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Enhancing Citizen Involvement in Environmental Governance

David L. Markell

There has been considerable emphasis in recent years on increasing opportunities for citizens to participate in environmental governance. The United States Environmental Protection Agency's (EPA) May 2003 Public Involvement Policy highlights EPA's commitment to public involvement and the reasons for the agency's commitment, and provides general guidance for promoting public participation in the agency's decision-making processes. U.S. EPA, OFFICE OF POLICY, ECONOMICS & INNOVATION, PUBLIC INVOLVEMENT POLICY OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY 1 (May 2003). In that document, EPA states that, to achieve its mission, "EPA needs to continue to integrate, in a meaningful way, the knowledge and opinions of others into its decision-making processes. Effective public involvement can both improve the content of the Agency's decisions and enhance the deliberative process." EPA also has developed guidance to facilitate or promote public participation in specific areas. See U.S. EPA, Interim Guidance for Community Involvement in Supplemental Environmental Projects, 68 Fed. Reg. 35,884 (June 17, 2003).

States have experimented with a wide variety of strategies to facilitate and encourage public participation as well. For example, New York adopted an unusual law for the siting of power plants that requires applicants to establish an "intervenor fund" of \$300,000 that local government officials and interested members of the public can access in order to develop the technical expertise needed to participate meaningfully in the consideration of permit applications.

In light of the broad range of government initiatives of this sort, it is no surprise that outside experts have noted that public participation has "taken center stage" in environmental governance and has gained an "increasing role" in environmental policymaking. THOMAS C. BEIERLE & JERRY CAYFORD, DEMOCRACY IN PRACTICE: PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISIONS 1 (RFF Press 2002).

Traditionally, citizens have participated in the enforcement/compliance realm in three main ways. First, citizens have worked directly with regulated parties. "Good Neighbor" agreements and other tools have provided mechanisms for citizens to learn more about regulated party operations and sometimes to play a more proactive role in how a facility operates. See, e.g., Sanford Lewis & Diane Henkels, *Good Neighbor Agreements: A Tool for Environmental and Social Justice*, 23 SOC. JUST. 4 (1996), available

at www.cpn.org/topics/environment/goodneighbor.html. "Sunshine" laws such as the Freedom of Information Act and, specific to the environmental arena, the Toxics Release Inventory, have enhanced citizens' capacity to interact meaningfully in Good Neighbor and similar programs, and also to pressure companies to reduce emissions through the compilation of "dirty dozen" lists and the like.

Second, citizens have worked with regulators to promote compliance. EPA recently solicited public input on its triennial national enforcement and compliance priorities for fiscal years 2005 to 2007. 68 Fed. Reg. 68,893-96 (Dec. 10, 2003). EPA's June 2003 SEPs Community Involvement Policy, 68 Fed. Reg. 35,884, is another example of its efforts to engage the public in the enforcement sphere. States have pursued similar initiatives. Over the years, New York State's Department of Environmental Conservation, for example, periodically convened an Environmental Enforcement Advisory Committee to review the department's enforcement priorities and to seek input from interested citizens. On a more resource-specific and/or regulated party-specific basis, citizens sometimes augment government compliance-promotion and environmental enforcement efforts by providing monitoring, information, and other types of support. Incident reporting hotlines have facilitated such partnering, and Riverkeepers, Baykeepers, and similar natural resource-oriented citizens' organizations have played an important role. See Barton Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185 (2000) (touting the possible value of this type of citizen/government partnership).

Third, citizens can promote compliance by accessing the court system themselves. The citizen suit provisions that virtually all of the major federal environmental statutes now include are the primary legal mechanism citizens have used to initiate legal action in their capacity as "private attorneys general" against alleged violators, although other vehicles, such as common law private nuisance actions, sometimes are available as well. In addition, on occasion citizens have sought to use the citizen suit provisions in the federal environmental statutes to require governments to pursue enforcement actions against alleged violators, although the courts generally have not been particularly receptive, as reflected by the Supreme Court's decision in *Heckler v. Chaney*, 470 U.S. 821 (1985).

A final point about the breadth of citizen opportunities to participate in environmental governance is that the three types listed above are by no means entirely independent of one another or mutually exclusive. As political scientist John Scholz and others have noted, new forms of governance are continually evolving, including the creation of informal and formal networks that may in-

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clude citizens, regulators, and regulated parties in various configurations and that operate on a number of levels for the purpose of promoting compliance and enhancing environmental protection.

Despite these opportunities for public involvement in the enforcement/compliance arena, many environmental non-governmental organizations (ENGOs) are dissatisfied with the mechanisms that are currently available for citizens who want to remedy perceived inadequacies in compliance or in government enforcement-/compliance-related efforts. This dissatisfaction extends more generally to the current state of environmental enforcement and compliance. It includes concerns about the level of compliance (or significant noncompliance, depending on one's perspective) with environmental requirements, the pace and quality of government enforcement efforts, and the accountability of government and regulated parties for their performance.

See generally CLIFFORD RECHTSCHAFFEN & DAVID L. MARKELL, *REINVENTING ENVIRONMENTAL ENFORCEMENT & THE STATE/FEDERAL RELATIONSHIP* (Environmental Law Institute 2003). Professor and citizens' advocate James May, for example, suggests in a recent article that "owing principally to a precipitous decline in government enforcement . . . since 1995, . . . citizen suits matter now more than ever" but that "statutory shortcomings coupled with judicial ambivalence makes for tough sledding for environmental citizen suit enthusiasts." James R. May, *Now More Than Ever: Trends in Environmental Citizen Suits*, 10 *WID. L. REV.* 1, 4 (2003).

This article offers a short primer on a strategy for environmental governance already in use that holds promise for responding to several of these concerns, including increasing citizens' opportunities to participate in environmental governance in the enforcement/compliance arena; and promoting government accountability, more effective government enforcement, and improved compliance. The mechanism is the citizen submissions process, which is administered by the North American Commission for Environmental Cooperation (CEC)—the creation of the environmental side agreement to the North American Free Trade Agreement (NAFTA), referred to as the North American Agreement on Environmental Cooperation (NAAEC). The CEC's citizen submissions process empowers citizens of any North American country to file a submission alleging that any of the countries is "failing to effectively enforce its environmental law." While this mechanism is not, by itself, a panacea for citizens' concerns, the institutional design of this process, as well as its implementation, may be useful for those interested in exploring creative ways to increase citizens' roles in the enforcement arena and in exploring strategies to increase government accountability, improve government enforcement, and enhance regulated party compliance. In fact, the mechanism was designed specifically to further these ends.

A Brief Primer on CEC

The recent ten-year birthday of CEC, the first institution created in North America to preserve and enhance the continent's environment, makes it an opportune time to consider its possible value as a model for environmental governance. CEC

owes its existence primarily to the leverage exerted during the NAFTA negotiations by ENGOs who were concerned about the impact that NAFTA-stimulated increases in trade might have on the environment and the possibility that NAFTA's reduction of trade barriers would precipitate a "race to the bottom" in which countries reduce environmental protection efforts to lure development. To attract environmental support for NAFTA in the United States and thereby increase prospects for NAFTA's adoption, the three North American countries—the United States, Canada, and Mexico—agreed to enter into an environmental agreement that would create a new regional environmental institution (GEC) that would be charged with protecting and improving the North American environment.

The CEC citizen submissions process represents a real-world experiment in bolstering opportunities for public involvement in environmental governance in the enforcement/compliance arena. Several commentators have characterized the process as "the most innovative" feature of CEC. See, e.g., International Environmental Law Project, *Comments on Issues Relating to Articles 14 & 15 of the North American Commission on Environmental Cooperation* (submitted Oct. 2, 2003), available at www.cec.org/files/pdf/jpac/ielp-comments_en.pdf. The process gives citizens an opportunity to engage government in a way that does not exist domestically through the filing of a written submission to the CEC secretariat. The citizen submissions process lets citizens: identify areas of enforcement they believe are lacking; engage government in a formal dialogue about their concerns; and enlist the resources, authority, and credibility of an independent body, the CEC secretariat, which is charged with pursuing detailed investigations of government enforcement practices that citizens identify as being of concern when the environmental stakes are high enough to warrant it and with disseminating the information it uncovers about these allegedly ineffective practices throughout the continent and beyond. (The CEC web page, www.cec.org, contains the ground rules for filing a submission.)

As noted earlier, *Heckler v. Chaney* and other judicial decisions have limited citizens' rights to use the court system to influence government decisions about enforcement. Other domestic mechanisms potentially may be of use, such as the right to petition EPA to withdraw a state program delegation on the ground that the state is failing to fulfill its obligations to enforce the environmental laws effectively, but these have seen limited use and they have been of even more limited effect. Similarly, there are significant, obvious differences between the CEC process and EPA-administered processes that are intended to give the public various types of entry into EPA's decision-making processes.

Two basic features of the citizen submissions process make it particularly interesting as a possible strategy for enhancing citizens' roles in environmental governance. First, it is launched by citizens, hence its name. Citizens can initiate this international process intended to focus on alleged domestic failures to effectively enforce environmental laws by filing a submission in which they identify domestic environmental laws that the citizens believe are not being effectively enforced. While citizens must overcome certain barriers to bring a submission, and while some submitters and others assert that the countries have raised the bar for filing successful submissions in recent years, a key feature of the process is that, as is the

case for citizen suits, the citizens set the agenda for the action that follows by identifying the actors and enforcement-/compliance-related practices or policies that should be scrutinized. At least in many instances, it should be easier for citizens to launch this process than it is for citizens to initiate a citizen suit under the federal environmental laws. CEC has been quite clear, for example, that a citizen of one of the three countries need not satisfy domestic U.S. standing principles in order to be able to invoke the jurisdiction of the citizen submissions process. See David Markell, *The Commission for Environmental Cooperation's Citizen Submission Process*, 12 GEO. INT'L ENVTL. L. REV. 545, 560-561 (2000).

Second, citizens can spur investigative efforts by others to learn more about allegedly ineffective government enforcement practices. CEC's secretariat, based in Montreal, is responsible for administering much of the citizen submissions process and is empowered to: request the country that is the focus of a submission to respond to allegations of ineffective enforcement (in all cases to date the country involved has provided a formal response when asked to do so); recommend, based on the submission and any country response, development of a "factual record" (or detailed investigatory report) concerning the alleged failures to effectively enforce; and develop a factual record if so directed by the CEC Council, which is comprised of the EPA administrator and his Canadian and Mexican counterparts. In developing such a record, the secretariat may consider information that any of the countries provides. In addition, the secretariat may consider information that is publicly available; submitted by interested NGOs or persons; submitted by CEC's Joint Public Advisory Committee (a body of fifteen members of the public, five from each country, whose role is to interact with the public and to provide advice to the Council); developed by independent experts; and that it develops itself. Thus, once citizens file a complaint concerning alleged failures to effectively enforce and the secretariat deems the complaint adequate, extensive effort is invested by the country involved and by the secretariat to develop information about the enforcement practices at issue. While citizens may participate in and contribute information to this process as part of the development of a factual record, considerable information that might be of substantial interest and value to citizens is likely to be developed or furnished by others. To borrow from the social science literature, the mechanism is a form of "fire alarm" that citizens may pull to trigger a more complete response. See, e.g., Kal Raustiala, *Citizen Submissions and Treaty Review in the NAAEC*, in *GREENING NAFTA: THE NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION* (David Markell & John Knox eds., Stanford Univ. Press 2003).

In short, the CEC citizen submissions process offers citizens a chance to engage their government (or any other North American government) about potentially ineffective government enforcement in a way that does not exist now. Further, the process enables citizens to leverage their resources by investing in the CEC secretariat the authority and resources necessary to conduct detailed investigations of citizen allegations and to issue reports with the information the secretariat has uncovered. Because of its design and focus, the process has the *additional* benefit of potentially addressing concerns that ENGOs and others have raised about government accountability, government enforcement, and

the extent of noncompliance with the law. While the process lacks coercive remedial or punitive authorities, its engagement of government in a public process that focuses on allegedly ineffective enforcement practices creates incentives for government to justify its enforcement priorities and practices to the public in a way that, ideally, will cause the involved government to reassess its approaches and consider possible improvements that are identified through the process. At a minimum, the process provides input for government decision-makers that might not be available to them otherwise, and it provides a mechanism for a government-citizen "dialogue" that otherwise might not occur. There is much to be said for the benefits that potentially could flow from these exchanges.

It is important to identify some of the more obvious qualifications on the enthusiasm for considering, and perhaps adopting domestically, a strategy that to some degree is based on the design of the CEC citizen submissions process. First, there have been substantial shortcomings in the track record of the CEC process to date. While there have been many statements of support for the process and for the value it has added to domestic governance in the three countries, a chorus of voices has actively and persistently criticized the countries for their management of this process. In fact, CEC's own citizen advisory body, JPAC, claims that the council is "intervening in the [citizen submission process's] fact-finding process," and thereby "undermining the independence of the Secretariat and the credibility of the process." North American Comm'n for Env't. Cooperation, *Advice to Council No: 03-05* (approved Dec. 17, 2003), available at www.cec.org/files/pdf/jpac/advice03-05_en.pdf. *The Washington Post*, on the eve of CEC's annual meeting in June 2000, published an editorial entitled "How to Wreck Trade" in which it criticized the countries for overstepping their authority in the implementation of the process. One citizens' group, which was involved in the most recent major submission involving the United States, registered its dissatisfaction with the countries' performance in administering the citizen submissions process in comments provided to CEC in October 2003, in which the citizens criticized the council's "seeming inability to allow the process to mature and flourish." The citizens' group continued:

We are not crying wolf. Groups such as the IELP, who have sought to use the Citizen Submission Process in a balanced and fair way to examine government conduct in the [North American] region, will simply turn away from the process once and for all if Council does not respect the roles and boundaries so clearly articulated in the NAAEC.

International Environmental Law Project, *Comments on Issues Relating to Articles 14 & 15 of the North American Commission on Environmental Cooperation* (submitted Oct. 2, 2003), available at www.cec.org/files/pdf/jpac/ielp-comments_en.pdf.

Thus, there is evidence of considerable dysfunction in the actual operation of the process that at least potentially raises significant questions for its future viability or its value as a model. The record in filing submissions is cause for concern as well. During the early years of the process, eight of the first twenty-eight submissions filed involved the United States, nine focused on Canada, and eleven targeted Mexican enforcement practices. More

recently, however, not one of the fourteen submissions filed since 2000 focused on the United States enforcement practices.

The fact that a critical review of the track record of an innovative governance strategy yields some successes accompanied by growing pains should, of course, not necessarily lead to tossing the initiative (and the model of governance that it represents) on the “garbage heap” of unworthy approaches. An essential component of any effort to consider innovative institutional designs and their implementation is to identify weaknesses and evaluate their significance vis-à-vis the potential benefits of experimenting with such approaches. Another key element of such appraisals involves whether there are ways to refine innovative approaches so that they are more likely to produce desired results. Such reviews might well lead to judgments to transplant a pilot strategy despite its limitations because the benefits on balance make it worthwhile, or to try out the model in a different context with new or different features that are intended to increase successes and reduce shortcomings.

For example, in addition to considering how much independence a secretariat-type entity should have from the government(s) involved, potential weaknesses in the CEC process include the lack of accepted benchmarks for evaluating government enforcement performance and the lack of follow-up to the process. Concerning the former, the purpose of the citizen submissions process is to provide information on a country’s enforcement priorities and practices so that the public can reach conclusions about the effectiveness of such practices. It might be useful to develop general benchmarks for assessing effectiveness so that the public would have some context for the enforcement practice-specific information contained in each report. Concerning the latter, once CEC issues its report for a particular submission, there is no obligation for the country involved to follow up, even to the extent of explaining what it plans to do to address the concerns identified in the report, if any. There similarly is no provision for CEC to monitor and apprise the public of any such follow-up, and there is no provision for CEC or any other institution to engage (or consider engaging) in capacity-building that might improve the enforcement priorities or practices that are at issue. Revisiting the relationship of government(s) with the investigatory body, in tandem with creation of performance measures and of a meaningful monitoring capacity, might yield significant increases in the effectiveness of a citizen submissions-type process, including a dramatic increase in citizen enthusiasm and a substantially greater contribution to increasing government accountability and other objectives.

Another significant issue involves the implicit premises of this article, notably that there may be some merit to the goals of increasing citizen involvement in enforcement, enhancing government accountability, strengthening enforcement, and improving compliance. None of these premises is unassailable, particularly if unbounded. For example, in the popular literature, some authors contend that too much democracy can be “too much of a good thing” and overwhelm liberty interests. See Fareed Zakaria, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (W.W. Norton & Co. 2003). In the academic realm, Professor Jim Rossi challenges various aspects of citizen participation in governance in his article, *Participation Run Amok: The Costs of*

Mass Participation for Deliberative Agency Decisionmaking, 92 *Nw. U.L. REV.* 173 (1997), in which he suggests that public participation may, at times, be counterproductive. For example, according to Professor Rossi, citizen participation may impair agency agenda-setting, and, perhaps paradoxically, affording citizens increased opportunities to participate in governance has coincided in a decline in citizens’ confidence in government. Other commentators have highlighted fundamental issues concerning the accountability of NGOs, including ENGOs, and the importance of requiring greater accountability in tandem with allowing greater roles. Leading scholars have noted that “optimum” levels of compliance are subject to debate. See Daniel A. Farber, *Taking Slippage Seriously: Non-Compliance and Creative Compliance in Environmental Law*, 23 *HARV. ENVTL. L. REV.* 297, 316–17 (1999). Thus, an essential feature of thorough consideration of innovative strategies, such as the CEC citizen submissions process, needs to be attention to the underlying policy objectives and to the question of how best to design strategies that will maximize the likelihood of achieving desired results and avoiding undesirable consequences.

To come full circle, government bodies, including our environmental agencies, increasingly tout the related themes of increased citizen participation in governance and greater accountability in government. This is not surprising since civil society itself is “demanding” a greater role and greater accountability. Many scholars have joined this chorus as well.

There clearly are risks inherent in such approaches to governance. Nevertheless, the design of the CEC citizen submissions process and the experience with its implementation may be a sign of things to come. The CEC process is an example of, and a specific experiment in the use of, what Professor Lester Salamon has termed the “new governance” in his book, *THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* (Lester M. Salamon ed., Oxford Univ. Press 2003). Professor Salamon suggests that “the defining characteristics of many of the most widely used, and most rapidly expanding, tools [of governance] is their indirect character, their establishment of interdependencies between public agencies and a host of third-party actors.” He further suggests that, as a result, “government gains important allies but loses the ability to exert complete control over the operation of its own programs.” The CEC model possesses these characteristics and its experience is, among other things, evidence of the growing pains associated with experimenting with new approaches and relationships, including, to some degree, a loss of government control. The fact that this experiment is occurring on an international level with potentially significant implications for domestic governance likely is contributing to the substantial nature of the growing pains it has produced.

Personal experience with CEC has convinced me that there is potentially much promise in experimenting with these structures of new governance, including innovative approaches for public problem-solving that give citizens a substantial voice and that are intended to expand government accountability for its performance. The CEC model is one that domestic policy-makers and others interested in the shape and content of domestic governance should know about, and think about, as we consider how best to build on these experiments to adapt our system of environmental governance for the future. 