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## NAFTA: Related Environmental Issues and Initiatives

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### Summary

The North American Free Trade Agreement (NAFTA) includes several environment-related provisions, that while limited, were lauded for their inclusion in a trade agreement. However, further environmental (and labor) assurances were needed to secure passage of NAFTA, and ultimately, the negotiating parties agreed to a side accord that promotes trilateral cooperation on environmental matters and includes provisions to address a party's failure to enforce environmental laws. Further to gain NAFTA support, the United States and Mexico agreed to establish a bilateral Border Environment Cooperation Commission and North American Development Bank to help border-area communities finance environmental infrastructure projects. The United States and Mexico also developed a cooperative plan to address a range of border environmental issues; phase two of the plan, the Border XXI Program, began in 1996.

Since NAFTA's inception, its environmental implications have remained a subject of debate and legislation. Ongoing issues include NAFTA's possible environmental effects, border funding, and the implementation of NAFTA-related environmental agreements. This report provides an overview of NAFTA's environmental provisions and associated agreements and initiatives, and discusses recent issues and congressional activities. It will be updated as events warrant

### NAFTA Environmental Provisions

Environmental issues emerged early in NAFTA negotiations, particularly in the context of liberalizing trade and investment rules between the United States and Mexico. One question concerned how NAFTA might affect one country's more stringent standards, and whether these standards could be challenged successfully as nontariff trade barriers. Conversely, the question was raised whether a country's weaker environmental protection measures or their ineffective enforcement would create a competitive advantage and provide an added incentive for businesses to relocate production to the least regulated country. Many in Congress expressed concern that, although Mexican regulations were becoming more like U. S. regulations, Mexico had many fewer requirements and historically lax enforcement. A related concern was that anticipated industrial growth in the U.S.-Mexico border region would exacerbate the severe pollution problems already present. Trade officials countered that environment was not a customary trade matter and that NAFTA talks were not the proper forum for resolving environmental issues. Nonetheless, the level of concern over these issues in Congress during NAFTA negotiations prompted the Bush Administration respond to them.

While not a new issue, the question of whether a country's stricter environmental measures could be found to pose non-tariff trade barriers received an unprecedented level of attention during the NAFTA debate. Ultimately, negotiators included language to conditionally protect a party's stricter environmental, health, and safety standards for products and produce (provided that, among other things, such measures are scientifically based). Other related NAFTA provisions place the burden of proof that an environmental measure is inconsistent with NAFTA on the party challenging the measure, encourage upward harmonization of standards, and encourage parties to integrate environmental protection and sustainable development into economic decision-making. NAFTA also includes hortatory language to discourage parties from lowering standards to encourage investment. The agreement's standards provisions generally do not affect a country's ability to determine its own levels of protection for manufacturing and other process standards (such as air and water pollution controls, and resource harvesting practices); however, the investment provisions do allow companies to challenge environmental measures that are viewed as harming their investments.

NAFTA also addresses its relationship to multilateral environmental agreements (MEAs). It identifies three trade-related MEAs that may take precedence over NAFTA where implementation conflicts arise, provided that the MEA is implemented in the least NAFTA-inconsistent manner. The listed agreements include the Montreal Protocol on Substances that Deplete the Ozone Layer; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and the Convention on International Trade in Endangered Species (CITES). U.S.-Mexico and U.S.-Canada bilateral waste-trade agreements also are included, and the parties may add others.

Despite the inclusion of the above provisions, some in Congress remained concerned that NAFTA's effect on specific standards or environmental laws could be unpredictable. As with other trade agreements, NAFTA comprises a mix of rights, obligations, and disciplines, and there is room for debate as to which provisions might prevail in particular cases. For example, an emerging issue involves the potential effect that NAFTA may have on state and federal environmental protection efforts because some investors have challenged domestic environmental measures as constituting a form of expropriation for purposes of the NAFTA investment chapter.

In addition to these concerns, several environmental issues persisted after completion of the NAFTA text and, to facilitate NAFTA passage, some of these issues were addressed in supplemental agreements. These related initiatives are discussed below.

North American Agreement on Environmental Cooperation

A matter not addressed in the NAFTA text was whether lax enforcement of environmental laws in Mexico would provide an added incentive for U.S. industries to relocate, and thus increase U.S. job losses, reduce the competitiveness of U.S. products, and increase border-area pollution. Many in Congress called for a side agreement that included an enforcement mechanism to address failures to enforce environmental laws. Others were troubled at the prospect of further environmental provisions, particularly any that might increase the regulatory burden on businesses. Opponents of a side agreement argued that NAFTA-related economic growth would increase Mexico's resources available for environmental protection, and that NAFTA would increase cooperation on environmental matters throughout North America. Congressional support for NAFTA remained uncertain. Candidate William Clinton endorsed NAFTA but promised to negotiate side accords on environmental and labor issues.

In September 1993, the three NAFTA governments signed the North American Agreement on Environmental Cooperation (NAAEC), which includes provisions to address a party's failure to enforce environmental laws. The side agreement's objectives cover a range of goals including avoiding the creation of trade distortions or new trade barriers, enhancing compliance with, and enforcement of, environmental laws and regulations, and fostering environmental protection and pollution prevention.

The NAAEC created the Commission for Environmental Cooperation (CEC), which is comprised of a Council, a Joint Advisory Committee, and an independent Secretariat. The Council consists of cabinet-level representatives of the parties, or their designees, and has key responsibilities regarding the side accord's dispute settlement provisions. The Joint Advisory Committee is comprised of nongovernmental organizations, and it advises the Council. The Secretariat's key responsibilities include preparing reports and serving as a point of inquiry for public concerns about NAFTA's possible environmental effects. The CEC's major goal is to broaden environmental cooperation among the parties. It provides a forum for the parties to consider ways to address environmental issues (including transboundary ones), and provides an avenue for dispute settlement panels to obtain environmental expertise. Among its many projects, the CEC is working to develop a methodology to evaluate the positive and/or negative environmental effects of NAFTA.

To address a party's failure to enforce environmental laws, the NAAEC contains a dispute settlement process that can impose monetary assessments and sanctions as a last resort. To invoke the dispute settlement process, a complaint must concern a party's persistent, systematic failure to enforce its laws, and the alleged failure must be trade-related or involve competing goods or services. Only the NAFTA parties can initiate a NAAEC dispute settlement proceeding. The Secretariat, however, may consider a submission from any nongovernmental organization or person asserting that a party is failing to enforce its environmental law and may request that party to respond. Through January 2000, 23 citizen submissions had been filed. (Information on CEC activities and reports is available at Internet website [<http://www.cec.org>].)

#### U.S.-Mexico Border Environment Cooperation Agreement

Throughout the NAFTA debate, proponents and opponents noted the need to identify funding sources for financing environmental improvements in the border area. Much of the pollution in the area had been attributed to the effects of unregulated industrial development and related population growth associated with Mexico's quasi free-trade maquiladora program, and both governments anticipated that NAFTA could further concentrate economic activity in the border region, and that existing environmental conditions would worsen without a binational effort to address infrastructure needs. For many in Congress, support for NAFTA was partially contingent on the identification of a mechanism for financing border environmental projects. The Administration estimated that \$8 billion would be required to address needs for sewage treatment, drinking water, and municipal solid waste infrastructure projects along the border over the next decade and that NAFTA-related industrialization would create additional needs. <sup>1</sup>

In October 1993, the United States and Mexico agreed to a new institutional structure to promote border environmental cleanup. <sup>2</sup> The Border Environment Cooperation Agreement authorized the establishment of the North American Development Bank (NADBank) and the Border Environment Cooperation Commission (BECC) which work in concert with one another. The BECC is directed to help border states and communities coordinate, design, and mobilize financing for environmental infrastructure projects, and to certify projects for financing, while the NADBank evaluates the financial feasibility of projects certified by the BECC and provides financing as appropriate. Public involvement is facilitated through representation on the BECC Board of Directors and through an 18-member Advisory Council. In addition, the public is to be notified of, and permitted to comment on, proposed projects. As of January 2000, the BECC had certified 33 wastewater, water supply, and solid waste projects. (Information on the BECC and BECC-certified projects can be found at Internet website <http://www.cocof.org>.)

The NADBank is expected to generate between \$2 billion and \$3 billion in loans and guarantees for financing border environmental projects. The United States and Mexico each contributed \$225 million over 4 years to leverage financing. Initial project priority is in three areas: drinking water, wastewater, and solid waste. Also, 10% of the NADBank's resources may be used for NAFTA-related community adjustment and investment projects. As of February 2000, the NADBank had assisted in financing 32 BECC-certified projects, providing a mix of private and public benefits and addressing a blend of new development and existing needs. Additional loan packages are under development. (For more information, see Internet website <http://www.nadbank.org>.)

In 1997, the NADBank entered into a cooperative agreement with the Environmental Protection Agency (EPA), under which EPA contributed \$170 million of appropriated border infrastructure funds to the Border Environment Infrastructure Fund established by the Bank to administer grant resources for border water and wastewater projects. The NADBank is able to formulate financing packages using its loan and guaranty programs, EPA grant money, and other sources. To qualify for EPA grant funding, a project must be BECC-certified and approved by EPA; it may be located on either side of the border.

#### U.S.-Mexico Border XXI Program and the La Paz Agreement

In the early stages of trade discussions in 1990, the U.S. and Mexican presidents agreed on the need for greater cooperation on environmental protection matters in the border region and directed their environmental agencies to develop a plan to augment border environmental cooperation. In 1992, EPA and Mexico's environmental ministry issued the Integrated Border Environment Plan that included commitments by each country to monitor and enforce their own environmental laws. The plan (based on a 1983 bilateral, environmental cooperation agreement known as the La Paz Agreement) <sup>3</sup> identified ways for the two countries to improve coordination and cooperation, with a view to solving a wide range of pollution problems in the region. Its principal objectives were to: strengthen enforcement of existing laws; reduce pollution; increase cooperative planning, training, and education; and improve understanding of the border environment.

In October 1996, EPA and Mexico's environmental agencies issued a 5-year strategy for the second phase of binational environmental planning in the border region. The U.S.-Mexico Border XV Program, also based on the La Paz Agreement, builds on and broadens the 1992 plan to place greater emphasis on health and natural resource issues and to reflect expanded opportunities for cooperation provided by the NAFTA side accord and the U.S.-Mexico Border Environment Cooperation Agreement. The mission of Border XXI is "to achieve a clean environment, protect public health and natural resources, and encourage sustainable development along the U.S.-Mexico border." The program involves multiple health and environment agencies in both countries and provides the framework for activities that contribute to improving the availability of water supply and sewage treatment services, improving industrial waste management practices, controlling air pollution, and enhancing compliance and enforcement programs. The Border XXI Program is designed to coordinate with the NAAEC, the BECC, and

the NADBank. Federal funding for the program is based on annual appropriations by the U.S. Congress and Mexico's Ministry of Finance. Funding for infrastructure projects under the umbrella of the Border XXI Program has come from various sources including federal and state governments, the private sector, and the World Bank. (More information on border environment activities can be found at <http://www.epa.gov/usmexicoborder>.)

#### The Administration's NAFTA Assessment

The NAFTA Implementation Act (P.L. 103-182) directed the President to report to Congress on the effects of NAFTA and the implementation of the NAFTA side agreements by July 1997. The resulting 1997 President's Study on the Operation and Effects of the North American Free Trade Agreement concluded that it was premature to assess any environmental effects of NAFTA and difficult to determine whether further environmental degradation at the U.S.-Mexico border was due to NAFTA or other economic development and events. (See <http://www.USTR.gov/report/NAFTA4th.pdf> ) Consequently, the report primarily discussed the new institutional framework put in place to foster cooperation on environmental issues at the border and throughout North America. The study noted that Mexico had increased enforcement efforts, particularly among border industries, and that the CEC, with EPA and others, has been working to develop a methodology to evaluate NAFTA's positive or negative environmental effects.

#### Congressional Activity and Issues

Since NAFTA's inception, its environmental implications have remained a subject of oversight and legislation. Some in Congress remain concerned about NAFTA's environmental impacts while others question the prudence of attempting to address environmental matters in trade agreements. Issues have included implementation of the environmental side agreement, the relationship of NAFTA to increased pollution in the U. S.-Mexico border region, the entry of vehicles not meeting U.S. emission standards; the safety of imported food, parties' enforcement of environmental laws, the performances of the BECC and NADBank, and differences in the parties' pollution control standards. An emerging issue involves the potential effect that NAFTA may have on state and federal environmental protection efforts because some investors have challenged domestic environmental measures as constituting a form of expropriation for purposes of the NAFTA investment chapter.

The 105th Congress passed the Border Smog Reduction Act of 1998 (P.L. 105-286) to limit the entry of certain "commuter" vehicles into California unless the vehicles meet California emissions testing requirements. Other bills were introduced that called for the investigation of NAFTA-related pollution and cleanup efforts in the border region, and renegotiation of, or withdrawal from, NAFTA unless certain conditions (including environmental conditions) were met. Also, the Senate Committee on Governmental Affairs held four hearings on the broader trade issue of imported food safety. In the 106th Congress, pending legislation includes H.R. 650 which calls for assessing the impact of NAFTA on the environment (and jobs), and requires the President to submit annual reports to Congress certifying that each NAFTA country is meeting obligations under the side agreements. H.R.1755 authorizes grants to states to reimburse them for costs incurred in implementing the Border Smog Reduction Act.

Funding of U.S.-Mexico border cleanup activities presents an ongoing issue. In addition to capitalizing the NADBank, Congress has appropriated funds for border environmental infrastructure projects regularly in recent years, primarily through EPA. In each of EPA's FY1996 and FY1997 appropriations laws, Congress provided \$100 million for wastewater projects along the U.S.-Mexico border and \$50 million for Texas colonias. <sup>4</sup> For FY1998, Congress approved \$75 million for border projects and \$50 million for Texas colonias. For FY 1999, EPA received \$ 5 0 million for border water and wastewater projects, and Congress extended the availability of the FY1997 and FY1998 colonias appropriations. Congress again provided EPA with \$50 million for border-area projects for FY2000. For FY2001, EPA has requested \$100 million to provide grant assistance to address problems associated with untreated industrial and municipal sewage on the border.

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#### Footnotes:

1. U.S. Congress. House. Committee on Banking, Finance, and Urban Affairs. *United States-Mexican Border Environment Agreement*. Hearings, 103d Cong., 2d Sess. Oct. 27, 1993. Washington, U.S. Govt. Print. Off., 1993. p. 8 and p. 141.
2. *Agreement between the Government of the United States of America and the Government of the United Mexican States Concerning the Establishment of a Border Environment Cooperation Commission (BECC) and a North American Development Bank (NADBank)*. Referred to here as the Border Environment Cooperation Agreement.
3. Since 1983, the United States and Mexico have shared a bilateral executive agreement designed to promote cooperation on solving environmental problems of the border region. The *Agreement between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, known popularly as the La Paz Agreement, entered into force February 16, 1984 (TIAS 10827). Since then, the United States and Mexico have negotiated five annexes to the La Paz Agreement that address border pollution issues involving sewage treatment, waste trade, emergency responses to hazardous substance spills, and air pollution. The La Paz Agreement defined the border region as the area lying 100 kilometers (62.5 miles) to the north and south of the U.S.-Mexico boundary.
4. *Colonias* typically are rural, unincorporated communities or housing developments that lack some or all basic infrastructure including plumbing and public water and sewer.

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