Disclosure of Environmental Law Enforcement in Canada: Lessons from America

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Publication of environmental enforcement information is an effective means of deterring potential offenders and allowing the public to make informed choices about the environmental risks to which they could be exposed. This paper critically assesses the federal government’s efforts to provide online public access to environmental enforcement information. While the federal-provincial divide is often pointed at as an explanation for the fragmented nature of environmental law in Canada, we contend that the exercise of political will by successive federal governments can create a holistic approach to reporting environmental enforcement information. An analysis of the enforcement reporting practices in the United States, also a federal state with no clear constitutional jurisdiction over the environment, illustrates the possibility and benefits of a centralized database on environmental enforcement data. By comparing Canada’s online enforcement information to what is available in the United States, we make recommendations as to how Canada can make improvements to its domestic system.

La publication des renseignements sur l’application des lois environnementales est un moyen efficace de dissuader les contrevenants potentiels et de permettre au public de faire des choix éclairés sur son exposition aux possibles risques environnementaux. Cet article évalue de manière critique les efforts déployés par le gouvernement fédéral en vue d’affirmer un accès public, en ligne, aux renseignements sur l’application de ces lois. Bien que la séparation des pouvoirs fédéraux et provinciaux explique souvent l’état fragmenté du droit de l’environnement au Canada, nous sommes d’avis que l’exercice d’une volonté politique par des gouvernements fédéraux successifs peut créer une approche holistique dans la déclaration d’application des lois environnementales au pays. L’analyse des pratiques de déclaration d’application des lois environnementales aux États-Unis - qui est d’ailleurs aussi un État fédéral dépourvu d’une juridiction constitutionnelle claire en matière d’environnement - démontre néanmoins la possibilité et les bénéfices que présentent une base de renseignements centralisée portant sur l’application de ces lois. En comparant les renseignements disponibles en ligne avec ceux des États-Unis, nous formulons des recommandations sur la manière dont le Canada peut améliorer son propre système national de renseignements.

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As the government of Canada candidly admits, "legislation and regulation are only as good as their enforcement". This report addresses the federal government's enforcement obligations and reporting practices as required under several federal environmental and wildlife statutes. These statutes not only require the Canadian government to enforce its laws but also to publish its enforcement practices by producing annual reports on inspections, investigations, prosecutions, and other enforcement measures. Publicizing the laying of charges and the results of prosecutions is an effective means of deterring potential offenders. Availability of enforcement data also allows the public to make meaningful informed choices about the environmental risks to which they expose themselves, and participate in enforcement activities by reporting or requesting action on environmental offenders.

Environment Canada has performed poorly with respect to reporting obligations required by the *Canadian Environmental Protection Act* (hereafter "CEPA"), as outlined in the 2009 report by the Commissioner of the Environment and Sustainable Development. In addition,

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2. See e.g. legislation listed in Appendix 1.
4. RSC 1999, c 33 (CEPA).
the Commissioner indicated that the quality of publicly available enforcement data is inadequate, based on accuracy, completeness and accessibility.\textsuperscript{6}

Moreover, many other federal environmental statutes do not include a general reporting obligation. In such cases, most of the information on enforcement activities is not publicly available and is instead held in a database called the National Enforcement Management Information System and Intelligence System (hereafter “NEMISIS”), access to which is restricted to government officials.\textsuperscript{7} Non-sensitive data is only available upon request,\textsuperscript{8} yet processing requests is evidently a costly and time-consuming use of resources for the government, as it is for the requester.

This paper provides new contributions to the discussion of environmental enforcement in Canada by critically assessing the federal government’s efforts to provide public access to environmental enforcement information through the Internet. It is our contention that while the federal-provincial divide is often identified in order to explain fragmentation of environmental law in Canada, the exercise of political will by successive federal governments can circumvent the jurisdictional constraints to create a holistic approach to enforcement of environmental law. An analysis of the enforcement reporting practices in the United States (hereafter “US”), also a federal state with no clear constitutional jurisdiction over the environment, illustrates the possibility and benefits of a centralized database on environmental enforcement data. By comparing Canada’s online enforcement information to what is available in the US, we make recommendations as to how Canada can make improvements to its domestic system drawing on the experience of its southern neighbour.

The paper begins with a discussion of jurisdictional differences with regards to environmental law in the United States and Canada which stem from their respective Constitutions. It follows with a discussion of the relationship between the community right to know and environmental enforcement reporting. We then analyze the website of the United States Environmental Protection Agency (hereafter “EPA”) to see how the US’s online portal realized certain benefits from implementing a community right to know approach to reporting. The paper critically analyses the US’s publicly available online portal, Enforcement and Compliance History Online (hereafter “ECHO”), in which all environmental enforcement information, from a variety of statutes and databases, is centralized in one system. It also looks at the US inventory of pollutant release, the Toxic Release Inventory (hereafter “TRI”). The paper then moves on to a comparative assessment of Canada’s restricted-access environmental enforcement reporting framework, through the National Enforcement Management Information System and Intelligence System (“NEMISIS”) database, as well as the inventory of pollutant release, the National Pollutant Release Inventory (“NPRI”).

\textsuperscript{6} Ibid at para 3.52.


1.1 Constitutional Jurisdiction over the Environment

The uncertainty about constitutional responsibility for environmental protection is one of the most controversial aspects of Canadian environmental law and policy. An understanding of Canadian constitutional law has been seen as the key to understanding the Canadian environmental law system with its complex array of jurisdictional powers. Under Canada's constitution, neither the federal nor the provincial governments have exclusive jurisdiction over environmental law. Rather, responsibility for environmental protection is shared between the federal and provincial governments. In *Friends of the Oldman River*, the Supreme Court of Canada held that environmental protection must be seen as an inherent part of the powers that are already assigned to the federal and provincial governments.

Accordingly, the federal government enjoys substantial environmental regulatory competence due to its constitutional powers over peace, order and good government (section 91), trade and commerce (section 91(2)), navigation and shipping (section 91(10)), sea coast and inland fisheries (section 91(12)), criminal law (section 91(27)), federal works and undertakings (section 91(29) and 92(10)), and canals, harbours, rivers and lake improvements (section 108). Various federal departments exist to manage the enforcement of environmental laws, including Environment Canada, Fisheries and Oceans Canada and Transport Canada.

The provincial governments have the power to enact environmental laws relating to all matters of a merely private and local nature within the province (section 92(16)), property and civil rights within the province (92(13)) as well as non-renewable resources, forestry resources and electrical energy (92A). As a result, the provinces have primary jurisdiction over agriculture, forestry, mining, hydroelectric power, and have all enacted legislation to establish a licensing and permit system for water pollution and air pollution. Most provinces strongly oppose federal interference in the management of natural resources, fearing that it will limit economic activities. Such provincial opposition contributes to the absence of legally binding national standards.

The fragmentation of environmental law in Canada has been seen to be the result of the constitutional division of jurisdiction over matters that touch upon the environment. No single statute at the federal level consolidates the full scope of environmental law. Specific stat-

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12 Mann, *supra* note 10 at 1188.
14 *Ibid* at s 92.
16 *Ibid*.
18 *Ibid* at 260.
utes deal with specific media, such as water and air, or specific types of concerns, such as wastes or toxic substances according to the constitutional head of power, and these often overlap with other areas of governance.\(^{19}\) For example, one may consider jurisdiction over water as an illustration of the complexity and fragmentation of environmental law in Canada between federal and provincial governments and even among various federal departments. Each province enacts and enforces legislation relating to water quality and quantity. While Ontario’s Ministry of the Environment governs the \textit{Clean Water Act}\(^{20}\), the \textit{Safe Drinking Water Act}\(^{21}\) and the \textit{Water Resources Act}\(^{22}\), Quebec’s Ministry of the Environment enforces the \textit{Water Resources Preservation Act}\(^{23}\) and the \textit{Environment Quality Act}\(^{24}\). At the federal level, Environment Canada enforces the \textit{CEPA} which regulates water quality concerning, among other things, phosphorus pollution as well as pulp and paper mill effluent.\(^{25}\) Transport Canada enforces the \textit{Canada Shipping Act}\(^{26}\) and the \textit{Arctic Waters Pollution Prevention Act}\(^{27}\), both of which prohibit certain levels of discharge of hazardous wastes from ships in Canadian waters.\(^{28}\) Fisheries and Oceans Canada enforces the \textit{Fisheries Act}\(^{29}\), which sets penalties for the discharge of harmful substances into waters where aquatic species may be.\(^{30}\) Jurisdiction over water quality and quantity can clearly generate confusion for an average citizen who seeks information pertaining to a nearby body of water. To further complicate matters, information about federal enforcement activities such as inspections, investigations and prosecutions are scattered across the Internet in downloadable files on the respective websites of each federal department.\(^{31}\) One explanation for the fragmented nature of federal environmental enforcement reporting on several government websites is that distinct agencies have been established pursuant to distinct headings of power in section 91 and 92 of the Constitution for matters that inherently overlap, like water.

In the United States, jurisdiction over environmental matters is not explicitly set out in the Constitution and the federal government enjoys broader jurisdiction in relation to States than the Canadian federal government does in relation to Provinces.\(^{32}\) This difference may account for more centralized environmental enforcement reporting in the US. One of the primary sources of constitutional legitimacy for federal environmental regulation is the Commerce Clause in Article 1, section 8 of the US Constitution.\(^{33}\) The Commerce Clause grants Congress

\(^{19}\) Mann, \textit{supra} note 10 at 1190.
\(^{20}\) RSO 2006, c 22.
\(^{21}\) RSO 2002, c 32.
\(^{22}\) RSO 1990, C O40.
\(^{23}\) RSQ c P-18.1.
\(^{24}\) RSQ c Q-2.
\(^{25}\) \textit{Ibid} at Schedule 1; Franson & Hughes, \textit{supra} note 15.
\(^{26}\) RSC 2001, c 26 at s 274.
\(^{27}\) RSC 1985, c A-12 at s 14.
\(^{28}\) \textit{Ibid} at s 4; \textit{Canadian Shipping Act}, \textit{supra} note 26 at 181.
\(^{29}\) RSC 1985, c 14; See also Franson & Hughes, \textit{supra} note 15.
\(^{30}\) RSC 1985, c F-14.
\(^{31}\) See \textit{infra} section on Annual Report section.
\(^{32}\) Mann, \textit{supra} note 10 at 1188.
the authority "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Supreme Court of United States has adopted a broad reading of the Commerce Clause, which has allowed federal environmental legislation to be considered constitutionally valid. In the first authoritative Supreme Court Commerce Clause case, *Gibbons v. Ogden,* Chief Justice John Marshall explained that the federal commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." The United States Congress has since actively utilized its expansive commerce power to regulate air pollution, water pollution, drinking water contamination, hazardous waste disposal, pesticides, radiation, toxic substances. As a result, the United States has a more complete array of legally enforceable national environmental standards compared to Canada.

The US has many statutes divided into specific subjects such as air quality, legislated under the *Clean Air Act* and water quality, legislated under the *Clean Water Act*. In Canada, it is mainly the provinces rather than the federal government that issue permits relating to water, air, waste management, transportation of dangerous goods, etc., under provincial legislation, though the federal government has permitting powers as well, for example under the *Fisheries Act*. This differs from the US where permits, for instance under *Clean Water Act* and *Clean Air Act*, are authorized solely through federal legislation.

Most environmental law in the US is administered by the Environmental Protection Agency (hereafter the "EPA"). The EPA was foreseen as a coordinating agency that would cut across existing agency lines to provide a coherent national policy for the environment. It has complete or partial jurisdiction over major environmental laws including: the *Clean Air Act*, the *Clean Water Act*, along with the *Safe Drinking Water Act*, the *Comprehensive Environmental

34 US Const art I, § 8, cl 3.
35 *Gibbons v Ogden*, 22 US 1 (1824).
36 *Ibid*.
37 Congress has passed most federal statutes including the *Clean Air Act*, 42 USC § 7401 (1970) and *Clean Water Act*, 33 USC § 1251 (1972) on the basis of Article 1.
38 Boyd, supra note 17 at 271.
40 Supra note 37.
41 *Ibid*.
43 *Fisheries Act*, supra note 30 at s 31.
46 *Ibid*.
Response, Compensation and Liability Act\(^47\), the Emergency Planning and Community Right to Know Act\(^48\) (hereafter the "Emergency Planning Act"), the Resource Conservation and Recovery Act\(^49\), the Sustainable Fisheries Act\(^50\), and participates in the implementation of many laws administered by other agencies at both the national at the federal level there is and state levels.\(^51\)

In contrast, Canada has no overarching environmental agency that oversees the enforcement of national laws. Moreover, at the federal level Canada has no enforceable national air quality laws, no national law guaranteeing safe drinking water, no national law requiring the clean-up of contaminated sites, no law guaranteeing citizens access to information about all of the types of and sources of toxic pollution in their communities, no national hazardous water law and no law requiring sustainable fishing practices.\(^52\)

Canada's constitution arguably gives more power to provinces than the US Constitution gives to states; however, Canadian provinces inconsistently exercise this power. For example, some provinces have safe drinking water laws while others do not. Therefore, environmental standards vary across Canada. In contrast, American states have more consistent environmental law regimes\(^53\) as they are responsible for the implementation of national standards established by federal environmental laws.\(^54\) Furthermore, as opposed to the Canadian government, the US government provides extensive funding to states to meet the national standards.\(^55\)

This difference in the separation of powers may only partially explain why the US and Canada have widely distinct enforcement reporting practices. Some authors, however, are not convinced that this factor is determinative of reporting outcome at all. They explain that the reason for fragmented enforcement reporting in Canada and the absence of national leadership on environmental governance is due to the lack of political will on the part of successive federal governments.\(^56\) While the Supreme Court of Canada has repeatedly ruled in favour of a broad federal role in environmental protection,\(^57\) successive federal governments have not pushed to fill this governance void that exists in environmental management. To quote Professor Kathryn Harrison, "[c]onstitutional uncertainty persists primarily because the federal government has taken a narrow view of its own powers."\(^58\)

We present that it is the political will of the US Congress to address environmental problems on a nation-wide scale, rather than the constitutional difference in the separation of powers compared to Canada, that likely explains the relative ease with which the US has been

\(^{47}\) 42 USC § 9601 (1980).
\(^{48}\) Supra note 39.
\(^{49}\) Supra note 39.
\(^{50}\) 16 USC § 1801.
\(^{51}\) Buck, supra note 46 at 25.
\(^{52}\) Ibid.
\(^{53}\) Ibid.
\(^{54}\) Ibid.
\(^{55}\) Ibid.
\(^{56}\) Ibid at 92-93.
\(^{57}\) See Friends of the Oldman River v Canada, supra note 11. See also R v Hydro Quebec [1997] 3 SCR 213.
\(^{58}\) Kathryn Harrison, Passing the Buck (Vancouver: UBC Press, 1996) at 54.
able to create a centralized federal database about enforcement of environmental laws. We contend that Canada could overcome the fragmentation caused by constitutional separation of powers, provided that political will allow for it. Whether Canada will invest in improving its administration of environmental reporting in a centralized and transparent manner is a matter of political will, not constitutional constraint.

1.2 Fragmentation on environmental enforcement reporting

Currently the public only has access to partial information regarding the federal government's enforcement of environmental laws through three sources: Annual Reports required by some environmental and wildlife legislation; Enforcement Notifications posted on departmental websites where a statute does not create an obligation to publish an annual report; and News Releases and Statements that provide further information regarding charges and convictions reported by Enforcement Notifications.

These publicly accessible sources of enforcement information fail to provide the public with sufficient data to meaningfully engage with the information. The information pertaining to government inspections and investigations of facilities in Annual Reports is limited to raw numbers of occurrences, and short descriptions of events. The Enforcement Notifications only provide the name of the party convicted, the date and reason for the conviction as well as the penalty imposed. These sources of enforcement information fail to produce a comprehensive list of all violators and the associated violation, regardless of whether a conviction has been made, and provides no compliance information about facilities that respect the law.

The Canadian situation contrasts sharply with the state of affairs in the United States. The EPA provides a relatively easy-to-use website for citizens with enforcement information that surpasses the minimum requirement of federal statutes. For example while the Clean Air Act does not explicitly require the reporting of greenhouse gas emissions, the EPA's recently promulgated regulation requires monitoring and reporting of greenhouse gas emissions above certain threshold levels from all fossil fuel suppliers and industrial gas suppliers, direct greenhouse gas emitters and manufacturers of heavy-duty and off-road vehicles and engines. The non-confidential greenhouse gas emission data reported by facilities and suppliers is then made available to the public in the EPA's electronic Greenhouse Gas Reporting Tool.

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60 Section 202(a)(1) of the Clean Air Act, supra note 37 requires the EPA to establish standards "applicable to the emission of any air pollutant from...new motor vehicles or new motor vehicle engines, which in [her] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare". While historically the EPA had denied it had authority under the CAA to promulgate regulations to address global climate change, and that CO2 and other greenhouse gases could not be considered "air pollutants" under section 202, this position has changed with the Supreme Court's Massachusetts v Environmental Protection Agency 549 U.S. 497 (2007) decision which declared that "greenhouse gases fit well within the [Clean Air Act's] capacious definition of 'air pollutant'". The EPA has since cited its authority under sections 114 and 208 of the CAA to promulgate the rule. United States Environmental Protection Agency, Enforcement & Compliance History Online, online: USEPA <http://www.epa.gov/climatechange/emissions/downloads09/GHG-MRR-full%20Version.pdf/>,

The EPA also has a comprehensive enforcement and compliance database, * Enforcement Compliance History Online* (ECHO) which conveniently regroups enforcement information into the EPA's *Integrated Data for Enforcement Analysis* (hereafter "IDEA") system. ECHO integrates inspection, violation, and enforcement for the *Clean Water Act*, *Clean Air Act*, and hazardous waste laws.\(^61\) It also includes *Safe Drinking Water Act* data, Toxics Release Inventory data, National Emissions Inventory data, and Water Quality Data. In other words, "IDEA" copies many EPA and non-EPA databases monthly and organizes the information to facilitate cross-database analysis.\(^62\) There is no such amalgamation of environmental enforcement information in Canada.

It is in the public interest to render environmental enforcement data available through an open data portal, in machine-processable formats, such as txt, csv, word, excel, KML, ESRI, SHAPE. Allowing interested members of the public to conduct their own analysis of enforcement data for legal and non-legal purposes would augment the public's ability to make informed choices about the level of environmental risk to which they expose themselves, participate in the democratic process and increase governmental accountability of statutory responsibilities.

2. COMMUNITY RIGHT TO KNOW IN CANADA

2.1 Democratic Participation, Government Accountability and Transparency

As stated in the 1992 Rio Declaration on Environment and Development to which Canada is a signatory:

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available."\(^63\)

The term "community right to know" reflects an individual's right to self-protection through the community's right to obtain access to information about chemicals, substances or conditions that might pose a risk to health or the environment.\(^64\) The availability of environmental information facilitates individualized decision-making because it allows citizens to

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\(^64\) Canadian Environmental Law Association, *Creating Community Right-to-Know Opportunities in the City of Toronto* (January 2006) at 4 online: CELA <www.cela.ca>.
make informed choices about the environmental risks to which they or their families could be exposed.65

Until the 1980s, public access to environmental information in Canada was at the discretion of decision-makers.66 The concept of "community right to know" was first implemented in Canada when the Access to Information Act67 came into force in 1983 and Office of the Information Commissioner of Canada was established to enforce it.68 The purpose of the Access to Information Act and the Privacy Act69 is to provide a right of access to records and personal information, in any format, held under the control of government institutions and subject to certain specific and limited exceptions to citizens and permanent residents of Canada as well as to individuals who are present in Canada.70 Environment Canada's Access to Information and Privacy (ATIP) office is mandated to administer the Access to Information Act and the Privacy Act.71

In addition to promoting informed public decision making, as the Supreme Court of Canada acknowledged in Dagg v. Canada (Minister of Finance),72 the Access to Information Act is concerned with advancing the values of participation and accountability in the democratic process. Based on the principle of right to know, the Access to Information Act upholds that the public availability of federal government information should be the norm, rather than the exception, and that decisions on the disclosure of government information should be reviewed independently of government.73 This principle underpins statutory reporting obligations, the Access to Information Petition, Proactive Disclosure requirements and other open government policies.

Access to information laws have increasingly had an impact on transparency in public affairs by enhancing government accountability mechanisms. Aspects of freedom of information's contribution to democracy have been recognized by the Supreme Court of Canada. As

65 Benidickson, supra note 9 at 380.
67 RSC 1985, c A-1.
68 Canada, Canadian Environmental Protection Act Office, Reviewing CEPA, The Issues #9: Community Right to Know (Hull, QC: Minister of Supply and Services, 1994) at 4.
69 RSC 1985, c P-21.
70 Section 4(3) of the Access to Information Act, supra note 67 prescribes that an agency must produce a record for an applicant if this can be done "using computer hardware and software and technical expertise normally used by the government institution." Pursuant to section 7 of the Access to Information Act, an institution has thirty days to complete an access to information request or may claim a time extension in limited and specific circumstances. Section 2 of the Privacy Act, supra note 69 states that the "purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information."
73 Environment Canada, Access to Information and Privacy Act (ATIP), supra note 71.
Justice La Forest stated in his dissenting judgment in *Dagg v. Canada (Minister of Finance)* which was not contradicted by the majority:

The overarching purpose of Access to Information legislation...is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.74

Therefore, public availability of environmental enforcement information serves a dual function: it facilitates public participation in environmental protection and strengthens democracies by holding governments accountable.

Public disclosure of information is not merely relevant to environmental enforcement outcomes. It may also lead to new insight and understanding regarding environmental problems and improves environmental performance. Dissemination of public data is the raw material of innovation, creating a wealth of economic opportunities. As stated by David Eaves, a prominent open government advocate:

Governments are waking up to the fact that data – the quantitative information about their services and the communities they serve [...] is not simply a byproduct of operations but a strategic asset as valuable, if not more so, as a highway or road. While reliable government data helps streamline internal operations, it also presents strong opportunities for productivity gains and new service offerings within the business sector.75

The positive impact of disseminating environmental enforcement information is, therefore, to be felt by the general public at different levels and it is necessary for the federal government to make it a priority.

2.2 Current State of Access to Information: the Need to Move towards Proactive Disclosure

An April 2010 report card released by the interim Information Commissioner76 evaluated 24 federal departments on their compliance with the *Access to Information Act*. In its conclusions, the Commissioner was highly critical of the ease of access and the clarity of information. Environment Canada received a grade of “F” in its report card for its backlog of 276 information requests as well as for the fact that it took an average of 97 days to complete a request.77 The Commissioner identified reorganization at the institutional level resulting in loss of corporate knowledge, changing responsibility for records and inadequate staffing as the main causes behind the delays.78 In addition to delays in responding to Access to Information requests,

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77 *Ibid* at 21 and 106.
78 *Ibid* at 106.
exemptions from public release provided for in the Access to Information Act set out in section 13 through 24 and 26 are a significant obstacle to releasing information.

Proactive dissemination of environmental enforcement information would more adequately respond to the growing interest in access environmental information among the Canadian public. This interested is reflected in a 35 percent increase in ATIP requests to Environment Canada from 2008 to 2009. The current “reactive disclosure” approach for environmental enforcement information is inefficient. The backlog of requests suggests that the principle of community right to know is unlikely to be achieved through access to information requests. An effective realization of this right is inextricably linked to the governments’ ability to publish data comprehensively, accurately, accessibly and in a timely manner. Under proactive disclosure policies, institutions make information available to the public as a matter of course, without the public having to resort to requests made under the Access to Information Act. Instead of the current cumbersome ATIP approach, the public would benefit from the dynamic opportunities Internet technology provides for immediate and universal access to such data.

The federal government has already taken some steps towards moving from reactive to proactive disclosure. A limited proactive disclosure policy currently exists to strengthen public sector management by enhancing transparency and oversight of public resources in the federal government. It is, however, limited to specific categories of information. In addition to mandatory publication on departmental websites of travel and hospitality expenses, federal government departments are required to provide information on contracts over $10,000, position reclassifications since 2004, and grants and contributions over $25,000 since 2005. Any cases of “founded wrongdoing” at departments or agencies, such as breaches of the law or misuse of public funds, must also be posted publicly. By making financial information and human resources-related information readily available on departmental websites, Canadians are better able to hold the Government and public sector officials accountable for their actions.

Most recently, the federal government launched a 12-month pilot national open-data site called “Open Data Pilot”, to disseminate federal government information. Its three-pronged approach to information access—“Open Data,” ‘Open Information,’ and ‘Open Dialogue’—appear to indicate a paradigm shift towards allowing citizen access to and involvement with government data. The Open Data Pilot seeks to improve the ability of the public to find, download and use Government of Canada data to provide citizens with a stronger say in government policies and priorities.

79 Ibid.
80 Interim Information Commissioner of Canada, Annual Report, supra note 8 at 28.
82 Ibid.
83 Ibid.
84 The site was launched 17 March 2011: Government of Canada, Open Data Pilot Project, online: Government of Canada <http://www.data.gc.ca>.
85 Ibid.
While the government's foray into proactive disclosure described above is a welcomed development, the principle of proactive disclosure of information should expand beyond the limited categories to cover environmental enforcement information as well. Public disclosure of information provides an incentive to facilities to control their pollution emissions, adding a different source of pressure to comply with laws and regulations in addition to other enforcement instruments such as penalties, fines and inspections.\(^8\)

The establishment of an open government data portal of environmental enforcement and compliance data from the federal government would facilitate the effective application of the community right to know principle. Decreasing or eliminating requirements and clearances in order to access data in cases where such access would not otherwise hurt an ongoing investigation, would not only provide an excellent source of information for citizen initiatives in the vein of emitter.ca\(^9\) but would also liberate the government from attending to ATIP requests for needlessly classified information. As a result, this would create an economy of government resources and improve transparency.

The link between open government and the community right to know was emphasized in the Information Commissioner of Canada's latest Annual Report.\(^6\) She noted the importance of making information available to the public as a matter of course, stating that "Proactive Disclosure is a fundamental aspect of freedom of information and open government, and we strongly encourage institutions to consider its value."\(^9\) We therefore recommend that the federal government provide the public with access to an online environmental enforcement and compliance database, updated monthly, that includes all non-sensitive information about all inspections, investigations and prosecutions, as well as compliance information concerning facilities that respect the law.

3. THE AMERICAN APPROACH

The federal government's present public disclosure mechanisms are simply not user-friendly. Publicly available information is scattered across various websites, in stark contrast to the United States' centralized database. The NEMISIS method of tracking and managing Environment Canada's enforcement activities under federal environmental and wildlife legislation is largely inaccessible due to government-restricted access and excludes compliance information,\(^5\) whereas the United States' database is publicly accessible and includes such information. We now turn our analysis to an in-depth comparison of the Canadian and American approaches to disseminating information on the enforcement of their main federal environmental statutes

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\(^7\) http://emitter.ca is an independent search engine, created by several promoters of open government, which enables Canadian citizens to search for air quality data released by NPRI for all facilities that self-reported to NPRI. Facilities are sorted by industry and are ranked along a gradient. "The color of a facility corresponds to the relative ranking of the facility's total emissions against all other facilities in Canada in the same industry" online: Emitter <http://www.emitter.ca/index.php/methodology>.

\(^8\) Interim Information Commissioner of Canada, *Annual Report*, supra note 8 at 46.

\(^9\) Ibid at 28.

\(^7\) Report of Seminar on National Enforcement Management Information System and Intelligence System, supra note 7.
through their respective websites. In doing so, we hope to highlight ways that the Canadian system could be improved.

In the US, information on the enforcement of the various statutes is compiled and can be accessed through a single online source called ECHO. ECHO provides fast, integrated searches of EPA and state data for more than 800,000 regulated facilities. It integrates inspection, violation and enforcement data for the Clean Water Act, Clean Air Act, and various hazardous waste laws. ECHO takes under its umbrella the Toxics Release Inventory (TRI) data, National Emissions Inventory data, and Water Quality data. This section sketches the services ECHO provides to ordinary citizens, specifically focusing on how its TRI database has realized the principles underlying the community right to know.

3.1 Enforcement and Compliance History Online (ECHO)

The US Emergency Planning Act was passed in 1986 to regulate the dissemination of compliance information on the basis of the principle of community right to know. The Emergency Planning Act requires facilities using any of 600 named hazardous substances to report inventories of their release into the water, atmosphere or soil. The data is available in the TRI database which was designed as a reporting tool to make information easily accessible to the general public. The TRI does not directly regulate plants emissions; rather it requires manufacturing firms to report releases or transfers of toxic chemicals to the EPA. The EPA in turn discloses and disseminates the data to the public. In effect, the public can obtain information allowing for self-assessment of exposure to environmental hazards. Overtime, disclosure through the TRI is meant to persuade a company to improve its environmental performance in order to avoid adverse reactions by the markets and the public: it is a mechanism for "regulation-through-information".

Using ECHO, one can also run a search by inputting a Zip code or a precise address. Data is presented in text, tables as well as through maps. One can also search for facilities to obtain a snapshot of its compliance record. A table will indicate the number of inspections carried out by enforcement officials within the past 5 years, quarters in non-compliance over the past 3 years, formal enforcement actions in the past 5 years, and informal enforcement actions in the past five years. It is possible to do a case search using the EPA Enforcement Case Report to discover related federal cases. Finally,

91 United States Environmental Protection Agency, Enforcement Compliance History Online, supra note 61.
92 Ibid.
93 Ibid.
94 Enforcement & Compliance History Online: Frequently Asked Questions, supra note 62.
95 Supra note 39.
98 See e.g. Don Grant & Andrew W Jones, "Do manufacturers pollute less under the regulation through-information regime?" (2004) 45 Sociological Quarterly 471.
[The Detailed Facility Report provides information about the facility location, characteristics, regulatory category along with inspection dates, violation status, pollutants in violation, enforcement actions taken by the government, informal enforcement actions taken by the government, penalties assessed, and demographics of the area surrounding the facility.]

This type of accessible information allows communities to stay continually informed about enforcement and compliance issues with respect to regulated facilities that may be of concern to them. ECHO provides user-friendly access to this information in an easily understandable and searchable format, allowing users to see data in a comprehensive and organized way. The enforcement data can be analyzed in many ways, thus facilitating the public's monitoring of environmental compliance in their communities and based on their particular concerns. Corporations can also monitor compliance of their facilities and investors are able to factor environmental performance into their investment decisions.

In addition to literature extolling the benefits of such a system that emanate from government agencies, there are a number of independent studies that have illustrated how public availability of enforcement data in the United States have reduced health risks and improved industry behavior. Bae, Wilcoxen and Popp focused on accessibility of published environmental data, concluding that with regard to the TRI, the state data processing efforts played a critical role in achieving TRI's intended policy goal to reduce health risks by providing more accessible information to end users. The study illustrated that the provision of processed and structured information was much more effective in reducing toxic risk than simple disclosure of raw data of total toxic releases in pounds. State efforts to provide value added, refined information played a significant role in reducing information overload, resulting in improved decisions by end users.

Decker et al examined whether community right to know legislation requiring the reporting of toxic chemicals by companies had a negative and statistically significant impact on residential property values. Their study showed that when controlling for relevant socioeconomic variables, TRI pollutant releases were significant determinants of residential housing values in the community that was the focus of their study.

Other studies have shown TRI's effect on industry behaviour. Bennear and Olmstead, for example, examined the impact of mandatory information provision on drinking water violations by 517 community water systems from 1990 to 2003 in Massachusetts. Under the 1996 Amendments to the Safe Drinking Water Act, companies were required to self-report to

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100 Ibid.

101 Bae et al, supra note 97.

102 Ibid at 179.

103 Ibid.


105 42 USC 300 (1996).
customer violations of drinking water through annual consumer confidence reports (CCRs).\textsuperscript{106} Subsequent to this reporting obligation, larger utilities that were required to mail CCRs directly to customers reduced total violations by between 30% and 44% and health violations by about 40%-57%.\textsuperscript{107}

Furthermore, Konar and Cohen have identified financial market responses to the TRI data, thus reinforcing their significance. In their 1997 study, they found that the stock prices of large TRI emitters declined on the day that those companies' TRI information was made public. Subsequently those companies reduced emissions more than their industry peers.\textsuperscript{108} In a later study, Konar and Cohen found that firms who reduced TRI releases realized substantial increases in capitalized company value.\textsuperscript{109}

There are some scholars, however, who have argued that the benefits of TRI as a regulatory strategy have been overestimated. In her 2005 study, Bui examined plant-level responses of petroleum refineries to state TRI programs. She found that while TRI-induced public disclosure may have contributed to the decline in reported toxic releases; it has not been the cause of those reductions. Instead, changes in toxic emission are a by-product of more traditional command and control regulation such as technical assistance, educational programs, data clearinghouses, tax incentives, government grants to help firms reduce wastes, and the establishment of a statewide quantitative goal for reductions in toxic pollutants.\textsuperscript{110}

In addition to the TRI, ECHO provides a centralized source of integrated environmental enforcement information to anyone with Internet access. Such information includes a record of facilities’ compliance with environmental regulations, specifically: the dates, the types of violations and their seriousness, whether a facility has been subject to enforcement action by the state or EPA and whether any penalties have been issued.

ECHO provides a model to the Canadian Government as to how to better organize enforcement data and provide easy access to enforcement and compliance information for Canadians. Enforcement information about facilities from six different sources is integrated into a single source in ECHO (for example, the Air Facility System and Safe Drinking Water System).\textsuperscript{111} In Canada, enforcement information from provinces and other government departments (OGD) could similarly be integrated into NEMISIS.


\textsuperscript{107} Ibid.


\textsuperscript{111} Enforcement & Compliance History Online: Frequently Asked Questions, supra note 62.
4. THE CANADIAN APPROACH

4.1 National Pollution Release Inventory

The federal government’s most prominent example of a public, web-accessible community right to know mechanism is Canada’s NPRI112 created in 1992 under the legislative authority of the CEPA.113 The NPRI provides published information on releases into the environment of a wide range of substances. The most recent NPRI—that for 2009—reported emissions of 347 regulated pollutants released, disposed of, or sent for recycling at over 8400 reporting facilities in Canada.114 CEPA creates an obligation for all Canadian companies with ten or more employees and using ten or more metric tons of a designated substance to disclose their environmental releases to the federal government.115 The NPRI not only contains self-reported data that is mandatory by the legislation, but it also requires “air pollutant emission estimates compiled for facilities that are not required to report and non-industrial sources such as motor vehicles, residential heating, forest fires and agriculture,”116 to be able to give a better picture on emissions in a certain area. Although the NPRI is not a repository for environmental “enforcement” data, it provides Canadians with information about pollutant releases and transfers in their communities.

The NPRI Online Data Search117 allows users to create tables by using a combination of variables such as year, facility, substance, location, type of industry, as well as type of pollutant release, disposal or transfer. The database allows comparison of data over the years and within industrial sectors. Alternatively, users can download the entire NPRI database in Microsoft Access format and perform their own analysis. The data is available in downloadable .kmz format files compatible with Google Earth, which allows users to search for reporting facilities in a specified location.118 The database also provides for postal code and community searches. The annual Air Pollutant Emission summaries and trends are available in HTML and Excel format.

The NPRI has several major limitations. While the NPRI was initially based on a review of the TRI, the NPRI is less comprehensive than the TRI, which reports on 581 individ-

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113 CEPA, supra note 4 at ss 48, 50.
ual pollutants and 30 pollutant categories.119 Many toxic substances are not covered by the NPRI. Furthermore, reporting thresholds are not as strict; the inventory relies on companies to estimate their own releases of pollutants and companies have the right to apply to have releases kept confidential.120 The accuracy of NPRI data has also come under attack. As the Commissioner of the Environment and Sustainable Development pointed out in his 2009 Fall report, Environment Canada does not have adequate systems and practices to assess the overall accuracy of NPRI data, to verify that all facilities required to report are doing so and that they are reporting on all substances they are required to report on.121

Furthermore, Environment Canada does not provide enough information to help users understand NPRI data.122 The range of estimation methods and the reporting thresholds that facilities use also restrict the ability of user to interpret the data.123 In addition, the Microsoft Access format, while allowing experts to run analyses, excludes the general public from interpreting the data.124 As Bae et al.'s study has showed through an evaluation of the TRI, the type of information provided determines whether or not it will become a useful community right to know mechanism.125 The provision of raw data to the members of public who do not know how to interpret it does little to realize the intended policy outcomes.

As the Commissioner of the Environment and Sustainable Development pointed out in his 2009 Fall report, "the Department [Environment Canada] should help users clearly understand the NPRI, its data, and the data's limitations regarding its completeness and accuracy."126 The report concluded that Environment Canada has to build on improvements made to date, ensure that the NPRI contains the best possible information on pollutant releases and transfers, and make this information more easily understandable.127 The NPRI constitutes a positive contribution to realizing the principle of community right to know and, provided that the shortcomings regarding data quality are improved, it provides a model for how to disseminate environmental enforcement information under Canada's federal environmental statutes.

120 Boyd, supra note 17 at 105.
121 Commissioner of the Environment and Sustainable Development, supra note 5 at para 3.65.
122 Ibid at 3.65.
123 Ibid at 3.65.
124 Emitter.ca, Tracking pollution in your neighbourhood: Methodology, supra note 87.
125 Bae et al, supra note 97 at 165.
126 Commissioner of the Environment and Sustainable Development, supra note 5 at para 3.68.
127 For a civil society initiative on how NPRI data could be made more understandable to the general public, please see www.emitter.ca, supra note 87. The initiative seeks to allow concerned citizens to check the existing levels of pollution in different areas and to compare how different regions or facilities in a particular industry fared against other areas or facilities.
4.2 Three Sources of Environmental Enforcement Information

Environmental enforcement information is available to Canadians from three distinct sources online. First, there are Annual Reports to Parliament required by an environmental statute. Second, Environment Canada publishes Enforcement Notifications about prosecutions where reporting is not required by statute. Third, News Releases and Statements are available online regarding various issues including conservation efforts, weather reviews and legal charges as well as convictions that are also reported on the Enforcement Notifications website. These sources of information generate information to interested Canadians, but the information is fragmented, scattered among three websites and only presented after-the-fact. Unlike the US ECHO database, one cannot look up what is going with a local facility down the street, so to speak, in terms of when a facility was inspected, what was found, what permits it has, how many violations it has, relating to which substance and at what levels they were reported.

4.2.1 Annual Reports on Inspections, Investigations and Prosecutions

Several federal environmental statutes oblige the Canadian government to provide enforcement information through yearly reports to Parliament.\(^\text{128}\) (See Appendix A). However, the Annual Reports are dispersed among several websites. This includes the Environment Canada website for reports on CEPA and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (hereafter “WAPPRIITA”),\(^\text{129}\) the Department of Fisheries and Oceans website for reports on the Fisheries Act, and the Species at Risk Public Registry website for a reports pertaining to Species at Risk Act (hereafter, “SARA”).\(^\text{130}\) The available information is fragmented and released at varying, unpredictable times throughout the year.

As an illustration of the inadequacies of Annual Reports, CEPA's Annual Report does not contain sufficient information to conduct a geographic analysis of the data. It is impossible to ascertain how enforcement activities are carried out in a particular location or vis-à-vis a particular regulated entity, like a business or municipality. Inconsistent with the government’s Open Data Pilot Project, data are not available in a downloadable format that would facilitate statistical analysis by other members of the public (such as a datafile or text document). There is no information on the cases that did not result in a conviction or on charges that did not result in prosecution. The Annual Report is also silent as regards to private prosecutions. Moreover, the information is available to the public only after-the-fact.

\(^{128}\) Federal environmental and wildlife statutes that require an Annual Report are Species at Risk Act (“SARA”) SC 2002, c 29; the CEPA, supra note 4; the Fisheries Act, supra note 30 and Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (WAPPRIITA), RSC 2002, c 29. Those that do not require an Annual Report are the Canada Shipping Act, supra note 26; the Migratory Birds Convention Act, RSC 1994, c 22 and the Canada Wildlife Act, RSC 1985, c W-9.

\(^{129}\) Supra note 128.

\(^{130}\) The Annual Report for SARA, supra note 128 can be found online: Species at Risk Public Registry [http://www.sararegistry.gc.ca]. The Annual Report for CEPA, supra note 4 can be found online: Environment Canada [http://www.ec.gc.ca/lcep-cepas]. The Annual Report for WAPPRIITA, supra note 128 can be found online: Environment Canada [http://www.ec.gc.ca]. The Annual Report for the Fisheries Act, supra note 30 can be found online: Department of Oceans and Fisheries [http://www.dfo-mpo.gc.ca].
It is recommended that publicly accessible information go well beyond the provision of raw numbers on how many inspections, investigations or prosecutions have occurred. All non-confidential information found in each enforcement file in possession of the Canadian enforcement authorities should be accessible, such as the name of the offenders, specific location of the offenders, type of offences, total number violations, and how many investigations resulted in a trial, were stayed by the Attorney General or were transformed into a public prosecutions. We recommend providing the public with enforcement data through the Canadian NEMISIS database. Ultimately, we recommend more comprehensive disclosure, such as that provided by the US through the ECHO model.

4.2.2 Enforcement Notifications of Prosecutions

Where an environmental legislation does not provide the obligation to publish a yearly report and a prosecution has occurred, Canadians are left to rely on Enforcement Notifications. Enforcement Notifications consist of a press release-style document providing limited information on successful prosecutions under any federal environmental or wildlife legislation. Unlike Annual Reports, Enforcement Notifications are available on a single webpage and are not scattered among the various websites of different government departments. These notifications are open to the public and can be found on the Environment Canada website.131

As an illustration of a typical Enforcement Notification, one released on December 9, 2010 entitled "Possession for the Purpose of Unlawful Export of Endangered Species Nets $8000 in Fines" is a mere three paragraphs long.132 It reports a successful conviction of a named individual and a named company under WAPPRITA and mentions that the court issued a $4000 fine to each party. There is a short description of the inspection that was conducted at an international airport during which endangered species were uncovered in outgoing cargo. The main shortcoming of Enforcement Notifications is that, like with the notification described above, the information on prosecutions they communicate is generally limited to bare elements about the name of the party convicted, the date and reason for the conviction, and the amount of the penalty. Like the yearly reports, the information is made available to the public after-the-fact. As such, neither the Enforcement Notifications nor the Annual Reports serve as a Right to know mechanism for concerned citizens while prosecutions are ongoing.

4.2.3 News Releases and Statements

Finally, the News Release and Statements section of the Environment Canada website133 issues information that is often a reproduction of what is found on the Enforcement Notifications website. For example, a three-paragraph statement was issued on March 14, 2011 entitled...

"CN Rail Convicted for Diesel Spill" as both an Enforcement Notification and a News Release. It indicates that a $75,000 fine was issued to CN Rail under the *Fisheries Act* for releasing diesel fuel into the Fraser River in British Columbia. Repetitive statements clearly do not add substantially to public knowledge about violations of environmental and wildlife statute. News Releases add another source of scattered information.

Together, yearly reports to Parliament, notifications and press releases only provide Canadians with fragmented information from a miscellany of sources. In addition, none of this information is provided in searchable formats similar to those discussed for the NPRI, and they are certainly a far cry from the user-friendly and accessible interface provided for by the ECHO database. Given that the way the information is presented affects its final policy outcome, the preceding analysis should raise concerns for those interested in the principle of the community right to know. The principle of community right to know cannot be realized when the public cannot find information relevant to their specific interests at an appropriate level of detail, and cannot customize the data by restructuring it for further analysis.

In response to these lacunae, we propose the introduction and development of an interactive Web 2.0 database in Canada whereby users could search for information by entering postal codes and company names, among other categories.

4.3 NEMISIS: Environment Canada's Internal Enforcement Database

The limited information that the Canadian public has access to through Annual Reports to Parliament, Enforcement Notifications and News Releases and Statements is only one part of federal environmental enforcement information. The remaining information is held in NEMISIS database and is presently for "government eyes" only. NEMISIS is an electronic information database internal to the Federal government; it is publicly inaccessible. The data is available to Environment Canada inspectors, investigators, wildlife officers and managers. NEMISIS is also widely accessed and used by other federal departments than Environment Canada that are in charge of enforcement of environmental statutes.

The purpose of NEMISIS is to track and manage federal enforcement activities with respect to six environmental protection and wildlife acts under the aegis of Environment Canada. The six acts are the *Canadian Environmental Protection Act*, the *Fisheries Act*,...
the Migratory Birds Convention Act, 1994\textsuperscript{140}, the Canada Wildlife Act\textsuperscript{41}, WAPPRITA\textsuperscript{42} and SARA\textsuperscript{43}. The legislation is categorized by Environment Canada into Environmental and Wildlife legislation\textsuperscript{144}:

1) Environmental Enforcement
   - Canadian Environmental Protection Act, 1999
   - Pollution Prevention Provisions of the Fisheries Act

2) Wildlife Enforcement
   - Migratory Birds Convention Act, 1994
   - Canada Wildlife Act
   - WAPPRITA
   - SARA

The NEMISIS database was initially created to support legislated compliance activities and has expanded its role to supporting Environment Canada's performance reporting. "As a management tool, NEMISIS can be used to monitor trends, set priorities and prepare regular and special purpose reports."\textsuperscript{145} The database includes "recording, tracking and reporting of occurrences, inspections, investigations, persons, organizations and enforcement officers."\textsuperscript{146} It can be used to create statistical reports on enforcement activities.

Without direct online access to the information on the NEMISIS database, citizens must endure a lengthy access-to-information process. Non-sensitive data is available through an access to information petition, but the process is long and costly for both petitioners and government. The inefficiency of the clearance process is illustrated by a Canadian Press investigator's attempt at retrieving information relating to arctic spills from NEMISIS. The investigator encountered considerable difficulty: "It took The Canadian Press two years and a complaint to the information commissioner to pry the data from Environment Canada under the Access to Information Act."\textsuperscript{147} Furthermore, much of the information eventually obtained was found to have gaps:

There are many instances in which the database doesn't say how much time it took to clean up the mess. Indeed, the government's tracking system is riddled with blank entries. Often

\textsuperscript{140} Supra, note 128.
\textsuperscript{141} Ibid.
\textsuperscript{142} RSC 1992, c 52.
\textsuperscript{143} Supra, note 128.
\textsuperscript{145} Report of Seminar on National Enforcement Management Information System and Intelligence System, supra note 7.
\textsuperscript{146} Environment Canada, Evaluation of Enforcement (1999), supra note 136 at 41.
\textsuperscript{147} "Sewage, Jet Fuel Spilted in the Arctic", Canadian Press (31 May 2010) (QL).
it doesn’t say how much of a contaminant has been spilled. Sometimes even the name of the responsible party isn’t known.\textsuperscript{148}

The investigator ended up creating a private database from the information retrieved, covering the period from January 2004 to November 2009. The analysis found 260 spills in the North over five years. There were 137 spills in the Northwest Territories, 82 in Nunavut and 41 in the Yukon\textsuperscript{149}.

NEMISIS holds a lot of classified information on oil spills which, according to the community right to know and proactive disclosure principles endorsed by the information commissioner, should be made available to the general public. Access to the data in NEMISIS, which may benefit the general public, is discouraged because of the time and cost of access to information requests. It would also benefit government officials who currently have to follow several lengthy steps to retrieve and release the information.

Such restricted access to information held by public authorities and the government’s current reactive disclosure rather than proactive disclosure mechanisms limit the right to self-protection inherent in community right to know theory. In accordance with the proactive disclosure principle and for efficient use of government time and resources, it is recommended to allow public access to the NEMISIS database in order to promote citizen oversight of federal enforcement activities, to monitor company practices, to enable informed consumer choices, and, if need be, to better empower citizens to launch their own lawsuits without reliance on the federal government to take action.

4.4 Improving NEMISIS

As mentioned above, there is presently no NEMISIS webpage and/or database that is accessible to the public. Like the ECHO database in the United States, NEMISIS could similarly become open to the public so that individual citizens could initiate searches based on locations (using postal codes) and particular facilities. It is recommended that NEMISIS be opened to the public and that public user be allowed to search based on location and facilities by providing information about the facility location, characteristics, regulatory category along with inspection dates, violation status, pollutants in violation, information for enforcement actions taken by the government, informal enforcement actions taken by the government, penalties assessed, in an understandable, useful, and downloadable in machine-readable formats to the exclusion of confidential information.

Additional information could be added to NEMISIS to improve the scope of its application and usefulness as a data analysis tool. Canada could integrate data into NEMISIS from its NPRI, its substantive equivalent to the US TRI, which is incorporated into ECHO. In addition, it is recommended that there be inclusion of compliance data, like with the United States ECHO database, in order to showcase all known cases of conformity with the law. This recommendation is supported by the Auditor General in a recent report about monitoring per-

\textsuperscript{148} "Classified Canadian Database reveals numerous spills in the Arctic", Canadian Press (31 May 2010) (QL).

\textsuperscript{149} "Sewage, Jet Fuel Spilled in the Arctic", supra note 147.
formance by the Enforcement Branch of Environment Canada. In addition, improvements could be made to NEMISIS to reduce duplication and gaps in enforcement that result from shared enforcement powers between federal government departments, and between federal and provincial governments. A cost-effectiveness study in the 2009-2010 Evaluation of the Enforcement Program report indicated that the overlap of federal and Provincial enforcement bodies has led to duplication of enforcement activities in some cases, and enforcement gaps in others. As mentioned, the Enforcement Program of Environment Canada "relies heavily on its relationship with external partners". External partners can include specific federal government departments and designated authorities. For example, Environment Canada shares responsibility for implementing the Fisheries Act and CEPA 1999, with other federal government departments, namely the Department of Fisheries and Health Canada. Also, the Minister of the Environment has statutory powers to allow qualified officials, including employees of provincial, territorial or Aboriginal governments, to enforce Environment Canada's laws. In order to reduce duplication and gaps in national and provincial enforcement action, enhance clarity for government officials, and promote the efficient use of resources, it is recommended that all environmental and wildlife enforcement activities be streamlined so that their information be shared among all federal and provincial governments through a single online open-access database.

A potential criticism of streamlining federal and provincial enforcement information on NEMISIS is that Canada would be following the US model of centralized power which would be unworkable considering Canada's constitutional allocation of heads of power between the provinces and the federal government. Yet, Canada has adopted strong centralized services in other government programs to improve efficiency. For example, the Canadian Border Services Agency (hereafter "CBSA") streamlines the way goods are imported into Canada using a "single window initiative" shared among government departments. The Accelerated Commercial Release Operations Support System is used to release low-risk shipments into Canada electronically and is especially time-saving when imports have multiple government department requirements. It is an efficient mechanism that allows the CBSA to shift its resources towards high-risk imports and other enforcement priorities.

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150 Environment Canada, *Evaluation of Enforcement (1999)*, supra note 136 at 30 ("NEMISIS is not currently designed to capture complete compliance information (i.e., this database captures suspected and real incidences of non-compliance, but does not necessarily capture conformity except in cases of compliant inspections)").

151 Ibid at 34.

152 Ibid at 36.

153 Ibid at 42.

154 Ibid at 35.

NEMISIS has additional inadequacies, even in its present state as a database internal to the federal government. Despite its potential as an enforcement reporting tool, data entry into NEMISIS has been criticized for its inconsistency and the quality of the data that may be found on NEMISIS has been criticized for its inaccuracy: "[t]he Program has primarily been reactive to data requests, providing analysis 'off the corner of the desk' when asked." Government employees who have access to NEMISIS data criticized it by pointing out to the missing, incomplete and inaccurate entries. "In many cases the type and amount of contaminant spilled isn't known. But, the department insists it has all the information it needs to track and prosecute polluters." Information contained in the database, however, is so incomplete that it is of little use to senior management or decision makers and would therefore be of little use to the public in its present state.

From the 2009-2010 Evaluation of the Enforcement Program report, the only performance information available on NEMISIS was with respect to two categories: "completed inspection and investigation reports", and "evidence and support for prosecution cases". Also, information was limited to two of 12 possible outcomes under the Compliance Analysis and Planning Program (hereafter "the CAP Program"): "investigations leading to prosecutions" and "increased successful prosecutions". Moreover, this problem does not seem to be adequately addressed. The CAP Program took on the initiative to improve data quality and reliability in 2003, but the 2009-2010 report does not point to improvements on this front. Overall, it was found a general sense of frustration among many Program representatives, who believe that "[although] the Enforcement Program has been cost-effective and quite successful at achieving its intended outcomes, [...] this cannot be clearly demonstrated due to a lack of good performance data."

The Canadian government points to financial constraints as one of the main reasons why NEMISIS is not currently fulfilling its intended potential:

Resource constraints on Enforcement’s key internal partners (i.e., Compliance Promotion, environmental protection programs and CWS) were viewed as a negative external factor, while an increased interest in environmental and wildlife enforcement was identified as a positive external factor influencing the success of the Program. Looking forward, expected increases in the number of new regulations to enforce are anticipated to pose challenges to the Program’s capacity in the future.

This reasoning betrays the fact that the government often views enforcement reporting as a byproduct or liability of service provision. According to David Eaves, however, quantitative information is an asset to government, industry and the public. Good quality data represents

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156 Environment Canada, Evaluation of Enforcement (1999), supra note 136 at 42.
157 Steve Rennie, "Millions of Litres of Pollutants Dumped in Cities," The Toronto Star (13 June 2010) online: The Star <http://www.thestar.com>. Because of the difficult and cumbersome process involved in gaining access to this database, we have relied on secondary literature as a basis of this critique, as well as the first hand accounts of those who have gone through access requests and have reported their experiences publicly.
158 Environment Canada, Evaluation of Enforcement (1999), supra note 136 at 68.
159 Ibid at 42.
160 Ibid at 33.
the potential for gain in productivity and efficiency if used properly. It is recommended that the quality of data on NEMESIS be improved in terms of accuracy, completeness, and consistency of data entry by officers to ensure its reliability and usefulness.

The US EPA has justified the expense required for more comprehensive reporting and has invested in public oversight of industry and government in recognition of the incentives it can create for industry, the help it can provide to government officials, and the security it affords to citizens to be aware of the state of their surrounding environment:

The ECHO site can assist citizens in determining whether facilities are complying with environmental laws or permit limits. Knowledge of this information can be a powerful incentive for facilities to maintain high environmental standards or quickly resolve problems that are occurring. Knowledge of compliance information can assist communities in asking the right questions of nearby facilities or regulators – particularly if releases are over permitted standards. The site also may help communities identify facilities that have not reported under environmental laws. For example, facilities with direct water discharges that are not shown in the ECHO database may be operating without a permit. This information can be passed to regulatory officials.

5. CONCLUSION

The comparison between the United States and Canada is not intended to present the United States as an environmental utopia. However, we find that constitutional constraints and upfront costs that surface as obstacles to a system of unified administration in Canada are hurdles that may be surpassed with the requisite political will. The federal government has already implemented a program with cross-departmental considerations in mind through the Canadian Border Service Agency's "single window initiative" shared among government departments to regulate goods imported into Canada. We put forward that there are long-term efficiency gains that justify the upfront costs of integrating information pertaining to environmental law enforcement that is currently boxed-in to distinct agencies. The ability to manipulate data that is collected by various departments by integrating it in a unified, organized and comprehensive way can lead to gains, such as improved decision-making at the regulatory level.

It is debatable whether pollution reduction is influenced more by government regulatory powers or market command and control mechanisms like technical assistance, educational programs, data clearinghouses, tax incentives, government grants to help firms reduce wastes, and goals for the reductions in toxic pollutants. Studies show the positive impacts of regulatory self-reporting through TRI on industry behaviour, pollution reduction, health risks, and even stock prices. We conclude that industries are responsive to regulatory incentives and public exposure to information.

Currently, the Canadian government's approach to environmental law enforcement reporting is reactive rather than proactive. Completed and successful federal enforcement of environmental laws, mainly convictions, are made publicly available at varying times throughout the year in Annual Reports, Enforcement Notifications and News Releases and Statements. We recommend integrating this reporting information that is scattered across government

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161 David Eaves, supra note 75.
162 Enforcement & Compliance History Online: Frequently Asked Questions, supra note 63.
websites into a single online environmental enforcement and compliance database and including all non-confidential information about all inspections, investigations and prosecutions, as well as compliance information concerning facilities that respect the law. Citizen access to such a database would breathe life to the principle of community right to know. It would reduce or eliminate reliance on access to information requests which usually entail long waiting periods for concerned citizens. Moreover, is logical to expand upon NEMISIS by opening its non-confidential information to the public. As such, the information would be provided in a centralized portal for public access. The overall rationale behind these changes is to promote citizen oversight, industry compliance, government transparency and efficient use of government officials' time.

NEMISIS could be adapted and improved to serve additional public functions. As a publicly accessible database, data from the NPRI could be integrated into NEMISIS, following the US model which integrates TRI data into ECHO. Additionally, efforts ought to be made to streamline enforcement activities among all federal and provincial governments into the database in order to reduce duplication and gaps in national and provincial enforcement action. The database ought to be updated regularly, mimicking ECHO's monthly updates.

We recommend that Canadians be given greater access to the enforcement information on the NEMISIS database and that the government provide such information in a way that is easily accessible by citizens, in accordance with the proactive disclosure and open government principle endorsed by Environment Canada and the federal government. Following the ECHO model, the new NEMISIS could contain a function which would allow users to conduct searches based on location and facilities to proactively disclose information such as inspection dates, violation status, pollutants in violation, enforcement actions taken by the government, and penalties, if any.

Canada's federal government must provide data in ways that are more understandable, useful, and downloadable in machine-readable formats. A first step is to provide the public with raw data in machine-processable formats such as txt, csv, word, excel, KML, ESRI, and SHAPE so that it can be used and combined in new ways by experts, researchers and academics. In this manner, interested parties such as individual citizens, community groups, NGOs and companies may combine and analyze data in ways other than those provided for by the federal government. The second step is to interpret the data and to provide comprehensive information to members of the general public since most individuals will not likely undergo their own analysis of the data provided. Such efforts would reduce information overload and provide concrete information about what the data represents. Ultimately, the ability of Canadians to access government data and freely analyze it provides one of the most significant measures of government accountability and industry abidance, at the level of the regulator and the regulated entity.
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<th>Statute</th>
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<td><strong>Canadian Environmental Protection Act, 1999</strong></td>
<td>342. (1) The Minister shall, as soon as possible after the end of each fiscal year, prepare and cause to be laid before each House of Parliament a report on the administration and enforcement of this Act for that year.</td>
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| **Fisheries Act**                                                      | 42.1 (1) The Minister shall, as soon as possible after the end of each fiscal year, prepare and cause to be laid before Parliament a report on the administration and enforcement of the provisions of this Act relating to fish habitat protection and pollution prevention for that year.  
Statistical summary  
(2) The Annual Report shall include a statistical summary of convictions under section 40 for that year. |
| **Species at Risk Act**                                                | 126. The Minister must annually prepare a report on the administration of this Act during the preceding calendar year and must have a copy of the report tabled in each House of Parliament within the first 15 days that it is sitting after the completion of the report. The report must include a summary addressing the following matters:  
...  
(e) enforcement and compliance actions taken, including the response to any requests for investigation;  
... |
| **Migratory Birds Convention Act**                                     | No general reporting obligation                                                                                                                                                                                        |
| **Canada Wildlife Act**                                                | No general reporting obligation                                                                                                                                                                                         |
| **The Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act** | 28. The Minister shall annually prepare a report with respect to the administration of this Act during the preceding calendar year and shall cause a copy of the report to be laid before each House of Parliament on any of the first fifteen days that the House is sitting after its completion. |