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Regulation 1210/90: Establishment of the European Environment Agency

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INTRODUCTION

Last May, after seventeen years of increasing worldwide concern for the environment, the European Community (EC or Community) passed Regulation 1210/90 establishing the European Environment Agency (EEA or Agency). The EEA's primary function is to act as a coordination and dissemination center for environmental information in the Community. Many see establishment of the EEA as a positive step towards uniform control over the environment by the Community as well as non-member nations. Critics, however, have stressed the Agency's limitations, especially its lack of enforcement powers.

This Note presents a critical evaluation of the EEA. Part I discusses Community environmental policies in the years preceding establishment of the EEA, including the various EC action programs on the environment. Part II addresses the regulation establishing the EEA. Part III then examines the defects of the EEA in light of current environmental regulation in the Community. This Note concludes that the EEA could play a more meaningful role if it were to have inspection and interpretation powers. Such powers would give the EEA consistently reliable data, and would eliminate costly and time-consuming litigation over member state compliance with environmental directives.

I. COMMUNITY ENVIRONMENTAL POLICY

Increasing Community concern for environmental protection during the 1970's resulted in four action programs on the envi-

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1 Regulation 1210/90, Council Regulation of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network, O.J. L120/1 (1990) [hereinafter Regulation 1210/90].
2 Id. at 2.
3 Fin. Times, June 18, 1990, at 4, col. 2.
4 See European Environment Agency—State of the environment and natural resources in the Community, O.J. 3-386/74, at 75 (1990) [hereinafter Parliamentary Debates].
5 See infra notes 6, 12, 15, and 21 and accompanying text.
Ronald. Each of these action programs concentrated on a specific area of environmental policy, but incorporated the goals of preceding programs.

The EC adopted its first action program (First Environmental Action Program) in December, 1973. The legal basis of the First Environmental Action Program was article 2 of the EEC Treaty, which called on member states to reconcile economic development and expansion with a higher standard of living. Recognizing environmental degradation as the usual price of expansion, Title I of the First Environmental Action Program required that economic expansion be balanced with environmental preservation. The First Environmental Action Program stressed uniform measurement of environmental information but only suggested broad plans of action, rather than specific processes.

The second action program (Second Environmental Action Program) highlighted the importance of individual member state compliance procedures. The Second Environmental Action Program sought to encourage compliance by establishing a decentralized information system that would enable member states to access a range of data sources to obtain the necessary informa-

6 Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council, of 22 November 1973, on the programme of action of the European Communities on the environment, O.J. C112/1 (1973) [hereinafter First Environmental Action Program].
8 Id. at art. 2.
9 First Environmental Action Program, supra note 6, at 5.
10 Id. at 8. In addition to the pragmatic balancing of expansion and environmental concerns, the Council was also concerned that the member states coordinate their environmental policies to harmonize them with those of the Community.
11 Id. Subsequently, the EC acknowledged the need to manage environmental data in December, 1975. Decision 76/161, Council Decision of 8 December 1975 establishing a common procedure for the setting up and constant updating of an inventory of sources of information on the environment in the Community, O.J. L31/8 (1975). The inventory procedure established a common procedure for inventorying sources of environmental information in the Community. The inventory procedure called on member states to provide lists of scientific and technical information and documentation centers and services such as laboratories and government agencies; specialist centers and independent experts; and current or scheduled research projects. Upon receipt of this information, the Commission would be required to develop a procedure to classify and manage the data.
12 Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council, of 17 May 1977, on the continuation and implementation of a European Community policy and action programme on the environment, O.J. C139/1 (1977).
Encouraged by member state efforts to set up organizations that would provide scientific, technical, and economic data, the Council also introduced the possibility of a permanent EC program of regular statistics on the environment. Recognizing that the Community’s expansion and harmonization efforts would be ineffective without a campaign to reduce pollution and improve environmental protection, the Council of the European Communities (Council) extended the Second Environmental Action Program through 1981.

The Council incorporated concern for divergent member state interpretation of EC environmental policies into its third action program (Third Environmental Action Program). The Third Environmental Action Program provided for the monitoring of member state compliance with EC directives in order to strengthen the cohesion of Community and member state environmental policy. The Third Environmental Action Program marked a change in the EC’s position on environmental policy by stressing that social developments and improved living conditions were just as important as the economic benefits of a coordinated environmental policy.

Two years after adoption of the Third Environmental Action Program, the Council established an experimental project for gathering, coordinating, and managing environmental information. This program, the Coordinated Information on the En-

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13 Id. at 39.
14 Id. at 38.
16 Id. at 6.
17 Id. at 3.
18 Decision 85/338, Council Decision of 27 June 1985 on the adoption of the Commission work programme concerning an experimental project for gathering, coordinating, and ensuring the consistency of information on the state of the environment and natural resources in the Community, O.J. L176/14 (1985) [hereinafter CORINE].

The Council later extended CORINE for a two-year transitional period, after which the EEA will take over the CORINE work as part of its regular functions. Decision 90/150, O.J. L81/38 (1990).

vironment Program (CORINE), was established to fulfill the third action program’s goals of obtaining consistent and comparative information on the state of the environment and natural resources. CORINE called for the gradual establishment of a system for gathering information on the environment over the period from 1985 to 1988. The Council also recognized the economic value of such a system. A coordinated approach would be less expensive than an ad hoc approach to the environmental problems of the member states, and thus would be more likely to foster long-term economic growth.

The Community’s fourth action program (Fourth Environmental Action Program), now in effect, was established under the Single European Act (SEA). The Fourth Environmental Action Program differs from its predecessors in that it more clearly recognizes specific environmental priorities. Specifically, the Fourth Environmental Action Program identifies the need for better research on the environment, better environmental impact

ditions that adversely affect the Community’s functioning. The Directive called on member states to make environmental assessments of public and private projects, and to share that information with the EC. Id. at 41, 43. The directive contained an “escape clause” that allowed a member state to exempt a construction project based on its investment or commitment. Id. at 41.

19 Id. at 16.
22 Single European Act, Feb. 17, 1986, O.J. L169/1 (1987) [hereinafter SEA]. Articles 100A and 130r of the EEC Treaty require a high level of environmental protection in Commission proposals, as well as Community action on environmental issues where such action would be more effective than at the member state level. Prior to the SEA, there were no explicit provisions for environmental protection in the EEC Treaty. The Community had relied on two provisions of the EEC Treaty to justify environmental programs and directives. EEC Treaty, supra note 7, at arts. 100, 235. Article 235 states that “if action by the Commission should prove necessary to attain . . . one of the objectives of the Community, and [the] Treaty has not provided for the necessary powers, the Council shall, acting unanimously on a proposal from the Commission, and after consulting the [Parliament], take the appropriate measures.” Id. at art. 235. The SEA, however, provided a specific legal basis for a Commission program on the environment.
23 Fourth Environmental Action Program, supra note 21, at 2.
asments, wider access to environmental information, and increased efforts regarding public education on the environment.\textsuperscript{24}

The Fourth Environmental Action Program recognizes that national environmental protection measures can function as impediments to free trade, and that member state reports on compliance with EC environmental directives are often erratic.\textsuperscript{25} The program also recommended continuation of CORINE to ensure that comparative environmental data is provided to interested parties.\textsuperscript{26} The clear articulation of Community environmental priorities in the Fourth Environmental Action Program laid the groundwork for the EEA.

\section*{II. Establishment of the EEA}

The Council passed Regulation 1210/90 establishing the EEA based on the combined experience of the four action programs on the environment and in accordance with its treaty authority under the SEA.\textsuperscript{27} As with previous environmental initiatives, the objective of the EEA is to provide member states with objective, reliable, and comparative environmental information. This information should then enable the member states to take the necessary measures to protect the environment, to evaluate the results, and to ensure that the public is properly informed about the state of the environment.\textsuperscript{28}

Regulation 1210/90 authorizes the EEA to: (1) collect, process, and analyze environmental data; (2) provide the Community with information that it needs to successfully carry out its tasks of identifying, preparing, and evaluating measures and legislation concerning the environment; (3) provide uniform assessment criteria for environmental data applicable to all member states; and (4) encourage improved harmonization of environmental measurement methods.\textsuperscript{29}

\begin{footnotesize}
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\item \textsuperscript{24} \textit{Id.} at 6, 9.
\item \textsuperscript{25} \textit{Id.} at 9. The Fourth Environmental Action Program also raised for the first time the question of whether the Community should have environmental inspectors appointed to work with national officials to ensure harmonious and effective implementation of EC law.
\item \textsuperscript{26} \textit{Id.} at 16.
\item \textsuperscript{27} See generally Regulation 1210/90, \textit{supra} note 1.
\item \textsuperscript{28} Regulation 1210/90, \textit{supra} note 1, at 2.
\item \textsuperscript{29} \textit{Id.} Other objectives of the EEA include promoting integration of EC environmental data by means of international compilations; ensuring the broad dissemination of reliable
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Member states will play a central role in EEA activities. Individual member state environmental agencies will function as the Agency's basic information sources. Under article 4 of the regulation, each state must inform the EEA of the main elements of its domestic environmental network. The member states may decide which of these environmental organizations will work directly with the Agency. The states may also declare certain organizations to be "topic centres" that will deal with specific environmental issues.

The Agency's management board consists of one representative from each member state and two representatives from the Commission. In addition, the European Parliament may select two scientific personnel to sit on the board. The board is governed by a chairman it elects to a three-year term, and decisions of the board require a two-thirds majority. While membership on the board is limited to the parties mentioned in the regulation, participation in the EEA is open to member states as well as non-member nations. At present, the regulation does not specify how non-member nations will participate. Nevertheless, several Eastern European nations have expressed interest. The EEA will commence operations once the Commission has selected a location for it.

During debates in the European Parliament, several members expressed dissatisfaction with the EEA's proposed role, noting that its lack of powers prevent it from addressing the problem of partial or non-compliance with EC environmental directives.

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30 Id. at 3.
31 Id. at 5. Information collected by the EEA is available to non-member states and private individuals, subject to Commission and member state rules on confidentiality. Id. at 3.
32 Fin. Times, June 18, 1990, at 4, col. 2. Among the Eastern European nations that have expressed interest are the Soviet Union, Czechoslovakia, and Yugoslavia.
33 Regulation 1210/90, supra note 1, at 5. Two leading candidates for the site are Madrid and Copenhagen, though officially all member states may propose cities in their countries. EEC's Delors Compares Seat Wrangle to Marx Brothers Film, Reuter Library Report, Oct. 23, 1990 (NEXIS, EUROPE file). Recently, however, France has said that it will block the decision on the EEA location until the Community confirms Strasbourg as the permanent home of the European Parliament.
34 See Parliamentary Debates, supra note 4, at 74. Beate Weber, rapporteur for the committee on the proposal for the EEA, pointed out the "dissatisfaction [which] is also
Despite the 362 infringements of EC environmental law in 1989, the EEA remains limited to an advisory and collection role. In effect, then, the EEA is a more formal version of CORINE.

Carlo Ripa di Meana, the Community’s Commissioner for the Environment, views the EEA as a coordinating body, rather than an active enforcement body. He has also noted a legal limit to the delegation of powers. Under the EEC Treaty, the Council can transfer powers only to the Commission, and cannot delegate its powers to an external independent body. The regulation, however, does provide for possible future expansion of the Agency’s mandate. Additional responsibilities are to be determined no later than two years after the regulation enters into force. Pragmatic limits aside, the two-year period holds promise for those who see the EEA as an effective administrative authority rather than an “ecological charade.”

III. A More Meaningful Role for the EEA

Certain Community procedures, such as the protracted and burdensome process of taking a member state before the Court of Justice of the European Communities (Court of Justice) for failure to comply with an environmental directive, suggest that the EEA will need expanded powers if it is to be a truly effective regulatory body. This section addresses the need for an administrative body to coordinate member state interpretation of EC environmental directives. Such a modification would remedy the dangerous inefficiency of litigating environmental disputes in the Court of Justice.

... reflected in the fact that the member states are still not prepared really to implement Community environment legislation on a sustained basis.” This has an extended effect, because citizens of member states tend to mistrust governments taken before the European Court.

55 Id. at 74.
56 Id. at 88.
57 Id. at 91.
58 Id. at 115. The EC Environmental Commissioner, Carlo Ripa di Meana, responded to the European Parliament’s desire for greater powers for the EEA by describing the Agency as a “supporting instrument for international environmental policy.”
59 EEC Treaty, supra note 7, at art. 145.
60 Parliamentary Debates, supra note 4, at 113.
61 Regulation 1210/90, supra note 1, at 5, art. 20.
62 Commissioner Ripa di Meana revealed that he refused to allow greater powers to the EEA in efforts to retain the consensus over the body’s role in the Council of Ministers. Fin. Times, Mar. 16, 1990, at III-3, col. 8.
63 Parliamentary Debates, supra note 4, at 112.
A. Monitoring Powers

One of the major shortcomings of the EEA is its lack of monitoring powers. Although the Agency will review environmental information submitted by member states, coordination between the states and the EEA is loose. Ideally, the EEA would be able to inspect member state compliance with environmental directives and compile its own data. Under the current organization, the EEA has no control over interpretation of directives by the member states. The effectiveness of the EEA is thus wholly dependent upon member state reporting habits.

When the Community adopts a directive containing a broad objective without specific instructions, good-faith interpretations by the member states can vary widely. For example, in applying the Community’s directive on water purity designations, a German environmental agency read the directive as protecting only freshwater fish and shellfish. Conversely, the Dutch interpreted the directive as broadly applying to all waters.

The Commission’s 1986 report on the state of the environment in the Community also resulted in divergent member state interpretations. The report used general classifications to compile data on member state land use, but member states interpreted the terms in varying ways. One result of this was the seemingly harmless misclassification of national park areas by the member states. This confusion, however, subverted the Community’s goal of protecting wildlife in particular areas.

These problems could be avoided if the EEA were able to aggressively monitor member state environmental activities and reporting methods, including compliance with directives. With monitoring powers, the EEA could step in upon learning that a

44 Regulation 1210/90, supra note 1, at 2, art. 2(ii).
45 Regulation 1210/90 does not empower the EEA to verify the accuracy of information supplied to it by member states. Under article 7, however, the EEA has legal personality, and it may have the ability to bring suit against a member state as though it were a private individual. Id. at 3, art. 7.
47 See Haigh, Assessing EC Environmental Policy; Unweaving the Spider’s Web; 1 EUR. ENV’T REP. 38, 39 (Feb. 1987).
49 Id. at 42–43.
member state has misapplied or is misinterpreting a directive. It could thus act before the problem causes any serious damage to the environment or distorts the EEA's compilation of environmental data.

B. Enforcement Powers

Currently, the only manner in which the Community can enforce compliance with environmental directives is to take offending member states before the Court of Justice. These enforcement cases generally take the form of actions by the Commission against a member state for failing to live up to its obligations under the EEC Treaty. When the Commission determines that a violation has been committed, it will notify the member state by letter. If the member state does not answer to its satisfaction, the Commission prepares a "reasoned opinion" outlining remedial actions that the member state should take. If the state still refuses to comply, the Commission will bring infringement proceedings before the Court of Justice.

The Commission has brought legal proceedings against all member states in efforts to force compliance with EC environmental directives. Though no member state has ever refused to accept the Court of Justice's ruling, state efforts at corrective action have varied widely. These disparities in interpretation and the delays in bringing the case before the court usually mean that the noncomplying activity continues to threaten the environment, public safety, and Community trade.

Varying interpretations of environmental directives by member states have been the source of several cases before the court. In Re: Groundwater Directive: E.C. Commission v. Netherlands, the di-
rective at issue concerned the quality of groundwater. Because of internal problems with its legislative processes, the Netherlands had enacted temporary provisions in partial compliance with the directive, assuming this to be satisfactory. The Court of Justice, however, reiterated its position that internal member state legal problems cannot justify a failure to comply with obligations in Commission directives.57 Another example of opposing interpretations of Community directives is that of The State (Italy) v. Giacomo Caldana,58 where the Commission and a member state disagreed with an individual on the definitions of hazardous substances, hazardous wastes, and preparations containing hazardous substances.59

Other cases have involved a member state whose interpretation of an EC environmental directive was correct but too restrictive, causing a disruption in trade. In Re: Disposable Beer Cans: E.C. Commission v. Denmark, the issue was Denmark’s implementation of a mandatory bottle recycling directive.60 Denmark adopted a program that imposed more stringent measures than those in the directive, but posed a significant impairment to internal trade. The Court of Justice reasoned that reuse of bottles should be encouraged and that member states may impose stricter environmental measures than the Community.61 Nevertheless, the court held that these measures favored environmental protection at the expense of the internal market and in violation of the EEC Treaty right of free movement of goods.62 An EEA with enforcement powers could prevent costly, protracted litigation before the Court of Justice. When the member state’s activities have an environmentally harmful impact, such as the confusion over marking of hazardous materials in Caldana,63 current enforcement procedures hamper quick discovery and remedy. If the EEA had inspection and enforcement powers as urged by the Euro-

59 Id. at 3021, 1 C.M.L.R. at 145.
61 Id.
62 Id. The Court of Justice also found, however, that the directive laid down neither particular levels of environmental protection nor specific methods to adopt, which caused Denmark to rely on its own interpretation of the directive.
European Parliament, it could obtain independent and reliable evidence of member state infringements and could intervene to halt the infringements.

**Conclusion**

An agency that can collect and disseminate environmental information to interested parties will make global ecological management easier and more effective. Nevertheless, the EEA's current mandate does not go far enough. The EEA must have the power to ensure the reliability of the information it receives. With monitoring powers, the EEA could act to correct a member state's misapplication of a directive before the problem causes further harm to the environment. The EEA must also have the power to force member state compliance with environmental directives. Such powers would promote standardized application of EC environmental directives, and could obviate burdensome litigation before the Court of Justice.

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64 See generally Parliamentary Debates, *supra* note 4.