

CITIZEN ENFORCEMENT:
TOOLS FOR EFFECTIVE PARTICIPATION

*Capacity Building Support Document
for Environmental Compliance and
Enforcement Programs*

**Fifth International Conference on Environmental Compliance and
Enforcement**

**November 16 - 20, 1998
Monterey, California, U.S.A.**

Preface

This document, *Citizen Enforcement: Tools for Effective Participation*, was prepared as one of eight Environmental Compliance and Enforcement Capacity Building Technical Resource Documents that developed to support the International Conferences on Environmental Compliance and Enforcement and ongoing exchange under the International Network for Environmental Compliance and Enforcement. Additional country examples and tools will be added based upon comments received during and following use at the Fifth International Conference in Monterey, California, November 16-20, 1998. These documents were developed as resource documents to be used by government officials and others who have responsibility for developing and/or enhancing environmental compliance and enforcement programs. The Resource Documents include:

- Financing Environmental Permit, Compliance and Enforcement Programs,
- Source Self-Monitoring, Reporting, and Recordkeeping Requirements: an International Comparison
- Multimedia Inspection Protocols,
- Communications Strategies for Environmental Enforcement Programs, and
- Transboundary Trade in Potentially Hazardous (Waste, Pesticides and Ozone depleting) Substances.
- International Inspector Training Compendium, Course and Program Comparison
- Country Progress/Self Assessment Reports on Environmental Compliance and Enforcement
- Citizen Enforcement: Tools for Effective Participation

Consistent with the goals of the Executive Planning Committees for the Fourth and Fifth International Conferences to build capacity internationally for environmental compliance and enforcement, this document addresses

The information presented can be used by government officials to help design or enhance their own environmental enforcement programs with the objective of achieving a higher level of compliance.

Citizen Enforcement: Tools for Effective Participation, and the other documents listed above are available on the International Network for Environmental Compliance and Enforcement's (INECE) Internet site: <http://www.inece.org>. They also are available from the INECE Secretariat at the addresses below. Finally, the INECE Secretariat seeks your comments as to whether these documents serve their intended purpose and how they might be improved. Please send comments in writing to the INECE Secretariat in care of Ms. Wasserman or Mr. Gerardu at the following addresses:

Ms. Cheryl Wasserman
Associate Director for Policy Analysis
Office of Federal Activities
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
401 M Street MC 2251-A
Washington, D.C. 20460
FAX 1-202-564-0070
PHONE 1-202-564-7129
E-MAIL wasserman.cheryl@epa.gov

or

Mr. Jo Gerardu
Head, Strategy, Planning and Control Division
Inspectorate for the Environment
The Netherlands Ministry of Housing, Spatial Planning and the Environment
IPC 680
P.O. Box 30945
2500 GX Den Haag
The Netherlands
FAX 1-31-70-339-1300
PHONE 1-31-70-339-2536.
E-MAIL gerardu@IMH-HI.dgm.minvrom.nl

Acknowledgments

This document is part of a series of capacity building support documents for environmental compliance and enforcement prepared for the International Conferences on Environmental Compliance and Enforcement. This document on the citizen role in environmental compliance and enforcement was compiled for the Fifth International Conference on Environmental Compliance and Enforcement, November 16 - 20, 1998, Monterey, California, by the International Network on Environmental Compliance and Enforcement partnership.

Citizen Enforcement: Tools for Effective Participation, capacity building support document was prepared by the Environmental Law Institute under United States Environmental Protection Agency Cooperative Agreement No. CR-822795-01. ELI staff who contributed to the report include Susan Casey-Lefkowitz, Suellen Keiner, and Jill van Berg. ELI would like to thank those who have contributed to the collections of materials on the role of citizens in environmental compliance and enforcement for prior conferences, such as Professor Michael Axline, University of Oregon and Joel Reynolds, Senior Attorney, Natural Resources Defense Council.

ELI also appreciates the work of those who contributed papers on this topic to the International Conferences on Environmental Compliance and Enforcement, including participants from Australia, Bangladesh, Belgium, Colombia, India, Kenya, Malawi, Nepal, the Netherlands, the Philippines, Poland, Russia, Tanzania, Ukraine, and the United States. References to these papers can be found in Appendix I.

Although the information in this document has been funded by the United States Environmental Protection Agency, it may not necessarily reflect the views of the Agency and no official endorsement should be inferred.

Table of Contents

Preface	i
Acknowledgments	iii
1 Introduction	1
2 Setting the Stage for Effective Citizen Participation	3
2.1 Recognition of Environmental Rights	3
2.2 Clear Environmental Standards	4
2.3 Access to Environmental Information	4
2.4 Access to Justice and “Standing”	5
2.5 Independent and Well-Informed Judiciary	6
3 Citizen Role in Domestic Environmental Compliance and Enforcement	7
3.1 Monitoring Compliance	7
3.2 Public Complaint Processes	8
3.3 Citizen Enforcement Litigation	9
3.4 Settlement of Enforcement Actions	11
3.5 Compliance Negotiations and Settlements	12
4. Citizen Role in International Environmental Compliance and Enforcement	14
4.1 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters	14
4.2 North American Citizen Submissions on Environmental Enforcement Matters	16
4.3 World Bank Inspection Panel	17
Appendix I: International Conference Proceedings References	
Appendix II: Selected Resources	
Appendix III: 1998 Convention on Access to Environmental Information, Public Participation and Access to Justice in Environmental Matters	
Appendix IV: Sample Right-to-Know Provision	
Appendix V: Sample Citizen Enforcement Suit Provision	
Appendix VI: Good Neighbor Agreement Model	
Appendix VII: Sample Intent to Sue Letters and Legal Pleadings in Citizen Enforcement Litigation	

1. Introduction

1.1 Tools for Effective Participation

This document, *Citizen Enforcement: Tools for Effective Participation*, is part of a series of capacity building support documents prepared for the International Conferences on Environmental Compliance and Enforcement. It was prepared for the Fifth International Conference to be held in Monterey, California, U.S.A., November 16-20, 1998. This series is for use as a resource by government officials and citizen enforcers.

Citizen Enforcement: Tools for Effective Participation pulls together in one document experiences and understandings of the various ways in which citizens around the world can be involved in environmental compliance and enforcement. The document relies on the efforts of government and citizen enforcers, primarily as documented in International Conference proceedings and workshop reports.

The role of citizens in environmental compliance and enforcement is fairly new in most countries. Historically, public participation has not includes clear mechanisms for citizen involvement in programs and actions to achieve compliance with and enforce environmental law. Perhaps the most well-known mechanism is citizens going to court to enforce the law. However, there are many other opportunities for citizens to supplement governmental efforts. For example, in some countries citizens contribute to monitoring or inspections. Where a public complaint process exists, citizens are an important source of information concerning potential violations. Citizens have much to add to the negotiation and settlement process of environmental compliance assurance or enforcement actions. Finally, there are a growing number of international mechanisms for citizen participation in enforcement, as demonstrated by the Commission on Environmental Cooperation's citizen submission mechanism, the World Bank Inspection Panel, and the new Convention on Access to Environmental Information, Public Participation and Access to Justice in Environmental Matters.

This document gives an overview of how citizens can and do participate in domestic environmental compliance and enforcement efforts, as well as how governments can facilitate this participation. It also looks at several international mechanisms for citizen participation in environmental enforcement, as well as the growing role for international institutions in facilitating citizen participation in enforcement.

1.2 Why Facilitate Citizen Enforcement?

Drawing on the resources of citizens can enrich and strengthen the environmental enforcement process in several ways. Public participation strengthens governmental authority; improves environmental decision-making; encourages sound business practices for sustainable development; and strengthens civil society. Participation and authority are two sides of the same coin. The government that encourages broad public participation is capable of mobilizing effective popular support of its policies. Its authority is legitimized. Citizens want the state to govern effectively and realize that at some point implementation demands authority.

Yet tension sometimes arises between the government and the governed. The government may fear that citizen involvement in environmental enforcement will disrupt its own enforcement efforts and reduce its flexibility to tailor enforcement decisions to particular circumstances. Government enforcers may also believe that if enforcement actions in the courts are mounted on a piecemeal basis, rather than as part of a coordinated strategy, poor judicial precedents may be set that could hinder further enforcement efforts. Consequently, government agencies sometimes decline to support, or may even resist, private enforcement initiatives.

Citizens, on the other hand, often suspect government agencies of not properly fulfilling their enforcement responsibilities. Citizens may view government employees as overly susceptible to the influence of the business interests they regulate. Or they may attribute government inaction to bureaucratic inertia. Either way, agency enforcers often are seen as overlooking or impeding environmental protection goals.

If properly channeled, this apparent divergence in interests between government and citizens can result in improved environmental enforcement. The government's desire to prevent citizen action it views as disruptive can encourage agencies to take their own regulatory or enforcement steps. The public's suspicion that government may not vigorously implement certain laws may prompt the legislature to grant citizens a statutory right to bring a lawsuit requiring the government to perform its statutory duties. And in instances when the government insists on inaction, citizen action can replace government enforcement. Not only may compliance be achieved, but the government can be required to account publicly for its own inaction.

When the interests of the government and the citizens are similar -- as is often the case -- individuals can fill gaps in government enforcement caused by resource constraints. The sheer size of the citizenry, for example, enables individual citizens to monitor compliance throughout the nation and identify violations that an understaffed investigative agency might miss. An enlightened government agency can also use citizen volunteers to implement a comprehensive enforcement strategy. This could both help the government meet its enforcement objectives and avoid the potential conflicts that may result from piecemeal enforcement efforts.

Finally, public involvement in enforcement is a logical next step for democratic political systems that have encouraged public participation in the creation of environmental statutes and regulations. Allowing citizens to have a concrete role in implementing the regime they helped to design strengthens public support for and awareness of environmental goals. If citizens are denied a role in enforcement, or if they are not educated about and encouraged to assume a role, even the most sophisticated system of environmental protection laws may exist only on paper. Developing and nurturing a role for the citizens in enforcement efforts could provide the missing ingredient necessary to make these countries' environmental protection goals a reality.

2. Setting the Stage for Effective Citizen Participation in Environmental Compliance and Enforcement

Effective public participation requires more than a willing citizenry. In countries where citizen involvement in enforcement is fairly common, and in countries where it is just beginning, there are several fundamental regulatory and institutional elements that are necessary for effective citizen participation. These prerequisites include recognition of environmental rights and a citizen cause of action, clear environmental standards, access to information, standing, and an independent and well-informed judiciary. Where even one of these elements is missing, citizens find it very difficult to participate in the environmental enforcement process. Many countries have developed creative solutions to meet one or more of these prerequisites, but few countries meet enough of them to allow for effective citizen participation in enforcement.

2.1 Recognition of Environmental Rights

Citizen participation in the environmental enforcement process is usually built around the recognition of certain rights beyond personal property rights. In many countries, citizen participation in environmental enforcement is grounded in the recognition of a right to a clean environment. When granted this right in provisions of law, citizens have a platform on which to stand in both administrative proceedings and court cases.

Many countries' constitutions expressly establish environmental rights and assign the state responsibility for protecting those rights. For

“The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.”
Article 2, Section 16, Constitution of the Republic of the Philippines (1986)

example, the Chilean constitution guarantees all persons the right to live in an environment free from contamination, and assigns the state the duty to protect this right and to preserve nature. Similarly, in the Philippines, the constitution instructs the state to protect and advance environmental rights.

Other countries have more general constitutional provisions that have been determined by courts to encompass environmental rights. For example, in Argentina, courts have used *amparo*, a constitutional guarantee that can be loosely translated as “protection,” to defend individual or collective environmental rights derived from statutes, international treaties, and the constitution itself. In India, the Supreme Court has extended the constitutionally guaranteed right to life to include the right to a clean and hygienic environment and has held that a person genuinely interested in the protection of environment on behalf of the society or community may appeal to the Supreme Court of India for the preservation of this fundamental right.

2.2 Clear Environmental Standards

Clear permitted emission levels and clear standards of conduct to which the behavior of potential violators can be compared are important pre-requisites for effective citizen participation in enforcement efforts. When a citizen is provided with specific emission levels, deadlines for compliance, or other enforceable substantive requirements in statutes, regulations, or permits, it is easier to identify and prove violations. A law that simply prohibits “harmful” or “dangerous” pollution would be much more difficult to enforce consistently, and would require citizen enforcers to tackle complicated questions of science and policy. With clear standards of conduct, the only question at issue in most enforcement actions should be whether the defendant violated the legal standard, order, or permit.

In the United States, the implementing regulations for most major environmental statutes set quantified pollution limits that entities such as states and municipalities must meet within specified time frames. To achieve area-wide compliance levels, regulatory agencies with jurisdiction over environmental matters issue industrial sources individual permits that establish specific emission and effluent limits for each facility. Historically, these standards have enabled citizen enforcers to hold violators accountable for their actions.

“No person shall be deprived of his life or personal liberty except according to procedure established by law.” *Constitution of India, Act 1985, Article 21*

“The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.” *Constitution of India, Act 1985, Article 32*

2.3 Access to Environmental Information

To effectively participate in environmental enforcement, citizens must be able to access information held by the government, such as monitoring data, government reports, industry records, and other relevant sources of information that document the status of administrative proceedings, government decisions, environmental quality, emissions, and releases.

Some countries have laws that specifically guarantee the right to access environmental information. This right is usually subject to certain limitations such as exemptions for industry trade secrets and matters of national security. For example, Member States of the European Union are implementing access to environmental information legislation pursuant to EU Directive 90/313/EEC, which calls for public access to information on the environment held by public authorities. The Directive also requires an appeal process for denials of access to information.

“Save as provided in this Article, Member States shall ensure that public authorities are required to make available information relating to the environment to any natural or legal person at his request and without his having to prove an interest.” *European Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, Article 3(1)*

Other countries have general provisions of law providing for access to government-held information, which can often be extended to include environmental information. For example, the Canadian Access to Information Act guarantees citizens the right to information held by the federal government, including environmental information. Like the EU Directive, this Act provides for an appeal process for denied requests.

For these and similar laws to work well, it is important that there be clear procedures for filing information requests. It must be made clear who is responsible for filling requests and what time limits govern their activity. There must also be a clearly defined process for appealing denied requests to ensure that citizens are not wrongly refused access to information. Lastly, for citizens to be able to use the process effectively, it is important that information be available to the public at low, or no, cost.

2.4 Access to Justice and “Standing”

To seek judicial resolution of alleged violations, citizens must have access to the appeals process, including standing to appear in court. Standing for citizen participation is often linked to a personal stake in the outcome of the case. The citizen may have to show that he or she has suffered or is threatened by some kind of harm, and often must have been a party to prior proceedings. How broadly the concept of “harm” is defined usually gives the scope of standing, both in prior proceedings and in appeals.

In the United States, federal environmental statutes grant citizens broad access to both administration proceedings and appeals processes. In addition, most environmental laws contain specific citizen enforcement suit provisions, granting standing to any person. However, when citizen suits are not specifically authorized, courts have great power to limit standing to those representing personal interests rather than the public interest. India, on the other hand, has a tradition of citizens having

access to justice on behalf of the public interest. Courts are usually likely to grant standing in these cases.

Case Holding: It is possible for environmental organizations to use civil proceedings to protect the environment. It is not necessary to prove that a specific individual interest has been harmed. The fact alone that environmental organizations tried to protect the interests of the environment was sufficient. *De Nieuwe Meer Case, Supreme Court of the Netherlands, 17 June 1986*

Even where law seems to grant citizens standing to become party to a proceeding, this access can be controversial when requested by environmental groups. For example, in Slovakia, the Supreme Court denied standing to a forest protection group to become party to an administrative proceeding concerning their local forest. However, in a few countries, environmental organizations are expressly granted standing to represent the “public interest” through legal proceedings. For example, in the

Netherlands, the Environmental Protection Act stipulates that the interest for which private organizations were established is regarded as sufficient interest in an environmental case. In Indonesia, in a 1989 case, the Jakarta District Court granted an environmental NGO, the Indonesian Forum for the Environment, legal standing to sue five national government agencies and the pulp-and-paper industry to enforce environmental laws.

In some countries, standing in an environmental suit hinges on prior involvement with the case during administrative proceedings. For example, in Hungary, a local environmental association was granted standing on appeal because it had proven interest in the case by participating in previous administrative proceedings.

2.5 Independent and Well-Informed Judiciary

When administrative avenues for citizen enforcement fail, the judicial system is the final resource for appealing environmental conflicts. For this reason, it is imperative that the judiciary be established and operated in manner that facilitates redress of environmental harms.

For access to justice in environmental matters to be effective, it is critical to have a judiciary that is independent of political pressures. If the judiciary is closely associated with government agencies, citizen enforcement actions against those agencies may be impracticable. Citizen suits against industry or the government also may be disadvantaged if judges rely on political support for reappointment or reelection.

“It is the Courts and more importantly the Judges who man these Courts who are required to give body and soul to these vibrant concepts [of environmental rights].” *Justice M. F. Saldanha, High Court of Karnataka, Bangalore, India, August 1998*

Brazil's judicial system is designed specifically to free the judiciary of political allegiances. Instead of election or appointment, judges earn their positions based on their performance on a standard examination. Once in office, they can never be removed. In India, being independent and well-respected by society has allowed the judiciary to confront difficult environmental problems and require individuals, government agencies, and industry to comply with the law and accept the costs associated with pollution control.

For the judiciary to be truly protective of environmental rights and the public interest, it is also important that judges be educated about environmental issues and related legal topics. Oftentimes, there are new bodies of law requiring understanding of scientific principles, the concept of risk and future harm, and the idea of public interest litigation. Continuing legal education is, therefore, critical to the ultimate usefulness of the judicial system in resolving environmental disputes.

3. Citizen Role in Domestic Environmental Compliance and Enforcement

3.1 Compliance Assurance Monitoring

Citizens can contribute to enforcement efforts by tracking industrial environmental performance through independently-compiled emissions data or compliance reports produced by regulated entities. Citizen monitoring can help government agencies identify violations and is particularly important when resources for government monitoring are scarce or insufficient.

In some countries, governmental institutions make use of citizen monitoring that may already be taking place independent of any authorizing legal provisions. For example, in the United States, a number of citizen organizations teach citizens to walk streams, identifying locations of pollutant emissions and observing the effects of those emissions on water quality or indicator species. The citizens then report information to a national clearinghouse, which notifies state and federal agencies. Sometimes state agencies help fund training and reporting programs for citizen groups.

Formal cooperative partnerships have also been established between citizens and the government for monitoring. For example, in the United States in 1992, the Minnesota chapter of the National Audubon Society (an NGO), the U.S. Environmental Protection Agency (U.S. EPA), and the U.S. Army Corps of Engineers (Corps) initiated a project to monitor wetlands mitigation in the state. The project, funded by U.S. EPA, utilized Audubon-trained volunteers to monitor mitigated wetlands sites and to report their findings to U.S. EPA and the Corps. The Corps used the data to evaluate the success of new wetlands mitigation programs under the federal Clean Water Act.

Another formal vehicle for public participation in monitoring is the establishment of coordination agreements between the government and public organizations. For example, in the Philippines, the emergence of multi-partite monitoring has enabled local community residents, NGOs, and industrial project proponents to join representatives from the Department of Environment and Natural

Resources (DENR) to undertake post-Environmental Impact Analysis (EIA) compliance monitoring. The DENR is moving to institutionalize this system of multi-partite team monitoring by creating, in each regional office, a Regional Community Advisory and Monitoring Committee whose membership will include NGOs and the private sector. The committees are expected to be involved in all phases of EIA, including compliance monitoring.

An increasingly useful monitoring mechanism for citizen enforcement of industrial environmental standards is the use of pollutant release and transfer registers (PRTRs). PRTRs enable citizens to monitor industrial environmental performance by providing detailed facility-specific data on types, locations, and amounts of hazardous substances released on-site and transferred off-site. In several countries, including Canada and the United States, certain corporations are required by law to compile and submit this data to the federal government, which then makes the information publicly accessible. Equipped with detailed information on facility-specific emissions, citizens can track compliance, work directly with corporations to encourage compliance, and help governments identify violations.

The specific type of information reported in PRTRs and the range of facilities covered vary from country to country. Key elements that define the scope of PRTR include: the types of facilities required to report; the thresholds for staff size and chemical use above which a facility must report; and the types of pollutants covered and how their use is quantified.

3.2 Environmental Inspections

Throughout the world, inspections are a key mechanism for enforcement of environmental laws. Typically, government agencies with jurisdiction over environmental regulations dispatch inspectors to visit companies to see first-hand whether a facility is in compliance with environmental standards and/or required practices. Failed inspections often provide a basis for further agency efforts to bring facilities into compliance.

Materials Accounting

Some states and municipalities in the United States are now moving beyond basic PRTRs to include “materials accounting” in their registries. Materials accounting requires facilities to report toxic substances handled on-site, not just those released or transferred off-site. For example, Massachusetts’ Toxic Use Reduction Act (TURA) requires facilities to report quantities of hazardous substances produced, processed or used on-site, generated as byproducts prior to handling, transfer, treatment or release, and shipped off-site. Reports must also include information necessary to identify the facility, the production unit, the user of toxic materials, and the toxic or hazardous substances themselves. This system allows citizens to examine more complete information on a facility’s chemical activity and to track specific substances from their entrance into the plant – through shipment or on-site production – through their departure, checking to see how much is discharged as pollution.

Some countries allow citizens to participate in compliance inspections conducted by government officials. Usually, the citizen must have been involved in the complaint process prior to the inspection. For example, water quality legislation in Argentina allows private parties who have filed a complaint about a facility to participate in any inspection of the facility during the investigation.

In some countries, government agencies are allowed to contract with citizen groups or other associations to enlist their assistance in inspection efforts. For example, under Estonia's Nature Protection Act, citizens can be deputized as "public inspectors" to monitor compliance with laws, regulations, and permits concerning hunting, fishing, and forestry. They are permitted to write protocols about violations of nature protection rules, but they cannot take payment. In Poland, a similar institution exists in the form of the Nature Protection Guard, an organization affiliated with conservation associations that monitors compliance with nature protection laws. Authorized members of the guard have the right to enforce nature conservation laws directly through a procedure of ticketing violators and imposing small fines. This model has yet to be transferred to the pollution control area through regulation, but there is a legal framework, under the Polish Environmental protection Act of 1980, for deputizing trade unions and other associations as inspectors.

Sample Legal Provision for Citizen Participation in Inspections

"When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection."
United States Surface Mining Control and Reclamation Act, 30 U.S.C. §1271(a)(1)

3.3 Public Complaint Processes

In many countries, public complaint processes are integral to facilitating citizen participation in administrative enforcement efforts. Typically, these processes establish a mechanism for citizens to submit complaints to the government concerning activities that are causing environmental harm or ecological imbalance. The government is then required to address complaints and respond in a timely manner. Public complaints can be very useful in drawing government attention to enforcement problems that may otherwise go unrecognized or escape proper redress.

Some countries have an independent complaint committee or designated staff member (ombudsman) at the national or local levels established to handle citizen complaints. These institutions are usually funded by, but independent of, the government and are competent to deal with complaints on the basis of statutory rules. Oftentimes, the laws creating the ombudsman position regulate what kinds of complaints may be reviewed.

Poland, for example, created a position called the Commissioner for Civil Rights Protection. The Commissioner's role is to receive and manage complaints about infringements of citizens' rights and freedoms determined by the Constitution and other provisions of law. The position is not specific to environmental law, but environmental issues fall under the Commissioner's jurisdiction and historically have been the focus of some of his activity. The Commissioner does not have authority to rule on administrative matters, but he can recommend or appeal decisions, suggest legislative initiatives or procedural amendments, and pursue solutions to specific violations to promote compliance with the law.

Citizens may also be able to use informal complaint mechanisms or petitions to draw government attention to enforcement issues. In Mexico, for example, the Federal Ecology Law and parallel state laws enable any person to file a complaint with the appropriate government agency regarding activities that cause environmental harm or ecological imbalance. The agency is required to investigate the matter and provide a prompt response.

Throughout Mexico, this process is the principal vehicle for public participation in administrative enforcement matters, and seems to be an important mechanism for focusing government attention on enforcement problems. In some states, the process has been the principal driving force behind enforcement efforts. One state has established a telephone hotline to receive complaints, and another set up a toll free number and a green mailbox to facilitate the complaint process.

Mexico's Citizen Complaint Process

The Mexican general environmental law and its predecessors establish a system for public complaints to be filed for any incident, act, or omission that falls within the jurisdiction of the Federal Government and produces an ecological imbalance or environmental damage, or which violates any environmental law provisions. The Mexican government has the obligation to receive, investigate, and respond to the administrative complaints and claims of citizens concerning failure to comply with environmental law. The government has specific time limits to inform the complainant of the procedures being undertaken, and to inform him or her of the results concerning verification of the alleged violations and the response measures being taken.

3.4 Citizen Enforcement Litigation

Typically, it is the government's role to enforce environmental laws in court. However, in many countries citizens can be given the right to assume or share this function through citizen suit provisions.

Citizen enforcement suits generally take one of two forms. Members of the public or environmental associations can sue industrial facilities directly for violating applicable laws or rights. Alternatively, members of the public can sue the government for failure to perform non-discretionary enforcement duties, with the aim of obtaining a court order requiring the appropriate agency to enforce the law.

Types of Remedies in Citizen Suits

- **Lawsuits to Halt Violations:** This form of a remedy is often called an injunction. The court issues an order barring or limiting future environmentally harmful activity.
- **Civil Penalties:** The imposition of monetary penalties is often reserved for government enforcement agencies. In some countries, citizen enforcement suits result in civil penalties as well.
- **Lawsuits to Influence Government Action:** In some countries, citizen enforcement suits can be brought to force a government agency to initiate an action the legislature has already mandated by statute.

In either case, citizen enforcement suits are designed to protect the public interest by allowing citizens to help ensure that environmental laws and rights are properly upheld. To achieve this purpose, countries throughout the world have established a variety of mechanisms for authorizing citizen enforcement suits. The following are some common models that have enabled citizens to utilize their judicial systems to enhance environmental enforcement.

Some countries grant citizens access to courts for the express purpose of environmental enforcement and institute specific provisions in their environmental statutes authorizing citizen suits for violations of those laws. For example, in the United States, all major federal environmental statutes grant citizens the right to bring suit against "any person," with person defined broadly to include individuals, corporations, associations, and governments.

In some countries, the right to enforce environmental laws in court is derived from general provisions of the civil code. For example, in Hungary, the civil code allows individuals to sue others for violating an obligation not to disturb others needlessly, "especially neighbors." While this provision is not specific to environmental law, it can be used by citizens to address environmental violations. In the case of pollution, the "neighborhood" encompassed is not restricted to property immediately adjoining the site of polluting activity, but instead includes anyone affected by the pollution.

Some countries allow citizens to go to court to enforce environmental laws in the public interest. For example, in India, citizens are granted broad access to bring public interest law suits to defend their human and social rights. Litigants need not prove a violation of law, as in countries where access to courts is established in environmental statutes, but they must demonstrate a violation of natural rights. Because these suits are filed in the public interest, citizens must base their claims on damages to society – not solely to themselves.

Many countries, particularly those in Latin America, authorize citizens or citizen organizations to bring popular actions, similar to class action law suits, to enforce environmental laws. For example, in Colombia, citizen groups can bring suit against any public or private entity causing threat of harm.

Similarly, Brazil allows citizens to file popular actions against public administrative acts that may be injurious to the public patrimony of the federal, state, or local government. However, in Brazil, only individual citizens may file popular actions; legal entities such as associations, corporations, or the state may not. Nevertheless, popular actions only serve to protect community rights, not the individual rights of the plaintiff. In Brazil, popular actions may be used to remedy administrative nonfeasance as well as misfeasance.

Allocating the Expenses of Litigation

Granting citizens the ability to bring enforcement suits does not necessarily mean that citizens will be able to do this in practice. Citizens also need to consider the costs of lawyers, court fees, and expert witnesses. In some countries, citizen suit provisions in environmental laws contain fee-shifting provisions that allow citizen enforcers who prevail on significant issues to recover the costs of litigation, including reasonable fees for attorneys and experts. Citizen enforcers are not responsible for the fees of the opposing side if the citizens do not prevail.

3.5 Compliance Negotiations and Settlements

It is common in the United States for environmental cases, including citizen enforcement suits, to be settled outside the courtroom through negotiations. To ensure that settlements are enforceable, they are often crafted as court negotiated consent decrees, with interim deadlines for specific actions and penalties. In many cases, there is a role for citizens in this process. In addition to citizen suit settlements, citizens who are parties to, or have an interest in, a government enforcement suit often may participate in negotiating the terms of the consent decrees.

In several citizen suit agreements under the U.S. Clean Water Act, the alleged violators have avoided civil penalties by instead paying a sum of money to an environmentally beneficial project. The U.S. government has looked upon settlements involving third-party payments with some suspicion, and carefully examines consent decrees containing payments to environmental organizations. However, courts have upheld consent decrees containing such payments. For example, a consent decree negotiated in the course of a citizen enforcement suit by the National Environmental Law Center

involved the discharge of pollutants by an oil company into the San Francisco Bay. In addition to obtaining the rights to future monitoring data, the Law Center negotiated for the oil company's two million dollars in punitive damages to be distributed among nearly two dozen regional environmental organizations for use in specific education and restoration projects within the Bay's watershed.

An emerging mechanism in the United States for achieving citizen-industry partnerships during the settlement of an enforcement case is the use of Good Neighbor Agreements. Under Good Neighbor Agreements, companies enter into negotiated contracts with workers, local community members and associations to establish a framework for public assessment of industrial environmental conditions. Common elements of Good Neighbor Agreements include provisions for public disclosure of relevant company information and stakeholder audits, whereby citizens engage in direct, on-site evaluations of facilities to identify changes that may be needed to ensure environmental compliance, safety, and sustainability. Good Neighbor Agreements can also provide a forum for addressing community recommendations for improvements in environmental protocol.

Each Good Neighbor Agreement is unique, because the parties, conditions, and issues vary significantly among cases. However, the Rhone-Poulenc Community Audit Agreement (RPCAA) in Texas serves as a good example for illustrating the fundamental elements of a typical agreement. The RPCAA provided for a safety and environmental audit to be financed by Rhone-Poulenc and integrated into the company's hazardous waste facility permit.

Under the agreement, the auditor was to be approved and accompanied by a committee comprised of community group members and facility workers. Citizens were also given permission to conduct additional inspections by appointment. The scope of the audit included regulatory compliance, safety training, accident prevention, emergency response, waste analysis and information systems, monitoring programs, and waste minimization practices. The agreement also provided for public disclosure of company documents including: a hazard assessment and risk analysis; lists of accidents, upsets, and corrective actions; and waste minimization and reduction plans. In the

Common Elements of Citizen-Industry Agreements

Commitments to Community and Workforce

- Pollution Prevention
- Remedial Action
- Accident Prevention and Preparedness
- Local Hiring
- Infrastructure Commitments
- Philanthropic Policy Reforms

Rights and Resources for Neighbor and Workers

- Community-selected Oversight Bodies
- Right to Inspect
- Funding of Independent Experts
- Right-to-Know Provisions
- Notifications and Studies
- Whistleblower Protection
- Enforcement of Agreement

(from Sanford Lewis, The Good Neighbor Project for Sustainable Industries, 1996)

agreement, Rhone-Poulenc consented to “negotiate in good faith” any recommendations resulting from the audit.

4. Citizen Role in International Environmental Compliance and Enforcement

Because many environmental issues and problems transcend national borders and fall outside the traditional realm of government jurisdiction, international and transboundary enforcement mechanisms are becoming an increasingly important avenue for citizen participation in environmental enforcement matters. Fora for international and transboundary citizen enforcement efforts include domestic and international court systems, regional and multilateral institutions, international treaties, and international cooperation. This section looks at three examples of international and transboundary mechanisms that enable citizen participation in environmental enforcement.

The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is the first international legal agreement placing an obligation on Parties to grant access to justice for citizens in the domestic implementation of the Convention. The Commission on Environmental Cooperation provides a model for a regional forum for gathering information following citizen complaints about alleged violations of domestic environmental law. The World Bank is the first multi-lateral institution to set up an information gathering mechanism, again based on citizen complaints to investigate alleged violations of its own internal environmental policies and procedures.

4.1 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* is the fruition of two years of intensive government negotiation in the United Nations Economic Commission for Europe (UNECE). In June 1998, 35 countries and the European Community signed the Convention.

Parties to the Convention are “concerned that the effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”

Preamble, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters

The Convention creates obligations that parties are to implement domestically. The three principles of the draft Convention, broadly stated, are: (1) the public should have access to environmental information, with limited, explicit exceptions; (2) the public should have a right to participate in the environmental decision-making process and have that participation taken into account in the decision-making process; and (3) the public should ultimately have access to an independent and impartial review process, capable of binding public authorities, when the public feels its rights have

been infringed. The Convention is the first time that States have agreed on the content of these principles and established their minimum procedural elements.

Article 9 of the Convention contains the provisions on access to justice. Although the article limits its provisions by affirming that they be carried out in accordance with national law, it still sets out some important principles for domestic access to justice in environmental matters. Article 9 confirms the importance of having an impartial and independent review procedure to enforce a citizen's right to access information and to participate in decision-making under the Convention. The Convention refers to standing for individuals and organizations alike, and promotes a very broad interpretation of what "sufficient interest" would mean for the purposes of granting standing to individuals and organizations under the Convention. Under Article 9, Parties to the Convention have the following obligations, always in accordance with their national law:

- Any person whose request for information was not dealt with in accordance with the Convention shall have access to a review procedure before an independent and impartial body, such as a court.
- Members of the public shall have access to some type of a review procedure to challenge the substantive and procedural legality of any decision subject to the public participation provisions of the Convention.
- Although the Convention leaves what constitutes "sufficient interest" for a member of the public to have standing to national law, it does encourage that this be determined "consistently with the objective of giving the public concerned wide access to justice within the scope of the Convention." Especially non-governmental organizations promoting environmental protection shall be deemed to have a sufficient interest and to have rights capable of being impaired for review under this Article.
- Members of the public shall have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.
- Access to justice procedures shall provide adequate and effective remedies, including injunctive relief, and be fair, equitable, timely and not prohibitively expensive.
- Decisions under Article 9 shall be recorded in writing and should be publicly accessible.
- Parties shall provide information to the public on the review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

4.2 North American Citizen Submissions on Environmental Enforcement

An environmental side agreement to the North American Free Trade Agreement (NAFTA) created several mechanisms for public participation in promoting the enforcement of national environmental laws in the United States, Mexico, and Canada. Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation (NAAEC), any citizen or non-governmental organization can present a submission to the Secretariat of the Commission for Environmental Cooperation (CEC) alleging that a NAFTA country is failing to enforce its environmental laws. The remedy for a submission found to be valid is the development by the CEC of a formal factual record of the case that can be made public. The CEC has guidelines for submissions on enforcement matters under Articles 14 and 15 of NAAEC. As of October 1998, these guidelines were undergoing revision and public comment and expected to be finalized in early 1999.

CEC Citizen Submission Process

Where the Secretariat determines that the Article 14(1) criteria are met, it shall then determine whether the submission merits requesting a response from the Party named in the submission under Article 14(2). In light of any response provided by that Party, the Secretariat may recommend to the Council that a factual record be prepared, in accordance with Article 15. The Council, comprised of the environmental ministers (or their equivalent) of Canada, Mexico and the United States, may then instruct the Secretariat to prepare a factual record on the submission. The final factual record is made publicly available upon a 2/3 vote of the Council.

Since 1995, eighteen submissions have been made to the CEC to develop a factual record on alleged violations of domestic law in Canada, the United States and Mexico. Only one case has gone through the entire process, including the development of a factual record. A coalition of Mexican environmental organizations initiated an inquiry into the Mexican government's failure to enforce applicable domestic laws during the environmental impact assessment phase of a construction project in Cozumel. In January 1996, the groups filed a submission with the CEC alleging the government's failure. One month later, the CEC Secretariat determined that the submission merited requesting a response from the Mexican government. In June 1996, after reviewing the government's response, the Secretariat advised the CEC Council that a factual record was warranted. On the first day of August 1996, the Council unanimously instructed the Secretariat to proceed with developing a factual record. The final factual record was concluded in October 1997 and was released to the public.

4.3 World Bank Inspection Panel

The World Bank is, thus far, the only one of the multilateral development institutions that has created a method for citizen participation in enforcement of internal bank policies and procedures in bank-financed projects. The Bank created an Inspection Panel in 1994 to investigate claims filed by affected parties and to review the Bank's compliance with its own policies and procedures, some of which pertain directly to environmental matters.

Upon receiving a complaint, the Panel conducts an initial review, including a review of the management's response to the claim. The Panel subsequently recommends to the Executive Directors whether a full investigation is warranted. The Executive Directors retain sole power to authorize a full investigation. For investigations that go forward, the panel enjoys broad investigatory powers including access to Bank management and staff. After the investigation, the Panel issues a report with its recommendations to the Bank management and the Executive Directors. Management has six weeks to respond and provide its own recommendations to the Executive Directors, who make all final decisions.

The first major claim before the Panel alleged violations of environmental assessment, resettlement, and other policies in the siting of the Arun III Hydroelectric dam. The Panel had just completed a full investigation into the alleged violations when the Bank president announced in August 1995 that the Bank would no longer support Arun III. The Bank president cited the work of the Inspection Panel as one of the reasons for his decision.

**The World Bank Inspection Panel,
Resolution No. 93-10, No. IDA 93-6**

“The Panel shall receive requests for inspection presented to it by an affected party in the territory of the borrower which is not a single individual (i.e., a community of persons such as an organization, association, society or other grouping of individuals).”

“ The affected party must demonstrate that its rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and /or implementation of a project financed by the Bank (including such situations where the Bank is alleged to have failed in its follow-up on the borrower's obligations under loan agreements with respect to such policies and procedures) provided in all cases that such failure has had, or threatens to have, a material adverse effect.”

Appendix I

International Conference Proceedings References

International Conference on Environmental Enforcement, September 22-25, 1992, Budapest, Hungary

The Role of Citizens in Environmental Enforcement, E. Roberts, J. Dobbins, and M. Bowman (page 531)

Citizens Role in Enforcement: a Spur, a Supplement, and a Substitute, R. Hallo (page 561)

Citizen Participation in U.S. Environmental Enforcement, R. Van Heuvelen and L. Breggin (page 573)

From Public Disclosure to Public Accountability: What Impact Will It Have On Compliance, F. Irwin (page 589)

Disclosure of Environmental Information and Enforcement of Environmental Law in Flanders: The Complementary Role of Governmental Authorities and NGOs, R. de Baere (page 605)

Use of Public Disclosure in Environmental Programs to Enhance Compliance and Change Behavior in the United States, P. Keough (page 611)

Third International Conference on Environmental Enforcement, April 25-28, 1994, Oaxaca, Mexico

Popular Actions and the Defense of the Environment in Colombia, G. Sarmiento (page 261)

Changing Environmental Behavior in the United States Through the Use of Public Disclosure of Information, P.G. Keough (page 285)

Fourth International Conference on Environmental Compliance and Enforcement, April 22-26, 1996, Chiang Mai, Thailand

Fifth International Conference on Environmental Compliance and Enforcement

The Evolving Role of Citizens in Environmental Enforcement, S. Casey-Lefkowitz, W.J. Futrell, J. Austin, S. Bass (page 221)

Summary of Workshop: Public Involvement in Enforcement (page 511)

Environmental Enforcement and Public Advocacy in Ukraine, S. Kravchenko (page 515)

Intergenerational Responsibility in the Philippine Context as a Judicial Argument for Public Action on Deforestation, A. Oposa (page 521)

Role of Public Participation in Enforcement, G. Sarmiento (page 527)

Fifth International Conference on Environmental Compliance and Enforcement, November 16-20, 1998, Monterey, California, U.S.A.

Peoples' Initiatives and Judicial Activism as a Catalyst of Institutional Reform, Saldanha, Michael F. (page 13)

Citizen's Environmental Enforcement in Ukraine, Kravchenko, Svitlana (page 145)

UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe, Jendroska, Jerzy (page 153)

Good Governance and Community Participation as Tools to Make Environmental Enforcement and Compliance Happen, Karanja, Mary N. (page 161)

Experience of Malawi: Public Role in Enforcement, Makawa, Ernest (page 169)

Public Access to Compliance Monitoring and Enforcement Data: A Look at the Sector Facility Indexing Project and Other Agency Initiatives, Stanley, Elaine G. and Teplitzky, Andrew L. (page 179)

Public Influence on the Supervision and Enforcement of Environmental Law in the Netherlands, van Dijk, J. (page 193)

Public Access to Environmental Information - Legal and Practical Problems: A Case Study of Tanzania, Ringia, Deogratias William (page 203)

Fifth International Conference on Environmental Compliance and Enforcement

Citizen Environmental Enforcement in Russia: The First Successful Nation-Wide Case,
Mischenko, Vera and Rosenthal, Erika (page 419)

*Environmental Compliance and Enforcement Through Public Litigation in the Godavari Area in
Nepal,* Belbase, Narayab (page 423)

Civil Enforcement of Environmental Laws in Australia, Johnson, James (page 435)

Public Interest Environmental Litigation: A Tool to Ensure Compliance and Enforcement,
Habib, Ehsanul (page 445)

Appendix II

Selected Resources

Readings

Axline, Michael, *Environmental Citizen Suits* (Butterworth Legal Publishers, 1993)

Babich, Adam, *Citizen Suits: The Teeth in Public Participation*, 25 ELR 10141-51 (Environmental Law Institute 1995)

Bonine, John, Susan Casey-Lefkowitz, Claudia Saladin, Jennifer Gleason, *Country Report on Public Participation: United States of America* (ELI, CIEL, ELAW, 1998)

Brañes, Raúl, *Citizen Participation in the Enforcement of Environmental Legislation: Alternatives Available in Mexico*, Proceedings First North American Conference on Environmental Law, Phase II (FUNDEA, CIELAP, ELI, 1993)

Casey-Lefkowitz, Susan, *A Comparative Look at the Role of Citizens in Environmental Enforcement*, National Environmental Enforcement Journal, Vol. 12 No. 5 (National Association of Attorneys General, June 1997)

Clark, Dana, and Michael Hsu, *A Citizen's Guide to the World Bank Inspection Panel*, Center for International Environmental Law (Washington, D.C., 1997)

Commission for Environmental Cooperation (CEC), *Guidelines for Submissions on Enforcement Matters Under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*

Davis, Shelton H., *Public Involvement in Environmental Decision-Making: Some Reflections on the Western European Experience* (The World Bank, Washington, DC., 1996)

Desai, Bharat, *Enforcement of the Right to Environment Protection Through Public Interest Litigation in India* (Indian Journal of International Law)

Fifth International Conference on Environmental Compliance and Enforcement

Environmental Law Institute, *SLAPPs: A Guide for Community Residents and Environmental Justice Activists* (Washington, D.C., 1997)

Hallo, Ralph, Editor, *Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC* (Stichting Natuur en Milieu, International Environmental Law and Policy Series, Kluwer Law International, 1996)

Kaniaru, Donald, Lal Kurukulasuriya, and Prasantha Dias Abeyegunawardene, *Compendium of Summaries of Judicial Decisions in Environment Related Cases: With Special Reference to Countries in South Asia*, SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy No. 3 (Colombo, Sri Lanka, 1997)

Lewis, Sanford, *Precedents for Corporate-Community Compacts and Good Neighbor Agreements* (The Good Neighbor Project for Sustainable Industries, 1996)

Pop, Cristian, *Access to Environment-Related Information in Romania: A Guide* (Ecoforum. Civic and Environmental Attitude, 1996)

The Regional Environmental Center for Central and Eastern Europe, *Status of Public Participation Practices in Environmental Decision-Making in Central and Eastern Europe: Case Studies of Albania, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, FYR Macedonia, Poland, Romania, Slovak Republic and Slovenia* (Budapest. September 1995)

Regional Environmental Center for Central and Eastern Europe, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in the Newly Independent States* (Szentendre, Hungary, 1998)

Regional Environmental Center for Central and Eastern Europe, *Doors to Democracy: Current Trends and Practices in Public Participation in Environmental Decisionmaking in Central and Eastern Europe* (Szentendre, Hungary, 1998)

Saladin, Claudia, Stephen J. Porter, and David Hunter, *Using Law to Protect the Environment- Case Studies from Around the World* (Center for International Environmental Law, Washington, D.C. 1996)

Santosa, Mas Achmad, *Environmental Law Enforcement and Compliance in Indonesia: Problems and Opportunities*, Indonesia Journal of Environmental Law, Edition I (Indonesian Center for Environmental Law 1996)

Van Eck, Ton, Ralph Hallo, Krisztina Horvath, Joost Rutteman, and Marga Verheiji. Editors, *Dutch Environmental Organisations Go To Court: An Example for Central and East European NGOs* (Milieukontakt Oost Europa, Amsterdam, The Netherlands, 1994)

World Bank, *The Inspection Panel for the International Bank for Reconstruction and Development, International Development Association: Operating Procedures* (World Bank, Washington, D.C., 1994)

Resources Contact Information

Environmental Law Association of Central and Eastern Europe and the Newly Independent States

Garay u. 29-31. I/1

H-1076 Budapest, Hungary

Tel/Fax: (36-1) 322-84-62

Email: CEELAW-L@rec.org

Center for International Environmental Law

1367 Connecticut Ave., N.W., Suite 300

Washington, D.C. 20036

Tel: (1-202) 785-8700

Fax: (1-202) 785-8781

Email: cielus@igc.apc.org

Web site: <http://www.igc.apc.org/ciel>

Fifth International Conference on Environmental Compliance and Enforcement

Commission on Environmental Cooperation
393, rue St. Jacques Ouest, Bureau 200
Montreal, Quebec
Canada H2Y 1N9
Tel: (1-514) 350-4300
Fax: (1-514) 350-4314
Web site: <http://www.cec.org>

Earthjustice Legal Defense Fund
180 Montgomery Street, Suite 1725
San Francisco, CA 94104
Tel: (1-415) 627-6700
Fax: (1-415) 627-6749

Environmental Law Alliance Worldwide
(U.S. Office)
1877 Garden Ave.
Eugene, Oregon 97403
Tel: (1-541) 687-8454
Fax: (1-541) 687-0535
Email: elaw.usoffice@igc.apc.org

Environmental Law Institute
1616 P Street, N.W., Suite 200
Washington, D.C. 20036
Tel: (1-202) 939-3800
Fax: (1-202) 939-3868
Email: eli@eli.org
Website: <http://www.eli.org>

Good Neighbor Project
P.O. Box 79225
Waverly, Massachusetts 02179
Tel: (1-617) 489-3686
Fax: (1-617) 489-2482
Web site: <http://www.enviroweb.org/gnp>

Regional Environmental Center for Central and Eastern Europe
Ady Endre ut 9-11
2000 Szentendre, Hungary
Tel: (36-26) 311-199
Fax: (36-26) 311-294
Email: rec-info@rec.org
Web site: <http://www.rec.org>

Working Group on Community Right-to-Know
218 D Street, S.E.
Washington, D.C. 20003
Tel: (1-202) 544-9586
Fax: (1-202) 546-2461
Web site: <http://rtk.net>

World Bank Inspection Panel
1818 H Street, N.W.
Washington, D.C. 20433
Tel: (1-202) 458-5200
Fax: (1-202) 522-0916