
EMERGING NETWORKS OF ENVIRONMENTAL ENFORCEMENT AND COMPLIANCE COOPERATION IN NORTH AMERICA AND THE WESTERN HEMISPHERE

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SUMMARY

This paper reviews progress to date in the emergence of networks of cooperation in environmental enforcement and compliance in North America and the Western Hemisphere, and explore the challenges and opportunities created by the development of such networks.

Since the Third International Conference on Environmental Enforcement, the countries of North America have continued to enhance and formalize bilateral and trilateral networks of environmental enforcement and compliance cooperation, making progress in a number of areas of cooperation. Under the North American Agreement on Environmental Cooperation, a working group of U.S., Mexican and Canadian enforcement officials has developed a cooperative work program on environmental enforcement, facilitated by the North American Commission for Environmental Cooperation. Meanwhile, citizen submissions on enforcement to the North American Commission for Environmental Cooperation has placed a spotlight on the commitment of the three countries to effectively enforce their environmental laws. The U.S. and Mexico continued to strengthen their bilateral cooperative relationship on environmental enforcement and compliance, building partnership among a diverse range of local, state and federal agencies to enhance enforcement and compliance efforts aimed at environmental problems in the U.S./ Mexico border area.

Cooperation on environmental enforcement and compliance is beginning to take shape throughout the Americas, stimulated by the creation of a Western Hemisphere Partnership for Pollution Prevention, as well as a commitment of the governments of Central America and the United States to work cooperatively toward sustainable development. North America's evolving network of environmental enforcement cooperation is thus becoming a regional subcomponent of, and a possible model for, a broader Western Hemisphere enforcement network. The development of hemisphere-wide environmental enforcement cooperation, however, presents unique challenges. These include: the development of an institutional framework for cooperation; responding to an emerging debate over the role of environmental regulations and enforcement as opposed to voluntary approaches in achieving environmental goals; and the need to address the question of compliance capacity in the private sector.

1 INTRODUCTION

At the December 1994 Summit of the Americas, the democracies of the Western Hemisphere established a Partnership for Pollution Prevention as they embraced the promise of hemisphere-wide free trade. In so doing, they acknowledged the need to couple development through economic integration with cooperation in ensuring the effective implementation of sound

environmental laws. Earlier, the negotiation of the North American Free Trade Agreement had similarly highlighted the need for environmental cooperation to minimize transborder pollution effects of increased economic activity, and to ensure a level playing field for free competition. The United States, Mexico and Canada responded to this challenge by accelerating the formal development of a multi-tiered, North America-wide network of cooperation in environmental enforcement and compliance. With increased hemisphere-wide environmental cooperation, this North American network presents itself as a regional subcomponent of an emerging hemisphere-wide environmental enforcement and compliance network.¹

The Third International Conference on Environmental Enforcement, in Oaxaca, Mexico in April, 1994, laid the groundwork for developing a hemisphere-wide network of cooperation in environmental regulation, enforcement and compliance. Representatives of seventeen Western Hemisphere countries, the Organization of American States, and the Netherlands, signed a declaration to constitute a "Network of Friends of Environmental Law", with the goal of facilitating information exchange and collaborative work, including in the areas of compliance and enforcement, public participation, domestic environmental regulations, and training. One of the papers presented at the Oaxaca Conference outlined a possible framework for the development of regional networks of environmental enforcement and compliance cooperation, in North America and beyond. The paper suggested that such cooperation should be solidly based on respect for sovereignty and international comity, and should seek to develop a rational institutional framework to combine partnership among the various actors at all levels of interaction (e.g. regional, bilateral, national, subnational). The paper suggested that enforcement and compliance network activities might seek to address specific environmental problems through cooperative work which might include the following areas:^{2,3}

- Strategic Priority-Setting and Targeting
- Compliance Promotion
- Compliance Monitoring
- Investigatory Cooperation in Specific Cases
- Sharing Experiences to Build Enforcement Capacity
 - Consultation on Laws and Policies
 - Training and Technical Assistance
 - Enforcement Results Information-Sharing
- Public Communication of Cooperative Enforcement Activity

Since the last conference, the countries of North America have continued to enhance and formalize the bilateral and trilateral networks of environmental enforcement and compliance cooperation; making progress in many of the above areas; and initial steps are underway toward enhanced enforcement and compliance cooperation throughout the Americas. This paper reviews the status of these efforts, and reflects on the challenges that lie ahead.

2 NORTH AMERICA: A MULTI-TIERED ENFORCEMENT AND COMPLIANCE NETWORK

NAFTA's "environmental side agreement", the North American Agreement on Environmental Cooperation ("Agreement"), created a unique institutional context for enhancing North America's network of cooperation on environmental enforcement and compliance, through the creation of the North American Commission for Environmental Cooperation ("Commission"), consisting of a Council of the Environment Ministers of the three countries, and a standing

Secretariat, located in Montreal, Canada. In the first phase of the Commission's operations, a Permanent Working Group on Environmental Enforcement Cooperation was established to facilitate cooperation at the trilateral level, among national governments, states and provinces. Meanwhile, bilateral U.S./Mexico cooperation on enforcement and compliance has continued to grow, with particular focus on the U.S./Mexico border area. As a result, the past two years have witnessed the continued evolution of a multi-tiered institutional framework for environmental enforcement and compliance cooperation in North America.⁴

2.1 The North American Commission for Environmental Cooperation

The Agreement takes a multi-pronged approach to promoting environmental enforcement and compliance. Central to the Agreement is a commitment by the Parties to effective enforcement of their respective environmental laws, reinforced by two formal procedures:

- A procedure for citizen submissions asserting ineffective enforcement by a Party, to which the Secretariat may respond by requesting a response from the Party and developing a factual record.
- A procedure for claims by a Party that another Party exhibits a persistent pattern of failure to effectively enforce its environmental law, involving consultations, possible formal dispute resolution, and, ultimately, economic sanctions.⁵

Complementing these procedures is an obligation of the Parties, through the Commission's Council of Ministers and assisted by the Commission's Secretariat, to promote effective enforcement and compliance, including through technical cooperation. In July, 1994, the Commission Council directed the Secretariat to develop an enforcement and compliance cooperative work program to facilitate "cooperative initiatives to improve compliance in identified industry and natural resource sectors", as well as substantial exchange of enforcement and compliance information and dialogue on the comparability of enforcement and compliance measures.^{6,7}

2.1.1 Permanent working group on environmental enforcement cooperation

To implement these priorities, the governments created a Permanent Working Group on Environmental Enforcement Cooperation, consisting of senior representatives of the Parties with environmental enforcement and compliance responsibilities. These include representatives of: the U.S. Environmental Protection Agency, Fish and Wildlife Service, and Department of Justice; U.S. state environmental enforcement agencies; Mexico's Attorney General for Environmental Protection ("PROFEPA"); Environment Canada and the Canadian Department of Justice; and Canadian provincial environmental enforcement officials. Meeting in June and November, 1995, the Working Group adopted the following terms of reference:

- Strengthen cooperation between the parties in environmental enforcement and compliance while respecting the individual approach of each party.
- Deliver concrete cooperative enforcement and compliance initiatives.
- Establish working relationships among the environmental enforcement agencies in recognition of the shared borders and inherent shared enforcement and compliance challenges.
- Exchange information and experiences with alternative approaches to enforcement and compliance.

- Facilitate enforcement and compliance training opportunities among the three countries.

Subgroups were established to facilitate work in the following areas:

- Development of the Commission's Annual Report on Enforcement.
- Development of a North America-wide system to assist in compliance monitoring of transboundary movements of hazardous wastes.
- Cooperation in wildlife enforcement.
- Promote voluntary environmental compliance and environmental auditing.⁸

2.1.1.1 Annual report on enforcement

Significant activity in late 1995 and early 1996 focused on the compilation of enforcement information for the Commission's first Annual Report, as required by the Agreement. Each country contributed information on its respective domestic enforcement programs and activities. This exercise has begun to stimulate discussion among the three countries on the comparability of enforcement and compliance statistics as the countries utilize different arrays of enforcement tools and methodologies for measuring compliance.⁹

2.1.1.2 Transboundary hazardous waste shipments

The subgroup on Transboundary Hazardous Waste began to discuss development of a North America-wide system for tracking transboundary hazardous waste shipments. Such a system could help identify illegal hazardous waste shipments and compliance circumvention schemes, as well as hazardous waste manifest violations and other technical non-conformances; and might facilitate enforcement targeting and enforcement cooperation between government authorities. Such a system could also have additional benefits, such as expediting hazardous waste export and import transactions and industry reporting, and providing information useful in hazardous waste program planning, policy-making, public reporting, and emergency preparedness and response. The subgroup began to develop a project plan for design and implementation of such a system, referencing the U.S./Mexico transboundary hazardous waste system ("HAZTRAKS") as a possible starting point for a North America-wide system.

2.1.1.3 Wildlife enforcement cooperation

The subgroup on wildlife enforcement, or the "North American Working Group on Wildlife Enforcement", identified as priorities for 1996 building improved communications and joint training courses focused on enforcement of the Convention on Illegal Trade in Endangered Species ("CITES") at border crossings. Programmed activities included training in CITES enforcement on the U.S./Mexico border, and training in Toronto, Canada on fur-bearing species. Future training priorities include focus on birds, reptiles and hides identification, and the development of materials on the laws, policies and organizations responsible for wildlife enforcement to support cooperative initiatives.

2.1.1.4 Voluntary compliance and environmental auditing

In September, 1995, the Commission Secretariat and Environment Canada joined Mexico and the United States in co-sponsoring a seminar for industries in the Juarez/El Paso area of the U.S./Mexico border zone on "Programs and Policies to Promote Environmental

Auditing and Voluntary Compliance in North America. Attended by over 200 industry representatives, the seminar marked the first cooperative effort under Commission auspices to actively promote industry compliance with environmental laws. The seminar focused on environmental auditing as a means of both assuring compliance and identifying pollution prevention opportunities, and explored government policies to encourage voluntary compliance through environmental auditing. The Commission and the three governments sponsored a second seminar in Tijuana, Mexico in December, 1995, expanding the focus to include discussion of emerging International Standards Organization voluntary standards for environmental management systems (EMS) to implement industry commitments to environmental compliance and pollution prevention ("ISO 14000").

At both seminars, the governments and the Commission conducted intergovernmental consultations on their respective policies and programs in more detail, including their potential relationship to ISO 14000. As a result of these consultations, the subgroup on Environmental Auditing and Voluntary Compliance agreed to continue its dialogue on government responses to ISO 14000 in North America, and to develop additional geographic or industrial sector based cooperative efforts to encourage voluntary environmental compliance.

To inform such future cooperative activities, the Commission Secretariat launched a study of alternative mechanisms to encourage voluntary compliance. The study will explore existing efforts in the three countries to develop and implement voluntary compliance mechanisms and develop recommendations, after consultation with enforcement and compliance officials and private stakeholders.

2.1.1.5 Additional enforcement cooperation priorities and opportunities

In addition to the subgroup activities, the Permanent Working Group agreed to pursue the following priorities: to share approaches to compliance data management; to publish a roster of enforcement and compliance officials to facilitate information and expertise exchange; to prepare a catalogue of existing training programs in North America pertaining to environmental enforcement and compliance; and to focus work on the detection of illegal shipments of ozone-depleting chemicals controlled by the Montreal Protocol. Other ideas for cooperation, subject to further dialogue, include subsector-based approaches to cooperation in enforcement targeting and compliance promotion, and the development of a North American protocol for cooperation in environmental enforcement investigations, including evidence-gathering and treatment of confidential information.

The Commission's broader cooperative work on substantive environmental problems (e.g., Commission Council priorities or cooperative work activities which do not pertain exclusively to enforcement) may present opportunities for future cooperative efforts in enforcement and compliance. For example, in October, 1995, the Commission Council adopted a resolution giving priority to cooperation in the management and control of persistent toxic substances, such as polychlorinated biphenyls (PCB's). Another Council resolution agreed to trilateral action to promote public access to environmental information. Initiatives such as these, driven at the Council level, could provide useful foci for future cooperative work in enforcement and compliance. For example, cooperative enforcement targeting and compliance promotion activities could be geared toward implementation of regulations controlling persistent toxic chemicals or requiring reporting and community access to environmental emissions data.^{10, 11}

2.1.2 Formal enforcement procedures

The Agreement's public complaint and dispute resolution processes complement the Commission's cooperative enforcement and compliance work program in guaranteeing the Parties' commitment to effective enforcement of their environmental laws. The citizen submission procedure provides an important opportunity for public participation in promoting effective environmental enforcement and compliance. By allowing private parties to request the Secretariat to develop a factual record shining a spotlight on a Party's alleged failure to effectively enforce its environmental law, citizens can participate directly in "bright-lights enforcement" of this central commitment of the Agreement. In October, 1995, the Commission published a set of guidelines to aid the public in preparing such submissions.^{12, 13}

Meanwhile, the Secretariat reviewed and ruled on the first two such public submissions, and began review of a third petition. In the first submission, Biodiversity Legal Foundation alleged that appropriations legislation passed by the United States Congress in 1995 had the practical effect of preventing U.S. administrative agencies from carrying out their enforcement mandates under the Endangered Species Act respecting the classification of threatened and endangered species and critical habitats. The petitioner requested that the Secretariat of the Commission seek a response from the United States on the matter under Article 14 of the Agreement. Similarly, in the second submission, the Sierra Club alleged that U.S. appropriations legislation effectively suspended citizen enforcement of environmental laws with respect to old-growth forest and salvage logging, through a "rider" provision which limited judicial or administrative review of whether timber sales comply with environmental statutes. The Sierra Club petitioned the Commission to develop a factual record to determine whether this legislative provision amounted to a failure of effective enforcement by the U.S.^{14, 15, 16}

The Secretariat declined to take the actions requested in both petitions, finding itself not empowered to act in response to legislative acts, as opposed to situations in which an agency charged with enforcing environment law fails to do so. In the Sierra Club petition, for example, the Secretariat concluded that the rider provision was new legislation which "becomes a part of the greater body of laws and statutes on the books." The Secretariat concluded that it "cannot characterize the application of a new legal regime as a failure to enforce an old one." The Secretariat was reluctant to involve itself in the essentially legislative function of assessing the prospective impacts of new legislation. The Secretariat noted that failures to enforce "are best construed to apply to the actions or omissions of the agencies and officials charged with enforcing environmental laws", and not the enactment of legislation. Thus, in both cases, although the Secretariat declined to conduct a factual investigation or seek a response from the implicated Party, its decisions provide valuable interpretive guidance on the scope of the Agreement's obligation that the Parties effectively enforce their environmental laws.¹⁷

The most recent submission, filed by the Centro Mexicano de Derecho Ambiental (Mexican Environmental Law Center) and el Grupo de los Cien (Group of 100), alleged failures in the implementation of Mexico's environmental impact assessment requirements with respect to a cruise-ship terminal development project located within a natural protected area. The submission, which was pending before the Secretariat as of the writing of this article, presents the Secretariat an opportunity to provide guidance on issues such as: application of the "effective enforcement" obligation to environmental impact assessment requirements; the application of the notion of "persistent" ineffective enforcement as applied to individual development projects and to conduct beginning prior to the Agreement; and the transboundary nature of marine flora and fauna.¹⁸

In addition to the citizen submission procedure, the Agreement provides for formal arbitration, and possible sanctions, if one Party alleges that another is failing to effectively enforce its environmental laws. To date, the Parties have preferred to focus on working cooperatively to enhance enforcement capacity, rather than initiating formal allegations. The mere possibility of such a proceeding, in fact, and the pressure of “bright lights enforcement” created by the citizen submission process, appear at this stage to be effective tools in encouraging the Parties to work cooperatively to improve the effectiveness of their environmental enforcement and compliance efforts.

2.2 U.S./Mexico bilateral enforcement and compliance cooperation

While the U.S., Mexico, Canada, and the Commission were developing a North America-wide program of enforcement and compliance cooperation, the U.S. and Mexico continued to develop their cooperative bilateral relationship in this area through the U.S./Mexico Cooperative Enforcement Strategy Workgroup, one of six workgroups set up under the 1983 U.S./Mexico Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (“La Paz Agreement”). Effective enforcement of and compliance with environmental laws in the U.S./Mexico border area is essential to ensure realization of each country’s environmental goals, as well as to prevent transboundary environmental problems and unfair trade advantages resulting from lax implementation. EPA and Mexico’s PROFEPA have worked to mutually enhance both countries’ capacity to enforce and promote compliance with their respective environmental laws, and to resolve mutual environmental problems caused by noncompliance.¹⁹

In June, 1995, the two countries developed a Work Plan for 1995-1996, which called for substantial activities in the following areas: cooperation in detecting violations and targeting enforcement; cooperation in specific case investigations and sharing enforcement information; capacity building through training and technical consultations; enhancing interagency cooperation; and promoting voluntary environmental compliance through environmental auditing and pollution prevention.²⁰

2.2.1 Recent and ongoing cooperative activities

2.2.1.1 Cooperative detection of violations and targeting

EPA and PROFEPA have been working to enhance their capacity to identify likely violators for enforcement follow-up. HAZTRAKS, a binational system for tracking transboundary movement of hazardous wastes initiated by the U.S./Mexico Hazardous Waste Workgroup under the La Paz Agreement, has proven to be an effective tool for monitoring compliance. Information drawn from HAZTRAKS has enabled EPA, its state agency partners, and PROFEPA to identify potential violations. EPA and PROFEPA are exploring approaches to enhance their capacity to identify likely violators for enforcement follow-up, e.g., by supplementing data from HAZTRAKS with other useful information, such as data about a facility or its use of chemicals.

Input of local, state, and regional enforcement officials is essential in identifying priorities for cooperative targeted enforcement initiatives. To foster cooperative targeting among Mexican and U.S. federal, state and local enforcement authorities, EPA and PROFEPA established two pilot regional subgroups of the Cooperative Enforcement Work Group: one for Texas/Chihuahua and one for California/Baja California. The subgroups will develop, propose, and implement cooperative initiatives to address identified local or regional environmental enforcement problems.

2.2.1.2 Investigations and information-sharing

U.S. and Mexican federal, state and local agencies engaged in environmental enforcement are increasingly cooperating in the investigation of environmental cases with transboundary aspects. EPA and PROFEPA are exploring development of a protocol for cooperation in the development of evidence for enforcement cases of each country.

EPA and PROFEPA have been exchanging periodic aggregate data on enforcement activities in their respective jurisdictions, and have agreed to determine criteria for sharing more detailed information on specific completed enforcement cases.

2.2.1.3 Training and technical consultations

EPA and PROFEPA have worked together to train hundreds of PROFEPA inspectors in Multimedia Inspection techniques. The course includes a "train-the-trainer" component to ensure its institutionalization by PROFEPA. The course was recently improved to include information for inspectors on pollution prevention technologies, and a new unit on wastewater discharge inspections to address the problem of cross-media transfer of pollutants from solid waste to wastewater. EPA and PROFEPA have begun to collaborate on more advanced training for Mexican inspectors, including training in field sampling and laboratory analysis, and in investigating environmental crimes.

In May, 1995, EPA facilitated and PROFEPA hosted a presentation of the international training course on the Principles of Environmental Enforcement and Compliance, attended by policy-makers from a diverse range of Mexican local and federal agencies. EPA and PROFEPA are now exploring future course deliveries which will include a "train-the-trainer" component, and are looking forward to collaborating in the delivery of this course to other Spanish-speaking countries in the Western Hemisphere.

EPA, its state agency partners, and PROFEPA, are improving interagency and binational enforcement cooperation through a bilingual training program for U.S. and Mexican customs and environmental inspectors on monitoring compliance with transboundary hazardous waste, pesticide, and toxic substance regulations. This training, which has already been presented at most major land border crossings, has proven to be an effective tool for building cooperative partnership among field enforcement personnel from diverse agencies on both sides of the border. Similar training is being developed regarding smuggling of ozone-depleting chemicals banned or restricted under the Montreal Protocol.²¹

In addition to these formal training exercises, EPA and PROFEPA have also engaged in less formal technical consultations on diverse aspects of environmental enforcement. These include enforcement data systems, environmental crimes, and administrative environmental enforcement. EPA and PROFEPA are planning a workshop to exchange perspectives on the legal and technical practicalities of environmental enforcement, and are exploring technical consultations on approaches to calculating economic penalties in enforcement cases.

2.2.1.4 Voluntary compliance and environmental auditing

EPA and PROFEPA initiated outreach to U.S. maquiladora parents to encourage voluntary compliance with applicable laws and regulations, including through participation in PROFEPA's innovative environmental auditing program. This effort spawned two industry conferences in the border area to promote voluntary compliance through strategies such as environmental auditing and pollution prevention, and trilateral consultations involving the U.S., Mexico, Canada, and the Commission, to exchange information about each country's policies to encourage voluntary compliance through environmental auditing. (See Section 2.1.1.4 above).

2.2.1.5 Building networks of interagency cooperation

A diverse range of local, state, and federal law enforcement agencies are essential partners of EPA and PROFEPA in assuring environmental compliance and in building enforcement capacity through cooperation. The Enforcement Work Group has strived to develop a border-wide network of enforcement and compliance cooperation, among all relevant agencies at all levels of government on both sides of the border. This border-wide network forms a significant regional component of a North America-wide enforcement and compliance cooperation network, and many activities initiated bilaterally are now forming the basis for North America-wide cooperative work under the Commission's Permanent Working Group on Environmental Enforcement Cooperation. (See Section 2.1.1, above).

EPA and PROFEPA have committed to work to improve coordination among the local, state, and federal agencies on both sides of the border involved with environmental enforcement. Binational multi-agency training, local task forces, and supporting state enforcement activities through grant programs, have proven to be effective tools for building interagency cooperation. Creation of the regional subgroups for Texas/Chihuahua and California/Baja California will foster even greater cooperation among relevant federal, state and local environmental agencies in these regions.

2.2.2 Border XXI: toward the 21st century

The U.S. and Mexico have begun to develop a new framework for border area environmental cooperation under the La Paz Agreement, to address the significant environmental challenges posed by rapid development in the border area as we approach the turn of the century. The new framework, dubbed "Border XXI", will seek to forge a partnership among border communities and state and federal governments on both sides of the border to work together in improving the border environment. To foster this partnership, as proposed by the U.S., the Border XXI program will emphasize the themes of public participation, decentralization of environmental decision-making to empower local communities and residents, and interagency coordination to maximize limited resources and avoid duplicative efforts. The Border XXI framework will seek to identify the resources necessary to achieve the environmental goals for the border area, and will strive to integrate interdisciplinary efforts related to environmental protection.

2.2.2.1 Enforcement and compliance cooperation under Border XXI

Enforcement and compliance cooperation will continue as a major component of the framework for U.S./Mexico cooperation in the border area, alongside the work of the other existing La Paz Agreement Workgroups (Air, Water, Hazardous Waste, Emergency Response, and Pollution Prevention) and new initiatives in areas such as environmental public health, environmental information, and environmental education. Because enforcement and compliance are cross-cutting themes which are important for protecting all environmental media, close coordination and cooperation is needed with other cooperative activities to ensure that they complement one another. The Enforcement Workgroup will continue to coordinate closely with and support the other La Paz Agreement Workgroups to enhance cross-cutting attention to enforcement and compliance.

In developing Border XXI, the U.S. has proposed a number of broad objectives for enforcement and compliance cooperation over the next five years, with specific implementing projects to be identified in annual work plans. The proposed objectives include:

- Measurably enhance compliance in the border area through aggressive inspection programs; targeting of inspections for maximum effectiveness; compliance actions and follow-up to ensure future compliance; and creation of an effective deterrence through sanctions which remove the economic benefit of noncompliance and through public communication of enforcement activities.
- Develop and implement cooperative targeted enforcement initiatives that address common environmental problems, in a manner which preserves respect for national sovereignty.
- Promote industry leadership in voluntarily achieving and demonstrating compliance, including through strategies such as environmental auditing.
- Develop sophisticated tools to monitor compliance.
- Promote pollution prevention solutions to compliance problems, in all enforcement/compliance related activities.

Enforcement cooperation would also be pursued in accordance with the broader proposed themes of Border XXI. For example, citizen involvement in the enforcement process provides an important avenue for public participation. In the U.S., citizens may initiate legal action to directly enforce most environmental laws. In Mexico, PROFEPA's procedures provide for follow-up investigation of citizen complaints about environmental compliance problems. In both countries, citizen input is an important source of information to assist the governments in responding to environmentally unsound behavior. The Enforcement Work Group will encourage the public, employing their respective domestic procedures, to work in partnership with the government agencies to enhance effective implementation of environmental laws.

Similarly, involvement in the Enforcement Workgroup will be an important avenue for state and local governments to help shape implementation of Border XXI, ensure responsiveness to the needs and priorities of local communities, and build interagency partnership and coordination. The recent creation of pilot regional geographic subgroups of the Enforcement Workgroup provides an important mechanism for state and local empowerment, and will help to ensure that interagency coordination occurs where it matters most — in the field, at the working level. In so building the enforcement and compliance network in the border area, the Enforcement Work Group will continue to coordinate its activities with broader, North America-wide enforcement efforts, and to identify bilateral initiatives which could benefit from trilateral cooperation.

3 TOWARD A WESTERN HEMISPHERE ENFORCEMENT AND COMPLIANCE NETWORK

At the December, 1994 Summit of the Americas, the presidents of the democratic nations of the Western Hemisphere announced a Plan of Action which included a call for a new hemispheric Partnership for Pollution Prevention. The Plan of Action specifically identifies initial substantive priorities to include safe pesticide management, the gradual elimination of lead from gasoline, and the reduction of lead exposures from other sources. The Plan calls on international organizations such as the Inter-American Development Bank, the Pan-American Health Organization, and the Organization of American States, to play a major role in organizing and implementing Partnership activities.²²

The Plan of Action for the Partnership calls for cooperative efforts in developing and improving environmental enforcement as a key aspect of the sound environmental management required to ensure sustainable development. The Plan of Action calls for the strengthening of implementation and enforcement of environmental protection frameworks, both through individual

government action and through intergovernmental cooperation to facilitate information exchange, technical cooperation and capacity-building. In recognizing the importance of cooperation to reinforce domestic enforcement efforts, the Partnership for Pollution Prevention sets the stage for development of a Western Hemisphere network of environmental enforcement cooperation.

Prior to the Summit, in October 1994, the governments of Central America announced a new Alliance for Sustainable Development, and invited the international community to join them in achieving the goals of the Alliance. At the Summit in Miami, the U.S. accepted this invitation. In a joint communiqué called the "CONCAUSA Declaration", the U.S. and the Central American governments issued an action plan to work together to achieve the goals of the Alliance. The action plan contemplates cooperation between the U.S. and its Central American partners in establishing a network of cooperation to promote and enforce compliance with environmental legislation.²³

3.1 Western Hemisphere partnership for pollution prevention implementation

In November, 1995, EPA, in cooperation with the Organization of American States, the Pan-American Health Organization, and the government of Puerto Rico, hosted an Advisors Workshop and an Intergovernmental Technical Experts Meeting in San Juan, Puerto Rico, to organize the Partnership for Pollution Prevention. Although the Summit of the Americas Action Plan identified the 1996 Summit Conference on Sustainable Development in Bolivia as the time of reporting on progress in implementation of Partnership activities, it provided no mechanism to coordinate between government and non-government organizations or funding institutions to develop specific programs. At the Puerto Rico meetings, participants from approximately 25 countries, international organizations and multilateral development banks, with input from nongovernmental and industry organizations, developed a Framework for Cooperation, and identified initial priority projects.

3.1.1 Framework for cooperation

The Framework for Cooperation developed in Puerto Rico calls for the Organization of American States to convene a meeting to establish a Task Force of involved international organizations to coordinate efforts and optimize resources for Partnership implementation. Each country is called upon to designate a national focal point for cooperation. The Task Force will establish its own structure and work plan and report through government focal points. As of March, 1996, initial meetings of the Task Force had taken place in Washington, D.C., with participation of the Organization of American States, the Pan American Health Organization, the World Bank, the Inter-American Development Bank, the United Nations Environment Program, EPA and the U.S. Agency for International Development, and the Canadian International Development Agency.²⁴

The Framework exhorts governments to cooperate to create and improve regional and subregional networks. The networks would include governmental and nongovernmental experts, and would exchange information and expertise for implementation of Summit-related activities. Information exchange would include electronic communications, follow-up meetings and other means. The Framework encourages reinforcing the Partnership with bilateral and multilateral relationships among governments and nongovernmental organizations to advance pollution prevention, and calls upon national focal points and international institutions to promote public participation.

The Framework specifically calls for strengthening of mechanisms for cooperation among governments to implement Partnership commitments, including “policy, legal and regulatory frameworks, institutional arrangements, economic instruments, enforcement and compliance.” Finally, the Framework encourages the countries and international organizations to identify specific opportunities for capacity-building, training, and technical cooperation in each of these “cross-cutting” areas.

3.1.2 Substantive project priorities

In addition to initial development of a Framework for Cooperation, the Working Groups at the Puerto Rico Meetings outlined recommendations for priority project goals to address pesticides, lead, sustainable tourism, and water quality. Each of these priority themes provides opportunities for cooperation in the area of enforcement and compliance.

The Lead Working Group recommended the development and incorporation into legal instruments of national plans to eliminate lead from gasoline in the Americas by the year 2001. This activity will provide a Western Hemisphere focus on the phase-out of lead in gasoline, in follow-up to global discussions initiated in March, 1995 at an International Workshop on Phasing Lead out of Gasoline, hosted by the United States and Mexico under the auspices of the United Nations Commission on Sustainable Development. To implement the Working Group’s recommendations, EPA is working with the U.S. Department of Energy, the U.S. Agency for International Development, and the World Bank, to develop a program for providing technical assistance to countries in the Americas in developing national plans to phase-out lead in gasoline. This effort appears to be taking shape as the first implementation activity on substantive priorities of the Partnership for Pollution Prevention.

The Pesticide Working Group recommended regional consultations on harmonizing of laws and regulations at high levels of environmental protection; the creation of information centers to facilitate information exchange, capacity-building, and assistance in government institution strengthening; and establishment of a “board” of interested country representatives to identify specific projects and assist in developing funding proposals. Projects recommended by the Water Working Group contemplated development and implementation of water quality criteria, exchange of experiences with implementation of legal, institutional and economic instruments for water resource management, including international river basins; management of water salinity in the Caribbean; and promoting institutional mechanisms for information-sharing, such as the Inter-American Water Resources Network of the OAS. The Sustainable Tourism Working Group recommended, *inter alia*, development of a sustainable management system, including through regulatory and enforcement mechanisms, for marine parks in Belize, Dominica, and Honduras.

3.1.3 Enforcement and compliance cooperation in the partnership

At the Puerto Rico meetings, EPA offered a concept paper on “Building Environmental Enforcement and Compliance Capacity in the Western Hemisphere”. The paper envisioned a hemisphere-wide network of officials and experts to promote development of sound environmental laws and build enforcement and compliance capacity through regional and hemispheric cooperation. The network would consist of several regional sub-networks to focus efforts on regional problems. Its members would include representatives of all relevant government agencies, and of nongovernmental experts to provide perspectives of NGO’s, academia, and industry, and ensure attention to citizen participation in the enforcement process. The paper suggested the following possible areas for cooperation:

- Capacity-building.

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- Cooperative compliance promotion.
 - Cooperative compliance monitoring.
 - Cooperation on specific enforcement cases.
 - Strategic priority-setting and targeting initiatives.
 - Enforcement activity information exchange.
 - Cooperative enforcement communications.

The objectives of the proposed strategy include: promoting sustainable development by ensuring that regulatory frameworks are capable of reaching their environmental goal; ensuring a level playing field of effective environmental enforcement as a basis for free trade; maximizing the efficiency of individual countries' efforts to build environmental enforcement capacity; and maximizing the deterrent effect of enforcement activity, by demonstrating a cooperative resolve to detect and respond to violations and promote voluntary compliance. The paper suggested that enforcement and compliance cooperation activities be incorporated into substantive priority projects (such as pesticides, lead, sustainable tourism, and water quality); but that they also be pursued through cross-cutting projects, not limited to the substantive priorities, to allow the network the flexibility to address, through cooperation, unique regional and subregional enforcement/compliance problems.²⁵

The Puerto Rico meetings resulted in recognition of enforcement and compliance as a cross-cutting theme for hemisphere-wide environmental cooperation. The Framework for Cooperation specifically encourages cooperative activities to address cross-cutting themes, including through development and enhancement of networks of cooperation. The meetings also produced several substantive themes which present opportunities for developing enforcement and compliance cooperation components. In its subsequent participation in the Task Force on Implementation of the Partnership for Pollution Prevention, EPA has recommended the establishment of Working Groups to promote cooperative action in the substantive theme areas as well as on cross-cutting themes such as legal frameworks, enforcement and compliance, public participation, and pollution prevention.

EPA has taken some initial steps toward implementing the strategy on enforcement and compliance as proposed at the Puerto Rico meetings. Building on the network developed through the International Conferences on Environmental Enforcement and Compliance, EPA began to develop a directory of contacts of legal and enforcement officials and experts, to support a hemisphere-wide network. EPA also developed an initial framework for a training course on environmental legislation and regulations, to be supplemented by interested countries or organizations. The training module, which will include a focus on enforcement considerations in drafting legal requirements, will supplement the existing international training module on the Principles of Environmental Enforcement.

At the Puerto Rico meetings, EPA proposed several specific projects to follow up this initial work. These include a hemisphere-wide delivery of the Principles of Environmental Enforcement and Compliance training, possibly in Mexico. EPA proposed a cooperative effort to supplement and further develop the training framework on environmental laws and regulations, and the development of case studies for both training modules to address identified Partnership priorities, such as pesticide regulation, lead exposure, and water quality. (An existing case study for the enforcement course, developed for the Third International Conference on Environmental Enforcement, covers sustainable tourism.) Finally, EPA proposed development of databases of environmental laws and regulations, agency and NGO organizational structures, and legal and enforcement contacts, to support the evolution of the Western Hemisphere network of environmental law and enforcement.

3.2 Regional enforcement and compliance cooperation in Central America

The Central American Commission for Environment and Development (CCAD), representing the seven governments of Central America, is taking a proactive approach to the development of a regional network of cooperation on environmental laws, enforcement and compliance. To implement U.S. commitments in the CONCAUSA Declaration to assist Central America's regional environmental cooperation efforts, the U.S. Agency for International Development (USAID) worked with CCAD and U.S. EPA to develop a Central American Regional Environmental Project (Proyecto Ambiental Regional para Centro America, or "PROARCA"), with components to address protected areas, coastal zone management, and environmental protection.

Under the Environmental Protection component, a regional comparative environmental risk assessment has been launched to reach consensus among key stakeholders on, and prioritize, the major pollution problems in the region. This effort will be supplemented by an assessment of existing environmental legislation in Central America and of institutional capacities to manage environmental risks. The workplan also envisions efforts to develop compatible national systems of environmental laws and standards among the Central American nations, including focus on the legislative basis for monitoring and enforcement. Finally, the Environmental Protection component calls for improving implementation and enforcement of environmental laws and regulations. This will include technical assistance and training to strengthen institutional capabilities, and compilation of statistics on enforcement activity. It will also include engaging the private sector in an open, managed dialogue to achieve concrete commitments to comply with environmental laws and regulations.

EPA's involvement in the PROARCA project is being funded by USAID, pursuant to an interagency agreement. Among the first activities, EPA facilitated a delivery of the Principles of Environmental Enforcement training in Belize in January, 1996, and is working to arrange future deliveries of this training in other countries in the region. EPA also participated in national assessments of environmental legislation in Honduras (December, 1995) and Nicaragua (February, 1996). EPA and CCAD are cooperating in the development of a Central American network of environmental legal and enforcement officials and experts, and are exploring cooperative projects in areas ranging from training of inspectors to promotion of voluntary environmental compliance. Once it is completed, the regional comparative risk assessment will further inform the development of cooperative projects focused on enforcement and compliance.

4 FUTURE CHALLENGES IN DEVELOPING THE WESTERN HEMISPHERE ENFORCEMENT AND COMPLIANCE NETWORK

North America's evolving network of environmental enforcement cooperation can provide a ready model for the growth of similar regional and subregional networks throughout the Western Hemisphere, which would link together in a hemisphere-wide network of cooperation. Initial steps have been taken to develop the architecture of such a hemisphere-wide network. Enforcement and compliance functions are unique and cross-cutting: they are identifiable as a separate activity while at the same time they are fundamental to achieving a broad range of environmental program goals. Thus, cooperation should focus on the broad functions of enforcement and compliance. In addition, specific projects can be responsive to the priority substantive environmental problems identified on a hemisphere-wide and regional basis.

Among developing countries in the Americas, enhancing institutional capacity through technical assistance and training is a priority need. As the North American experience suggests, however, there is great opportunity for enforcement and compliance cooperation to go beyond

capacity-building efforts. Exchange of ideas and experience benefits all countries in a region by expanding awareness of possibilities and policy options. Cooperation in areas such as compliance monitoring, enforcement targeting, enforcement case investigations, and environmental auditing, can achieve economies of scale in deterring violations and encouraging compliance.

The task of hemisphere-wide coordination itself presents a great institutional challenge. Although the institutional framework for cooperation has developed rapidly in North America, the outlines of a hemisphere-wide framework for cooperation have only begun to be drawn. Regional efforts, such as that of the CCAD in Central America, appear to provide the greatest hope for developing cooperative networks. Building a hemisphere-wide network which will ensure optimal cooperation at the operational level, therefore, appears to depend on the development of regional subnetworks, which will link together in a broader network for the Americas. These regional subnetworks, in turn, should be developed to enhance partnership between national and local governments, to ensure responsiveness to local problems and enhance cooperation among all entities which may provide assistance in detecting and responding to violations or promoting compliance.

One of the greatest challenges in establishing the Western Hemisphere network pertains to differing perceptions of the proper role of legal requirements and enforcement in achieving environmental goals. Many of the presentations at the Puerto Rico meetings suggested an emerging debate regarding traditional approaches to "regulation and enforcement" versus "economic instruments, incentives, and other alternative approaches." This characterization, however, presents a false dichotomy. First, although environmental law in the United States has traditionally involved "command and control" or "end-of-pipe control" strategies, many alternative approaches involve the promulgation of legal requirements, triggering concerns of enforcement and compliance. For example, economic instruments, such as taxes or emissions trading, often rely on self-monitoring and reporting of emissions or discharges. Such requirements must be encoded into law, and enforced, to ensure that the economic approach achieves its environmental goals. Even some "voluntary" approaches involve notions of enforcement and compliance. For example, many of the same compliance monitoring concerns are involved regardless of whether behavior is proscribed by law, or imposed as a condition of some incentive, whether it be a government subsidy or a private loan.

Finally, regulatory/enforcement and voluntary approaches, if designed properly, are compatible and complementary, rather than mutually exclusive. Although some purely voluntary approaches will cause many polluters to improve their environmental performance out of rational self-interest or altruism, it cannot be assumed that all polluters will act rationally or altruistically. This is particularly so if the desired behavior change involves radical changes to institutionalized business practices or large short-term capital expenditures. Hence, voluntary incentives work best if backed up by baseline requirements and substantial certainty that sanctions will be imposed if noncompliance is detected.

A more legitimate concern, however, is whether the private sectors in developing countries have adequate tools and resources to achieve compliance with strict new environmental standards. While this issue was raised by Central American industry group participants in the Puerto Rico meetings, the compliance capacity of small or economically disadvantaged businesses has been a matter of significant debate within the United States for some time. In response to these concerns, EPA recently modified its traditional approach to enforcement to include an emphasis on promoting voluntary compliance, particularly targeted at small and medium-sized businesses. EPA's new program of compliance promotion is supplemented by enforcement policies which encourage environmental auditing as a means of assuring compliance, and provide incentives to small businesses to participate in compliance assistance

programs. EPA is also engaging industry directly in dialogue on how environmental performance can exceed the baseline levels of protection achieved by mere compliance with environmental standards, while reducing overall regulatory burdens. At the same time, EPA is exploring new ways of recognizing industry for exemplary behavior which exceeds compliance. These efforts provide examples of how traditional enforcement might combine with positive incentives to change behavior to comply with environmental requirements.

5 CONCLUSION

Much work needs to be done to consolidate the Western Hemisphere environmental enforcement and cooperation network. In North America, the U.S./Mexico border area is still a large environmental concern. Industry performance in this region remains a key test of sustainable development in the Americas. Coordinated trilateral cooperative projects are only just getting under way. Although great strides are being made, promoting interagency partnership among all relevant entities remains a challenge, as does ensuring appropriate public participation. In other regions of the hemisphere, many environmental laws and standards are only now being developed; and these laws are perceived as challenging traditional relationships between government and industry. Yet, drafting environmental regulations that are enforceable from the start is a key to achieving the intended goals of an environmental protection program. Although electronic communications promise to enhance communications and cooperation within the hemisphere-wide network, not all stakeholders are at the same milepost on the "Information Superhighway."

Notwithstanding these obstacles, in the two years since the Third International Conference on Environmental Compliance and Enforcement, an Americas-wide network of environmental enforcement and compliance cooperation has begun to emerge. While a hemisphere-wide institutional structure for this network has begun to take shape, substantial work has been done to form a coherent, multi-tiered institutional framework for a key regional component of that network, North America. Meanwhile, other key regions of the Hemisphere, such as Central America, have begun concerted efforts to organize regional networks. Clearly, the benefits of mutually enhancing the capacity for and deterrent effect of enforcement, minimizing trade distortions and transboundary environmental degradation, improving voluntary compliance, and ultimately improving environmental performance, will be well worth the hard work. Hopefully, the Fifth International Conference on Environmental Enforcement and Compliance will provide an opportunity to report on further progress in the evolution of enforcement and compliance cooperation in the Western Hemisphere.

REFERENCES

1. Summit of the Americas Plan of Action, Miami, Florida, Dec. 9-11, 1994.
2. Oaxaca Declaration, Third International Conference on Environment Enforcement, Oaxaca, Mexico, April 25-28, 1994.
3. Fulton, Scott C., and Perling, Lawrence I., North American Trading Partners: Canada, United States, and Mexico as an Enforcement Network, Presented at the Third Conference on Environmental Enforcement, Oaxaca, Mexico, April 25-28, 1994.
4. North American Agreement on Environmental Cooperation, Between the United States of America, the Government of Canada and the Government of the United Mexican States (entered into force January 1, 1994).
5. *Id.*, arts. 14, 15, and 22-36.
6. *Id.*, art. 10.

7. North American Commission for Environmental Cooperation, Council Cooperative Work Program Priorities, Washington D.C., July 1994.
8. Commission for Environmental Cooperation, Permanent Working Group on Enforcement, minutes from November meeting.
9. North American Agreement on Environmental Cooperation, Council Resolution #95-5 on Sound Management of Chemicals, October, 13, 1995 (final ratification by ministers pending).
10. Commission for Environmental Cooperation, Council Resolution #95-5 on Public Access to Environmental Information, October 13, 1995 (final ratification by ministers pending).
11. North American Agreement on Environmental Cooperation, *supra* note 4, arts. 14, 15.
12. Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation, October 13, 1995.
13. U.S.C. 1531-1544 (1973).
14. Commission for Environmental Cooperation Secretariat Response to Submission by Legal Foundation, September 22, 1995.
15. Commission for Environmental Cooperation Secretariat Response to Submission by Sierra Club Legal Defense Fund, August 30, 1995.
16. *Id.*
17. Denuncia que Formula el Comite para la Proteccion de los Recursos Naturales A.C. de Cozumel, el Grupo de los Cien Internacional, A.C., ye el Centro Mexicano de Derecho Ambiental, A.C., Ante La Comision Para la Cooperacion Ambiental (January 17, 1995).
18. Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area (Done at La Paz, Mexico, August 14, 1995).
19. U.S./ Mexico Cooperative Enforcement Strategy Work Group Work Plan, Mexico City, Mexico, June 1995.
20. Montreal Protocol on Substances that Deplete the Ozone Layer, 26 I.L.M. 1541 (1987); 30 537 (1991).
21. Summit of the Americas Plan of Action, *supra* note 1.
22. Conjunta Centroamerica-USA (CONCAUSA) Declaration, Miami, Florida, December 19, 1994.
23. Partnership for Pollution Prevention Framework for Cooperation, San Juan, Puerto Rico, November 8, 1995.
24. Building Environmental Enforcement and Compliance Capacity in the Western Hemisphere (U.S. Environmental Protection Agency concept paper, presented at the Summit of the Americas Advisors Workshop and Intergovernmental Experts Meeting, San Juan, Puerto Rico, November, 1995).
25. PROARCA Project Paper, U.S. Agency for International Development, June, 1995.