UNMASKING CHINESE BUSINESS ENTERPRISES: USING INFORMATION DISCLOSURE LAWS TO ENHANCE PUBLIC PARTICIPATION IN CORPORATE ENVIRONMENTAL DECISION MAKING*

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I. INTRODUCTION

In 2005, China's lead environmental department, the State Environmental Protection Administration ("SEPA"), issued its annual environmental report proclaiming that "China [has] made considerable progress in environmental protection work."[1] Yet since 2002, Chinese environmental authorities have seen a 30% increase in the number of complaints filed each year, culminating in over 600,000 by 2004.[2] In addition, "mass incidents of social unrest" related to environmental issues have reportedly "increased by an average of 29% a year."[3] Environmental laws governing Chinese corpo-

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[1] STATE ENVTL. PROT. ADMIN., REPORT ON THE STATE OF THE ENVIRONMENT IN CHINA 5 (2005), *available at* http://english.mep.gov.cn/down_load/Documents/200710/P020071023479859455977.pdf.

[2] Ma Jun, *A Path to Environmental Harmony*, CHINADIALOGUE, Nov. 30, 2006, http://www.chinadialogue.net/article/show/single/en/589-A-path-to-environmental-harmony. There were over 50,000 environmental complaints filed in 2005 alone. Wang Canfa, *Chinese Environmental Law Enforcement: Current Deficiencies and Suggested Reforms*, 8 VT. J. ENVTL. L. 159, 167 (2007) (citing Pan Yue, Vice Minister, State Envtl. Prot. Admin., Address to the First National Environmental Policy Legal System Workshop (Dec. 12, 2006), *available at* http://www.sepa.gov.cn/info/ldjh/200701/t20070118_99754.htm).

[3] Ma Jun, *supra* note 2.

> There were more than 74,000 incidents of protest and unrest recorded in China in 2004, up from 58,000 the year before. While there are no clear statistics linking this

rate activities have developed substantially over the last several decades. However, China's economic expansion and the resultant environmental harms borne by its citizenry continue to create disharmony between communities and domestic industries.[4]

Today, China is on the cusp of economic greatness and possesses a sophisticated and organized citizenry that is collectively seeking greater access to environmental information.[5] For instance, a recent survey of peasant farmers in Guangdong Province revealed that many rural villagers, often living near polluting industries, wanted, but could not obtain, greater access to environmental information.[6] Unfortunately, insufficient access to information undermines the ability of an inquiring public to participate in legal, administrative, and permitting proceedings concerning environmental and land use matters.[7] Wang Canfa, a Professor at the China University of Politi-

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number of protests, riots, and unrest specifically to pollution issues, the fact that pollution was one of four social problems linked to disharmony by the Central Committee implies that there is at least the perception of a strong correlation.

Nathan Nankivell, *China's Pollution and the Threat to Domestic and Regional Stability*, CHINA BRIEF, Oct. 25, 2005, *available at* http://jamestown.org/china_brief/article.php?articleid=2373143 (citation omitted). In 2005, Chinese officials reported over 87,000 "public order disturbances" that were incorrectly called "mass incidents" by Western media. *Are Mass Incidents Increasing or Decreasing in China?*, Chinese Law and Politics Blog, http://sinolaw.typepad.com/chinese_law_and_politics_/2007/03/are_mass_incide.html (March 31, 2007).

Nevertheless, the semantic confusion gives way to a general recognition that a rising popular movement exists, willing to actively protest against the Chinese government over concerns regarding environmental pollution and public and environmental health risks. In one of many examples, environmental activists in Xiamen recently used cell phone text messaging to bypass government-controlled media, mobilizing almost 10,000 protestors against local police in a successful bid to stop construction of a chemical factory pending further environmental study. Local residents feared the factory would pollute their communities and lead to "leukemia and deformed babies." Edward Cody, *Text Messages Giving Voice to Chinese: Opponents of Chemical Factory Found Way Around Censors*, WASH. POST, June 28, 2007, at A1 (internal quotation omitted).

[4] *See* Nankivell, *supra* note 3 ("As the impact of pollution on human health becomes more obvious and widespread, it is leading to greater political mobilization and social unrest from those citizens who suffer the most.").

[5] *See id.* Nankivell goes on to say:

> Protests are uniting a variety of actors throughout local communities. Pollution issues are indiscriminate. The effects, though not equally felt by each person within a community, impact rich and poor, farmers and businessmen, families and individuals alike. As local communities respond to pollution issues through united opposition, it is leaving Beijing with no easy target upon which to blame unrest, and no simple option for how to quell whole communities with a common grievance.

Id.

[6] Li Zhiping, *Protection of Peasants' Environmental Rights During Social Transition: Rural Regions in Guangdong Province*, 8 VT. J. ENVTL. L. 337, 343 (2007). The survey found that 54.2% of villagers had only "a little" knowledge as to the causes of environmental problems, and that only 12.8% of respondents obtained environmental information from notices provided by village committees, as compared to 38.1% from personal experience and 34.4% from newspapers or other media. *Id.* at 368-69 tbls. 3.1 & 3.2.

[7] *See* Li Zhiping, Essay, *The Challenges of China's Discharge Permit System and Effective Solutions*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 375, 384 (2005) ("Without relevant information, citizens are unaware of events occurring around them; they cannot identify the harm of

cal Science and Law in Beijing and Director of the Center for Legal Assistance to Pollution Victims, has argued that an underdeveloped system to facilitate public participation is one of a number of factors preventing the effective enforcement of Chinese environmental laws.[8]

A major problem with existing environmental law is a general lack of "democratic legal mechanisms" to encourage Chinese enterprises[9] and government agencies to comply actively with and enforce measures designed to protect citizens and the environment.[10] In today's China, the public is concerned that the same domestic industries that give life to communities also pollute homes, poison water, and damage local ecosystems. The public seeks to voice these concerns to government and corporate leaders. Pan Yue, Vice Minister of SEPA, recently stated that:

> China's increasing public environmental awareness, especially among the younger generation, is a reflection of the progress of our socialist democracy and political civilization. It is the success of the concept of sustainable scientific development, and the hope for the future of the Chinese nation. This requires us to recognize and support the public's right to be informed, to supervise and to take part in decision-making on environmental issues.[11]

In this article, we argue that the existing state of corporate disclosure laws and regulations in China is insufficient to allow the Chinese public adequate access to environmental information. As a result, citizens are unable to participate properly in crucial government and corporate decisions that impact local communities and ecosystems. The public's effective involvement in environmental decision making often turns on how widely pertinent information is disseminated and whether that information is made available in a timely fashion. In order to encourage Chinese businesses to publicly disclose environmental information in a timely fashion, we propose the com-

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certain kinds of behavior; they cannot estimate whether an action is legitimate or not; and they cannot foresee the relevance of their interest in the establishment of future legal policy.").

[8] Wang Canfa, *supra* note 2, at 169. The other factors are: (1) poorly researched and "unrealistic" legislation; (2) local governments preferring economic development over environmental protection; and (3) general disjunctions between administrative departments, the National People's Congress Standing Committee, and the court system. *Id.*

[9] As in the United States, Chinese domestic business entities comprise a wide range of corporate structures, which, in the course of this article, we broadly label "enterprises," a term often used to refer to all business forms in general. *See* ChinaDetail, *Types of Chinese Domestic Companies,* http://www.chinadetail.com/Business/InvestmentChinaCompanyOwnership.php (listing and describing various Chinese business forms); *see also* Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006), art. 3, LawInfoChina (last visited Oct. 15, 2008) (P.R.C.) ("A company is an *enterprise* legal person, which has independent legal person property and enjoys the right to legal person property.") (emphasis added).

[10] Pan Yue, *The Environment Needs Public Participation*, ChinaDialogue, Dec. 5, 2006, http://www.chinadialogue.net/article/show/single/en/604-The-environment-needs-public-participation.

[11] *Id.*

bined use of traditional command-and-control regulatory regimes and voluntary market-based incentives. We will evaluate laws and regulations that increase the availability of environmental information in the United States as possible models for modifying similar Chinese laws.

Part II provides a brief overview of the role domestic Chinese enterprises have played in China's recent unprecedented economic growth and the resultant environmental and public health concerns. Part III opens with a general discussion regarding the importance of public participation in environmental decision making and concludes with an analysis of the Chinese public's general lack of access to corporate environmental information.

Part IV addresses both voluntary and involuntary disclosure laws in China and the United States. The first section focuses on involuntary protocols by generally outlining the importance of traditional command-and-control regulations to compel the disclosure of environmental liability and performance information. Various United States laws will be evaluated before describing existing Chinese disclosure provisions under both corporate and environmental laws and regulations. The first section concludes with a proposal to enhance these disclosure provisions through increased agency enforcement, more stringent penalty sanctions for noncompliance, and more detailed guidance as to the types of information enterprises must release to the public. The second section addresses voluntary disclosure options and will evaluate existing incentive-based programs in China after describing the United States Environmental Protection Agency ("EPA") Self-Audit Policy. The section concludes with a proposal to enhance corporate participation in voluntary disclosure programs by creating economic incentives, such as the mitigation or waiver of penalties when Chinese enterprises self-disclose environmental violations.

II. UNDERSTANDING THE CHINESE ENTERPRISE: AN ECONOMIC AND ENVIRONMENTAL JUGGERNAUT

The ancient Chinese military philosopher, Sun Tzu, once remarked, "Know the enemy and know yourself; in a hundred battles you will never be in peril."[12] Information is a critical component of an effective strategy to engage a potential adversary, and the Chinese business enterprise is a complex, often elusive amalgamation shaped by centuries of development. Yet, it is also distinctively modern — despite having been constructed under a

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[12] SUN TZU, THE ART OF WAR 84 (Samuel B. Griffith trans., Oxford Univ. Press 1971) (n.d.). The entire passage reads:

> Therefore I say: "Know the enemy and know yourself; in a hundred battles you will never be in peril. When you are ignorant of the enemy but know yourself, your chances of winning or losing are equal. If ignorant both of your enemy and of yourself, you are certain in every battle to be in peril."

Id.

socialist economic regime it now operates in a global free market.[13] Consequently, the Chinese citizenry requires substantially greater access to corporate information so as to unmask their opposition. Before exploring the legal mechanisms that Chinese citizens may deploy, we should pause briefly to discuss the modern history of China's current business entity, as well as the resulting environmental degradation wrought by it. The production mythos that has perpetrated the present environmental havoc is embedded within the history of the modern Chinese enterprise. This havoc, in many ways, defines present-day visions of China.[14]

A. The "Peaceful Rise" of Modern China's Corporate State

Zheng Bijian, a highly influential domestic and international policy advisor to the Chinese government, has characterized China's continuing economic growth as a "peaceful rise" to power: "[I]n contrast to some other emerging powers in modern history, who plundered other countries of their resources through invasion, expansion, or even large-scale wars of aggression, China will acquire the capital, technology, and resources needed for its modernization by peaceful means."[15] Although China has already modernized its economy to a large extent, China's global influence continues to grow. On one hand, Chinese interests have a substantial foothold in the global marketplace.[16] On the other hand, China's domestic economy, partic-

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[13] Non-governmental organizations (NGOs) are playing an increasingly important role in mobilizing the Chinese citizenry around environmental issues. There may be as many as 2,500 (or as few as 40) environment-related NGOs operative in China. Srini Sitaraman, *Regulating the Belching Dragon: Rule of Law, Politics of Enforcement, and Pollution Prevention in Post-Mao Industrial China*, 18 COLO. J. INT'L ENVTL. L. & POL'Y 267, 300 (2007) (citing Jonathan Schwartz, *Environmental NGOs in China: Roles and Limits*, 77 PAC. AFF. 28, 36 (2004)). However, many of these domestic NGOs may be more correctly considered to be government-created consulting and research organizations. *Id.* For a detailed accounting of domestic and international NGO activities with respect to environmental activism, see generally Adam Briggs, Note, *China's Pollution Victims: Still Seeking a Dependable Remedy*, 18 GEO. INT'L ENVTL. L. REV. 305, 321-25 (2006).

[14] *See Visions of China: China at 2050: Experts Consider Possible Scenarios for the Middle Kingdom 50 Years from Now*, CNN.COM, http://www.cnn.com/SPECIALS/1999/china.50/50.beyond/china.at.2050/ (last visited Oct. 15, 2008) (exploring various challenges facing China, many of which include the problem of environmental pollution as it impacts the Chinese population, economy, and political stability).

[15] ZHENG BIJIAN, CHINA'S PEACEFUL RISE: SPEECHES OF ZHENG BIJIAN 1997-2005, at 39 (Brookings Inst. Press, 2005).

[16] *See* Enoch Yiu, *Old China Hand Sells London Allure; Lord Mayor sees UK-Listed Mainland Firms Tripling*, S. CHINA MORNING POST, Oct. 22, 2007, at B16 ("China is no longer a sweatshop to manufacture cheap goods. It has started to play an important economic role in global financial markets. China's development will have a significant impact on the global economy."); Zoran Nedeljkovic, *Enter a Different Dragon*, S. CHINA MORNING POST, Sept. 25, 2007, at 22 ("'Chinese funds will become a major force in global markets as the government liberalizes capital flows,' says Ms. Ulrich, noting that in 2006, foreign direct investment into China was $60USbillion, while outbound investments totaled $16USbillion. High domestic savings rates and huge surpluses in China's balance of payments could see outbound investments rocketing to $800USbillion plus by 2020."); David J. Lynch, *China Could Use Its Pile of Cash to Buy U.S. Companies; But Politics Would Likely Play a Part*, USA TODAY, Aug. 9,

ularly on a per capita or purchasing power parity basis, still remains only a fraction of the comparative value of competing nations, such as the United States.[17] When Zheng Bijian heralded China's "peaceful rise" he noted that China could turn its massive economic energies inward to bolster domestic constituencies.[18] Zheng also recognized, however, that China suffers from a severe per capita deficiency of available natural resources, most of which are unsustainably developed, breeding local and national economies dependent upon wasteful, pollutant-laden, and inefficient production.[19]

Not surprisingly, these complex social, economic, and environmental tensions are not new to modern China. By the time of the Qing dynasty, the last ruling dynasty in imperial China (1644-1912), a complex network of dynamic and sophisticated regional economies had emerged to meet the demands of a dramatically increasing population.[20] At the closing of the Qing dynasty, Chinese government efforts to wrestle control of the highly lucrative railroad lines from foreign investors, in part, helped fuel the growth of domestically-owned heavy industries and independent modes of generating foreign capital, and more importantly, spurred forward a nationalist movement and constitutional reform.[21] In 1903, the Qing dynastic government promulgated China's first corporate legislation, the Great Qing Commercial Code, which contained over 130 provisions enacted to regulate business activities.[22]

By the mid-twentieth century, heavy industries using modern technologies emerged in a by-then communist China under the leadership of Chairman Mao Zedong. These industries were governed almost exclusively under centralized collectives, "Leninist-type political structure[s] that suppressed any truly autonomous social or economic organizations."[23] With Mao

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2007, at 3B ("Earlier this year, the Chinese government announced plans to use some of its $1.33 trillion in financial reserves to crate a $200 billion state investment company. The country's state-owned banks are well heeled, and foreign investment by its leading corporations hit $16.1 billion last year, up 31% from the year before, according to Jing Ulrich, managing director of JPMorgan in Hong Kong.").

[17] *See generally* Wayne M. Morrison & Michael F. Martin, How Large is China's Economy? Does it Matter? (Cong. Research Serv., CRS Report for Cong. Order Code RS 22808, Feb. 13, 2008), *available at* http://fas.org/sgp/crs/row/RS22808.pdf.

[18] *See id.* at 40.

[19] *See id.* (commenting that natural resource limitations, environmental damage, and a "lack of coordination between economic and social development" are three "development challenges" China must face in the twenty-first century).

[20] *See* JONATHAN D. SPENCE, THE SEARCH FOR MODERN CHINA 74-81 (2nd ed. 1999) (chronicling the economic structures present during the reign of Emperor Yongzheng (1723-1735) and how the rising population complicated "the mid-Qing society and economy"). It is interesting to note that, in at least one sense, ecological modifications caused by the introduction of New World crops, like potatoes, maize and peanuts, which were capable of growing in marginally productive environments, greatly boosted the caloric intake of the rural poor and thereby helped fuel a rapid population growth. *Id.* at 80.

[21] *Id.* at 250.

[22] Yuwa Wei, *A Chinese Perspective on Corporate Governance*, 10 BOND L. REV. 363, 366 (1998).

[23] KENNETH LIEBERTHAL, GOVERNING CHINA: FROM REVOLUTION THROUGH REFORM 120 (2004). Between 1949 and 1956, the communist regime in China effectively destroyed the notion of privately owned companies through a process of transferring ownership from private

Zedong's death in 1976 and the rise to power of the more moderate and globally conscious Deng Xiaoping, China began a slow, but dramatic, period of systemic reform, which would radically restructure China's political, social, and economic worldview.[24] In 1979, the Chinese Communist Party launched a major reform initiative that offered state-owned enterprises increased operational autonomy.[25] These businesses gained the ability to retain a larger portion of profits for reinvestment and, for the first time, award bonuses to employees.[26] Moreover, the 1993 Third Plenum of the Fourteenth Chinese Communist Party Congress aggressively modernized China's enterprise system, creating new forms of ownership and establishing frameworks for corporate governance.[27] Under the 1993 Company Law, which emphasized separating government from business development to incentivize profit motivation, many large and medium enterprises could be refitted as limited liability enterprises, even if still solely state owned.[28] The Fifteenth Communist Party Congress went even further in 1997 by effectively privatizing many small state-owned companies through a conversion into different forms of non-state and non-collective stock cooperative entities.[29]

With recent laws and policies decoupling various business enterprises from the government, future economic growth in China will turn on how these enterprises evolve organizationally and respond to domestic and foreign market competition.[30] At the beginning of the reformist era around the time of the Eleventh Central Committee (1978), 80% of China's industrial GDP was generated by public sector industries.[31] There were no privately

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interests to state or collectively owned enterprises under the rubric of a nationally controlled economy where the government, not the market, dictated the means and outputs of production. Yuwa Wei, *supra* note 22, at 367. In contrast, the Nationalist government that succeeded the Qing enacted and updated China's first Company Laws, modeled after the Great Qing Commercial Code. *See id.* at 366. For a more detailed history the development of Chinese company laws, see DAVID FAURE, CHINA AND CAPITALISM: A HISTORY OF BUSINESS ENTERPRISE IN MODERN CHINA 45-64 (2006).

[24] *See* LIEBERTHAL, *supra* note 23, at 127. Deng recognized that, in order to achieve rapid economic growth, China would have to develop new sources of "capital, technology, and managerial know-how" in order to reconfigure its "Soviet-type system" of production into a more efficient, technology-based scheme, rather than one focused on mere capacity. *Id.* at 129-30.

[25] NICHOLAS R. LARDY, CHINA'S UNFINISHED ECONOMIC REVOLUTION 22 (1998).

[26] *Id.*

[27] *See id.* at 23-24.

[28] *See id.* at 24; *see also* Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective July 1, 1994) art. 21, LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.) ("A [s]tate-owned enterprise set up before the implementation of this law if [sic] can fulfill the condition of a limited liability company under this law may be reorganized into a solely [s]tate-owned limited liability company in the case of an investment entity with a single investor, or into a limited liability company as provided for in the first paragraph of the preceding Article in the case of an investment entity with many investors [which requires capital contributions from more than two, but fewer than fifty shareholders].").

[29] LARDY, *supra* note 25, at 24.

[30] *See* SHAHID YUSUF ET AL., UNDER NEW OWNERSHIP: PRIVATIZING CHINA'S STATE-OWNED ENTERPRISES 4 (2006) ("With many of the initial and easier stages of reform completed and the economy significantly deregulated, growth now depends more on institutions governing market competition, how industrial organization evolves, and what firms do.").

[31] *Id.* at 5.

owned companies and only 150,000 recognized sole proprietorships, which represented only one percent of the GDP.[32] By 2004, state-owned enterprises accounted for only 40% of the industrial GDP, with the lion's share of GDP generated by collectively owned enterprises and private, individual, and foreign-owned firms and joint ventures.[33] Even more astonishing is that private enterprises and sole proprietorships, effectively nonexistent in 1978, accounted for over 20% of the industrial GDP in 2004.[34] In large measure due to these economic liberalization reforms, China's economy has grown by an average of 9.5% per year for the last two decades.[35] And while this economic growth has dramatically reduced overall poverty in China,[36] the dark side of this financial revolution is widespread environmental destruction.

B. The Environmental and Human Health Cost

In 2006, Xie Zhenhua, then director of SEPA, stated that as "[China] enter[s] the new century, we are resolved to change the practice of polluting first and cleaning up later, and we are striving to build a resource-saving, environmentally friendly society."[37] Currently, China's manufacturing-based economy has a vast appetite for raw resources, which it demands in order to satisfy a fast-growing domestic and international consumer market.[38] In part, the manufacturing sector is driven by cost-conscious, savvy foreign investors seeking to transplant "heavy polluting energy and resource-intensive industries" to China, where many local governments actively compete for these dirty businesses in "blind pursuit of quick and

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] ORG. FOR ECON. CO-OPERATION & DEV., POLICY BRIEF, ECONOMIC SURVEY OF CHINA, 2005, at 1 (2005), *available at* http://www.oecd.org/dataoecd/10/25/35294862.pdf.

[36] *See id.* at 7 ("National income has been doubling every 8 years and this has been reflected in the reduction of the poverty rate to much lower levels. Indeed, by some accounts, over half of the reduction in absolute poverty in the world between 1980 and 2000 occurred in China."); *see also* Window of China, Sept. 26, 2008, http://news.xinhuanet.com/english/2008-09/26/content_10116246.htm (transcript of Premier Wen Jiabao before the U.N.) ("Since 1978, we in China have accelerated development mainly with our own efforts and through reform and opening-up. As a result, China has brought down the number of people in absolute poverty from 250 million to 15 million in less than 30 years."). Yet approximately 595 million Chinese, at least as of 2001, still live on less than two dollars a day. YUSUF, *supra* note 30, at 8.

[37] THE WORLD WATCH INSTITUTE, STATE OF THE WORLD 2006: SPECIAL FOCUS: CHINA AND INDIA, at xv (2006) [hereinafter STATE OF THE WORLD 2006].

[38] "In 2005, China used 26 percent of the world's crude steel, 32 percent of the rice, 37 percent of the cotton, and 47 percent of the cement." *Id.* at 5. Moreover,

> China is also starting to build one of the world's largest automobile industries. Annual production rose from 320,000 in 1995 to 2.6 million in 2005, and China could overtake Japan and the United States, which each produce about 8 million cars annually, to become the world's largest auto producer by 2015.

Id.

short-term economic gain without regard to environmental consequences."[39] Ultimately, the environmental repercussions of the new manufacturing-based economy, combined with a decades-long legacy of pollution, endanger not only the Chinese people, but the future viability of local and transboundary natural resources.[40]

For instance, while China is home to 22% of the world's population, it captures only 8% of the world's fresh water supply, much of which is unsuitable for human consumption due to heavy pollution.[41] A recent Yale University environmental performance study revealed that out of 133 countries, China ranked 116th with respect to water resource pollution.[42] Chinese officials have admitted that 75% of China's rivers are heavily polluted, with over 80% of wastewater discharged into watercourses without treatment.[43] Moreover, domestic water resources are geographically skewed. Eighty percent of China's water is trapped in southern China, whereas in the semiarid north, which accounts for two-thirds of China's cultivated agricultural production, life-sustaining crops often wither in recurring droughts.[44] More systematically, inefficient large-scale dam projects, inadequate capital investments, and dangerously bloated subsidies that substantially undervalue

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[39] Yuhong Zhao, *Trade and Environment: Challenges After China's WTO Accession*, 32 COLUM. J. ENVTL. L. 41, 49 (2007).

[40] In fact, one scholar has noted that the international community now actively seeks China's participation in the "global governance system . . . because of the transboundary implications of its environmental problems, its growing share of the world's population, its increasing global economic clout, its blistering economic growth, and the globalization of the Chinese economy." Sitaraman, *supra* note 13, at 317 (footnote omitted). Additionally, international scholars have recognized the geopolitical concerns surrounding China's management (or mismanagement) of domestic watercourses, in particular the downstream environmental impacts associated with India's interests related to Himalayan headwaters and southeast Asian countries' concerns with what happens upstream within the Mekong River basin. James D. Seymour, *China's Environment: A Bibliographic Essay*, *in* CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT 248, 254 (Kristen A. Day ed., 2005).

[41] STATE OF THE WORLD 2006, *supra* note 37, at 7. "Of the 412 sites on China's seven main rivers that were monitored for water quality in 2004, 58 percent were found to be too dirty for human consumption." *Id.*

[42] YALE CTR. FOR ENVTL. L. & POL'Y & CTR. FOR INT'L EARTH SCIENCE INFO. NETWORK, PILOT 2006 ENVIRONMENTAL PERFORMANCE INDEX 52, *available at* http://epi.yale.edu/Home [hereinafter 2006 EPI]; *see also* Ruoying Chen, *Legal Implications of a Rising China: Information Mechanisms and the Future of Chinese Pollution Regulation*, 7 CHI. J. INT'L L. 51, 52 (2006).

[43] Ruoying Chen, *supra* note 42, at 52-53 (citing Qu Geping, *Zhong guo huan jing xing shi yu huan jing fa zhi jian she* [China's Environment Status and Legal Development], Report to the National People's Congress Standing Committee (July 11, 2002), *available at* http://www.npc.gov.cn (Chinese)).

[44] Lü Zhi, Michael Totten & Philip Chou, *Spurring Innovations for Clean Energy and Water Protection in China: An Opportunity to Advance Security and Harmonious Development*, *in* CHINA ENV'T SERIES 61, 62 (2006), *available at* http://www.wilsoncenter.org/topics/pubs/CEF_SpecialReport.8.pdf [hereinafter *Spurring Innovations*]. For instance, the north China plain in the 92 million people strong Beijing-tianjin is considered the "breadbasket" of China — producing 67% of the nation's wheat and 44% of its corn, and more importantly, 31% of total GDP — but has access to only 7.5% of China's total runoff discharge. CHARLES WOLF, JR. ET AL., FAULT LINES IN CHINA'S ECONOMIC TERRAIN 76 (2003).

water prices, serve to perpetuate a failing public water system that undercuts both rural and urban sustainable development.[45]

The same Yale University study also found that China ranked 128th out of 133 countries in terms of overall air quality, the worst among all Asian-Pacific nations.[46] Low efficiency, high ash, high sulfur coal provides two-thirds of China's total energy, which contributes approximately one billion tons of climate-altering carbon into the atmosphere each year, or 14% of the world's total carbon emissions.[47] As alternative energy sources, such as solar, wind, and biomass, are being explored by China's National People's Congress, efforts are presently underway to increase oil importation and expand domestic nuclear power.[48] Nevertheless, coal will likely remain the dominant fuel source for the next fifty years.[49]

Finally, environmental degradation directly impacts public health. The 1949 rise of the Communist Party brought primary health care and preventative health services to a majority of the Chinese population.[50] Yet since the 1979 reform movement, many public health services have been privatized, blocking more and more citizens from accessing affordable healthcare.[51] Consequently, preventable infectious diseases continue to plague China today.[52] Many diseases directly result from environmental contamination. Poor outdoor air quality leads to various respiratory ailments.[53] Unsanitary municipal water sources contribute to diarrheal diseases, hepatitis, cholera, and typhoid.[54] And unsafe use of pesticides can result in the chronic poisoning of agricultural workers.[55]

III. Public Access to Environmental Information in China

In a 1995 survey, over half of urban residents and four-fifths of rural residents identified China's environmental problems as "very serious" or "serious."[56] In the same survey, 78% of urban residents and 90% of rural

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[45] *See Spurring Innovations*, *supra* note 44, at 71 (citing Tina Butler, *China's Imminent Water Crisis* (May 30, 2005), http://news.mongabay.com/2005/0531-tina_butler.html).

[46] 2006 EPI, *supra* note 42.

[47] State of the World 2006, *supra* note 37, at 8-9.

[48] *Id.* at 10-11.

[49] Jack J. Fritz, *Environmental Performance of Coal-Fired Power Plants Financed by the World Bank*, *in* National Research Counsel et al., Urbanization, Energy, and Air Pollution in China: The Challenges Ahead 187, 188 (Nat'l Res. Couns. et al. eds., 2004).

[50] Drew Thompson & Xiaoqing Lu, *China's Evolving Civil Society: From Environment to Health*, *in* China Env't Series 27, 30 (2006), *available at* http://www.wilsoncenter.org/topics/pubs/CEF_SpecialReport.8.pdf.

[51] *Id.*

[52] *Id.*

[53] World Health Org., Environmental Health Country Profile — China 8 (2005), *available at* http://www.wpro.who.int/NR/rdonlyres/1BAA5515-9571-4383-BA1D-169BDD4A8C38/0/China_EHCP_EHDS_9jun05.pdf.

[54] *Id.*

[55] *Id.* at 9.

[56] Yok-shiu F. Lee, *Public Environmental Consciousness in China: Early Empirical Evidence*, *in* China's Environment and the Challenge of Sustainable Development, *supra*

residents "confessed that their command of environmental knowledge could be regarded as 'very little' or 'relatively little.'"[57] Despite the Chinese public's lack of environmental knowledge, evidence suggests that it has become more involved with improving China's environmental condition since the mid-1990s.[58] Unfortunately, public participation regulations and the present business model in China fail to make key environmental information available, hindering public efforts to meaningfully and critically engage businesses and the government on environmental problems.[59]

A. China's Recent Efforts to Facilitate Public Participation Through Environmental Information Disclosure Programs

Wanxin Li, assistant professor of regulatory governance and sustainable development at Tsinghua University in Beijing, has noted that the Chinese government has promulgated a host of environmental enforcement laws in the last twenty-five years with increasingly harsh penalties, but "the lack of transparency and formal involvement of the public" has hindered the effectiveness of these laws.[60] Historically, Chinese authorities generally did not disseminate environmental information, and the citizenry effectively lacked the ability to openly voice political opposition to activities which caused or threatened to cause environmental pollution.[61] Today, SEPA has promulgated a number of initiatives specifically designed to spur public participation in local environmental decision making.[62] For instance, SEPA recently adopted new regulations establishing a "code of conduct," which incorporate public accountability for regulated entities or oversight agencies that fail to follow procedures required under China's Environmental Impact Assessment Law.[63]

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note 40, at 35, 46-48 (citing China Envtl. Prot. Found. & China People's Univ., *Quan min huan jing yi shi diao cha [A Survey on Public Environmental Consciousness]*, *in* ZHONG GUO GONG ZHONG HUAN JING YI SHI DIAO CHA [A SURVEY ON CHINA'S PUBLIC ENVIRONMENTAL CONSCIOUSNESS] 73 (Xi Xiaolin & Xu Qinghua eds., China Envtl. Sci. Press, 1999)).

[57] *Id.* at 48.

[58] *See* Elizabeth Economy, *Environmental Enforcement in China*, *in* CHINA'S ENVIRONMENT AND THE CHALLENGE OF SUSTAINABLE DEVELOPMENT, *supra* note 40, at 102, 116 (noting the general increase in public awareness of environmental issues through increased lodgings of complaints with the Chinese government).

[59] *See generally* Ruoying Chen, *supra* note 42 (arguing that existing public participation requirements under Chinese environmental laws are inadequate).

[60] Wanxin Li, Commentary, *Opening Up the Floor: Environmental Performance Information Disclosure Pilot Programs in Zhenjiang and Hohhot*, 8 CHINA ENV'T SERIES 125, 125 (2006), *available at* http://www.wilsoncenter.org/topics/pubs/CEF_SpecialReport.8.pdf.

[61] ORG. FOR ECON. CO-OPERATION AND DEV., ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN CHINA: AN ASSESSMENT OF CURRENT PRACTICES AND WAYS FORWARD 43 (2006), *available at* http://www.oecd.org/dataoecd/33/5/37867511.pdf.

[62] *See id.* at 38-40 (providing a brief synopsis of SEPA regulations and programs related to the release of environment-related information to the public).

[63] Provisions on Code of Conduct for Environmental Impact Assessment and Honest and Clean Administration Concerning Construction Projects (promulgated by State Envtl. Prot. Admin., Nov. 23, 2005, effective Jan. 1, 2006), LAWINFOCHINA (last visited Oct. 15, 2008) (P.R.C.). *See generally* Jesse L. Moorman & Zhang Ge, *Promoting and Strengthening Public*

In 1999, two Chinese municipalities volunteered to pilot the Environmental Performance Information Disclosure (EPID) program, a World Bank initiative that rated various industrial enterprises' environmental performance using a simple five-color identification system.[64] The idea behind EPID was that by "making the environmental performance of industrial enterprises visible, the public would be empowered to target bad polluters and help the Environmental Protection Bureaus take enforcement actions."[65] Unfortunately, a 2000 poll conducted by Nanjing University revealed a general lack of "public engagement" in the EPID program.[66] Moreover, industry interest waned because the program offered little more than "positive publicity in local newspapers."[67]

EPID's failure reveals a deeply-seated systemic problem embedded in the Chinese social-industrial-legal complex. While the Chinese government has actively sought to change laws to include the public, some scholars believe that many such efforts are merely "masquerades," which conceal an underlying misuse of the concept of beneficial involvement under a veil now coined the "tyranny of participation."[68] These scholars explain that under existing Chinese laws and regulations, public participation provisions often turn on imposed, involuntary, manipulative, unsustainable, or unaccountable practices.[69] After decades of highly centralized governance, scholars have argued that Chinese leaders are worried about opening environmental decision making to the public for fear it would "cause confusion and chaos," or otherwise undermine the ability of the government to develop solutions to conflicts between a myriad of divergent stakeholder interests.[70]

The government's failure to create an environment of effective public participation is unfortunate because engaged and proactively nurtured public

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Participation in China's Environmental Impact Assessment Process: Comparing China's EIA Law and U.S. NEPA, 8 VT. J. ENVTL. L. 281 (2007).

[64] Wanxin Li, *supra* note 60, at 125; *see also* Hua Wang et al., *Environmental Performance Rating and Disclosure: China's Green-Watch Program* (World Bank Policy Research Working Paper 2889, 2002), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/10/18/000094946_02100304104987/additional/126526322_20041117182557.pdf. The two municipalities were Zhenjiang, Jiangsu Province, and Hohbot, Inner Mongolia. *Id.* at 2.

[65] Wanxin Li, *supra* note 60, at 127.

[66] *Id.* at 128 (finding that, while 56% of respondents knew about EPID, only 8.3% understood its objectives). The Nanjing University poll was limited to the Zhenjiang municipality (Jiangsu Province). *Id.*

[67] *Id.* Industries wanted more than publicity; they wanted "substantial benefits for their good performance, such as favorable treatment by the Zhenjiang EPB [Environmental Protection Board] in loan applications for environmental protection work or rights to label their product as green." *Id.*

[68] Janelle Plummer & John G. Taylor, *The Characteristics of Community Participation in China*, *in* COMMUNITY PARTICIPATION IN CHINA: ISSUES AND PROCESSES FOR CAPACITY BUILDING 36, 52 (Janelle Plummer & John G. Taylor eds., 2004) (citing generally PARTICIPATION: THE NEW TYRANNY? (Bill Cooke & Uma Kothari eds., 2001)).

[69] *Id.* at 52-53.

[70] Allison Moore & Adria Warren, *Legal Advocacy in Environmental Public Participation in China: Raising the Stakes and Strengthening Stakeholders*, 8 CHINA ENV'T SERIES 3, 10–11 (2006) (internal quotation marks omitted), *available at* http://www.wilsoncenter.org/topics/pubs/CEF_SpecialReport.8.pdf.

participation offers the opportunity for effective local-level dispute resolution and small-scale solutions to specific issues.[71] Public participation also ensures a "measure of procedural justice by allowing interested parties to be heard before a decision is rendered."[72] Moreover, public involvement in environmental decision making can enhance the "credibility, effectiveness, and accountability of governmental decisionmaking [sic] processes, ultimately resulting in better implementation of sustainable development objectives."[73]

On the other hand, what constitutes "public participation" remains an open scholarly inquiry and is, at best, a "nebulous" concept that must be operationalized in a particular context.[74] Consequently, we must first explore existing corporate information disclosure practices before considering how best to integrate the public into the corporate decision making model.

B. Defining Chinese Corporate Responsibilities to Publicly Disclose Environmental Information

Within the last several years, the Chinese government has codified the obligations of enterprises to conduct business in a manner that respects public interests. In 2005, the Standing Committee of the National People's Congress amended and adopted the Company Law of the People's Republic of China, which stipulates that "[i]n conducting business operations, a company shall comply with the laws and administrative regulations, social morality, and business morality" and "[i]t shall act in good faith, *accept the supervision of the government and general public, and bear social responsibilities*."[75] Additionally, in 2006 the Shenzhen Stock Exchange ("SSE") issued comprehensive "social responsibility instructions" for the purpose of "implementing [a] scientific outlook [on] social development, building social harmony, accelerating sustainable economic and social development and promoting commitment to social responsibilities."[76]

Although drafted primarily by the SSE as a guidance document that expresses what enterprises *should* do, this instructional document specifically addresses the desire of the Chinese government to foster a corporate attitude that actively accounts for the impact of business decisions on the

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[71] Hari M. Osofsky, *Popular Sovereignty, Geography, and Public Participation in Environmental Decision-Making in China*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 225, 227 (2005).

[72] *Id.*

[73] Frances Irwin & Carl Bruch, *Public Access to Information, Public Participation, and Justice*, *in* STUMBLING TOWARD SUSTAINABILITY 511, 511 (John C. Dernbach ed., 2002).

[74] Nancy Perkins Spyke, *Public Participation in Environmental Decisionmaking at the Millennium: Structuring New Spheres of Public Influence*, 26 B.C. ENVTL. AFF. L. REV. 263, 267 (1999).

[75] Company Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) art. 5, LAWINFOCHINA (last visited Oct. 15, 2008) (P.R.C.) (emphasis added).

[76] Shenzhen Stock Exchange, SOCIAL RESPONSIBILITY INSTRUCTIONS TO LISTED COMPANIES ART. 1 (Sept. 25, 2006), *available at* http://www.szse.cn/main/en/rulseandregulations/sserules/2007060410636.shtml [hereinafter Shenzhen SRI].

environment and public well-being. For instance, the list defines "social responsibilities" to include "obligations" to the "natural environment and resources," along with "communities" in general.[77] Moreover, enterprises should "commit themselves to social welfare services like environmental protection and community development in order to achieve social harmony."[78]

There are also provisions in the instructions that *require* businesses to develop "environmental protection policies" and muster the human, capital, and technical resources necessary to "support environmental protection" programs.[79] The instructions also encourage, but do not require, enterprises to generate "social responsibility reports."[80] These reports should be released alongside otherwise required annual reports and either disclose corporate efforts to protect the environment and foster strong community relationships, or identify gaps in social responsibilities and propose anticipated solutions.[81]

These recent legislative and regulatory overtures by the government result from an increasing recognition in China that past, and in many instances, present, corporate activity has had a tremendous impact on domestic resources and local communities. The laws in China today are designed to hold enterprises accountable for business activities that harm the environment or surrounding communities. While older business models would consider such environmental and community obligations to be externalized costs, emerging models assert that socially responsible business development establishes a market advantage by enhancing corporate reputation and credibility with individuals and organizations holding a stakeholder interest in the enterprise.[82] Yet, in general, public participation in corporate environmental decision making remains poor, largely because the public cannot gain timely access to pertinent environmental information.

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[77] *Id.* art. 2.

[78] *Id.* art. 3.

[79] *Id.* art. 27. These policies should cover compliance with applicable laws and also include efforts to reduce resource consumption and waste generation, use environmentally-friendly materials, minimize adverse impacts to the environment, institute training programs, and "create an environment for sustainable development." *Id.* art. 28.

[80] *Id.* art. 36.

[81] *Id.*

[82] ZHAO XUDONG, THE SYSTEMATIC DESIGN OF NEW CORPORATION LAW 207 (2006); *see also* Nike O. Gozali, Janice C.Y. How & Peter Verhoeven, *The Economic Consequences of Voluntary Environmental Information Disclosure*, 2 Int'l Envtl. Modeling & Software Soc. Integrated Assessment & Decision Support Conf. 484, 486 (2002), *available at* http://www.iemss.org/iemss2002/proceedings/pdf/volume%20due/349.pdf (reviewing literature related to social responsibility disclosures among companies and recognizing such disclosures as a "strategy to improve . . . public image and gain public acceptance") (citing specifically K.T. Trotman, *Social Responsibility Disclosures by Australian Companies*, ACCOUNTANT IN AUSTRALIA, Mar. 1979, 24-28).

C. The Chinese People's General State of Non-Entitlement to Information under the Current Legal Regime

As will be discussed in greater depth below, Chinese corporate environmental reporting is still in its infancy and requires "further development" as improvements are made in corporate governance and the Chinese people become more engaged in environmental issues.[83] Presently, the Chinese domestic marketplace has generally not embraced the need for environmental reporting and disclosure.[84] As a consequence, many enterprises "try to release as little information as possible."[85] Thus, in many ways, the general public faces a difficult challenge when seeking accurate, detailed, and timely information regarding the environmental performance of individual enterprises.

Because many enterprises and government agencies regard compiling and disseminating information as a nuisance, they refuse to release environmental information beyond the information they are legally obliged to disseminate.[86] Moreover, governmental and corporate officials tend to consider citizens "troublemakers," particularly when seeking access to large amounts of information.[87] Enterprises therefore tend to release information only to the extent necessary to comply with government-imposed mandates. Even then, this information may not reach the public.[88] Additionally, the disclosed information may not be entirely accurate as enterprises use "creative accounting" practices to mask or falsify actual environmental performance.[89] A recent survey conducted by the Shanghai Stock Exchange revealed that only a small percentage of individual investors (8.45%) fully believed the information contained in enterprise-related information disclosures, while no institutional investor trusted them.[90] The lack of available information and the concerns with the veracity of information generates a situation wherein enterprises "can manipulate the dissemination of information to mislead the public."[91]

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[83] Guo Peiyuan, *Corporate Environmental Reporting and Disclosure in China* 1, 48 (School of Public Pol'y & Management, Tsinghua Univ., 2005), http://www.csr-asia.com/upload/environmentalreporting.pdf; *see also infra* Part IV.

[84] Guo Peiyuan, *supra* note 83, at 48.

[85] *Id.*

[86] Li Qiwei & Wang Chao, Lue lun wo guo huan jing zhi qing quan fa lu zhi du [On the Protection of Environmental Right to Know in China Legislation], 6 J. CHAOHU COLLEGE 41 (Mar. 2004).

[87] Wang Ziyuan, Public Participation in Environmental Impact Assessment (EIA) Law of China (Guo jia huan jing bao hu zong ju wu han da xue huan jing fa yan jiu suo [State Envtl. Prot. Admin. Wuhan Univ. Envtl. L. Inst.] 2005), http://www.riel.whu.edu.cn/show.asp?ID=3082.

[88] Guo Peiyuan, *supra* note 83, at 48.

[89] XU JIALIN & MENG FANLI, ENVIRONMENTAL ACCOUNTING 164 (2004).

[90] Liu Chengqing et al., *Study on the Environmental Information Disclosure System for Companies Listed in Securities Market* [sic], 22 CHINA ENVTL. MANAGEMENT 20, 22 (2003).

[91] Thomas P. Lyon & John W. Maxwell, *Greenwash: Corporate Environmental Disclosure under Threat of Audit* 5 (Stephen M. Ross School of Business, Univ. Michigan, Working

Another barrier to direct citizen access to corporate environmental performance information is a general lack of uniformity in environmental accounting standards. Inquiring citizens will face difficulties in verifying and comparing what information is available since individual enterprises likely use different accounting protocols.[92] Reports that are released also tend to address specific environmental events or issues instead of providing long-term performance information that the public could use to advocate for pollution prevention.[93] Furthermore, the reports are often drafted using highly technical language that makes it difficult for laypersons to understand them.[94] Many citizens "do not know or understand environmental statutes or regulations" and rely upon government officials to explain them, which, in many circumstances, is not a service (or courtesy) these officials provide.[95] The content of the reports tends to be noncomprehensive, and consequently misleading, due to a lack of data related to environmental costs, expenditures, and existing or anticipated environmental liabilities.[96] Ultimately, Chinese laws and regulations fail to place sufficient emphasis on compelling enterprises to develop and make available environmental information in a manner calculated to facilitate citizens' proactive involvement in decisions that directly impact their communities and local ecosystems. As will be discussed in Part IV, disclosure laws are often vague and laconic, poorly enforced, lacking incentives, or embedded with anemic penalty provisions that fail to deter noncompliance. Yet opportunities exist to transform these laws into effective conduits transferring vital information from the business and government sectors directly to the public.

IV. Changing Chinese Corporate Laws to Ensure Voluntary and Involuntary Disclosures of Environmental Information to the Public

Under existing laws and regulations, Chinese enterprises have few environmental disclosure requirements.[97] Although China has recently under-

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Paper No. 1055, 2006), http://webuser.bus.umich.edu/tplyon/Lyon_Maxwell_Greenwash_March_2006.pdf.

[92] China Accounting Association, *The Review of Seminar on Environmental Accounting Board* [sic], 1 Kuai ji yan jiu [Acct. Res.] 58, 60 (2002).

[93] Xiao Shufang & Hu Wei, *A Study on the Environment Information Disclosure System of Chinese Enterprises*, 3 Kuai ji yan jiu [Acct. Res.] 47, 50 (2005). Third parties cannot evaluate overall corporate performance such as toxic emissions or hazardous waste practices when they merely receive ad hoc reports of noncompliance events.

[94] Xiao Hua & Li Jianfa, *Proposals To Improve China's Business Environment Information Reporting*, J. Xiamen U., Nov. 2002, at 114-15.

[95] Chang Jiwen, *How To Harmonize Community Autonomy and Administrative Responsibility in Environmental Decision-Making: Environmental Hearing Institutions in Wuhan*, 24 Temp. J. Sci. Tech. & Envtl. L. 229, 238 (2005).

[96] Li Zhiping, Huan jing fa de xin fa zhan guan zhi yu min zhu zhi hu dong [The New Development of Environmental Law: The Interaction Between Control and Democracy] 287 (The People's Court Press, 2006).

[97] Li Zhiping, *supra* note 7, at 385.

taken several legal reforms that specifically target disclosure requirements, when these laws are reconsidered or enhanced in the future, even greater "emphasis should be placed on an enterprises' [sic] obligation to disclose environmental information to the public."[98] In fact, as Professor Li Zhiping of Sun Yat-sen University School of Law has already asserted, "enterprises should be mandated to provide access to information under certain circumstances, and even be given incentives to voluntarily provide access to information in other circumstances."[99] In this part, we will probe in depth both voluntary and involuntary compliance schemes to promote the fair dissemination of necessary environmental performance information directly from Chinese enterprises to the public.

A. Using Traditional Command-and-Control Laws to Ensure Periodic Corporate Disclosures of Environmental Information

China "has developed a relatively comprehensive environmental protection apparatus [that] largely employs conventional command-and-control . . . policies."[100] Yet, the historical command-and-control political culture in China is under increasing pressure to yield to public "oversight" with respect to addressing the mounting and compounding environmental problems that are now endangering communities throughout Mainland China.[101] Nevertheless, command-and-control laws play an integral role in establishing systemic corporate information disclosure obligations that ultimately will facilitate the very public "oversight" sought by environmental reformers.

1. *Facilitating Corporate Disclosures Beyond Traditional Obligations*

China maintains laws and regulations compelling corporations to seek permits or licenses for industrial or land-disturbance operations, particularly when the activities will involve the discharge of pollutants that may adversely impact public health or the environment.[102] Moreover, China has

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[98] *Id.*

[99] *Id.*

[100] Jolene Lin Shuwen, *Assessing the Dragon's Choice: The Use of Market-Based Instruments in Chinese Environmental Policy*, 16 GEO. INT'L ENVTL. L. REV. 617, 618 (2004).

[101] Joseph Kahn & Jim Yardley, *As China Roars, Pollution Reaches Deadly Extremes*, N.Y. TIMES, Aug. 26, 2007, at 1.

[102] *See, e.g.*, Environmental Protection Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) art. 27, LAWINFOCHINA (last visited Oct. 1, 2008) (P.R.C.) ("Enterprises and institutions discharging pollutants must report to and register with the relevant authorities in accordance with the provisions of the competent department of environmental protection administration under the State Council."); Detailed Rules for the Implementation of the Law on the Prevention and Control of Water Pollution (promulgated by the State Council, Mar. 20, 2000, effective Mar. 20, 2000) art. 4, LAWINFOCHINA (last visited Oct. 15, 2008) (P.R.C.) (requiring entities that either already do or seek to discharge a pollutant to a watercourse to file an application with the government); Provisions on the Prevention and Control of Vessel Pollution of the Inland Water Environment

enacted laws specifically addressing the need for industrial operators to disclose information in the event of an emergency, such as a chemical spill or unauthorized contaminant discharge to a drinking water resource.[103] While such laws constitute the vanguard in terms of regulatory initiatives designed to mitigate risks to the public and the environment, they are nonetheless event-driven and offer little incentive to encourage regulated entities to proactively develop environmentally conscious strategies to avoid the potential environmental and human health risks in the first place.

In the recent past, China, like the United States, has sought legal reforms through traditional "command-and-control" laws and regulations in an effort to encourage businesses to proactively develop protocols for measuring environmental risks and disclosing them to the public.[104] Although these "first generation" command-and-control laws generally have been criticized as "unduly rigid, cumbersome, and costly," proponents have lauded the "current command regulatory system" as "having pushed firms to develop and adopt pollution controls and sound waste reduction and management practices."[105] At least in the United States, some scholars argue that a command regulatory system was initially necessary in order to "jump

(promulgated by the Ministry of Comm., Aug. 20, 2005, effective Jan. 1, 2006) art. 6, LAWINFOCHINA (last visited Oct. 15, 2008) (P.R.C.) (requiring a vessel to obtain an "effective pollution prevention certificate").

[103] *See, e.g.*, Environmental Protection Law art. 31 (P.R.C.) ("Any unit that, as a result of an accident or any other exigency, has caused or threatens to cause an accident of pollution, must promptly take measures to prevent and control the pollution hazards, make the situation known to such units and inhabitants as are likely to be endangered by such hazards, report the case to the competent department of environmental protection administration of the locality and the departments concerned and accept their investigation and decision."); Measures for the Prevention and Control of Environment [sic] Pollution by Discarded Dangerous Chemicals (promulgated by State Envtl. Prot. Admin., Aug. 30, 2005, effective Oct. 1, 2005) art. 19, LAWINFOCHINA (last visited Oct. 15, 2008) (P.R.C.) (establishing emergency reporting and disclosure requirements for entities managing dangerous chemicals that may be released into the environment); Detailed Rules for the Implementation of the Law on the Prevention and Control of Water Pollution art. 19 (P.R.C.) (mandating, in detail, reporting following a "water pollution accident").

[104] Generally understood, "command-and-control" regulations are defined as "measures that require or proscribe specific conduct by regulated firms." Barbara K. Bucholtz, *Coase and the Control of Transboundary Pollution: The Sale of Hydroelectricity Under the United States-Canada Free Trade Agreement of 1988*, 18 B.C. ENVTL. AFF. L. REV. 279, 315 n.189 (1991) (quoting Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CAL. L. REV. 1259, 1264 (1981)). Another scholar defines the term as "a top-down, hierarchical regulatory form used to control pollution either through performance standards established for polluters, enforced through a permitting system, or uniform technology-based controls established for certain types of polluting activity." David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 380 (2005). Despite becoming "part of political discourse," legal scholars have not settled on one definitive definition, but many tend to focus on the "prescription" scheme of compelling specific conduct from a regulated entity. David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 297 n.44 (1998).

[105] Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 22 (2001).

start" an environmental paradigm shift within the corporate community.[106] In the twenty-first century, command-and-control laws continue to play an important — if not dominant — role in environmental regulatory activities in the United States and abroad.[107]

Mandatory public disclosure laws can augment traditional command-and-control regulatory schemes. Disclosure "enlist[s] the aid of non-governmental forces, particularly economic markets and public opinion" to encourage corporate entities to enhance environmental performance.[108] Such public disclosure laws can let loose "market forces" that compel corporations to modify behaviors and thus are an important regulatory device that can be used in conjunction with more traditional command-and-control laws.[109] In the United States, mandatory public disclosure requirements have been included in securities laws since the 1930s, and they also appeared in the health, safety, and environmental laws that emerged in the 1960s and 1970s.[110] The 1990s saw a "renewed emphasis on corporate social responsibility," which spurred the greater use of "formal voluntary environmental reporting" to answer the rising tide of market-based pressure exerted by a wide range of stakeholders, including "current and potential investors, employees, customers, local communities, business competitors and industry standard setters, government regulators, environmental and social advocacy groups, and the media."[111]

From a market-based perspective, mandatory environmental disclosure laws offer a number of benefits to corporations. Unlike strictly voluntary disclosure programs, mandatory disclosure requirements prevent regulated corporations from under-producing information for fear of losing a competitive advantage against those corporations that do not disclose.[112] Additionally, by establishing uniform standards for disclosure, regulatory agencies establish a template allowing for environmental performance comparisons between different corporations or industries.[113] Such laws compel corpora-

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[106] *See* Paula C. Murray, *Inching Toward Environmental Regulatory Reform – ISO 14000: Much Ado about Nothing or a Reinvention Tool?*, 37 AM. BUS. L.J. 35, 35-36 (1999) ("The command-and-control paradigm was necessary to jump-start American environmental policy — companies had to be ordered to clean up their pollution act and to be punished to keep them in line.") (citations omitted).

[107] *See* Sanford E. Gaines, *Reflexive Law as a Legal Paradigm for Sustainable Development*, 10 BUFF. ENVTL. L.J. 1, 19 (2003) ("Substantive, purposive environmental law — yes, command-and-control regulation — still has a vital role, especially in helping to achieve the sweeping economic, social, and environmental agenda implicit in 'sustainable development.'"); Jessica C. Stabile, *Clashes Between Economics and Environments: Consumerism Versus Conservation in Taiwan and Hong Kong*, 7 ASIAN-PAC. L. & POL'Y J. 125, 168 (2006) ("Command-and-control regulation continues to dominate in most of Taiwan's environmental laws, although market-based strategies such as levying pollution tax on sources of pollution are beginning to be utilized as well.") (citation omitted).

[108] *See* Case, *supra* note 104, at 383.

[109] *Id.* at 383, 387.

[110] *Id.* at 384.

[111] *Id.* at 390, 391.

[112] *Id.* at 440.

[113] *Id.* at 441-42.

tions to release more information than they would otherwise do willingly, even when participating in voluntary programs.[114]

2. *Examples of Mandatory Corporate Disclosure Laws in the United States*

In the United States, corporations are bound by numerous mandatory public disclosure requirements, particularly related to activities that may adversely impact public health or the environment. In this section, we identify and briefly outline two laws that can inform existing Chinese corporate and environmental disclosure obligations from both a procedural and enforcement perspective: the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA")[115] and, jointly, the Securities Act of 1933 and the Securities Exchange Act of 1934.[116] Each of these laws is complex — a full discussion of them requires more room "to get into sailing trim and run a course or two before they make their port" than we have in this Article — but we seek to supply enough background information to allow us to apply general policies or processes to the present regulatory environment in China.[117]

a. *The Emergency Planning & Community Right-to-Know Act of 1986*

The Emergency Planning and Community Right-to-Know Act was enacted as one element of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"),[118] a wide-ranging reauthorization of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), better known as the "Superfund" law.[119] The United States Congress integrated EPCRA into the SARA legislation, partly as a response to two catastrophic events: the 1984 Union Carbide toxic gas release in Bhopal, India, which resulted in over 2,000 deaths and more than 200,000 injuries, and the 1985 Union Carbide pesticide release that impacted nearly 150 West Virginians.[120] Specifically, Congress enacted EPCRA to ensure that local communities had access to critical information when responding to

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[114] *Id.* at 439.

[115] Emergency Planning and Community Right-to-Know Act of 1986, Pub. L. No. 99-499, §§ 300–330, 100 Stat. 1613, 1728-58 (codified as amended at 42 U.S.C. §§ 11001-11050 (2000)).

[116] Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) (codified as amended at 15 U.S.C. §§ 77a-77aa (2006)); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a–78kk (2006)).

[117] HENRY DAVID THOREAU, WALDEN 185 (G.G. Harrap, 1910) (1854).

[118] §§ 300-330, 100 Stat. at 1613.

[119] Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (1980) (codified as amended at 42 U.S.C. §§ 9601-9675 (2000)).

[120] 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, 325 (2004) (citations omitted).

hazardous materials incidents,[121] and to guarantee that corporations using, storing, or distributing large quantities of hazardous materials would proactively develop comprehensive emergency response plans to minimize risks to surrounding human populations and the environment.[122]

As the title of EPCRA explicitly expresses, Congress sought to declare that citizens hold a clear right to know "that extremely dangerous chemicals are present at chemical manufacturing plants and other facilities in communities all across America."[123] Moreover, the scope of EPCRA exceeds merely conveying information about accidental release events to include a community's right to be "informed about *routine* releases of these chemicals to the air and the water and the land."[124] Ultimately, EPCRA was adopted as an answer to a general understanding at the time that there existed an "inadequacy of disaster planning around facilities where large amounts of toxic and hazardous chemicals are used and stored."[125]

In practice, EPCRA addresses a number of emergency-response and planning-related requirements that cover a wide range of industrial facilities. First, EPCRA compels each state to establish a "state emergency response commission" that in turn creates smaller districts overseeing "local emergency planning committees," which establish and annually review emergency response plans.[126] Facilities containing predetermined amounts of "extremely hazardous substances"[127] must develop "comprehensive emergency response plans," which require notification procedures, evacuation protocols, and training programs, among other requirements.[128] In the event of an accidental hazardous material release, a facility owner or operator — even if the facility does not contain designated extremely hazardous substances — must immediately notify the "community emergency coordinator."[129]

Beyond emergency disclosures, EPCRA includes provisions to encourage local planning and enhance community awareness of potential chemical hazards. In particular, EPCRA requires regulated facilities to provide material safety data sheets ("MSDS") to appropriate local emergency

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[121] *Id.* The actual death toll and injury count for the Bhopal disaster range between 2,000 and 20,000 killed and between 200,000 and 600,000 injured. Trevor C.W. Farrow, *Globalization, International Human Rights, and Civil Procedure*, 41 ALBERTA L. REV. 671, 671 n.3 (2003) (citations omitted). In the United States civil litigation that followed, federal district Judge John F. Keenen started his opinion and order by stating that Bhopal was the "most tragic industrial disaster in history." *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, 634 F. Supp. 842, 844 (S.D.N.Y. 1986), *modified & aff'd*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, 484 U.S. 871 (1987).

[122] Durham-Hammer, *supra* note 120, at 325.

[123] 132 CONG. REC. 28,418 (1986).

[124] *Id.* (emphasis added). "Just as the public has a right to know about releases that might happen as a result of an accident, the public also has a right to know about releases that do happen every hour and every day that some manufacturing facilities operate." *Id.*

[125] *Id.*

[126] 42 U.S.C. § 11001 (2000).

[127] *Id.* § 11002.

[128] *Id.* § 11003.

[129] *Id.* § 11004.

planning committees, first responders, and the general public.[130] Additionally, EPCRA includes a requirement for many facilities to develop "toxic chemical release forms" that identify chemicals manufactured, processed, or otherwise used at a particular facility; facilities must then submit the forms to various government agencies.[131] All plans, MSDS forms, inventory or toxic chemical release forms, and notices must be available directly to the public.[132] EPCRA violations carry substantial civil, administrative, or criminal penalties,[133] and under certain conditions, EPCRA permits citizens to bring direct civil actions against the government or the violating facility owner or operator.[134] Due to EPCRA's success, many proponents now argue that "mandatory public distribution of information" can have a substantial effect on improving "industrial environmental performance."[135]

b. Securities Act of 1933 & the Securities Exchange Act of 1934

The 1933 Securities Act was a governmental effort, following the high financing of the 1920s and the 1929 market crash, to reestablish public faith in "a system as a whole that had failed miserably in imposing those essential fiduciary standards that should govern persons whose function it was to handle other people's money."[136] Similarly, the Securities Exchange Act of 1934 was adopted to curtail "[w]idespread abuses in securities transactions" and to "deter future abuses and to protect stockholders from predatory transactions that adversely affected their investments."[137] Distilled to their barest terms, the 1933 Securities Act "regulates registrations of distributions of securities, [and] the 1934 [Securities Exchange Act] regulates post-distribution trading of securities and other matters."[138] The Securities Exchange Act also established the Securities Exchange Commission (SEC), which administers and enforces federal laws governing securities trading.[139] The SEC has broad powers under both acts to enforce substantial civil liabilities or criminal penalties against corporations violating federal securities laws.[140]

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[130] *Id.* § 11021.
[131] *Id.* § 11023.
[132] *Id.* § 11044.
[133] *Id.* § 11045.
[134] *Id.* § 11046.
[135] *See* Case, *supra* note 104, at 382; *see also id.* at 382 n.13 (citing proponents).
[136] James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1960).
[137] Kathleen Ambrose Ley, Note, CBI Industries, Inc. v. Horton: *The Seventh Circuit Lets the Insider Off*, 33. AM. U. L. REV. 247, 248-49 (1983) (citations omitted).
[138] Jeffrey A. Smith, *Environmental Disclosure Requirements Under Securities Law*, *in* ENVIRONMENTAL ASPECTS OF REAL ESTATE AND COMMERCIAL TRANSACTIONS: FROM BROWNFIELDS TO GREEN BUILDINGS 415, 417 (James B. Witkin ed., 3d ed. 2004) (citation omitted).
[139] Dariusz M. Budzen & Ania M. Frankowska, *Prohibitions Against Insider Trading in the United States and the European Community: Providing Guidance for Legislatures of Eastern Europe*, 12 B.U. INT'L L.J. 91, 95 n.20 (1994).
[140] For instance, the Securities Act establishes civil liabilities for including false information in a registration statement, 15 U.S.C. § 77k (2006), and unlawfully offering or selling

Although criticized by some as overly narrow, existing SEC disclosure regulations require corporations to divulge information reflecting existing and potential environmental liabilities.[141] The 1969 passage of the National Environmental Policy Act ("NEPA")[142] compelled the SEC to "re-examine its rules in light of NEPA's requirement that government agencies consider environmental protection in the interpretation and administration of their policies and regulations."[143] In response, the SEC issued an interpretative release in 1971 recognizing that existing general disclosure laws "required that public companies disclose any 'material' proceedings arising from compliance with environmental laws."[144]

In order to facilitate uniformity with respect to corporate disclosure obligations, the SEC promulgated Regulation S-K, which contains several provisions that specifically address environmental disclosure requirements.[145] Item 101 requires corporations to disclose material environmental compliance costs that may have an impact upon "earnings, capital expenditures, and competitive position."[146] Item 103, which addresses disclosures of administrative or judicial legal proceedings, requires disclosure of an action if a legal matter (1) is material; (2) concerns a claim in excess of ten percent of the consolidated assets of the corporation; or (3) involves a governmental

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securities. 15 U.S.C. § 77l. Individuals violating any provision of the Act or making an "untrue statement of a material fact" are subject to a monetary fine and possible federal incarceration, 15 U.S.C. § 77x. Similarly, the Securities and Exchange Act includes provisions establishing civil liabilities for individuals who make misleading statements, 15 U.S.C. § 78r, and specific liabilities for individuals who "aid and abet" violations of the Act, 15 U.S.C. § 78t, or participate in "insider trading," 15 U.S.C. § 78t-1, u-1. Additionally, the Securities and Exchange Act provides for substantial, multi-million dollar criminal fines and federal incarceration up to ten years. 15 U.S.C. § 78ff. For a general discussion on U.S. Securities Acts penalties, liabilities, and SEC enforcement, see Anish Vashista et al., *Securities Fraud*, 42 AM. CRIM. L. REV. 877 (2005) and Matthew Scott Morris, Comment, *The Securities Enforcement Remedies and Penny Stock Reform Act of 1990: By Keeping Up with the Joneses, the SEC's Enforcement Arsenal is Modernized*, 7 ADMIN. L.J. AM. U. 151 (1993).

[141] For a general critique of the SEC's limited scope of environmental liability disclosures, see Clifford Rechtschaffen, *Enforcing the Clean Water Act in the Twenty-First Century: Harnessing the Power of the Public Spotlight*, 55 ALA. L. REV. 775, 809-14 (2004).

[142] National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-70 (2000)).

[143] Tracy Soehle, Comment, *SEC Disclosure Requirements for Environmental Liabilities*, 8 TUL. ENVTL. L.J. 527, 529 (1995) (citing 42 U.S.C. § 4332(l) (2000)).

[144] *Id.* (citing Disclosures Pertaining to Matters Involving the Environment and Civil Rights, Exchange Act Release No. 9252, 3 Fed. Sec. L. Rep. (CCH) ¶ 23,507 (July 19, 1971)). It should be noted, however, that the SEC asserted that compelling corporate environmental disclosure was not to "change corporate conduct," but merely to "facilitate investors' access to relevant, economically significant information, thereby assisting the investors to make informed investment decisions." Robert J. Lewis, Note, *"Shh! Maybe in My Backyard!" An Equity and Efficiency-Based Critique of SEC Environmental Disclosure Rules and Extraterritorial Environmental Matters*, 78 MINN. L. REV. 1045, 1049 n.22 (1994) (citing Proposed Environmental Disclosures, No. 5627, Fed. Sec. L. Rep. (CCH) ¶¶ 85,710-13 (Oct. 14, 1975)).

[145] 17 C.F.R. §§ 229.10-229.802 (2007).

[146] 17 C.F.R. § 229.101(c)(1)(xii) (2007). Moreover, a reporting entity must "disclose any material estimated capital expenditures for environmental control facilities for the remainder of its current fiscal year and its succeeding fiscal year and for such further periods as the registrant may deem material." 17 C.F.R. § 229.101(c)(1)(xii).

authority and any potential monetary sanction that, if imposed, would likely exceed $100,000.[147] Although not specifically addressing environmental concerns, Item 303 requires corporations to discuss in their disclosures contingent events that are reasonably likely to have a material effect on the corporation's financial condition and operations.[148] Finally, corporate disclosures must be written in "plain English" in a manner generally calculated to make prospectuses and registration statements, among other disclosure documents, more "reader-friendly."[149]

3. *Current Chinese Laws Governing Involuntary Reporting of Environmental Information*

Enterprises listed on Chinese stock exchanges are also subject to various mandatory financial and environmental disclosure requirements under securities laws and regulations.[150] Moreover, SEPA expands a broader net that captures many unlisted enterprises through disclosure provisions in more traditional environmental laws. As the Chinese capital market continues to develop, the need for greater access to reliable corporate information is garnering "more and more attention from society."[151] Recognizing existing market transparency issues under current law, there is a legislative and regulatory focus on ensuring "compulsory disclosure," with voluntary disclosure opportunities as a secondary means of compelling corporations to release critical corporate governance, financial, and liability information to the public.[152] Consequently, a number of securities laws and regulations and environmental laws and regulations now require corporations to disclose environmental information.

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[147] 17 C.F.R. § 229.103.

[148] 17 C.F.R. § 229.303; *see* Soehle, *supra* note 143, at 536.

[149] Smith, *supra* note 138, at 434-35. Federal regulations require that information presented in prospectuses, for example, must be drafted in a "clear, concise and understandable manner." 17 C.F.R. § 230.421(b). The regulations specify "six minimum plain English writing principles [for] use in drafting the front of prospectuses: Active voice, short sentences, everyday language, tabular presentation of complex material, no legal jargon, and no multiple negatives." Plain English Disclosure, 62 Fed. Reg. 3152, 3152-53 (Jan. 21, 1997) (codified as amended at 17 C.F.R. § 230.421 (2007)).

[150] There are two exchanges in Mainland China: the Shanghai Stock Exchange and the Shenzhen Stock Exchange. These exchanges are administered directly by the China Securities Regulatory Commission (CSRC). There is also the Hong Kong Stock Exchange located in the special administrative region of Hong Kong.

[151] Chi Guotai et al., *The Trends of Transparency, Laws and Regulations on Chinese Corporate Governance* 1 (Dalian Univ. of Tech. 2007), http://ethicsworld.org/corporategovernance/ChinaCorporateGovernance.pdf.

[152] *Id.*

a. SEPA-Enforced Environmental Disclosure Laws and Regulations

One of the most important laws is the Cleaner Production Promotion Act,[153] promulgated by the Standing Committee of the National People's Congress in 2002. The Act's purpose is "to promote cleaner production, improve the resource utilization efficiency, reduce and avoid pollutants from production, protect and improve environment, safeguard human health, and promote sustainable economic and social development."[154] Government agencies must facilitate the "popularization" of cleaner production opportunities, and media outlets, such as television and news publishers, must "bring their respective advantages into full play so as to accomplish cleaner production propaganda."[155] Also, environmental departments and local governments may use local media sources to publicly disclose heavily polluting enterprises that violate pollutant discharge standards "so as to provide [a] basis for the public to supervise enterprises' implementation of cleaner production."[156] Enterprises that are identified on this blacklist must "announce the discharge of main pollutants, and be subject to the public surveillance" pursuant to regulations to be developed by the overseeing governmental agencies.[157] Finally, those blacklisted enterprises that continue not to publicly disclose the required information may be fined up to 100,000 yuan (RMB) (approximately $14,000).[158]

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[153] Law on the Promotion of Cleaner Production (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003), ISINOLAW (last visited Oct. 15, 2008) (P.R.C.).

[154] *Id.* art. 1. The law defines "cleaner production" as

> fundamental reduction of pollution from sources, efficiency improvement of resource utilization, reduction or avoidance of pollutions [sic] from the course of production and use of services and products by means of improving design incessantly, using cleaner energy resources and raw materials, adopting advanced techniques, equipment, improving management, and comprehensive utilization, so as to reduce or eliminate harm to human health and environment.

Id. art. 2. This definition is consistent with and expands upon the U.N.'s notion of "cleaner production." The U.N. broadly defines "cleaner production" to mean the "continuous application of an integrated, preventive strategy applied to processes, products and services in pursuit of economic, social, health, safety and environmental benefits." U.N. ENV'T PROGRAMME, INTERNATIONAL DECLARATION ON CLEANER PRODUCTION (1998), *available at* http://www.unep.fr/scp/cp/network/pdf/english.pdf.

[155] Law on the Promotion of Cleaner Production (promulgated by the Standing Comm. Nat'l People's Cong., June 29, 2002, effective Jan. 1, 2003) arts. 7, 15, 2002 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 291 (P.R.C.).

[156] *Id.* art. 17.

[157] *Id.* art. 31. According to a SEPA bulletin, local and provincial authorities enforcing the Cleaner Production law should publish a wide range of information regarding the environmental performance of offending enterprises, including total discharge of pollutants, major pollution abatement projects, compliance histories, and environmental management initiatives. State Envtl. Prot. Admin., Guan yu qi ye huan jing xin xi gong kai de gong gao [Bulletin on Information Disclosure for Corporate Environmental Performance], U.N. Conference on Env't and Dev. 156 (2003), *available at* http://www.sepa.gov.cn/info/gw/huangfa/200309/t20030902_86629.htm (last visited Feb. 17, 2008).

[158] Law on the Promotion of Cleaner Production art. 41 (P.R.C.). It should also be noted that the Act provides for a "cleaner production commending and rewarding system" for

On February 8, 2007, SEPA approved the Decree on Environmental Information Disclosure (for Trial Implementation) ("DEID"), a far-reaching regulation that went into effect May 2008, which in part requires enterprises and governmental agencies to disclose environmental information to the public.[159] DEID also encourages enterprises to voluntarily release environmental information to the public.[160] In promulgating DEID, one SEPA official stated that the public should play a more substantive role in corporate environmental decision making beyond merely participating in tree planting or recycling programs.[161]

Under DEID, enterprises that are identified by the government as having "discharge[d] pollutants in excess of national or regional discharging standards" or that are otherwise responsible for "seriously pollut[ing] the environment"[162] must compile disclosure materials that detail the types and quantities of pollutants discharged, and the means of environmental release.[163] These disclosure materials must also include emergency plans and describe the condition of "environmental protection facilities" operated by the enterprise.[164] This information is not merely distributed to local or state environmental agencies, which in turn, disseminate it to the general public; rather, listed enterprises are required to directly release this information through "local main mass media" and provide verification to the "local en-

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"[e]ntities and individuals that achieve remarkable successes in cleaner production." *Id.* art. 32.

[159] State Admin. for Indus. & Commerce of the People's Republic of China, Decree of State Environmental Protection Administration No. 35, http://english.wzj.saic.gov.cn/nd/070429093919-0.htm (last visited Oct. 15, 2008); Measures for the Disclosure of Environmental Information (for Trial Implementation) (promulgated by State Envtl. Prot. Admin., Apr. 11, 2007, effective May 1, 2008), LAWINFOCHINA (last visited Oct. 15, 2008) (P.R.C.). *See also* Ma Jun, *The Environment Needs Freedom of Information*, CHINADIALOGUE, May 9, 2007, http://www.chinadialogue.net/article/show/single/en/990-The-environment-needs-freedom-of-information. "These regulations — the first departmental rules relating to the release of state information — are a milestone on the path to guaranteeing the public's right to access environmental information."

[160] *See* Measures for the Disclosure of Environmental Information (for Trial Implementation) (promulgated by State Envtl. Prot. Admin., Apr. 11, 2007, effective May 1, 2008) art. 4, LAWINFOCHINA (last visited Oct. 21, 2007) (P.R.C.).

[161] Press Release, State Envtl. Prot. Admin., Shou bu huan jing xin xi gong kai ban fa chu tai qiang zhi huan bao bu men he wu ran qi ye gong kai huan jing xin xi pan yue hu yu yi gong zhong shen du can yu tui dong wu ran jian pai [Introducing Mandatory Environmental Information Disclosure Law, Pan Yue Urges Environmental Protection Departments and Enterprises to Disclose Information to Promote Public Participation in Pollution Abatement] (Apr. 25, 2007), *available at* http://www.zhb.gov.cn/xcjy/zwhb/200704/t20070425_103120.htm ("Yin ci, gong can yu jiu bu neng ting liu zai zhi shu zhong cao he qing li la ji de jie duan, er ying gai wang geng shen ceng ci fa zhan, ji chong fen li yong xian fa fu yu de zhi qing quan, biao da quan, can yu quan, jian du quan, jian du qi ye de huan bao xing wei, can yu zheng fu de huan jing jue ce.") (statement by then SEPA deputy director Pan Yue) ("Therefore, public participation will not be able to stay at the stage of planting trees and grass, and cleaning up litter, it should develop to a deeper level, make full use of the right to information given by the constitution, the right to expression, the right to participate, supervision, monitoring corporate environmental conduct, and participate in the government's environmental policy making.").

[162] *Id.* art. 11.

[163] *Id.* art. 20.

[164] *Id.*

vironmental administration for archival purposes."[165] Enterprises failing to comply with DEID requirements may be subject to a fine not to exceed 100,000 yuan (RMB) pursuant to state agency authority granted under the Cleaner Production Promotion Act.[166]

Additionally, under DEID Chinese citizens may petition government agencies to release a range of environmental compliance and enforcement information, including the list of enterprises discharging pollutants in excess of reported limits, administrative enforcement actions, "[e]nvironmental protection plans," and "environmental impact evaluation documents for construction projects."[167] More importantly, much of this information must be made available in a manner calculated to provide easy access to the general public.[168] Finally, DEID permits citizens to file administrative lawsuits to compel agencies to comply with DEID when their rights have been affected, while also compelling higher-level agencies to police lower-level agencies by requiring the imposition of sanctions for recognized failures to comply with or implement DEID disclosure provisions.[169]

In 2003, SEPA also instituted an inspection and verification protocol for certain industry-specific enterprises seeking listing on a Chinese domestic stock exchange or already listed enterprises applying for refinancing.[170] This inspection and verification regulation targets "industries of heavy pollution" in an effort to ensure that individual enterprises are complying with environmental laws, minimizing investment risks, and properly managing publicly raised capital.[171] Affected enterprises must develop a comprehen-

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[165] *Id.* art. 21.
[166] *Id.* art. 28.
[167] *Id.* arts. 5, 11.
[168] *Id.* art. 13.
[169] *Id.* art. 26, 27.
[170] Regulation on the Inspection and Verification of Environmental Protection of Corporations Applying for Listing and Listed Corporations Applying for Refinancing (promulgated by State Envtl. Prot. Admin., June 16, 2003, effective June 16, 2003), LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.). This Regulation has been updated by SEPA guidance materials twice in 2007. STATE ENVTL. PROT. ADMIN., GUAN YU JIN YI BU GUI FAN ZHONG WU RAN XING YE SHENG CHAN JING YING GONG SISHEN QING SHANG SHI HUO ZAI RONG ZI HUAN JING BAO HU HE CHA GONG ZUO DE TONG ZHI [FURTHER STANDARDIZATION FOR ENVIRONMENTAL PROTECTION VERIFICATION FOR LISTING OR REFINANCING OF HEAVILY POLLUTING INDUSTRIES] (Aug. 13, 2007), http://www.sepa.gov.cn/info/gw/huanban/200708/t20070816_107999.htm; STATE ENVTL. PROT. ADMIN., SHOU CI SHEN QING SHANG SHI HUO ZAI RONG ZI DE SHANG SHI GONG SI HUAN JING BAO HU HE CHA GONG ZHOU ZI NAN [ENVIRONMENTAL PROTECTION VERIFICATION GUIDE FOR FIRST TIME LISTING OR REFINANCING COMPANIES] (Sept. 27, 2007), http://www.zhb.gov.cn/cont/gywrfz/200709/t20070927_109609.htm. The thrust of the regulation, however, effectively remains the same: to prevent environmental risks by requiring enterprises from certain heavily-polluting industrial sectors to meet minimum compliance standards before listing on a stock exchange or obtaining refinancing. Enterprises applying to SEPA for environmental inspection still must send applications and technical documentation to provincial Environmental Protection Bureaus, which in turn file reports with SEPA and CSRC.
[171] Regulation on the Inspection and Verification of Environmental Protection of Corporations Applying for Listing and the [sic] Listed Corporations Applying for Refinancing (promulgated by State Envtl. Prot. Admin., June 16, 2003, effective June 16, 2003), LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.). The regulation applies to the following industries: "metallurgy, chemical industry, petrochemistry, coal, thermal power, building ma-

sive environmental report that is submitted to provincial level environmental departments and subsequently forwarded to SEPA and the CSRC.[172] After environmental officials review the materials, provincial agencies then must publish the results of the inspection or verification analysis to local media outlets for ten days.[173]

b. CSRC-Enforced Environmental Disclosure Laws and Regulations

Beyond SEPA, the CSRC is another important state agency that requires listed enterprises to publicly disclose environmental information.[174] Enterprises pursuing initial public offerings ("IPOs") must prepare a prospectus which includes a demonstration that the enterprise has not been subject to an administrative penalty for violating any "environmental protection" provision under "serious circumstances."[175] The enterprise must further warrant that any investment funds raised will be used in a manner compliant with environmental protection laws.[176] Additionally, a companion regulation requires the enterprise to state that all business activities supported by the stock offering would comply with environmental laws.[177] For enterprises classified as "industries of heavy pollution," documentation from provincial environmental departments is also required to support the environmental performance warranties made in the IPO prospectus.[178]

China's Securities Law, while not specifically addressing disclosure requirements related to environmental concerns, generally captures the principle that compels publicly held enterprises to periodically release environmental performance and liability information.[179] Enterprises must annually develop comprehensive reports that disclose, among other provi-

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terial, paper making, brewage, pharmaceutical, fermenting, spinning and weaving, tanning and mining." *Id.* para. 1.

[172] *Id.* para. 2, 3. The reporting requirements are extensive, but most importantly enterprises must demonstrate compliance with state and local pollutant discharge standards and with permit or license requirements. *Id.* para. 2.

[173] *Id.* para. 3.

[174] The CSRC constitutes the lead national agency enforcing disclosure obligations through self-promulgating regulations and enforcement of the Securities and Company Laws. For an in-depth discussion of CSRC regulatory oversight of corporate disclosures, see generally Daniel M. Anderson, *Taking Stock in China: Company Disclosure and Information in China's Stock Markets*, 88 GEO. L.J. 1919 (2000).

[175] Measures for the Administration of Initial Public Offering and Listing of Stocks (promulgated by the China Sec. Reg. Comm'n, May 17, 2006, effective May 18, 2006) art. 25(2), LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.).

[176] *Id.* art. 40.

[177] Shanghai Stock Exchange, Gong kai fa xing zheng quan de gong si xin xi pi lu nei rong yu ge shi zhun di jiu hao shou qi gong kai fa xing gu piao bing shang shi shen qing wen jian [Public Offering of Securities Companies to Disclose Information Content and Format of the Guidelines on the 9th—Initial Public Offerings of Stock and Listing Application Documents] (May 18, 2006), http://www.sse.com.cn/ps/zhs/fwzc/xxpljg.shtml (last visited Nov. 16, 2007).

[178] *Id.*

[179] Securities Law (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2005, effective Jan. 1, 2006) arts. 63-72, LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.).

sions, major litigations or other "important matters."[180] Additionally, enterprises must immediately and publicly announce whenever a "major event" occurs; the announcement must include the cause of the event, the impact on the present situation of the enterprise, and any possible legal consequences.[181] A major event may include substantial litigation, major asset transactions, incurring substantial debt, or other changed circumstances that impact the trading price of a company's shares.[182] Finally, enterprises must retain copies of the disclosure and make them available at the corporate office for public inspection.[183]

4. *A Proposal to Change Existing Chinese Involuntary Reporting Laws*

a. *Recent Trends and Performance Data Related to Chinese Enterprises Disclosing Information to the Public*

Although China's movement toward a free market economy and the recent enactment of new mandatory disclosure laws are fostering an understanding of the importance of transparency, a number of factors haunting both market and regulatory systems prevent a high level of transparency.[184] A survey evaluating data from 827 Shanghai-listed A-share enterprises in 2004 revealed that 60% of heavy-polluting industries publicly disclosed critical information, as compared with only 23% for all other industries.[185] The researchers attributed the substantially higher heavy-polluting industry performance to the promulgation of sector-specific mandatory disclosure requirements.[186] A 2001 survey of corporations, banks, and securities and accounting firms asked why corporations disclose environmental information.[187] When CEOs were asked to indicate motivations for disclosure, 70% responded that disclosure was related to mandatory requirements; only 19% responded that disclosure was related to pressure exerted by investors.[188]

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[180] *Id.* art. 65.

[181] *Id.* art. 67. It should be noted, however, that the CSRC has generally not specified the content that needs to be contained in a major event report. Anderson, *supra* note 174, at 1929.

[182] Securities Law art. 67 (P.R.C.).

[183] *Id.* art. 70.

[184] *See* Chi Guotai et al., *supra* note 151, at 3. Chi explains:

> The construction of Chinese market transparency is going along orderly, and the market transparency is steadily improving. . . . The Chinese capital market is a typical new and transitional market. There are many nonstandard problems with the size and quality of listed companies, the controlling level and the development of rules and laws. These factors lead to a low-level of transparency, but Chinese market transparency is marching towards transparence [sic] step by step.

Id.

[185] Zhou Yihong & Sun Xiaoyan, *The Positive Analysis of Environmental Disclosure of Listed Companies in China*, 3 J. NANJING AUDIT UNIV. 23 (Nov. 2006).

[186] *Id.*

[187] Guo Peiyuan, *supra* note 83, at 31 tbl.12.

[188] *Id.*

The same survey, however, also revealed that market factors are playing an important role in the corporate decision to disclose environmental information.[189] Such factors include direct market pressure (44%) and the desire to build or sustain a positive reputation (55%).[190]

Not surprisingly, government agencies tend to be the primary users of environmental information released by corporations. Again, the 2001 survey found that government agencies were the top users of corporate environmental reports, accounting for 52% of the users, while the public (including non-governmental organizations) accounted for only 9% of the users.[191] This data has led some researchers to conclude that environmental reporting has "not yet become mainstream in China."[192] Moreover, corporate disclosures tend to be primarily motivated by governmental disclosure requirements, as opposed to pressure applied by consumers or investors.[193]

Although China's relatively new stock exchange system is gaining greater sophistication, lax enforcement and poor corporate compliance with disclosure laws result in continuing inefficiencies in the entire market system.[194] Systemic concerns include inaccurate or fabricated financial statements, deceptive or noncompliant means of disclosing information, and price manipulation and insider trading.[195] Additionally, lack of enforcement and inadequate public access to the Chinese court systems limit the effectiveness of administrative and judicial influence to ensure continuous, accurate, and compliant corporate reporting of environmental information. As argued above, the synergy of these barriers further perpetuates public disenfranchisement and stymies the potential for advancing a corporate culture cognizant of the benefits of information transparency.[196]

b. Recognizing the Need for Greater Regulatory Enforcement

Although China has an extensive set of environmental laws, lax enforcement continues to haunt governmental efforts to compel public and private enterprises to consistently maintain compliance with environmental performance standards, including public disclosure obligations.[197] Chinese environmental laws tend to be vague and read more like "policy statements;" they usually "encourage" rather than "require" assurances of compliance.[198] In addition, many government agencies simply fail to properly

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[189] *Id.*
[190] *Id.*
[191] *Id.* at 32 tbl.14.
[192] *Id.* at 33.
[193] *Id.* at 35-37.
[194] Chi Guotai et al., *supra* note 151, at 2.
[195] *Id.* at 2-3.
[196] *See supra* Part III.
[197] *See* Alex Wang, *The Role of Law in Environmental Protection in China: Recent Developments*, 8 VT. J. ENVTL. L. 195, 203 (2007) ("It is now generally accepted that China's environmental laws are relatively complete and that enforcement is now the real problem.").
[198] *Id.* at 203.

utilize the full scope of supervisory power granted under existing law.[199] Regulatory agencies have even falsified reports to appease corporate interests.[200] Notwithstanding instances of corruption, investigations of alleged violations are often not initiated in time to protect the public, and violators are "often free from corrective responsibilities."[201] Additionally, SEPA cannot resolve complaints in a timely fashion because its small staff is overwhelmed by the number of complaints, which topped 50,000 in 2005; as a result, some actions linger in dispute for over ten years.[202]

Even when public disclosure laws are enforced, in many instances the penalties are substantially cheaper than the cost of compliance. As already noted above, information disclosure violations are generally capped at a mere 100,000 yuan (RMB) fine,[203] unlike punitive fines, criminal sanctions, or provisions that operate under a "polluter pays" principle.[204] Overall, the low fees and lack of effective enforcement, coupled with the higher cost of actually preparing and disseminating environmental information, entrenches

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[199] Wang Canfa, *supra* note 2, at 164 (citing generally Wang Canfa, *On Limitations of Legislation on Environmental Administration Mechanism of China and the Ways of Perfecting It*, 21 J. CHINA UNI. POL. SCI. & L. (Aug. 2003)).

[200] *See, e.g.*, *id.* at 166 (citing generally Center for Legal Assistance to Pollution Victims ("CLAPV"), Jiao hua an jian dao ju min qu "zheng fun xing wei" shi shou hai zhe zou shi nian guan si lu [Coking Plant to be Built in Neighborhood: Government Acts After Citizens File Suit a Decade Ago], Oct. 19, 2005 [hereinafter CLAPV Report], http://www.clapv.org/new/show.php?id=1111 (describing construction violations of a coke plant where agency official doctored the actual distance between the proposed plan and a residential district from 20 meters to 400 meters)).

[201] *Id.* at 167.

[202] *Id.* (citing CLAPV Report, *supra* note 200). China's SEPA only has a full-time staff of less than 300, as compared to the U.S. EPA, which has over 17,000 employees. John Warburton & Leo Horn, *China's Crisis: A Development Perspective (Part One)*, CHINA-DIALOGUE, Oct. 25, 2007, http://www.chinadialogue.net/article/show/single/en/1418-China-s-crisis-a-development-perspective-part-one.

[203] *See supra* note 158 and accompanying text.

[204] *See* Ying Zhao, *A Survey of Environmental Law and Enforcement Authorities in China*, in FOURTH INTERNATIONAL CONFERENCE ON ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT 903, 908-09, 911-12 (1996), *available at* http://www.inece.org/4thvol2/zhao.pdf. Yet at least some scholars have noted that the polluter pays principle, penalties, and criminal sanctions may not be entirely effective under the current Chinese enforcement scheme. *See* William P. Alford & Yuanyuan Shen, *Limits of the Law in Addressing China's Environmental Dilemma*, 16 STAN. ENVTL. L.J. 125, 136 (1997).

> The effort to align Chinese environmental law more closely with stated national economic objectives and the call for more serious punishment for those who wantonly harm the environment are laudable, but both present problems. Adherence to the "polluter pays" principle and the establishment of a workable system of tradable discharge permits presume more in the way of market mechanisms overseen by independent regulatory authorities than is now available in China or likely to be in the foreseeable future. Severe criminal sanctions are no substitute for such circumstances, as China has learned from its attempts to use criminal law to instill fundamental civic virtue and define appropriate market behavior in its rapidly changing economy.

Id. (footnote omitted).

a standing corporate attitude in China that such disclosures are an unnecessary burden.[205]

c. *Recommendations for Reforming Mandatory Environmental Information Disclosure Requirements in China*

It is important to reiterate that China has only recently targeted private and public enterprises with legal and policy initiatives designed to increase the public availability of environmental information.[206] While achievements have been made in the last two decades, more can be done. The seven recommendations below suggest institutional, legal, and policy reforms to existing environmental or securities laws and regulations, with an emphasis on encouraging the government to aggressively enforce disclosure requirements.

First, penalties for failure to comply with disclosure laws and regulations should be increased. Increasing the penalties will help ameliorate strategic avoidance decisions many enterprises make by closing the gap between the cost of compliance and the economic risk of paying a fine for noncompliance. As outlined above, United States securities laws permit the imposition of substantial civil, administrative, and even criminal sanctions for failing to comply with federal disclosure laws and regulations. This penalty regime should be replicated in China.[207]

Yet merely increasing the fines will be wholly ineffective absent more aggressive enforcement. Thus, our second recommendation is to systematically increase enforcement actions by both SEPA and the CSRC and related lower-level agencies.[208] Increased enforcement will require a national effort to prioritize sustainable development, or at least a movement away from merely accepting "pollution as an inevitable or necessary byproduct of economic development."[209] Specifically, the status quo development scheme facilitates lackluster enforcement by local and regional environmental departments, particularly when contemplating action against state-owned enterprises, which are often the most egregious polluters *and* usually owned (wholly or in part) by the local governments.[210] Again, as argued above, lax

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[205] *Cf.* Guo Peiyuan, *supra* note 83, at 48.

[206] *See* Sitaraman, *supra* note 13, at 295-300 (detailing the recent historical expansion of Chinese environmental laws and enforcement).

[207] *See supra* note 140 and accompanying text.

[208] Beyond SEPA, there are purported to be over 2500 environmental protection departments in China with a combined staffing level exceeding 100,000 people who work in "environmental protection, monitoring, inspection, data collection, basic research, education, and publicity." Sitaraman, *supra* note 13, at 299 (citing ORG. FOR ECON. COOPERATION & DEV., CHINA IN THE GLOBAL ECONOMY: GOVERNANCE IN CHINA 498 (2005)).

[209] *Id.* at 303.

[210] *See id.* Sitaraman goes on to say:

> The enormous emphasis placed on economic growth and the assurance of a well-off society (*xiaokang*) has led to lax enforcement of environmental laws and regulations by the local EPBs [Environmental Protection Boards], which answer to provincial and district leaders. Regrettably, under the present pollution enforcement situation,

enforcement encourages corporate noncompliance and imbues the legal and corporate climate with a sense that disclosure laws serve more as an additional burden than as a potential asset to the enterprise, government, and the Chinese people in general.[211]

Third, efforts should be made to standardize reporting requirements, including the format and content of information contained in documents made available to the public. Presently, "there is no standard on corporate environmental reporting and disclosure" and the content of what is reported is "diverse."[212] Merely compelling the release of more information may not necessarily "result in more company transparency."[213] In the United States, EPA and the SEC provide substantial guidance and regulatory provisions detailing the material and format for most forms of disclosure.[214] Such protocols provide a template that all regulated enterprises can follow and would ensure that the appropriate level of detail is made available to the public and the CSRC through the Mainland stock exchanges.[215]

Fourth, and coupled with the third recommendation, an effort should be made to standardize how enterprises disclose information through media outlets. A number of enterprises avoid proactively releasing securities information to the public by using provincial newspapers rather than larger publishers with a wider circulation, as well as generally disregarding legal

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> state-owned industrial enterprises and mines are both the principal polluters and the regulators because most of the polluting industries are state-owned enterprises and Township and Village Enterprises (TVEs), which are controlled and run by the local governments. Increasingly, the local governments and EPBs are finding it very difficult to regulate the industries closely tied to the local governments that are more interested in sustaining industrial and agricultural production rather than controlling environmental externalities.

Id. (footnotes omitted). Ultimately, the conflicting interests between local regulators and enterprises are subsumed into a far more complicated and dangerous turf war between local and national environmental agencies, where often local governments will intentionally exploit regulatory "loopholes" in national laws to avoid enforcing them against local polluting industries. *See id.* at 309-11 (discussing the conflicting interests between local and national governments relative to environmental compliance enforcement).

[211] *See supra* Part IV.A.4.b.

[212] Guo Peiyuan, *supra* note 83, at 26.

[213] Anderson, *supra* note 174, at 1920. In fact, enterprises — particularly state-owned enterprises — "often disclose false figures of profits or even forge financial reports" when presenting an initial public offering. Jiangyu Wang, *Dancing with Wolves: Regulation and Deregulation of Foreign Investment in China's Stock Market*, 5 ASIAN-PACIFIC L. & POL'Y J. 1, 39 (2004) (citing QINGLIAN HE, XIAN DAI HUA DE XIAN JING — ZHONG GUO ZHI WEN TI [THE TRAP OF MODERATION — CHINA'S PROBLEMS] 24 (1998)).

[214] For instance, the SEC offers a website that provides filing forms and instructions, which are available free to the public. U.S. Sec. & Exch. Comm'n, SEC Filings & Forms (EDGAR), http://www.sec.gov/edgar.shtml (last visited Oct. 22, 2008). Similarly, EPA offers a website, again free for the public, that serves as a nexus compiling regulatory guidance materials. U.S. Envtl. Prot. Agency, Significant Guidance Documents by Environmental Topic, http://www.epa.gov/lawsregs/guidance/bytopic.html (last visited Oct. 22, 2008).

[215] Presently, Mainland Chinese stock exchanges are responsible for overseeing information disclosures released by listed enterprises, but "lack real power to investigate and punish information disclosure malpractice," which authority is ultimately vested with the CSRC. Chenxia Shi, *Protecting Investors in China Through Multiple Regulatory Mechanisms and Effective Enforcement*, 24 ARIZ. J. INT'L & COMP. L. 451, 470 (2007) (citation omitted).

disclosure requirements with respect to both announcement timing and content.[216] This issue could be solved through more specific regulatory guidance and greater enforcement to ensure corporate accountability.

Fifth, SEPA disclosure requirements specific to heavy-polluting industries should be expanded to cover most, if not all, industrial business sectors. Additionally, the disclosure requirements should be mandated irrespective of whether a particular enterprise is in violation of a pollutant discharge threshold. Such a proactive disclosure policy would allow the public to have more consistent access to overall environmental performance data. It would also establish a more detailed public record, which would be valuable in citizen-initiated legal or administrative challenges to the accuracy of information disclosed either by the enterprise or the government. Moreover, such increased transparency would motivate enterprises to more aggressively consider environmental performance and liabilities within the overall context of business management.

Sixth, similar to the American EPCRA law, efforts should be undertaken to directly involve the local citizenry in environmental and emergency planning. Environmental performance documents and emergency plans compiled by companies should be subject to public scrutiny through public participation in the oversight organizations that approve, monitor, and enforce the compliance laws. In this circumstance, compliance, enforcement, and disclosure obligations are synergized through public oversight, which empowers the public, while simultaneously encouraging greater transparency by the enterprise.

The final recommendation concerns judicial reform, which addresses a far broader issue that reaches beyond disclosure obligations. Particularly with respect to securities law violations, which capture numerous information disclosure obligations, Chinese courts are often unwilling or unable to open their doors to address investor grievances, let alone complaints forwarded by the general public.[217] To be effective, Mainland Chinese stock exchanges require "a reasonably accurate information disclosure system and a good corporate governance structure," both of which can be institutionally promoted through appropriate judicial oversight when allegations of corruption or malfeasance are raised.[218]

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[216] Chi Guotai et al., *supra* note 151, at 2-3.

[217] *See* Jiangyu Wang, *supra* note 213, at 43-44 (discussing the absence of judicial protection for investors alleging securities law violations against listed enterprises).

[218] *Id.* at 56. Jiangyu Wang notes that a "well-functioning stock market" will require the reformation of state-owned enterprises so as to ensure "good corporate governance" by enterprise elites wholly willing to honestly participate in the market place, which includes accurate information disclosures. *Id.* Yet, even with corporate reforms, existing rules promulgated under China's Securities Laws provide that "no private securities litigation can be adjudicated by a Chinese court unless an administrative penalty . . . or a criminal penalty has already been imposed." Walter Hutchens, *Private Securities Litigation in China: Material Disclosure About China's Legal System?*, 24 U. PA. J. INT'L ECON. L. 599, 634-35 (2003).

> Thus, even when claims are based on bad disclosure and thus are within the scope of the PSL [Private Security Litigation] Rules, investors may not seek relief without

As argued by others before, systemic judicial reforms must be implemented to facilitate greater public access to the courts so that citizens can bring actions against noncompliant enterprises or governmental agencies.[219] Although any individual has the "right to report on or file charges against units or individuals that cause pollution or damage to the environment" under China's Environmental Protection Law,[220] Chinese citizens generally still lack the ability to directly raise public interest lawsuits without having to rely on provincial authorities to file complaints on the public's behalf.[221]

As Chinese authorities ponder the next round of enhancements to environmental disclosure laws, they may consider implementing citizen suit provisions similar to the United States Freedom of Information Act (FOIA).[222]

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enabling government action. This requirement has no basis in the PRC Securities Law and it strips investors of the right to sue for disclosure fraud explicitly provided for in the Securities Law. The requirement effectively puts the threat of private securities litigation under government leash. It substantially removes the "private" aspect of private securities litigation; under the PSL Rules, the government must sanction all "private" litigation. This significantly dilutes the potential of private securities litigation to create incentives for compliance with China's disclosure laws. No army of private attorneys general will be unleashed without specific government sanction in each instance. Just as stock markets exist in China without privatization of ownership, private securities litigation exists in China without fundamental privatization of the cause of action.

Id. at 635-36 (referencing generally *Guanyu shenli zhengquan shichang yin xujia chenshu yinfade minshi peichang anjian de ruogan guiding* [Several Regulations Concerning the Adjudication of Civil Compensation Securities Cases Based upon Misrepresentation] (Sup. People's Ct., Jan. 9, 2003), *available at* http://www.people.com.cn/GB/jinji/35/159/20030110/905268.html (last visited Feb. 26, 2008)) (footnotes omitted).

[219] *See, e.g.*, Wang Canfa, *supra* note 2, at 176-77 (discussing the need to establish a more independent and "vertically" aligned judiciary in China); Alex Wang, *supra* note 197, at 207-12 (detailing the framework and judicial limitations facing plaintiffs raising "pollution compensation cases" ["*wuran sunhai peichang anjian*"]); Patti Goldman, *Public Interest Environmental Litigation in China: Lessons Learned from the U.S. Experience*, 8 VT. J. ENVTL. L. 251, 258-73 (outlining, in broad strokes, the need for greater public access to Chinese courts to prevent environmental harm).

[220] Environmental Protection Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) art. 6, LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.).

[221] Li Zhiping, *supra* note 7, at 393.

[222] 5 U.S.C. § 552 (2006). The idea of implementing a scheme like FOIA in China is not new, although some scholars question whether it is feasible. *See, e.g.*, Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 262 (2001) ("China is not likely to pass a freedom of information act in the foreseeable future."). But other scholars offer more hopeful prospects, recognizing that Chinese law has made some progress toward developing legal hooks upon which citizens can hang claims against the government. *See* Wu Changhua, *Improving the Legal and Policy Foundation for Public Access to Environmental Information in China*, 24 TEMP. J. SCI. TECH. & ENVTL. L. 291, 292 (2005) ("China has started a fundamental reform, developing legislation and policies to fill gaps in the legislative framework on the basis of such principles as openness, transparency, justice, and fairness. Such reform is similar to that in the United States during the mid-twentieth century with the enactment of the Freedom of Information Act (FOIA), when Congress realized that, 'although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for the information,' and set out to bring into the open 'the hundreds of departments, branches, and agencies" of government.') (citing S. REP. NO. 89-813, at 3 (1965)); John Ohnesorge, *Chinese Administrative Law*

FOIA is a comprehensive legislative mandate empowering individual citizens to compel agencies to disgorge information and to seek redress directly from federal courts when agencies fail to comply.[223] Such reforms are sweeping and are part of a greater jurisprudential and policy debate that is ongoing in China. As with so many aspects of environmental and securities regulations, individual issues are intricately intertwined within a larger public discourse.

Implementation of these recommendations would offer a number of benefits not only to Chinese citizens and NGOs, but also to the government and enterprises themselves. For instance, increased public accountability compels enterprises to more aggressively identify cost-saving means to reduce pollution production, develop higher quality products, and advance a positive public image that would increase market branding. Additionally, greater transparency through the full disclosure of environmental performance and liability information would increase the confidence of potential investors and local communities by giving them advanced notice of current or future business activities that may pose a potential risk to public health or the environment. It also would enhance domestic market competition by allowing enterprises within a similar industry to evaluate relative performance. Moreover, with increasing foreign investment in domestic Chinese enterprises, greater transparency could open new export markets and spur investment by individuals or organizations that demand a higher level of environmental accountability. Finally, more aggressive disclosure protocols could lead to foreign certifications (such as ISO 14000), which offer the opportunity to expand both domestic and foreign market presence.[224]

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in the Northeast Asian Mirror, 16 TRANSNAT'L L. & CONTEMP. PROBS. 103, 145-46 (2006) ("A second gap exists with respect to citizen access to government-held information, which is not now facilitated by an information disclosure law along the lines of the Freedom of Information Act . . . . China is experimenting with a loosening of restrictions on information and publicity, with information disclosure systems being created at the provincial level, and with public hearings being held prior to certain types of regulatory decisions. This may have gone furthest with respect to environmental decisions, where international norms favor extensive interaction with affected citizens." (footnotes omitted)).

[223] Specifically, FOIA permits federal district courts to hear citizen challenges to efforts on behalf of the government to withhold information pursuant to a valid FOIA request. 5 U.S.C. § 552(a)(4)(B). The law places the burden of proof upon the government to demonstrate why the information should be withheld. *Id.* Perhaps more importantly, if a citizen "substantially prevails" in a FOIA action, then the court may assess attorneys' fees and litigation expenses for the citizen against the government. *Id.* § 552(a)(4)(E). Finally, in the most egregious of circumstances, where a government officer "arbitrarily or capriciously" withholds information, FOIA requires the appointment of a Special Counsel to conduct an investigation and propose recommendations dealing specifically with the offending government official. *Id.* § 552(a)(4)(F).

[224] China "officially" adopted the International Standards Organization's 14000 series environmental management systems protocol in 1997. Christine Mikulich, *ISO 14000-14001, The Developing World's Perspective*, 17 TUL. ENVTL. L.J. 117, 142 (2003) (citing ISO 14000 Series to Be Adopted April 1 as State Policy in China, 20 Int'l Env't Rep. (BNA) No. 5, at 198 (Mar. 5, 1997)). China's support for ISO 14000 indicates an attempt to use market mechanisms to compensate for otherwise insufficient regulatory enforcement. Paulette L. Stenzel, *Can the ISO 14000 Series Environmental Management Standards Provide a Viable Alternative to Government Regulation?*, 37 AM. BUS. L.J. 237, 277 (2000). Yet, many Chinese enter-

B. Encouraging Voluntary Corporate Disclosures

One Chinese legal scholar has noted that given the ever-increasing complexity of environmental laws and regulations, "even well-intentioned and diligent facilities can benefit from compliance assistance efforts."[225] In many ways, current enforcement models are shifting to incorporate the idea of fostering a cooperative relationship between regulators and regulated entities.[226] Moving beyond enforcement penalties, enterprises can become "highly motivated to comply without the threat of sanctions because of market forces, such as reduced waste disposal and increased investor interest due to a positive environmental reputation."[227]

1. *Incentivizing Voluntary Disclosures Through Market-Based Policies*

Beyond "first generation" command-and-control laws and regulations, "second generation," or market-based policies, "encourage businesses to think creatively about pollution prevention as a means of achieving environmental goals."[228] While first generation laws tend to focus on "end-of-pipe" management for controlling the release of pollution into the environment, second generation policies create opportunities for cost-effective environmental solutions throughout the entire production process of a particular industry activity.[229] Under a command-and-control paradigm, regulatory agencies use the "threat of punishment to motivate environmentally responsible corporate behavior."[230] On the other hand, second generation policies add "carrots," or incentive programs, to entice corporations to improve environmental accountability and performance.[231]

In the United States, various federal laws have been amended to include formal voluntary disclosure provisions to "generally entice voluntary disclosure of corporate wrongdoing by offering affirmative rewards."[232] These

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prises, particularly the most heavily polluting state-owned enterprises, are not ISO 14000 participants. *See* Yuhong Zhao, *Trade and Environment: Challenges After China's WTO Accession*, 32 COLUM. J. ENVTL. L. 41, 89 (2007) ("However, most Chinese enterprises have not fully realized the significance of the certification. For the first half of 2001, only about 500 China-based enterprises had obtained certificates, and most of these were foreign or Sino-foreign companies." (footnote omitted)).

[225] Li Zhiping, *supra* note 7, at 390.

[226] *See id.* at 389-90 (discussing the improvement of enforcement in China through cooperation and incentives in addition to traditional compliance enforcement obligations).

[227] *Id.* at 390 (citing CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP 69 (2003)).

[228] Dennis D. Hirsch, Symposium Introduction, *Second Generation Policy and the New Economy*, 29 CAP. U. L. REV. 1, 7 (2001).

[229] *Id.*

[230] *Id.* at 13.

[231] *Id.*

[232] Stephen Robert Geisler, Commentary, *Voluntary Disclosure of Corporate Violations of Federal Law*, 51 ALA. L. REV. 375, 376 (1999). Examples of such programs include the Office of the Inspector General, U.S. Department of Health and Human Services, "Provider Self-Disclosure Protocol," which concerns the disclosure of wrongdoing with respect to fed-

provisions provide a number of benefits to corporations that voluntarily disclose violations to the proper authorities, such as protection from criminal prosecution and the waiver or reduction of civil or administrative penalties.[233]

Disclosure incentive provisions embedded in voluntary audit laws benefit the general public and enforcement agencies. Such laws or programs encourage information transparency and facilitate cooperation between agencies and regulated industries.[234] These audit and disclosure initiatives motivate corporations to come into compliance by requiring action before a corporation can accrue any protections afforded by the initiatives.[235] Ultimately, the general "rationale for protecting the results of voluntary audits is to create incentives for the regulated community to evaluate its own environmental compliance status and correct identified violations expeditiously, thereby increasing compliance with environmental requirements and reducing the government resources required to enforce federal, state, and local environmental laws."[236]

2. *The Example of the U.S. EPA Audit Policy*

One such audit and disclosure protocol is EPA's Audit Policy.[237] The purpose of the policy is to "safeguard[ ] human health and the environment by providing several major incentives for regulated entities to voluntarily comply with federal environmental laws and regulations."[238] In order to avail themselves of these "major incentives," regulated entities must "voluntarily discover, promptly disclose to EPA, expeditiously correct, and prevent recurrence of future environmental violations."[239]

The Audit Policy first emerged in 1986 as an effort to "encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations."[240] This first policy, however, offered little in the way of incentives beyond an agency

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eral heath care programs, the U.S. Department of Defense "Voluntary Disclosure Program," addressing procurement fraud, and several disclosure initiatives within the U.S. Department of Justice. *Id.* at 376-77.

[233] *Id.* at 379-84.

[234] Ronnie P. Hawks, Comment, *Environmental Self-Audit Privilege and Immunity: Aid to Enforcement or Polluter Protection?*, 30 ARIZ. ST. L.J. 235, 272 (1998).

[235] *Id.*

[236] Brooks M. Beard, *The New Environmental Federalism: Can the EPA's Voluntary Audit Policy Survive?*, 17 VA. ENVTL. L.J. 1, 2 (1998).

[237] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19,618 (Apr. 11, 2000) [hereinafter EPA Audit Policy], *available at* http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditpolicy51100.pdf. For the definition of "environmental audit," see Environmental Auditing Policy Statement, 51 Fed. Reg. 25,004, 25,004 (July 9, 1986).

[238] U.S. Envtl. Prot. Agency, *EPA's Audit Policy*, http://www.epa.gov/compliance/incentives/auditing/auditpolicy.html (last visited Sep. 25, 2008).

[239] *Id.*

[240] Environmental Auditing Policy Statement, 51 Fed. Reg. at 25,004.

statement to "not routinely request environmental audit reports."[241] Given inherent uncertainties embedded within the policy, few regulated entities picked up EPA's auditing policy gauntlet,[242] which led to a more robust "interim" program instituted in April 1995[243] and finalized in December of the same year.[244] The interim policy provided numerous incentives to regulated entities that conducted audits, disclosed potential environmental violations, and undertook corrective action, such as potentially waiving punitive penalties, forwarding EPA recommendations to the Department of Justice to stay criminal proceedings, and a promise to avoid using "environmental audits to trigger enforcement investigations."[245] The 1995 final policy added a caveat wherein a regulated entity complying with all the policy requirements could have "all gravity-based penalties eliminated, while those entities discovering violations through 'due diligence'" would be eligible for only a 75% reduction.[246]

In 2000, EPA amended and clarified the 1995 policy; the 2000 version is the current policy program operating in the United States.[247] This policy consists of nine conditions that must be satisfied in order for a regulated entity to be eligible to receive a 100% mitigation of any "gravity-based penalty"; absent a demonstration of the first condition ("systemic discovery of violations"), the regulated entity may be entitled to only a 75% mitigation.[248] The nine conditions are (1) systemic discovery of the violation through an environmental audit of a compliance management system; (2) voluntary dis-

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[241] Allison F. Gardner, *Beyond Compliance: Regulatory Incentives to Implement Environmental Management Systems*, 11 N.Y.U. ENVTL. L.J. 662, 676 (2003) (citing Environmental Auditing Policy Statement, 51 Fed. Reg. at 25,007).

[242] *Id.* at 676-77 (citing David Sorenson, *The U.S. Environmental Protection Agency's Recent Environmental Auditing Policy and Potential Conflict with State-Created Environmental Audit Privileges*, 9 TUL. ENVTL. L.J. 483, 486 (1996); Miri Berlin, Note, *Environmental Auditing: Entering the Eco-Information Highway*, 6 N.Y.U. ENVTL. L.J. 618, 623 (1998)).

[243] Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement, 60 Fed. Reg. 16,875 (Apr. 3, 1995) [hereinafter 1995 Interim Policy].

[244] Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, Final Policy Statement, 60 Fed. Reg. 66,706 (Dec. 22, 1995) [hereinafter 1995 Final Policy].

[245] Beard, *supra* note 236, at 6-7 (citing 1995 Interim Policy, 60 Fed. Reg. at 16,875–76).

[246] *Id.* at 8 (citing 1995 Final Policy, 60 Fed. Reg. at 66,706-07).

[247] EPA Audit Policy, 65 Fed. Reg. 19,618 (Apr. 11, 2000).

[248] *Id.* at 19,618. Within the Audit Policy, EPA distinguishes between the economic and gravity-based components of civil penalties:

> In general, civil penalties that EPA assesses are comprised of two elements: the economic benefit component and the gravity-based component. The economic benefit component reflects the economic gain derived from a violator's illegal competitive advantage. Gravity-based penalties are that portion of the penalty over and above the economic benefit. They reflect the egregiousness of the violator's behavior and constitute the punitive portion of the penalty.

Id. at 19,620. For further discussion, see Calculation of the Economic Benefit of Noncompliance in EPA's Civil Penalty Enforcement Cases, 64 Fed. Reg. 32,948 (June 18, 1999) and U.S. ENVTL. PROT. AGENCY, A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS (1984), *available at* http://www.wildlaw.org/Eco-Laws/civ-pen.htm#on%20Civil%20Penalties.

covery; (3) prompt disclosure; (4) discovery and disclosure independent of government or third-party plaintiff; (5) correction and remediation; (6) prevent recurrence; (7) no repeat violations; (8) other violations excluded; and (9) cooperation.[249]

In terms of disclosure obligations, regulated entities must first establish a comprehensive due diligence program either through an "environmental audit" or a "compliance management system" to proactively prevent, monitor, and respond to environmental issues that may arise.[250] The regulated entity must also promptly disclose the full nature of any violation within twenty-one days after the entity "discovered that the violation has, or may have, occurred."[251] Moreover, the disclosure must be voluntary and made before an enforcement agency initiates an investigation, a third party files a legal complaint, or imminent discovery.[252] It should be noted, however, that "[r]epeat violations, those that result in actual harm to the environment, and those that may present an imminent and substantial endangerment are not eligible for relief" under the policy.[253]

These caveats encourage regulated entities to "take the initiative to find violations on their own and disclose them promptly instead of waiting for an indication of a pending enforcement action or third-party complaint."[254] Regulated entities may also enter into "Corporate Audit Agreements" with EPA, which allows for the planning of "a corporate-wide or facility-wide audit with an advanced understanding between the entity and EPA regarding schedules for conducting the audit and disclosing violations beyond the current 21-day disclosure requirement for single-facility disclosures."[255]

In 1999, EPA conducted a survey of the 1995 Audit Policy that indicated that the policy had been widely used with a high satisfaction rate (88%).[256] Although the survey covered only a limited sample population, it did reveal that the policy had a positive influence on encouraging regulated

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[249] EPA Audit Policy, 65 Fed. Reg. at 19,621-23. Similar to the 1995 policy, the current policy also includes the following two incentives: (1) no recommendations for criminal prosecution; and (2) no routine requests for audit reports. *Id.* at 19,620.

[250] The Audit Policy defines an "environmental audit" as a "systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements." EPA Audit Policy, 65 Fed. Reg. at 19,625. A "compliance management system" is also a "systematic effort" that includes comprehensive policies and procedures to ensure employees and agents understand how to comply with all applicable environmental laws; assignment of compliance responsibilities; mechanisms to ensure compliance; appropriate communication protocols; and incentives to encourage internal implementation of the program. *Id.*

[251] EPA Audit Policy, 65 Fed. Reg. at 19,626.

[252] *Id.*

[253] *Id.* at 19,619.

[254] *Id.* at 19,622.

[255] U.S. Envtl. Prot. Agency, Corporate Audit Agreements, http://www.epa.gov/compliance/incentives/auditing/auditagree.html (last visited Sep. 26, 2008).

[256] Gardner, *supra* note 241, at 680-81 (citing Evaluation of "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations" Policy Statement, Proposed Revisions and Request for Public Comment, 64 Fed. Reg. 26,745, 26,747 (May 17, 1999) [hereinafter EPA 1999 Evaluation]).

entities to implement or improve existing self-audit programs.[257] In a 1998 survey of entities that had self reported under the policy, out of fifty total responses, twenty-six stated that they did not know or would not have reported absent the policy.[258] Although the survey sampled a relatively small and non-random population, it indicates that incentivizing voluntary disclosure is a potentially viable means of encouraging corporations to actively implement programs to prevent, monitor, report, and quickly resolve environmental problems.

3. *Current Disclosure Laws & Influences Compelling Chinese Enterprises to Voluntarily Disclose Environmental Information*

Since SEPA first introduced mandatory reporting requirements in 1992,[259] environmental reporting and disclosure has been on the rise in China.[260] Statistical studies and polls indicate a marked trend towards greater corporate transparency as enterprises release more environmental information through reports, many of which are directly available to the public.[261] Chinese enterprises are now recognizing the need to develop and maintain a positive public image, and they are facing mounting public and government pressure to disclose important information.[262] Yet this increased voluntary transparency is probably more a response to external pressures than an evolving corporate management practice which, in many respects,

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[257] *Id.* at 681 (citing EPA 1999 Evaluation, at 26,751).

[258] U.S. ENVTL. PROT. AGENCY, AUDIT POLICY USER'S SURVEY RESULTS 4 (Dec. 22, 1998), http://www.epa.gov/compliance/resources/policies/incentives/auditing/auditresults1298.pdf.

[259] Guo Peiyuan, *supra* note 83, at 10 (explaining that this provision requires enterprises to report the use, amount, and management programs for pollutants used to the government).

[260] *Id.* at 34.

[261] To show the mounting social pressure exerted by the public on Chinese corporations, Guo Peiyuan references a 2004 survey that shows "that 89% of Chinese CEOs agree that corporate reputation is very important" and "a relatively high 57% said that they sponsored environmental activities." *Id.* at 34 (citing HILL & KNOWLTON AND THE ECONOMIC OBSERVER, 2004 CORPORATE REPUTATION WATCH (CHINA), SUMMARY OF FINDINGS 11, 24 (2004), http://www2.hillandknowlton.com/crw/download.asp?filename=2004 China CRW Survey (English).pdf [hereinafter HILL 2004 SURVEY]). Guo Peiyuan also references a 2003 Shenzhen Stock Exchange study that reveals a positive upward trend in corporate voluntary disclosure. *Id.* at 34-35 (citing ZHANG ZONGXIN ET AL., STUDY OF THE VALIDITY OF VOLUNTARY DISCLOSURE OF LISTED COMPANIES (2003)).

[262] *Id.* at 34. It is also interesting to note that in some instances, there is a synergy combining media and governmental influence on domestic Chinese enterprises. For instance, since 1993 the Propaganda Department of the Communist Party of China Central Committee and other state agencies have implemented an annual environmental reporting campaign, which provides information to media reporters about environmental laws and regulations. Zhong hua huan bao shi ji xing jie shao [China Trans-century Environmental Protection Inspection Campaign], http://www.ccep.org.cn/intro/index.htm. The purpose of the campaign is to use the media to compel local governments and enterprises to address environmental concerns in Mainland China more aggressively. *Id.* Since its inception, over 80,000 individuals and reporters have participated, who have in turn written hundreds of thousands of news stories and reports. *Id.*

remains well-rooted within the more guarded communist-era mindset bent on minimizing the disclosure of any information to the public.[263] Recent research reveals that Chinese corporate leaders continue to undervalue transparency and environmental performance. In a 2004 survey of 122 listed and non-listed enterprises, corporate officers were asked, "[W]hat internal aspects of your company are the most influential on your company's corporate reputation, other than financial performance?"[264] Only 7% responded that "transparency" was the most influential factor, as compared to 31% of North American corporate leaders.[265] Moreover, in the same question "handling of environmental issues" again received only 7%, as opposed to 21% in North America.[266] Additionally, only 49% of the enterprises reported that they had "formal policies" covering "pollution and the environment."[267]

Notwithstanding the lack of corporate interest in releasing environmental information to the public, Chinese government agencies have issued a number of regulatory and guidance materials designed to encourage corporate disclosure. Scheduled for implementation in 2008, the DEID is the most current and aggressive SEPA attempt to facilitate voluntary corporate environmental disclosure.[268] Article 19 within DEID "encourages enterprises to voluntarily disclose" a wide range of environmental performance,

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[263] *See* Guo Peiyuan, *supra* note 83, at 35. Peiyuan explains:

> Corporate environmental reporting and disclosure in China is still at a stage of being pressure oriented. In other words, companies are often reluctant to release environmental information if they are not asked to do so and nobody puts much pressure on them. Companies usually want to disclose as little information as possible, partly because they see this process as costly.

Id.

[264] HILL 2004 SURVEY, *supra* note 261, at 39.

[265] *Id.*

[266] *Id.* The top scoring categories for Chinese enterprises were "industry leader status" (50%), followed by "product/service" (48%). *Id.*

[267] *Id.* at 46. Yet an astute researcher can find examples of Chinese enterprises that have picked up the gauntlet of developing corporate environmental programs and disclosing environmental performance information to the public. For instance, Baosteel Group, an unlisted massive state-owned industrial enterprise, issues annual business reports that include an analysis of environmental concerns regarding domestic steel production operations. *See* BAOSTEEL GROUP CORP., 2006 ANNUAL REPORT 40-43 (2006), *available at* http://tv.baosteel.com/web/group/pdf/group2006e.pdf (discussing Baosteel's need to modify business models and growth strategies in response to increasing environmental regulatory pressure and limited natural resources, along with other factors, including increased market competition). Baosteeel's 2006 annual report references a publicly-available 2005 "Sustainability Report," touted as the first of its kind in China, which in addition to the enterprise's "environmental reports," chronicles business-wide environmental and conservation activities designed to enhance overall corporate environmental performance. *Id.* at 40. Additionally, Haier Group, a Hong Kong listed Chinese enterprise incorporated in Bermuda, also issues annual environmental reports available directly to the Chinese people that provides a comprehensive listing of environmental management programs and sustainability-driven initiatives. *See, e.g.*, HAIER GROUP, 2005 ENVIRONMENTAL REPORT OF HAIER, *available at* http://www.unglobalcompact.org/data/ungc_cops_resources/65172937-1044-4B5D-BAA2-35CA065EFB68/COP.pdf.

[268] Measures for the Disclosure of Environmental Information (for Trial Implementation) (promulgated by State Envtl. Prot. Admin., Apr. 11, 2007, effective May 1, 2008), LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.). For a general discussion of DEID involuntary requirements, see *supra* Part IV.A.3.a.

accounting, and liability information.[269] The information required extends beyond merely accounting for pollutant discharges and includes the reporting of annual environmental performance goals and achievements, resource consumption, and environmental protection guidelines and procedures.[270] Article 19 also calls for enterprises and SEPA to enter into "voluntary environmental improvement" agreements, as well as to commit to disclosing information regarding the enterprises' social responsibilities.[271] Article 22 allows reporting enterprises to use mass media, the internet, or annual reports to disclose Article 19-related information.[272] Finally, Article 23 empowers SEPA to offer a number of awards, including public "praise," priority approval of projects from state environmental funds, and other state subsidies for "model clean production projects."[273]

As already discussed, the Shenzhen Stock Exchange also recently issued an instruction document designed to encourage listed enterprises to address social responsibility obligations, including the development of comprehensive environmental plans and initiatives to disclose information to the public.[274] Additionally, embedded in mandatory disclosure laws are opportunities for Chinese enterprises to release pertinent environmental information. For instance, the CSRC disclosure regulations call for listed companies to issue "temporary reports" in the case of a "major event that may considerably affect the trading price" of shares and is not otherwise already known by investors.[275] Major events cover a wide range of potential internal and external circumstances, including a change in business guidelines, major purchase of a new asset, or "major change in the external conditions for the business operation of the company."[276] The promulgation of new laws and policies, along with the enterprise being embroiled in litigation, also count as potential "major events."[277]

As already argued above, given lax enforcement of both environmental and securities laws, listed enterprises have sufficient maneuvering room to construe newly encountered environmental liabilities or existing environment-damaging operations as minor events, thus avoiding public disclosure. Yet, a more literal and objective reading of the CSRC regulations would compel enterprises to consider aggressively the environmental impacts of existing or potential business decisions as potential major events and seek to

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[269] Measures for the Disclosure of Environmental Information (for Trial Implementation) (promulgated by State Envtl. Prot. Admin., Apr. 11, 2007, effective May 1, 2008) art. 19, LawInfoChina (last visited Oct. 21, 2008) (P.R.C.).

[270] *Id.*

[271] *Id.*

[272] *Id.* art. 22.

[273] *Id.* art. 23.

[274] *See supra* note 76 and accompanying text.

[275] Administrative Measures for the Disclosure of Information of Listed Companies (promulgated by the China Securities Reg. Comm'n, Jan. 30, 2007, effective Jan. 30, 2007) art. 30, LawInfoChina (last visited Oct. 21, 2008) (P.R.C.).

[276] *Id.*

[277] *Id.*

disclose them through temporary reports. Irrespective of the CSRC's past enforcement record, the option to voluntarily disclose environment-related information through temporary reports is certainly available under present securities disclosure regulations.

4. *A Proposal to Modify Existing Chinese Voluntary Disclosure Laws*

Returning to the World Bank's EPID pilot program in Zhenjiang and Hohhot,[278] commentators noted that enterprises that received high ratings in the voluntary environmental performance rating initiative were dissatisfied with the lack of benefits and failed to "see how their time and commitment to the EPID program helped their bottom line."[279] The EPID program's incentive of positive public publicity through local media outlets was not enough, and enterprises wanted more substantial rewards like favorable loan treatment from local Environmental Protection Boards for environment-related projects or the ability to label their products as "green."[280] With respect to protecting corporate reputation, Chinese enterprises place great emphasis on avoiding unethical corporate behavior and negative public attention by the media and customers, while they tend to have little regard for the potentially adverse impacts associated with litigation judgments.[281] In essence, market forces play a crucial role in motivating corporate environmental accountability, particularly when environmental issues are linked to corporate image, behavior, products, or services.

As the Chinese public becomes more engaged with local environmental concerns and environmental laws and regulations become more stringent, companies' goal of maintaining compliance will merge into the broader goal of preserving a positive public and customer reputation with respect to environmental matters. Such a confluence of external influences offers a unique opportunity for the Chinese government to use voluntary, incentive-based disclosure programs to enhance corporate compliance with environmental standards, while ensuring the flow of pertinent information directly to the public.

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[278] *See* discussion *supra* Part III.A.

[279] Wanxin Li, *supra* note 60, at 128.

[280] *Id.* For a discussion of "green" product labeling in China, see Robert V. Percival, *Environmental Law in the Twenty-First Century*, 25 VA. ENVTL. L.J. 1 (2007) ("Now that environmental protection has become an urgent priority of the Chinese government, China has not hesitated to import into its environmental laws regulatory policy innovations from other countries, such as emissions trading, effluent charges, green labeling, and environmental performance grading." (citing Gary McNeil & David Hathaway, *Green Labeling and Energy Efficiency in China*, 7 CHINA ENV'T SERIES 72 (2005); Hua Wang et al., *supra* note 64; Yuhong Zhao, *supra* note 39, at 87-88 (describing the recent history of China's eco-labeling efforts))).

[281] *See* HILL 2004 SURVEY, *supra* note 261, at 17 (reporting that when asked which threats most concern Chinese enterprises, 55% of surveyed executive officers said "unethical corporate behavior;" followed by 53% regarding "media criticism" and 40% for "customer criticism," and only 10% related to "litigation judgments").

Corporate incentives must be considered in order to develop an effective voluntary disclosure system. As explained above, the present awards and government-sponsored positive media programs fail to offer sufficient incentives to enterprises. Economic awards are inadequate motivational forces when the cost of compliance for many industry sectors substantially outweighs the economic risks of noncompliance, particularly with respect to violating disclosure obligations.[282] But, as regulatory enforcement increases and adverse administrative, civil, or criminal proceedings are disclosed to the public through local media, such legal proceedings (including government initiated and third party lawsuits) will likely begin to directly undercut an enterprise's economic performance. Such penalties can raise investor doubts, increase customer concerns, and damage local community good will and trust.

Taking a cue from EPA's Audit Policy, SEPA could enhance existing market-based incentive programs to encourage both greater corporate development of comprehensive environmental programs and the dissemination of environmental information to regulatory agencies and the public. EPA's program offers a direct economic incentive to corporations that voluntarily disclose environmental violations by providing either the reduction or waiver of gravity-based penalties.[283] A similar program in China would directly link voluntary disclosure with environmental compliance and incentivize self-motivated enterprise environmental performance by reducing the economic impact associated with failures to meet minimum regulatory standards.

Of course, the benefits of a SEPA-sponsored penalty mitigation program would be predicated upon an active enforcement regime.[284] A proactive enforcement initiative is necessary to demonstrate to corporations that disclosing violations would be in the company's best interest from both a public relations and profitability point of view. Moreover, EPA's Audit Policy provides more than mere guidelines for participation. Enterprises must meet very specific requirements in order to remain eligible for penalty waivers, including demonstration of an active internal environmental management program.[285]

Additionally, a voluntary audit program would minimize the financial and human resource burden on SEPA and lower-level environmental departments because it places the onus on the enterprise to demonstrate that it has, in fact, met all eligibility requirements. The enterprise must also come forward with an announcement of a violation. Such an audit policy would also lend legitimacy to the administrative and judicial review process for enforcing environmental laws by establishing a policy to aggressively pursue penalties against enterprises that could have substantially reduced such penalties

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[282] *See supra* Part IV.A.4.b.
[283] *See* Gardner, *supra* note 241, at 677-79.
[284] *See supra* Part IV.A.4.
[285] *See supra* Part IV.B.2.

had they taken the initiative to seek waivers or mitigations under a voluntary audit program.

V. CONCLUSION

In 1982, the National People's Congress adopted a new constitution, one that exchanged an emphasis on class struggle for an emphasis on economic development and modernization.[286] Yet the constitution still proclaimed that "[a]ll power in the People's Republic of China *belongs to the people*" and the "people *administer* state affairs and manage economic, cultural and social affairs."[287] Moreover, China's new foundational charter, unlike the United States Constitution, also explicitly recognized the need to use domestic natural resources wisely. The Chinese Constitution provides, for the most part, that natural resources are "owned by the whole people" and that the state will ensure the "rational use" of those resources, while also protecting "rare animals and plants."[288] Perhaps more importantly, China's constitution declares that the state will protect not only the Chinese people's "living environment," but also the "ecological environment" and will otherwise "prevent and control pollution and other public hazards."[289]

By 1989, the National People's Congress had enacted the Environmental Protection Law, which, in part, provided that all state agencies and Chinese citizens have an "obligation to protect the environment" and that the law will provide for a cause of action against those who "cause pollution or damage to the environment."[290] This law also compelled national, state, and local environmental agencies to "regularly issue bulletins on environmental situations" to the public.[291] Similar provisions can be found in various other environment-related laws.[292]

Despite the rhetoric teeming with expressions of the legal necessity of engaging the Chinese people with respect to the potential development impacts on domestic "living" and "ecological" environments,[293] it has not been until very recently that Chinese laws and regulations have sought to provide for the disclosure of environmental information to the public. For instance, China's most aggressive disclosure law, the DEID proposed in

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[286] Cong. Executive Comm'n on China, China's Constitutional Framework, http://www.cecc.gov/pages/virtualAcad/gov/stateconst.php (last modified June 3, 2004).

[287] XIAN FA art. 2 (1982) (P.R.C.) (emphasis added).

[288] *Id.* art. 9 (emphasis added).

[289] *Id.* art. 26.

[290] Environmental Protection Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989) art. 6, LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.).

[291] *Id.* art. 11.

[292] *See* Hua Wang et al., *supra* note 64, at 7 ("Similar provisions appear in China's Air Pollution Prevention and Control Law, Water Pollution Prevention and Control Law, Marine Environment Protection Law, and Environmental Noise Prevention and Control Law.").

[293] *See, e.g.*, notes 60-63.

2007, did not come into effect until 2008.[294] Additionally, notwithstanding the state of the law, the stark reality is that many sectors of the Chinese population continue to lack reasonable access to environmental information due to a variety of factors, including poor governmental accountability, lack of disclosure compliance programs, and a dominant business model that favors the withholding of information from the public or shareholders.[295] Access to information is critical if the public is to have a legitimate voice in the cacophony of market-based and governmental interests that shape Mainland China's domestic environmental pollution control and resource development programs.

In terms of involuntary disclosure laws, there are a variety of environmental and securities laws and regulations that address, albeit cursorily in most instances, corporate obligations to disclose various types of environment-related information to the public.[296] These laws can be amended to require more effective enforcement of disclosure obligations, impose sufficiently severe penalties to compel compliance, and standardize the types of information and the means of public dissemination.[297] Moreover, there are numerous provisions within the United States' securities laws and EPCRA, for instance, which can serve as models for the Chinese government when it considers how to bolster its existing information disclosure programs.[298] EPCRA offers a highly detailed protocol to directly incorporate local communities into the comprehensive planning for the management of hazardous or dangerous materials, as well as emergency plans in case of an accidental spill or discharge.[299] United States securities laws offer a model of standardized disclosure requirements for publicly traded corporations, which provide for effective flows of information to stockholders, the public, enforcement agencies, and competing enterprises.[300] These disclosure requirements fuel a more vibrant domestic free-market economy.

Beyond the traditional command-and-control laws that demand the disclosure of information, there are a range of opportunities to use market-based incentives to encourage domestic Chinese enterprises to voluntarily

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[294] Measures for the Disclosure of Environmental Information (for Trial Implementation) (promulgated by State Envtl. Prot. Admin., Apr. 11, 2007, effective May 1, 2008) LAWINFOCHINA (last visited Oct. 21, 2008) (P.R.C.). For a general discussion of DEID involuntary requirements, see *supra* Part IV.A.3.a, and for voluntary programs, see *supra* Part IV.B.3. It is interesting to note that within three months of implementation, it was reported that DEID has encouraged the Chinese government to be more forthcoming with information, even though there have been incidents where citizens cannot always obtain specifically-requested information. Tang Hao, *New Challenges to Environmental Transparency*, CHINA-DIALOGUE, Aug. 20, 2008, http://www.chinadialogue.net/article/show/single/en/2321-New-challenges-to-environmental-transparency.

[295] *See* discussion *supra* Part III.

[296] *See* discussion *supra* Part IV.A.3.

[297] *See* discussion *supra* Part IV.A.4.c.

[298] *See* discussion *supra* Part IV.A.2.

[299] *See* discussion *supra* Part IV.A.4.c.

[300] *Id.*

disclose environmental information to the public. Existing voluntary disclosure programs in China are relatively ineffective due to the lack of sufficient economic incentives to overcome the increased costs born by enterprises to generate and disseminate the information.[301] Most programs reward environmental projects with cash or preferential consideration for state funding. Developing a voluntary incentive program around the idea of mitigating or waiving penalties assessed against companies that voluntarily disclose violations could be one possible way to encourage corporations to voluntarily develop environmental management systems.[302]

Ultimately, the Chinese government should consider a combination of voluntary and involuntary legal initiatives targeted specifically at ensuring a timely, accurate, and detailed supply of environmental information directly to the public. These laws, regulations, policies, and incentive programs should be structured to support the growth of a Chinese business model that recognizes the profit and public relations benefits that arise from keeping the public, enforcement agencies, and shareholders (present and potential) apprised of environmental performance and liabilities. Such a paradigm shift will serve the best interests of the Chinese people, Chinese businesses, and all levels of the Chinese government.

[301] *See* discussion *supra* Part IV.B.3.
[302] *See* discussion *supra* Part IV.B.4.