

# **ENFORCEMENT INDICATORS AND CITIZEN SUBMISSIONS ON ENFORCEMENT MATTERS UNDER THE *NORTH AMERICAN AGREEMENT ON ENVIRONMENTAL COOPERATION***

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## **SUMMARY**

In North America, under a side agreement to the North American Free Trade Agreement, members of the public can complain to an international body when they feel that either Canada, Mexico or the United States is failing to effectively enforce one of its environmental laws. The *North American Agreement on Environmental Cooperation* (NAAEC) contains a commitment by the three countries to effectively enforce their environmental laws and lists measures of enforcement effectiveness agreed to by Canada, Mexico and the United States. The NAAEC creates the Commission for Environmental Cooperation (CEC), and it is the Montreal-based Secretariat of the CEC that receives submissions from the public regarding environmental law enforcement. Citizen submissions to the CEC Secretariat are filed in writing with supporting information, and they must meet a list of admissibility criteria to be eligible for review. These submissions are often rich in detail regarding what submitters expect from environmental law enforcement, and why submitters feel those expectations are not being met. This information is relevant to a consideration of enforcement effectiveness, though in some cases, it may be more relevant to an assessment of the government's overall approach to an environmental issue. Under the NAAEC, the CEC Council can instruct the Secretariat to prepare a factual record regarding matters raised in citizen submissions. Factual records developed by the Secretariat can contain information on measures of enforcement effectiveness advanced by a wide range of actors with an interest in environmental law enforcement. Such information is relevant to understanding the factual context in which enforcement occurs and to considering whether, in regard to the matter raised by a submission, the government is failing to effectively enforce its environmental law.

## **1 INTRODUCTION**

Article 14 of the NAAEC allows any nongovernmental organization (NGO) or person resident in North America to file a submission with the CEC Secretariat alleging that a country that is a Party to the NAAEC is failing to effectively enforce its environmental law. If the submission meets certain formal requirements set out in Article 14(1), and after considering the factors listed in Article 14(2), the Secretariat can ask the Party concerned to respond to the submission. On the basis of the Party's response, if any, the Secretariat again reviews the submission and decides whether it considers that the submission, in light of the Party's response, warrants developing a factual record. If so, it recommends to the CEC Council (composed of the highest environmental official from each of the three countries) the development of a factual record. A factual record sets out information gathered by the Secretariat relevant to a consideration, by interested persons, of whether the Party is failing to effectively enforce its environmental law in

regard to the matter at hand. A factual record is made public by a two-thirds vote of the Council.

The CEC citizen submissions process zeroes in on domestic environmental law enforcement from an international platform, and does so at the request of the public. At the heart of the process is the elusive concept of effective enforcement, a concept that means different things depending on whom you ask. In this paper, I consider the text of the NAAEC, the content of citizen submissions, and factual records developed by the Secretariat as sources of information on enforcement indicators. While this paper does refer to notions such as “outputs” (like number of inspections or prosecutions) and “outcomes” (like compliance with the law or achieving consistency in enforcement), on the whole, “enforcement indicator” is taken to mean simply what a given actor considers to be a measure of effective environmental law enforcement, in general or in a specific situation. For present purposes, an indicator can be anything from “inspections are carried out” to “enforcement action is cost efficient” to “effluent meets permit requirements.” The focus here is not on what the indicators may be, but rather on the fact that there may be as many indicators as there are actors with an interest in environmental law enforcement. Knowing who these actors are and what they expect from environmental law enforcement is relevant to gaining an understanding of the factual context within which enforcement occurs and to evaluating enforcement action.

In all likelihood, enforcement will not always meet everyone’s expectations. However, the job of the Secretariat, in preparing factual records under the NAAEC, is to present facts relevant to an alleged failure to effectively enforce the law. While expectations are subjective, from the perspective of the Secretariat, they are “facts” which may be relevant or may not, depending on the circumstances. The Secretariat determines the relevance - but does not assess the validity – of performance measures that it identifies in its research, and it does not develop or apply its own.

## **2 THE NAAEC AS A SOURCE OF ENFORCEMENT INDICATORS**

Article 5(1) of the NAAEC reads as follows:

With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action, subject to Article 37,<sup>1</sup> such as:

- (a) appointing and training inspectors;
- (b) monitoring compliance and investigating suspected violations, including through on-site inspections;
- (c) seeking assurances of voluntary compliance and compliance agreements;
- (d) publicly releasing non-compliance information;
- (e) issuing bulletins or other periodic statements on enforcement procedures;

- (f) promoting environmental audits;
- (g) requiring record keeping and reporting;
- (h) providing or encouraging mediation and arbitration services;
- (i) using licenses, permits or authorizations;
- (j) initiating, in a timely manner, judicial, quasi-judicial or administrative proceedings to seek appropriate sanctions or remedies for violations of its environmental laws and regulations;
- (k) providing for search, seizure or detention; or
- (l) issuing administrative orders, including orders of a preventative, curative or emergency nature.

While not exhaustive, the list in Article 5(1) sets out actions which the Parties to the Agreement deem to be appropriate governmental actions for effective environmental law enforcement.

Article 45(1) defines what is not a failure to effectively enforce an environmental law for the purposes of the NAAEC:

A Party has not failed to “effectively enforce its environmental law” or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:

- (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
- (b) results from *bona fide* decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities; [...]

Part Five of the NAAEC sets out a procedure for settling disputes in cases where a Party to the Agreement considers that there has been a persistent pattern of failure by another Party to effectively enforce its environmental law. Article 45 defines “persistent pattern” as a sustained or recurring course of action or inaction beginning after the date of entry into force of the NAAEC (1 January 1994).

As can be seen above, the NAAEC contains a commitment by the Parties to effectively enforce their environmental laws, provides examples of appropriate governmental actions in this regard, makes allowance for the exercise of enforcement discretion and resource prioritization, and contains a procedure for settling disputes when a Party alleges that another Party is engaging in a persistent pattern of failing to effectively enforce its environmental law. Article 5(1), read together with Article 45(1), spells out what the Parties to the NAAEC expect from each other as regards environmental law enforcement, with Article 45(1) providing the basis for a defense to another Party’s allegations in a dispute under Part V. Article 5(1) also contains two outcomes (“high levels of environmental protection” and “compliance with its environmental laws”) which

can be tracked as enforcement indicators by anyone wishing to monitor the effectiveness of a Party's actions under this article.

### **3 CITIZEN SUBMISSIONS UNDER THE NAAEC AS A SOURCE OF SOFT ENFORCEMENT INDICATORS**

To be admissible for consideration by the CEC Secretariat, a citizen submission must allege a failure by a Party to the NAAEC to effectively enforce its environmental law. This gives submissions good potential as "public response indicators," soft indicators that have been described as follows: "[...] behaviors, attitudes and opinions of the public, including stakeholders, which are, or may be, reliable and useful measures of environmental compliance and enforcement programs, policies and strategies."<sup>2</sup>

Only about fifty submissions have been filed with the Secretariat since 1994, on a wide range of topics, so attempting to glean meaningful information about enforcement effectiveness through statistical analysis of submissions is not a worthwhile endeavor. On the other hand, it is important not to view individual submissions as lacking the objectivity required of enforcement indicators; sometimes subjectivity is a good thing! It would also be unfortunate to use submissions only outside the enforcement context, for example, as indicating the success or failure of government communications initiatives (ie proxy public opinion indicators). Since Article 14 of the NAAEC provides a set of criteria that must be met and a range of factors that must be considered before the Secretariat can request that a Party respond to a submission, submissions for which the Secretariat does request a response may very well contain valuable information on submitters' expectations around environmental law enforcement, information that could be useful to governments in considering their approach to enforcing the law or to addressing an environmental issue. Failing to look to individual submissions as potential public response indicators – as useful feedback for enforcement programs – would be a missed opportunity.

For example, submitters may view treaties, laws and policies related to the environment as "promises" from government to civil society. Submissions yield information on what submitters think has been promised to them, and how and why they feel that the promise is being broken. Submissions also contain information regarding submitters' procedural preferences (do submitters favor prosecutions over compliance promotion, and why?), and regarding expectations as to outcome (is the desired outcome proof of compliance with the law or proof of environmental conservation or restoration, and why?).

It may be tempting to dismiss submitters as "not having all the facts." At the very least, this suggests that governments would do well, in formulating a response to a submission, to provide the Secretariat with ample information in support of enforcement decisions in a given context. However, that is beside the point: the value in a submission, from a government perspective, should lie not in whether the submitters have all the facts, but rather in the insight a submission can yield on the submitters' expectations regarding environmental law enforcement. After all, submitters may have the ability to use the submissions process to mobilize public opinion against the government and the regulated industry.

Finally, a submission can indicate whether the outcome of enforcement action desired by submitters is consistent with the objectives of an enforcement program. If it is not,

and if the outcome desired by submitters is well beyond the capacity of an agency to deliver, using existing resources and enforcing the laws on the books, then submissions may, in some cases, be of more use in considering the government's overall approach to an environmental issue, rather than in assessing the effectiveness of enforcement action. This may be so even though submissions focus, as they must, on an alleged failure to effectively enforce an environmental law.

#### **4 FACTUAL RECORDS AS REPOSITORIES OF INFORMATION ON EXPECTATIONS OF DIFFERENT ACTORS AROUND ENVIRONMENTAL LAW ENFORCEMENT**

The NAAEC does not define what a factual record is. It simply states that the Secretariat shall prepare a factual record if the Council, by a two-thirds vote, instructs it to do so (Article 15(2)), and then spells out that in developing a factual record, the Secretariat shall consider any information furnished by a Party and may consider any relevant technical, scientific or other information, including information developed by the Secretariat (Article 15(4)). In developing factual records, consistent with Council's instructions, the Secretariat gathers information relevant to a consideration of whether a Party is failing to effectively enforce its environmental law in regard to the matter raised by the submitters. The factual record does not contain a conclusion regarding the allegations made by the submitter, nor does the Secretariat make any recommendations. Rather, the document is intended to provide information that will be useful to interested persons in taking whatever actions they deem appropriate in connection with the matters addressed.

When it is developing a factual record, the Secretariat can gather information on enforcement expectations of different actors (within and outside government) around environmental law enforcement. A good example is the information gathering process for the BC Mining factual record, made public by the CEC Council in 2003.<sup>3</sup> In that case, the Council had instructed the Secretariat to prepare a factual record concerning allegations that Canada was failing to effectively enforce a federal *Fisheries Act* prohibition on depositing deleterious substances into fish-bearing waters in connection with the discharge of acid mine drainage to Howe Sound from the abandoned Britannia copper mine in British Columbia.

In preparing the BC Mining factual record, the Secretariat sought to identify the principal actors with an interest in the enforcement of pollution prevention legislation in a mining context, eventually narrowing its focus to enforcement of s. 36(3) of the *Fisheries Act* in connection with abandoned mines in general and the Britannia mine in particular. The main actors identified were: Fisheries and Oceans Canada, Environment Canada, and Justice Canada; the mining industry and its industry associations; NGOs; the Canadian Council of Ministers of the Environment (CCME); the Government of British Columbia (Mining and Environmental Departments); Parliament (in particular the House of Commons standing committees on Natural Resources and the Environment and Sustainable Development); the Commissioner of the Environment and Sustainable Development (CESD) (part of the Office of the Auditor General of Canada); the Secretariat of the Treasury Board of Canada; and the Auditor General of British Columbia.

The Secretariat then identified sources of information on expectations of each of these actors around enforcing and ensuring compliance with s. 36(3) of the *Fisheries Act* in the context of mining / abandoned mines / the Britannia mine. For government agencies, sources of information included the *Fisheries Act* (and relevant provincial legislation), compliance and enforcement policies, prosecution policies, reports on plans and priorities, annual performance reports, and, in general, any government information creating an expectation regarding enforcement of s. 36(3) that could serve as basis for explaining and/or evaluating actions taken in regard to the Britannia mine. For the mining industry, the Secretariat considered a multistakeholder initiative from the early 1990's intended to put the industry on the path toward sustainable development, as well as industry submissions to the House of Commons Standing Committee on Natural Resources and industry submissions to the annual Canadian Mines Ministers' meetings. The Secretariat considered NGO briefs to Parliamentary committees. It also considered the CCME's principles for a consistent approach to the remediation of contaminated sites across Canada and the CCME's federal-provincial regulatory and enforcement harmonization initiatives. House of Commons standing committee debates and reports provided valuable information on enforcement expectations from representatives of the electorate. Reports of the CESD and the Auditor General of British Columbia provided insights on what government auditors expect from environmental law enforcement, including enforcement of s. 36(3) in connection with mining, abandoned mines, and the Britannia mine.

After identifying actors and setting out their enforcement expectations, the BC Mining factual record lays out all the information made available to the Secretariat and considered relevant regarding enforcement and compliance promotion activities carried out at the Britannia mine. All of this information, taken together, is intended to allow for a consideration of whether Canada is failing to effectively enforce s. 36(3) of the *Fisheries Act* in the context of the Britannia mine. The inclusion of background information on the multiplicity of expectations of different actors regarding enforcement of s. 36(3) at mines in Canada and at the Britannia mine in particular is intended to allow for an informed, nuanced, and realistic appreciation of the enforcement context and an evaluation of the enforcement choices that were made regarding the Britannia mine.

## REFERENCES

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<sup>1</sup> Art. 37: "Nothing in this Agreement shall be construed to empower a Party's authorities to undertake environmental law enforcement activities in the territory of another Party."

<sup>2</sup> Swanson, E., "Public Response Indicators as Measures of Effective Environmental Compliance and Enforcement Programs, Policies and Strategies: A Survey and Analysis of Canadian Experience" in *Indicators of Effective Environmental Enforcement – Proceedings of A North American Dialogue – Report of the Law and Policy Program of the Commission for Environmental Cooperation* (Montreal: Commission for Environmental Cooperation, 1999) at A4-7, available at <http://www.cec.org/files/pdf/LAWPOLICY/indic-e.pdf>.

<sup>3</sup> Commission for Environmental Cooperation, *Factual Record – BC Mining Submission* (SEM-98-004). N.A.E.L.P., Vol. 13, 2004, available at <http://www.cec.org/citizen>.

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