Jan. 30, 2007).

118. The sale of organic foods has been increasing throughout Europe. Mette Wier et al., *Information Provision, Consumer Perceptions and Values—The Case of Organic Foods*, in ENVIRONMENT, INFORMATION AND CONSUMER BEHAVIOR, *supra* note 55, at 161, 161.

119. See Welcome to MSC Online, <http://eng.msc.org/> (last visited Jan. 30, 2007).

IV. THE NEXT STEP FOR THE EU: SPOTLIGHTING ENFORCEMENT AND COMPLIANCE INFORMATION

Despite its potential, so far spotlighting has only been employed as an enforcement strategy in a very limited way. Yet as discussed above, spotlighting is a valuable and cost-effective tool that should be better exploited by EU regulators.¹²⁰ While the EU has embraced spotlighting in some contexts, such as the E-PRTR and with respect to beaches, it has not publicized the extent to which individual companies are meeting the requirements of EU law (with the notable exception of Great Britain, discussed below). This article proposes that EU regulators take the next step and publicly profile and disclose the compliance records of individual firms in all member states.

The U.S. EPA has taken a major step in this direction with its Enforcement and Compliance History Online (“ECHO”) website.¹²¹ Started in 2002, ECHO provides enforcement and compliance information about three major statutes—the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act—for approximately 800,000 regulated facilities.¹²² This includes information from the previous two years regarding: facility inspections and evaluations, compliance status, violations detected, pollutants associated with the violations and whether they are significant, formal enforcement actions, and penalties imposed as a result of enforcement actions.¹²³ In little more than its first three years of operation, the website received approximately 2.5 million visits.¹²⁴

Great Britain’s Environmental Agency has gone further than ECHO and has presented a template for the rest of the EU to fol-

120. See Robert H. Cutting et al., *Enforcement Data: A Tool for Environmental Management*, 36 ENVTL. L. REP. (Envtl. Law Inst.) 10,060-61 (2006) (“an assemblage of existing enforcement and compliance data from all environmental regulatory agencies in a publicly accessible format would be a valuable tool that is either overlooked by policymakers or is intentionally ignored”).

121. See Envtl. Prot. Agency, Enforcement and Compliance History Online, <http://www.epa.gov/echo/> (last visited Jan. 28, 2007).

122. Envtl. Prot. Agency, Enforcement and Compliance History Online: About the Site, http://www.epa.gov/echo/about_site.html (last visited Jan. 28, 2007).

123. Envtl. Prot. Agency, Enforcement and Compliance History Online: About the Data, http://www.epa.gov/echo/about_data.html (last visited Jan. 28, 2007).

124. Press Release, Envtl. Prot. Agency, Three EPA Programs Nominated for Government ‘Oscars,’ (March 30, 2006), available at <http://yosemite.epa.gov/opa/admpress.nsf/198a007cc57e64d3852570210055f3f6/09d2dfd224b8298f852571410059871a!OpenDocument&Highlight=0,ECHO>.

low. For the past decade, the Agency has published a "Spotlight on Business Environmental Performance," which details the environmental performance and compliance record of individual firms in various business sectors.¹²⁵ Within each sector, the report highlights good and bad performers (including some case studies), pollution incidents, and fines assessed over a given threshold.¹²⁶ In its 2005 report, for example, the Agency listed the ten firms with the highest cumulative fines, events leading to prosecution, and repeat offenses.¹²⁷ The Agency also grades operator performance from "A" to "E" based on the firm's ability to comply with permit conditions and its actual compliance history, including violations, pollution incidents, and prosecutions.¹²⁸ Within its grading scheme, the Agency divides operators into three categories of regulated facilities: publicly-traded corporations (including the stock market listed parent companies of the businesses highlighted) large private companies, and small and medium sized companies.¹²⁹

In its 2002 annual report, the Environment Agency noted the positive results achieved through its spotlighting reports program:

When the Environment Agency first turned the media spotlight on poor environmental performance five years ago, a chorus of disapproval rose through the ranks of regulated industry.

Five years on, Spotlight on business environmental performance has developed and expanded into a rounded assessment of performance, good and bad, and highlights positive action as well as failings. In its short lifetime the report has become a regular fixture in the environmental calendar, its findings keenly anticipated by some, anxiously awaited by others.

The latest report shows the positive trends of previous years continuing. [These trends include] reductions in many pollutants and significant overall improvements in environmental management.¹³⁰

125. See generally ENVIRONMENTAL AGENCY, THE ENVIRONMENT: WHAT'S IN IT FOR YOU? SPOTLIGHT ON BUSINESS ENVIRONMENTAL PERFORMANCE IN 2005, 2006, available at <http://publications.environment-agency.gov.uk/pdf/GEHO0706BLBM-e-e.pdf> [hereinafter SPOTLIGHT ON BUSINESS ENVIRONMENTAL PERFORMANCE IN 2005].

126. See generally *id.*

127. See generally *id.*

128. *Id.* at 42.

129. *Id.* at 5.

130. ENVIRONMENT AGENCY, SPOTLIGHT ON BUSINESS ENVIRONMENTAL PERFORMANCE, 2002, at 1, available at http://image.guardian.co.uk/sys-files/Guardian/documents/2003/07/30/spt_2002full_523404.pdf.

A more recent observer describes the positive impact of the spotlighting reports:

There has been an impact here, specifically on major utility corporations and investors such as in the waste industry and the water quality industry. The reality of convictions and the “naming and shaming” is that it is effective. It does modify company behavior as it has caused problems in England and Wales and overseas. Experience has been had, for example, of other companies contacting the [Environment Agency] to seek advice of how to best avoid doing something illegal that their competitors have done. Public limited companies do not like bad publicity. . . .¹³¹

The EU itself, however, has only taken small steps in the direction of using spotlighting to showcase the compliance records of regulated firms. In the Commission’s last several reports on the implementation of EU environmental law, it has published “scoreboards” documenting comparative implementation records, but only on a member state basis.¹³² These reports compare various types of noncompliance by member states (such as missed deadlines for transposition measures, incorrect transposition of directives, and inadequate implementation of directives, in certain regulatory areas).¹³³

In order to improve compliance with the large body of EU laws, the EU should publicly evaluate and compare the compliance records of the best and worst regulated facilities. It should rank facilities based on factors such as the number and severity of violations, the number of civil and criminal prosecutions, the size of penalties assessed, the degree to which discharges or emissions exceed permitted levels, and the number and severity of spills or accidental releases. More ambitiously, and perhaps further down the road, the EU also should require member states to evaluate “operator performance” (as the British Environmental Agency does) based on the firm’s ability to comply with permit conditions, including the quality of its environmental management systems and internal mechanisms for monitoring compliance.

A reasonable starting point for this program would be to spotlight the record of facilities governed by the EU’s Integrated Pollu-

131. Martha Grekos, *Environmental Fines – All Small Change*, J. PLANNING & ENV’T L. 1330, 1336 (2004).

132. See, e.g., *Sixth Annual Survey*, *supra* note 3, at 5.

133. See *id.* at 53-58.

tion Prevention and Control Directive, which applies to major industrial facilities that are responsible for a large share of pollution in Europe, including the chemical, energy, mineral, paper, and waste processing sectors.¹³⁴ An estimated 50,000 facilities are covered by this directive.¹³⁵

It is important that the reports about firm compliance within EU states be comparative. Spotlighting is at its most powerful and effective when it draws clear distinctions among firms. Professor Shelley Metzenbaum explains that spotlight comparison has great power to embarrass and motivate, just as comparison shopping by consumers spurs firms to improve their products.¹³⁶ As one recent analysis argues, publicizing enforcement and compliance data "provides both positive reinforcement for those in compliance and negative reinforcement for those who are not. . . . The regulated community is wary about the release of [environmental] performance and enforcement information, which is precisely why it can be so effective."¹³⁷

It is also important that the task of publicizing data and drawing comparisons be done by an EU governmental agency, as opposed to having the government make raw data available and letting environmental groups prepare evaluative reports. When the government is actively involved in evaluating private firm performance, the evaluations are likely to carry greater weight and credibility with the public.¹³⁸ In particular, the spotlighting should be carried out by the European Environment Agency, which already has responsibility for maintaining the E-PRTR.

Lastly, and most obviously, an effective spotlighting system depends upon having underlying data to disclose. There are cur-

134. Council Directive 96/61, 1996 O.J. (L 257) 26, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0061:EN:HTML> (concerning integrated pollution prevention and control).

135. The IPPC Directive, <http://ec.europa.eu/environment/ippc/index.htm> (last visited Jan. 30, 2007).

136. SHELLEY METZENBAUM, BROOKINGS INST. CTR. FOR PUB. MGMT., MAKING MEASUREMENT MATTER: THE CHALLENGE AND PROMISE OF BUILDING A PERFORMANCE-FOCUSED ENVIRONMENTAL PROTECTION SYSTEM 42 (1998), available at <http://www.brook.edu/gscpm/metzenbaum.pdf>.

137. Cutting et al., *supra* note 120, at 10,061-62. A study by the Oregon Department of Environmental Quality found that "65% of Oregonians would stop or reduce buying from a company that was 'taking action that was bad for the environment.'" *Id.* at 10,064.

138. *C.f.* John Thøgersen, *Consumer Behavior and the Environment: Which Role for Information*, in ENVIRONMENT, INFORMATION AND CONSUMER BEHAVIOR, *supra* note 55, at 51-53 (consumers trust information about energy-conserving improvements more when provided by the government than private firms).

rently considerable gaps in information concerning the extent to which EU laws are actually complied with. If member states are not monitoring compliance or collecting data about the performance of firms, it will be impossible for the EU to report this information. Some member states, however, currently lack the administrative capacity (or perhaps the political will) to effectively monitor the behavior of regulated entities. Further, even where they do collect this information, they may not turn it over to the EU. One leading authority indicates that it has been "extremely difficult" for the EU to gain access to data held by national, regional, or local authorities.¹³⁹ He further contends that "no administration would be easily persuaded to release data showing that a directive is not properly monitored or applied in practice."¹⁴⁰ Thus, a basic prerequisite for a spotlighting program is that the EU adopt a directive or regulation mandating that member states systematically collect and maintain data about compliance by regulated entities within their borders.

To be sure, there will be significant hurdles to the implementation of an EU spotlighting program. Countries that are resistant to meaningful implementation of EU law will not want attention drawn to their enforcement deficits. Likewise, companies that are violating the law will not welcome the harsh glare of additional public attention and notoriety (though firms that are leaders in environmental performance and compliance are keen to publicize this fact). If these hurdles are overcome, however, a spotlighting approach could work where other traditional methods of environmental enforcement have failed. This approach is far less intrusive and expensive than direct EU enforcement. It should not be seen as compromising the sovereignty of individual countries or interfering with their primary role in achieving enforcement within their boundaries. Spotlighting also does not require levying fines or other sanctions for noncompliance, which countries may be reluctant to impose. Rather, it relies on the simple but potent power of public scrutiny to motivate better performance.

139. KRÄMER, *supra* note 1, § 12-16.

140. *Id.*

V. CONCLUSION

To date, efforts to ensure widespread compliance with EU environmental laws have been met with mixed success. The spotlighting approach offers a practical and effective alternative, and should be implemented by the EU.