
THE NORTH AMERICAN AGREEMENT FOR ENVIRONMENTAL COOPERATION: A REGIONAL FRAMEWORK FOR EFFECTIVE ENVIRONMENTAL ENFORCEMENTDUNCAN, LINDA F.¹

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SUMMARY

In 1994 Mexico, Canada and the United States signed the North American Agreement for Environmental Cooperation imposing common environmental obligations and commitments on the Parties and creating a unique regional framework for cooperation in implementing environmental protection. This article reviews the enforcement related obligations under the agreement and the regional structures adopted for their implementation. It also provides an overview of recent initiatives in support of strengthened regional environmental enforcement networking and capacity.

1 THE NORTH AMERICAN AGREEMENT FOR ENVIRONMENTAL COOPERATION (NAAEC)**1.1 The origins of the NAAEC**

In 1994 Mexico, United States and Canada entered into the North American Agreement on Environmental Cooperation (NAAEC).² The Agreement establishes a unique regional framework for cooperation, joint action and dispute resolution among the three governments as well as requiring greater levels of transparency and participation in environmental decision making. The NAAEC imposes specific environmental obligations on the Parties thereto, including those related to enforcement.

The NAAEC creates a Commission for Environmental Cooperation (CEC) headed by a Council of environment ministers responsible for overseeing the implementation of the agreement.³ It requires the appointment of a regional public advisory committee (JPAC) with the option of additional national public and government advisory committees.⁴ Finally a Secretariat is established with a dual role of technical support to the Council and a more independent investigatory role.⁵

The motivations and context for the agreement were multi-fold.⁶ The NAAEC reaffirms the Parties commitment to the Stockholm Declaration and the Rio Declaration⁷ while expressly recognizing the benefits to be derived from a regional approach to implementing these common international obligations and commitments to conservation, protection and enhancement. The adoption under the NAAEC of a regional framework reflects the reality of shared ecosystems, waterways, oceans, air sheds, migratory species and by implication shared pollutant pathways and environmental threats. The NAAEC establishes procedures directed at enabling and fostering regional responses as a complement to national initiatives on these common issues.

At the same time it is important to recognize that the NAAEC devolved as a product of the negotiation process for the North American Agreement for Free Trade (NAFTA)⁸. Among the rationales given for creation of this environmental side agreement was the concern that one country may gain an unfair trade advantage by failure to enact environmental standards or to enforce them. The NAAEC consequently requires not only that the Parties implement and upgrade environmental protection and conservation laws and regulations⁹ but also that they be effectively enforced.¹⁰

The agreement provides a linkage between enforcement obligations and trade regimes in several unique ways. The NAAEC incorporates a graduated process of dispute resolution for inter Party disputes over allegations by parties regarding persistent patterns of failed enforcement of environmental laws.¹¹ Potential penalties for failure to implement an agreed action plan to address enforcement failures include monetary penalties and the suspension of trade benefits.¹² Secondly, the NAAEC designates the Council as a point of inquiry and depository for comments from NGOs and persons concerned with the environmental goals and objectives of the NAFTA.¹³ It obligates the Council to provide assistance in consultations under Article 1114 NAFTA where a party considers that another party is waiving or derogating from, or offering to waive or otherwise derogate from, an environmental measure as an encouragement to establish, expand or retain an investment of an investor, with a view to avoiding such encouragement.¹⁴ These provisions requiring effective enforcement within a prescribed framework are intended to remove any unfair trade or economic advantage. In other words, enacting standards is not enough. Compliance must be ensured through enforcement or other means.

In the same instance the NAAEC recognizes the Parties' sovereign rights to adopt their own distinct policies and procedures reflective of their particular domestic priorities and legislative and institutional framework, in meeting any of the NAAEC obligations for standard setting or their enforcement.¹⁵ The following provides an overview of the regional cooperative approach adopted by the Parties for implementation of their enforcement related obligations under the agreement.

1.2 Environmental Enforcement and Compliance: New Commitments, Obligations, Opportunities

A significant number of the provisions of the NAAEC introduce new obligations, commitments and opportunities for effective enforcement of environmental laws and regulations. The agreement also introduces new regional fora for addressing environmental regulatory and compliance issues. In tandem with obligations and opportunities for resolving inter Party disputes related to allegations of failed enforcement, the agreement institutes the internationally recognized principles of transparency and participation in environmental decision-making through expanded rights and opportunities for the North American public to participate in environmental enforcement processes. Together these provisions have had the dual effect of expanding the public profile of domestic environmental regulatory and enforcement policies and practices and fostering an enhanced regional approach to ensuring effective environmental enforcement.

1.2.1 Obligations of the Parties

As mentioned the NAAEC requires the Parties "to effectively enforce their environmental laws and regulations through appropriate action" within a prescribed framework which mirrors Chapter 8, Agenda 21.¹⁶ The agreement additionally prescribes minimum enforcement proceedings and procedural guarantees, and specifies a range of sanctions and

remedies and considerations for their application in each instance.¹⁷ The commitment to transparency is manifested in the obligation for an annual public reporting of actions taken by the Parties to fulfill related enforcement obligations, inclusive of data.¹⁸

To date the Parties have issued two annual reports on their enforcement obligations.¹⁹ The 1995 report documents the environmental and wildlife enforcement policies, strategies and responses of each of the three countries. This report is intended to provide a baseline for future reporting on selected areas of priority concern. The 1996 report focuses on enforcement of laws regulating transboundary movement of hazardous wastes, air pollution and international trafficking in flora and fauna.²⁰ The Parties have committed to providing intermittent updates on key laws.

In addition to the obligation for an annual public accounting, the Parties are obliged under the NAAEC to notify each other of any proposed or actual measure and to respond to any requests for related information. The Parties are jointly examining potential avenues for facilitating the exchange of enforcement data, while still respecting national confidentiality requirements.²¹

1.2.2 Council Role and Mandate

The Council is obligated to encourage effective enforcement by the Parties, compliance with their respective environmental laws and technical cooperation to that end.²² In furtherance of that mandate the Council, in 1995 instituted the Enforcement Cooperation Program within the CEC Secretariat. In 1996, at the recommendation of the Secretariat, the Council formally established the North American Working Group on Environmental Enforcement and Compliance Cooperation (EWG) as an advisory body and intergovernmental forum.²³ In 1997, on the recommendation of this advisory group, the Council passed a resolution stating that the governments of Canada, Mexico and the United States must retain the primary role in establishing environmental standards and enforcing compliance with laws and regulations and that 'strong and effective governmental programs to enforce environmental laws and regulations are essential to ensure the protection of public health and the environment'.²⁴ They then directed the EWG to evaluate the effect of ISO 14000 and other environmental management systems initiatives on their respective enforcement and compliance regimes.

The Council is also charged with responsibility for making determinations on public submissions alleging failed enforcement efforts²⁵ and serves as the forum for directing resolution of inter-party allegations of persistent patterns of failure to effectively enforce environmental laws.²⁶

1.2.3 The CEC Secretariat

The CEC Secretariat is responsible for providing technical advice and support to the Council on the delivery of the agreement and CEC program.²⁷ The Secretariat has endeavored to consult with affected government agencies and the North American public in the development and delivery of its programs. As will be discussed later, the Secretariat established a special government advisory group to advise in the design and delivery of its enforcement related activities. Several CEC projects have also specifically targeted public input to future processes for enforcement and compliance.²⁸

The Secretariat is responsible for preparation of the annual report on CEC programs and budget, following instruction from Council.²⁹ This includes coordination of the report by the Parties on their common NAAEC obligations and commitments. The Secretariat is also mandated to prepare independent reports for the Council on matters within the scope of the annual work program, excluding issues related to whether a party has failed to enforce its

environmental laws and regulations, unless the Council approves by a two-thirds majority.³⁰ The Secretariat has initiated three article 13 reports, focused on threats to migratory birds and habitat, and pollutant pathways.³¹ Experience has shown that the article 13 process can serve to broaden the scope of public concerns beyond immediate issue of alleged ineffective enforcement action to broader issues of capacity. The result has been to channel shared resources and expertise towards addressing local or national issues with potential regional significance.

Finally, the Secretariat is charged with responsibility for reviewing submissions from individuals or NGOs asserting that a Party is failing to effectively enforce an environmental law.

³² As of September 1998 the public has filed a total of 18 submissions.³³

1.2.4 Public Rights and Opportunities

The NAAEC expands public and private rights and opportunities with the objective of infusing greater transparency in North American environmental decision making processes, inclusive of enforcement. These unique rights and processes establish a role for the North American public in monitoring and improving the capacity for effective enforcement and compliance.

As required under the NAAEC a Joint Public Advisory Committee (JPAC) has been appointed to provide advice to the Council of Ministers.³⁴ All three countries have additionally appointed National Advisory Committees and United States a Government Advisory Committees composed of representatives of state, municipal and tribal governments. In 1997 the JPAC was directed by the Council to hold North America wide consultations on among other subjects, public views on voluntary compliance.³⁵ The NACs have raised concerns with their Ministers about enforcement and compliance.

The NAAEC requires the Parties to provide processes for public request for investigations, standing before administrative, quasi-judicial or judicial proceedings for the enforcement of environmental laws and private right of access to remedies.³⁶ The Agreement introduces a process for the submission of complaints to the CEC Secretariat of failure of any of the Parties to effectively enforce their environmental laws.³⁷ The Parties are obligated to provide for notice and comment by all interested persons on all proposed or existing laws, regulations, procedures and administrative rulings on matters covered by the agreement.³⁸ The Parties are also obligated to report annually to the public on enforcement related obligations inclusive of enforcement data.³⁹

The Secretariat is currently exploring alternatives with the Enforcement Working Group for infusing greater public involvement in the Enforcement Cooperation Program, reflective of the need to ensure the initiatives are more transparent and inclusive.

2 THE CEC ENFORCEMENT COOPERATION PROGRAM

The CEC has established within its Secretariat an Enforcement Cooperation Program specifically targeted at enhancing the capacity of the Parties to fulfill their enforcement obligations. The program, under the guidance of the North American Working Group on Environmental Enforcement and Compliance, has to date delivered a wide range of initiatives. A major portion of the work has been focused on enhancing linkages amongst North American environmental and wildlife enforcement agencies and exploring alternative approaches to addressing regional issues. Following are highlights of the program and a brief review of some of the challenges and opportunities that this regional approach presents.

2.1 North American Working Group on Environmental Enforcement and Compliance Cooperation (EWG)

The mode of design and delivery of the CEC Enforcement Cooperation Program is unique. As previously mentioned, the program benefits from the participation and advice of the North American Working Group on Environmental Enforcement and Compliance Cooperation (EWG) established by the CEC Council. The Working Group is composed of senior level environmental and wildlife enforcement and justice officials from the national, state and provincial agencies of the three countries, appointed by the Parties. An adjunct group the North American Working Group on Wildlife Enforcement (NAWEG), has so far chosen to focus its efforts on improved enforcement of the Convention on International Trade in Endangered Species of Fauna and Flora (CITES). The EWG is mandated by the Council to:

- provide a forum for North American cooperation in environmental enforcement and compliance
- support initiatives for sharing enforcement-related strategies, expertise and technical knowledge
- support capacity building in effective enforcement and enhanced compliance
- facilitate the development and implementation of trilateral enforcement cooperation programs and initiatives
- examine alternative approaches to enforcement and compliance, and
- support the Parties in the preparation of annual enforcement reports and the examination of improved indicators or measures of effective enforcement and compliance.

The regional working groups now serve a dual role firstly providing a regional forum for the joint review of regional priorities and strategies for improved enforcement of environmental and wildlife laws and secondly, for cooperation in capacity building and exchange of enforcement related information and expertise. These fora complement domestic and bilateral efforts to implement joint border area enforcement strategies, exchange information and intelligence and to forge direct linkages towards more timely and effective enforcement responses.

2.2 Building the Regional Networks

The creation of the EWG under the umbrella of the CEC has allowed for direct financial and administrative support to the development and maintenance of these regional networks and their joint initiatives. Under the sponsorship of the CEC the EWG meets twice annually to review regional enforcement priorities and to advise in the development and delivery of the CEC Enforcement Cooperation Program. The working group has to date coordinated the preparation of three annual reports on the Parties' enforcement obligations.

Support to the NAWEG as a regional network has introduced a forum for exploring common initiatives and policy positions as well as coordinating regional and global activities.

The NAWEG has evolved as an active regional network working in close cooperation with the CEC and the Trilateral Committee for Wildlife Ecosystem Conservation and Management. Participation in the Trilateral has provided a unique opportunity for exchange between wildlife scientists and enforcers on the implementation of CITES and domestic wildlife laws. The participation of the NAWEG on the CEC Enforcement Working Group has fostered communication among wildlife and pollution enforcement officials across the North American region. The establishment of the NAWEG has also strengthened the opportunities for

presentation of regional policy proposals to other international forums. Consideration is being given by the World Customs Organization CITES Working Group and the Interpol Subgroup on Wildlife Enforcement to utilize the NAWEG as their North American link. The NAWEG is also proving a useful forum for exploration of regional strategies for CITES related matters. Efforts are underway as well to build a regional network of wildlife forensic experts.

These unique fora have enabled the agencies to work together in development and delivery of field level training programs and joint enforcement initiatives, to explore alternative enforcement and compliance mechanisms and to forge direct contacts for more timely and effective enforcement actions. Following are some of the major initiatives delivered under the program.

2.3 Regional Efforts for Enforcement Capacity

One of the priorities identified for cooperative effort has been joint training to enhance field level enforcement capacity. In the area of wildlife enforcement, efforts have focused on capacity to detect and enforce CITES violations by the enhancing field level skills for inspectors, investigators and forensic laboratories. Specialized joint courses on tracking and enforcing CITES violations related to endangered fur bearing species, birds and reptiles have succeeded in both enhancing the knowledge and skills of officers and forging transborder working relationships. The spin-off networks among national wildlife enforcement officials have enhanced national abilities to enforce domestic laws and to implement international obligations. Another product of these programs has been an intergovernmental commitment to more long term cooperation in capacity building for wildlife enforcement, including in some instances renewed support for bilateral initiatives.

For environmental agencies, the focus has been on improved capacity to track and enforce laws regulating the transboundary movement of hazardous wastes and the illegal trade in CFCs. Future joint training priorities include training support for customs officers and for improving tracking and intelligence capabilities. The regional scope of the planning is enabling the agencies to share specialized facilities, expertise and innovations.

2.4 Regional Policy Forum

The EWG and NAWEG provide a regional forum for dialogue amongst the national, state and provincial environmental and wildlife enforcement agencies regarding delivery of their respective domestic and international obligations. These networks have enabled the three countries to explore common strategies and positions for delivery of obligations under international treaties such as CITES and the Basel Convention. Support is given to the NAWEG to participate in the meetings of the Trilateral Committee for Wildlife, Plant and Ecosystem Conservation and Management, enabling a merging of scientific and legal and enforcement perspectives for implementing CITES in North America.⁴⁰ The very existence of the NAWEG ensures that any capacity building programs of the CEC reflect the immediate needs and priorities of the government agencies. Efforts have also been made to incorporate evaluation into all training sessions to ensure the programs are targeting the critical needs and respect the variances in the systems and capabilities of the three countries. Efforts have been made to concentrate resources to building a strong foundation of basic enforcement skills allowing for the possibility of joint enforcement efforts where needed.

In the first years of the program the CEC was asked to lend support to a series of seminars targeting improved compliance levels within the industries operating in the Mexico-United States border area. The CEC program supplemented a joint initiative of the USEPA and Mexico's PROFEPA directed at encouraging those industries (maquiladoras') to take the

initiative to implement voluntary compliance and pollution prevention programs. The project provided a catalyst for the initiation of a more intensive exchange among the agencies of the three countries on alternative approaches to enhancing compliance. In support of these efforts, the CEC commissioned a study surveying and analyzing North American experiences with the development and use of voluntary approaches to compliance and the implications for enforcement programs.⁴¹

As mentioned previously, the CEC also supported a joint review by the enforcement officials of the three countries of the implications of the ISO 14000 initiative and other environmental management systems on preexisting enforcement obligations, policies and strategies. In 1997 the CEC Council directed the EWG to undertake a more detailed review and analysis with the purpose of providing advice to the Council.⁴²

With the support of the CEC the three countries are also examining alternative approaches to measure and report on the effectiveness of their respective enforcement regimes. In 1998 the EWG, with the support of the CEC Secretariat, chaired a multi-stakeholder dialogue to examine the varied perspectives and approaches to date. The joint initiative is expected to continue for several years, with the long-term objective of improved domestic capacity to institute credible systems of accountability and ultimately some common regional measures. The intent is to ultimately use these evaluative tools to prepare their annual enforcement reports. It is also their intention to reach out to other regions with the objective of exchanging experiences in this area.

3 FUTURE CHALLENGES

This regional approach to enhancing effective environmental enforcement poses numerous challenges. In an era of diminishing resources available for environmental protection, many agencies may be hard pressed to continue support to international cooperation where their own domestic programs are stretched. However experience has shown that the regional networks can assist by joint funding and shared expertise for training and exploration of alternative approaches. The Parties face the ongoing challenge of finding common ground for cooperative action while still respecting individual domestic policies and priorities. The successes to date are evidence of the commitment by the agencies to pursue a cooperative approach. The financial and administrative support from CEC has helped in at least maintaining communication channels and support for priority initiatives.

In addition to their commitment to continue participation in the regional initiatives outlined above, the EWG and NAWEG are committed to expanding their networks to include other related agencies, inclusive of state and provincial levels. The challenge will be to continue current programs while opening the door to other priorities of these additional agencies. In addition, with the signing of additional regional agreements, pressure is mounting to establish similar cooperative arrangements with other bordering nations, including in Central and South America and countries of the Circumpolar region.⁴³

Finally, the commitment under the NAAEC to transparency and public participation in environmental enforcement has resulted in the additional need to involve the North American public in the regional initiatives. The CEC Joint Public Advisory Committee and the National Advisory Committees have requested greater opportunity for involvement in the CEC Enforcement Program. The NAWEG has made some efforts to involve interested NGOs in their regional dialogues. As previously mentioned, representatives of regulated industry and the public participated in the regional dialogue on indicators of effective enforcement. The challenge

for the future will be to provide meaningful opportunities for involvement in policy dialogue while respecting the necessity for some level of confidentiality in the exchanges among enforcement agencies.

ENDNOTES

1. The opinions expressed are those of the author and do not necessarily reflect the views of the Commission for Environmental Cooperation (CEC) or the Parties.
2. 8 September 1993, Canada- Mexico -United States, 32 I.L.M. 1480. See also Federal Implementation of the North American Agreement on Environmental Cooperation, Executive Order 12915 U.S.C.C.A.N.
3. Ibid, Part Three.
4. Ibid., Section C.
5. Ibid, Section B.
6. Numerous books and articles may be referenced for a perspective on the underlying reasons for the agreement. See for example John J. Audley, *Green Politics and Global Trade: NAFTA and the Future of Environmental Politics*(Georgetown University Press, Washington D.C. 1997; Pierre Marc Johnson and Andre Beaulieu, *The Environment and NAFTA: Understanding and Implementing the New Continental Law*(Island Press, Washington D.C., 1996); Daniel Magraw ed. *NAFTA & the Environment: Substance and Process*(American Bar Association, 1995).
7. Supra n. 1, Preamble
8. North American Free Trade Agreement, 8 December 1992, Canada-Mexico- United States, 32 I.L.M. 289;See also North American Free Trade Agreement Implementation Act, S.C. 1993, c.44: North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057.
9. NAAEC, article 3.
10. Ibid, article 5.
11. Ibid, Part Five.
12. NAAEC article 10(6) establishes the process for interaction between the Council and the NAFTA Commission. Part V establish a series of gradated dispute resolution processes and penalties regarding Party to Party disputes on allegations of persistent pattern of non enforcement.
13. Article 10(6)(a).
14. Article 10(6)(b).
15. Article 37.
16. Article 5(1); 6.
17. Articles 5(2),(3); 7.
18. Article 12(1), (2)(c).

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19. Commission for Environmental Cooperation, 1995 and 1996 Annual Report.
 20. 1996 Annual Report, Commission for Environmental Cooperation, Montreal, Annex : Enforcement Report.
 21. Article 20
 22. Article 10(5).
 23. CEC Council Resolution # 96-06
 24. CEC Council Resolution # 97-05 on Further Cooperation Regarding Environmental Management Systems and Compliance. The report tabled with the Council in June 1998 is available from the CEC.
 25. Article 15.
 26. Part Five.
 27. NAAEC, Section B.
 28. For example the 1996 Dialogue on Trends in Environmental Law in North America and background papers of which are published; the CEC report on North American Law, Policy and Practice related to Public Access to Environmental Information (due for release in 1997), and the CEC environmental law data base which can be accessed through the CEC homepage.
 29. Article 12.
 30. Article 13. To date the Secretariat has initiated three reports, two of which have been publicly released including "CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir(1994-95) ", October 1995, Montreal; "Continental Pollutant Pathways: An Agenda for Cooperation to address Long Range Transport of Air Pollution in North America," June 1997, Montreal and a third in preparation examining alleged threats to the ground water regime in Southern Arizona and associated potential detrimental effects to a Council designated Important Bird Area(IBA).
 31. The reports are available from the CEC.
 32. Articles 14, 15.
 33. The record of submissions and responses can be accessed on the public record on the CEC homepage <http://www.cec.org>.
 34. Article 16. The JPAC was appointed in 1994 and has continued to play an active role.
 35. Proceedings of these consultations and back ground reports are available on the CEC Homepage.
 36. Article 6.
 37. Articles 14, 15.
 38. Article 4.
 39. Article 12.

40. The NAWEG have also been seeking support for establishment of a similar but more global network of wildlife enforcement officials under the CITES. A global network has been established for environmental enforcement agencies (INECE).
41. The study is available from the CEC.
42. The report, which documents findings to date and presents an agenda for further joint action, is available from the CEC.
43. For example the OAS in May 1998 sponsored a meeting to explore the establishment of a hemispheric network of officials and experts in environmental law and enforcement, in response to a commitment made by the governments of the Americas at the Bolivia Summit on Sustainable Development. Canada is in the process of implementing law and enforcement programs pursuant to its cooperative environmental agreement with Chile. Similar discussions have been occurring amongst the Arctic nations.