

**NORTH AMERICAN FREE TRADE AND THE ENVIRONMENT:
BORDER ENVIRONMENTAL GROUPS AND THE NAFTA**

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ABSTRACT

The North American Free Trade Agreement has generated an unprecedented degree of interest and concern over the potential Impact of unrestricted trade and Investment on North America's environmental and public health conditions. This paper evaluates the role of nongovernmental environmental organizations along the U .S. /Mexico border within the context of the NAFTA debate, concluding that regardless of NAFTA'S ratification, border environmental groups will continue to play an important role in the development of on-site projects as well as proposals for transboundary environmental reform.

RESUMEN

El Tratado de Libre Comercio en Norteamérica ha generado un nivel de interés y preocupación sin precedente sobre los posibles efectos que tendrán el comercio y la inversión en Norteamérica sobre el medio ambiente y la salud pública. Este artículo evalúa el papel de las organizaciones no gubernamentales ambientalistas a lo largo de la frontera México-Estados Unidos en el contexto del debate sobre el TLC, concluyendo que, independientemente del proceso de ratificación del TLC, los grupos ambientalistas fronterizos continuarán jugando un rol importante en el planteamiento de proyectos de desarrollo en la región así como planteando reformas en el régimen ambiental transfronterizo.

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Introduction

WITH its promise of eliminating barriers to trade and investment among countries of widely varying environmental regimes, the North American Free Trade Agreement (NAFTA) has accentuated continental concerns about the prejudicial impacts of liberalized trade on environmental protections. Many non-governmental border environmental organizations (NGBEOs), after years working to broaden policy responses to local environmental problems, have seen the NAFTA as a vehicle for innovative solutions to some of the problems of the border region in particular and North America in general.¹ Recognizing the potential for institutionalizing environmental and health safeguards, and informed by their direct experience along the border, NGBEOs have emerged as vocal advocates of strong, comprehensive, transborder environmental regimes both attached to, and independent of, the NAFTA.

In retrospect, the NAFTA debate has resulted in greater attention in Washington D.C. and Mexico City to border environmental problems, stronger and more comprehensive networks among environmental groups working in the U.S. and Mexico, and active participation of environmentalists in the trade policy arena. Despite financial and institutional constraints, NGBEOs have managed to exert significant influence on the negotiations on NAFTA and its environmental side agreements, and they deserve a measure of credit for the creation of environmental funding mechanisms and a trinational environmental commission, and NAFTA language promoting public participation, right-to-know and transparency. Nevertheless, NGBEOs remain largely unconvinced that the NAFTA and the parallel North American Agreement on Environmental Cooperation (NAAEC) will provide sufficient protections to human health and the environment.

NAFTA and the Environment

Environmental concerns over the NAFTA exist within a larger debate over the short- and long-term environmental effects of expanded trade and investment. Envisioned by its architects as a necessary

1 While recognizing the important links between human rights, labor, and agricultural groups and environmentalists and the complexity of the problems presented by the NAFTA, this article focuses on the role and concerns of non-governmental organizations along the U.S./Mexico border whose orientation is primarily environmental.

component of a hemispheric trend toward trade liberalization, the NAFTA would eliminate tariffs and subsidies, reduce foreign investment restrictions, *and generally promote the* free flow of goods and services between Canada, the United States and Mexico. Environmentalists fear that such policies, aimed at eliminating international barriers to flows of investments, *goods and services, will derail* countries' efforts to protect human health and the environment, to conserve natural resources and to create or maintain effective regulatory systems.²

With its parallel environmental and labor side agreements completed and signed, the NAFTA still must confront one final hurdle before it can be ratified. Already passed by Canada's parliament and virtually assured passage by Mexico's Congress of Deputies, the NAFTA must run the U.S. Congressional gauntlet, where passage is hardly assured.³ As the U.S. Congress deliberates NAFTA'S merits and flaws, among the concerns voiced will be whether the NAFTA and the AEC provide sufficient environmental and health safeguards to protect North America's natural resources and public health from the negative effects of unrestricted trade and investment; that is to say, whether the agreement can overcome the kinds of problems created in the U.S./Mexico border region after a quarter century of industrialization and liberalized trade.

NGBEOS and the Border Environment

Recently, the border region's environmental crisis has been emphasized as a harbinger of future U.S./Mexico economic relations, and debate surrounding the NAFTA has been filled with references to depressed colonias, sewage-laden border rivers, anencephalic babies, abandoned hazardous waste dumps, and polluting factories. But long before the border's environmental ills became symbols of NAFTA'S faults, dozens of border groups and several informal binational networks were working to address border health needs, develop water and air monitoring programs, track loans and invest-

2 See Stephen P. Mumme, "Environmentalists, NAFTA and North American Environmental Management," *Journal of Environment and Development*, 2,1, Winter 1993, for a broader discussion of environmental responses to NAFTA.

3 So-called "fast track" legislation requires that the U.S. Congress either approve or disapprove the NAFTA package. Still unclear is the possibility of additional alterations in the final agreement, through implementing legislation or other means.

ments, and conduct inventories of hazardous materials used in border industries.

The Austin-based Texas Center for Policy Studies (TCPS) and the Bisbee, Arizona-based Border Ecology Project (BEP) played pivotal roles in the formation of binational environmental networks in the eastern and western border regions, respectively. Beginning in 1990, for example, the TCPS, in close collaboration with non-governmental organizations (NGOs) in Chihuahua and other northern Mexico states, began monitoring and tracking the environmental impacts of a World Bank loan for forestry development in Chihuahua and Durango. Under the project, TCPS and Bioconservación, A.C., a Mexican environmental NGO based in Monterrey, Nuevo León,⁴ developed a network of environmental and community groups along the Texas/Mexico border to address common problems such as water quality, natural resource protection and hazardous materials management.

Similarly, the western border region is home to a variety of environmental and health groups working on transboundary environmental and health problems. La Red Fronteriza de Salud y Ambiente (Border Health and Environmental Network), for example, emerged in early 1991 with support from BEP as a forum within which U.S. and Mexican academics and environmental activists—many of whom had been collaborating for several years—could develop locally generated policy recommendations on hazardous materials inventories, health studies, hazardous waste tracking and contingency planning.⁵

While NGBEOS do have considerable credibility on many 'front line' environmental problems, their geographic isolation and scant numbers have in some ways limited their political clout in Washington D.C. and Mexico City. Environmental advocates from both sides of the border must cope with a common history of political and

4 Founded in 1970 and formalized as an Asociación Civil in 1974, Bioconservación, A.C. is one of Mexico's oldest non-governmental environmental organizations. Bioconservación began as a biological resource conservation group, integrated family planning into its agenda during the 1970s, and with the industrialization of the border has increasingly worked to address negative impacts of uncontrolled economic growth.

5 Based in Hermosillo, Sonora, and formalized as an A.C. in 1993, La Red is an environmental and health network of activists, academics and professionals from Arizona, Sonora, California and Baja California Norte. Affiliated groups and institutions include El Colegio de Sonora, El Colegio de la Frontera Norte, Enlace Ecológico A.C., Comité Cívico de Divulgación Ecológica A.C., Border Ecology Project, Arizona Toxics Information, Proyecto Fronterizo de Educación Ambiental A.C. and the University of Arizona.

economic disenfranchisement. U.S. NGBEOs are often absent *from* important briefings, hearings and ‘insider’ discussions in Washington D.C. Similarly, in Mexico, though NGBEOs may have more working knowledge of on-site problems related to water pollution and hazardous waste dumping, for example, they enjoy less lobbying power than their counterparts in Mexico City, who often have direct and daily access to high-level policy makers.⁶ As SEDESOL decentralizes many of its regulatory responsibilities, however, the resulting need for organizations and individuals with direct environmental experience is strengthening Mexican NGBEOs’ influence on state and municipal environmental policy making.

NGBEOs and the NAFTA

The collective experience of these networks of groups has helped to inform the debate over the NAFTA, its potential environmental effects, and options for North American safeguards. While most NGBEOs remain small, locally focused and only marginally involved in the dialogue over a NAFTA, many of the NGBEOs dealing with transboundary environmental impacts have been drawn steadily into the free trade debate.⁷ Seen by some as a testing ground for free trade, the border region has been described as a “worst case example of what low-wage free trade means when it isn’t linked to adequate regulatory protection for human health and the environment.”⁸ Project-specific collaborations have facilitated dialogue between border groups on the NAFTA and allowed border groups such as TCPS and BEP to serve as critical links between environmental groups and policy makers in Washington D.C. and their counterparts in Mexico City. In many ways, NGBEOs’ involvement in the NAFTA debate represents a logical outgrowth of previous endeavors to increase public participation in environmental problem resolution and develop practical solutions to the negative impacts of increased economic integration between the U.S. and Mexico.

6 Interview with Salvador Contreras, Bioconservación, September 6, 1993.

7 Figuring prominently among these are: Arizona Toxics Information, Bioconservación A.C., Comité Cívico de Divulgación Ecológica A.C., the Border Ecology Project, Enlace Ecológico A.C., Environmental Health Coalition, Proyecto Fronterizo de Educación Ambiental A.C., La Red Fronteriza de Salud y Ambiente A.C., and the Texas Center for Policy Studies.

8 Michael Gregory and Dick Kamp, “Protecting Health and Environment in the Proposed NAFTA: Brief Notes,” September 10, 1992.

From the outset, U.S. NGBEOs have played a key role in the public debate surrounding the NAFTA. U.S. border environmental groups were an important element in the grassroots coalition of labor, human rights, agricultural and environmental groups that emerged to advocate a wider agenda of issues needing to be addressed in a continental trade pact. Before the advent of the NAFTA, the environmental problems along the U.S. / Mexico border were largely ignored by national environmental organizations. But the direct experience of U.S. NGBEOs with the impacts of economic integration along the border and their links to Mexican environmental NGOs lent them credibility not enjoyed by many national environmental groups and helped shape the environmental agenda of NAFTA activists. For example, in a September 1993 letter to Jay Hair (President of the Washington D.C.-based National Wildlife Federation), responding to Hair's assertion that environmentalists not supporting the NAAEC were "feeding off misinformation,"⁹ TCPS, BEP and Arizona Toxics Information (ATI) argued that "without some of our research and documentation of border environmental issues associated with the rapid industrialization of the maquiladora program, national groups would have had much less success in getting environmental issues on the table in NAFTA negotiations..."¹⁰

Some border groups have magnified their impact on environmental policy making by cultivating strong links to the U.S. and Mexican news media. Possessing a "shared empirical experience on many transboundary environmental issues" NGBEOs and media correspondents are often able to share views in an information-starved environment and promote dialogue on key policy issues related to the NAFTA.¹¹

TCPS, BEP and ATI were among the first to articulate the concerns of many border environmentalists, arguing the need for the NAFTA to address the environmental impacts of increased economic integration between the U.S. and Mexico, not just along the border but in Mexico's interior as well.¹² Existing binational networks quickly found that as informal fora for interaction within a rapidly changing political landscape, they were uniquely prepared for the NAFTA

9 Keith Schnelder, "Environmentalists Fight Each Other Over Trade Accord," *New York Times*, September 16, 1993.

10 Mary Kelly, Dick Kamp and Michael Gregory, Letter to Jay Hair, September 17, 1993.

11 Interview with Dick Kamp, Border Ecology Project, September 19, 1993.

12 See "MexIco-U.S. Free Trade Negotiations and the Environment: Exploring the Issues," Texas Center for Policy Studies and Border Ecology Project Discussion Paper, by Mary Kelly; Dick Kamp, Michael Gregory and Jan Rich, January 1991 (and later published in *Columbia Journal of World Business*, Summer 1991).

debate. Border groups were co-sponsors of an early public forum on grassroots concerns and the NAFTA, held on Capitol Hill in January 1991, which, according to ATI Director Michael Gregory, helped lay the foundation for “the intensive and remarkably successful coalition-building among NGOs that continued throughout the NAFTA process.”¹³

Several binational border networks have addressed environmental issues as part of a broader social agenda which includes labor rights, economic justice, and human rights. The broad-based Southwest Network for Environmental and Economic Justice (SNEEJ) and Coalition for Justice in the Maquiladoras, for example, have been arguing for a complete renegotiation of the NAFTA in order to include labor guarantees, human rights and environmental protections.

Many Mexican border groups, uncertain about their direct influence on the NAFTA process, have remained on the margins of the NAFTA debate, choosing to focus their attention on Mexican domestic policy trends that are tied to the NAFTA but not dependent on its ratification, such as *ejido* reform. World Bank loans, forestry loans and liberalization of foreign investment laws. While Mexican NGBEOs have contributed to public awareness about environmental issues, thereby helping to pressure Mexican authorities to respond to specific problem areas, many have problems gaining access to information about the NAFTA and its potential impacts. In Tijuana, for example, there are no Mexican environmental networks dedicated to free trade Issues, few have even heard of the parallel Agreement on Environmental Cooperation, and accurate, up-to-date information about the NAFTA (including the NAFTA text itself) is rare to non-existent.¹⁴ Mexican NGBEOS have relied heavily on U.S. NGBEOS for NAFTA-related documents and texts, but even then the language barrier obstructs efficient use of the information, as most is in English. Besides the pervasive information shortage, Mexican NGBEOS also face financial obstacles, as funding support for Mexican non-profits is extremely limited. In many ways, Mexican NGBEOS are

13 For a more detailed retrospective of public participation and the NAFTA, see Michael Gregory, “Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective,” *Journal of Environmental Law and Litigation*, vol. 7, Summer 1992, pp. 99-174.

14 Interview with Laura Durazo, Proyecto Fronterizo de Educación Ambiental, September 7, 1993. Other Tijuana-based environmental groups, such as Foro Ecologista, AIRE SANO and Movimiento Ecologista de Baja California (MEBAC), have been active in local and regional environmental issues, but none has taken a stance directly on the NAFTA.

just beginning to recognize the influence they have (or can have) on Mexican environmental policy.¹⁵

For most Mexican NGBEOS, the challenge of border environmentalism arises from local, grassroots orientations -establishing community education programs, mitigating effects of unmanaged industrial growth, promoting ordered urban planning and professionalism within agencies overseeing environmental protection, and ensuring public participation in the development of state and federal environmental legislation.¹⁶

For these groups, the NAFTA threatens to undermine their efforts in these areas and to accentuate existing problems, offering no guarantees of public oversight and community participation, right-to-know programs, and protection of natural resources. Still, few have taken firm stances on the NAFTA and its parallel accords.

The IBEP/PIAF Debate

In mid-1991, when the U.S. and Mexican governments released a draft Integrated Border Environmental Plan (IBEP)/Plan Integral Ambiental Fronterizo (PIAF) in an attempt to ease public concerns about existing problems along the border, NGBEOS were among the most vocal critics of the plan. During the Fall of 1991, in a series of parallel public hearings on the Draft IBEP/PIAF held along the U.S./Mexico border, NGBEOS were quick to highlight the IBEP/PIAF'S many failings, including: 1) its failure to address public health effects of environmental problems; 2) the lack of technical and financial assistance for local agencies in emergency planning and environmental programs; 3) the lack of any programs for tracking, reducing, or preventing generation of hazardous wastes in the border region; 4) its failure to Integrate local and regional problem solving and to strengthen local responses and monitoring; 5) the lack of public participation guarantees; and 6) its vague and voluntary pollution prevention and enforcement programs.

With the first phase of the IBEP/PIAF now nearly complete, many of the concerns initially expressed by NGBEOS about the plan's shortcomings have become realities, while many of the border's

15 Ironically, many Mexican NGOs have found it easier to gain access to the U.S. policy-making process than to Mexico's. Mexican border environmentalists have been active in U.S. state and federal briefings, and testified at U.S. Congressional hearings on the NAFTA's potential impact in Mexico.

16 Interview with Salvador Contreras, Bioconservacion, A.C., September 7, 1993.

environmental problems have worsened. For example, though PIAF funds have brought street lights to some small towns like Naco, Sonora, still unaddressed are fundamental, long-standing problems related to mismanagement of hazardous materials and wastes, air pollution, emergency preparedness, habitat destruction, and environmental clean-up. In Tijuana, home to some of the border's worst environmental disasters, PIAF'S reality seems more rhetorical than substantive.¹⁷ In August 1993, the EPA'S Public Advisory Committee (PAC), charged with public oversight of the IBEP/PIAF'S implementation, reported that the plan had failed in many respects, and called for better binational coordination, more rational funding allocations, and greater responsiveness to border residents. PAC members expressed frustration at the inadequacy of the IBEP/PIAF and other such federal programs aimed at improving border conditions, concluding that "We often do not see much relationship between the policies devised for us and our needs."¹⁸

NGBEO Proposals and Recommendations

The current world-wide trend toward globalized production and integrated capital markets has been accompanied by an unprecedented number of proposals for expanded transboundary environmental management regimes. This is especially true in U.S./Mexico relations, where during the last three years deliberations on free trade and governmental plans for addressing transboundary environmental problems have emerged alongside proposals for institutional reform of U.S./Mexican environmental management arrangements¹⁹ -many of which originated in recommendations put forth by border groups.²⁰

17 Interview with Laura Durazo, Proyecto Fronterizo de Educación Ambiental, A.C., September 7, 1993. Evidently, some PIAF funds helped provide trees and initiate a Cañón del Padre study in the early stages of the plan, but there is no evidence of PIAF funding going to Tijuana since Spring 1992, when SEDUE merged with SEDESOL.

18 Letter to EPA Administrator Carol Browner from EPA Public Advisory Committee, July 22, 1993.

19 Besides the North American/Free Trade Agreement and its parallel environmental side agreements, other plans include the EPA/SEDUE Integrated Border Environmental Plan/Plan Integral Ambiental Fronterizo and the 1991 Bush "Action Plan."

20 For a more detailed analysis of border proposals, see Stephen Mumme, "New Directions In U.S./Mexico Transboundary Environmental Management: A Critique of Current Proposals," *Natural Resources Journal*, vol. 32, Summer 1992. Universities and research centers along the border also played an important role in the development of policy recommendations for institutional reform of

The reform agenda of NGBEOS has addressed the need for new institutional arrangements both within and external to the NAFTA framework. While the debate surrounding the NAFTA has established the possibility of continental environmental safeguards linked to liberalized trade, NGBEOS have continued to advocate the need to address existing problems in ongoing U.S. / Mexico environmental management—problems that will exist regardless of a NAFTA. Principal elements of this reform agenda include the promotion of: 1) comprehensive reform of existing institutions, towards integrated management of transboundary environmental problems with strong community participation; 2) effective enforcement of existing environmental laws and penalties for non-compliance overseen by a trinational commission; 3) specific guarantees of public participation and transparency at all stages in the regulatory process; and 4) effective Right-to-Know laws and programs; 5) assurances that highest technical standards (and mandatory state-of-the-art hazardous waste management) be applied to all new continental Investments; 6) protection of state and local environmental standards; 7) strong environmental safeguards, natural resources protection and pollution control throughout the continent, not just along the U.S./Mexico border; and 8) dedicated funding for environmental clean-up, Infrastructure and other needs through investor-based sources such as a cross-border tax, the application of the “precautionary polluter pays principle,” a border tariff, or other such funding options.²¹

What follows is a brief summary of several reform proposals put forth by NGBEOS for strengthening U.S./Mexico environmental management within the context of the NAFTA.

Reforming the IBWC

Spearheaded by U.S. NGBEOS (and largely independent of NAFTA considerations), this proposal involves a complete re-evaluation of the International Boundary and Water Commission (IBWC). The IBWC's most commonly cited shortcomings include its limited scope and unclear mandate (narrow focus on water quantity, rather than quality, issues, for example) as well as its “cumbersome” institutional structure, which hinders prompt responses to environmental

transboundary environmental regimes, including the University of Arizona, the University of Texas, Austin, and the University of Texas, El Paso.

21 La Red Fronteriza de Salud y Ambiente, Letter to NAFTA negotiators. July 1992.

problems and obstructs any public participation element.²² BEP, TCPS and others have argued for broader participation in IBWC activities and for a mandate limited specifically to sanitation control activities.

Establishing a Border Office of the EPA

TCPS and other groups have long argued the need to establish a Border Region office of the Environmental Protection Agency (EPA) to take over border-related activities that have been divided between Region IX (San Francisco) and Region VI (Dallas), in order to centralize the EPA'S data management and enforcement efforts. The recent announcement that the EPA is planning such an office came as welcome news to many U.S. NGBEOS.

Strengthening the La Paz Agreement

The inadequacies of the 1983 La Paz Agreement between the U.S. and Mexico have been another focus of NGBEOS. TCPS and BEP have been vocal in criticizing the Agreement's narrow scope, weak enforcement provisions and poor public participation and information access mechanisms. Potential remedies include: 1) strengthening the agreement by giving it treaty status, creating a binational oversight commission, linking it via a trinational commission to the NAFTA, or renegotiating the treaty altogether; 2) negotiation of a separate environmental accord between the U.S. and Mexico that guarantees enforcement of environmental laws, penalties in cases of persistent non-compliance, Right-to-Know legislation, and adequate funding mechanisms.

Enacting a Foreign Environmental Practices Act

Many U.S. NGBEOS, having worked directly on problems caused by border industries fleeing tighter environmental controls elsewhere, have called for U.S. legislation requiring U.S. companies operating in Mexico to adhere to U.S. laws or high international standards. One proposal supported by many U.S. NGBEOS calls for the establishment of a Foreign Environmental Practices Act (FEPA), modeled after the

²² Mary Kelly, "Facing Reality: The Need for Fundamental Change In Protecting the Environment Along the U.S. /Mexico Border," 1991.

Foreign Corrupt Practices Act, which would hold U.S. citizens and companies responsible for their environmental impacts in a foreign country and strengthen efforts to stop industrial flight to polluter havens.²³

Promoting Right-to-Know Programs

The development of Right-to-Know (RTK) programs has been a top priority of many NGBEOs, which see RTK as a critical tool for the realization of a wide range of environmental priorities, such as freedom of information, public participation, hazardous materials tracking, contingency planning, emergency response, pollution prevention and public safety. Regardless of NAFTA's ratification, NGBEOs are likely to continue to promote RTK programs which involve not just hazardous materials inventories and RTK legislation, but also active dissemination of available information to the public to ensure that citizens and workers not only know about, but *understand*, the potential public health and environmental threats posed by hazardous materials in the community and workplace.

Creating a Trinational Environmental Commission

Much of the environmental debate on the NAFTA has revolved around the proposal for a trinational commission negotiated through side accords and charged with overseeing the environmental impacts of the NAFTA. Among the first of these proposals was "Environmental Safeguards for the North American Free Trade Agreement," prepared by ATI, BEP, TCPS and eleven national environmental organizations, June 1992.

In general, NGBEOs have supported the creation of a commission that would complement (and ensure) enforcement of national environmental laws, facilitate the creation of mechanisms for funding, public participation and transparency, and resolve problems of natural resource exploitation and pollution. Recognizing the need to balance Mexican sovereignty concerns with enforcement guarantees, and building on existing proposals, Hermosillo-based Red Fronteriza de Salud y Ambiente, A.C. has proposed a commission

²³ For a more detailed description of the proposed FEPA, see Alan Neff, "Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act," *Ecology Law Quarterly*, Vol. 17:477, 1990.

which would investigate, arbitrate and (as a last resort) recommend sanctions in cases of persistent and unjustifiable non-enforcement of environmental laws. The proposal advocates a phased-in program overseen by the commission and designed to strengthen Mexico's regulatory capacity through decentralized networks of environmental monitoring and enforcement, as well as strong Right-to-Know laws and procedures.²⁴

Establishing Environmental Funding Mechanisms

Funding for environmental programs is closely linked to the question of environmental protection and enforcement under the NAFTA.²⁵ U.S. environmental NGOs have advocated the creation of funding mechanisms tied to the NAFTA to ensure that enforcement of environmental law is linked to support for Mexico's regulatory regime. Such mechanisms would serve to enhance regulatory and enforcement capacity of local, state and federal governments, ensure clean-up of environmental hazards, and support environmental infrastructure development. Many U.S. NGBEOs were troubled at the fact that in late September 1993, as the Clinton Administration initiated its congressional NAFTA campaign, no sources of dedicated funding (other than appropriations, marketing strategies and bonding authorities) had been established. TCPS and BEP have supported a proposal for a stand-alone North American Development Bank, which would provide a guaranteed source of funding for NAFTA-related environmental and development financing.²⁶

U.S. NGBEOS have also emphasized the importance of financing mechanisms that provide for public participation and community oversight. While recognizing that the border region has specific, immediate environmental funding needs, U.S. NGBEOS have been strong proponents of a funding authority that is able to address environmental needs not only along the U.S./Mexico border, but throughout Mexico. They have also advocated a financing mechanism whose funding sources are linked to the specific

24 La Red Fronteriza de Salud y Ambiente, Letter to Canadian, U.S. and Mexico Trade Negotiators on the NAFTA, July 2, 1993.

25 For a more detailed discussion of NAFTA-related funding needs, see "Funding Environmental Needs Associated with the North American Free Trade Agreement," prepared by Sierra Club with NGBEO Input, July 7, 1993.

26 See "Proposal for a North American Development Bank," prepared by the Hon. Esteban Torres, July, 1993.

problems being addressed, through the application of the “precautionary polluter pays principle” or other means for deriving financing from those directly benefiting from the NAFTA.

Confronting the Final Text

While supportive of many of the principles outlined in the NAFTA and the NAAEC, NGBEOs have found it difficult to support the final negotiated language. For example, in an August 1993 letter concerning the NAAEC draft text written to Bill Pistor, an EPA negotiator on the NAAEC, ATT’S Michael Gregory and BEP’s Dick Kamp expressed concern about the Commission’s unclear mandate, limited powers and narrow scope.²⁷ Gregory and Kamp argued that until the NAAEC can guarantee effective public participation and access to information, ensure upward harmonization of continental standards, and protect the continent’s natural resources, the negotiations on environmental side agreements should continue. Other border groups such as San Diego-based Environmental Health Coalition have criticized the NAFTA and the NAAEC as “simply not going far enough to protect human health and the environment.”²⁸

One fundamental NGBEO criticism of the final NAAEC text (signed September 15, 1993) concerns the so-called “conservation carve-out,” which (as an apparent concession to Canada) exempts the harvesting and exploitation of natural resources from the provisions of the agreement.²⁹ Viewing the “carve-out” as a huge loophole allowing for an expansion of resource extractive activities (such as mining, forestry and fisheries) without environmental safeguards, U.S. NGBEOs have strongly opposed it, insisting that the “definition of environmental law include all natural resource laws and regulations whether or not they address management of commercial harvesting and exploitation.”³⁰

27 Michael Gregory and Dick Kamp, Letter to Bill Pistor regarding recommendations on NAFTA draft text on the environment, August 31, 1992.

28 Intel view with Jose Bravo, Environmental Health Coalition, September 16, 1993.

29 Draft North American Agreement on Environmental Cooperation between the government of Canada, the government of the United Mexican States and the government of the United States of America, September 1993, Article 45:2:b, p. 31. The text excludes from the Commission’s Jurisdiction activities whose “primary purpose” is “managing the commercial harvest or exploitation, or subsistence or aboriginal harvesting, or natural resources.”

30 Gregory and Kamp, *supra* note 28.

Equally troubling to many NGBEOs is the NAAEC'S vague definition of "effective enforcement" of national environmental laws, which would allow a country to escape responsibility for non-enforcement by claiming it has insufficient resources to do so. According to Annex 34 of the NAAEC, the Commission panel charged with "monetary enforcement assessments" would take into account "the level of enforcement that could reasonably be expected of a Party given its resource constraints." ATI and BEP have proposed requiring due diligence from the accused Party, along with cooperative support from the Commission. Such a provision would require that an accused Party approach the Commission to explain what level of resources would be necessary for effective enforcement, and would require that the Commission work with the Party to ensure that enforcement occurs.³¹

For most NGBEOS, these fundamental flaws alone provide reason enough to withhold support for the NAFTA. But many NGBEOS see still more problems with the NAAEC, such as its excessively vague language (such as "encourage," "promote," and "suggest"), the limited powers of the Commission and its Secretariat, its inadequate guarantees of public participation and transparency, limited access to legal remedies, and its unclear enforcement powers.

Conclusion

In retrospect, it is clear that few NGBEOS have remained unaffected by the NAFTA. The NAFTA process has served to draw attention to critical environmental problems and foster public debate on issues that had long been ignored—issues that will remain with or without a NAFTA. The NAFTA has strengthened links between U.S. and Mexican environmental groups, and resulted in strong border networks that will continue to seek solutions to existing problems independent of NAFTA's fate.

NGBEOS have also significantly affected the substance of the NAFTA debate, if not every specific outcome. Their direct experience working to develop concrete solutions to the detrimental effects of economic integration between the U.S. and Mexico has resulted in a variety of innovative recommendations for institutional and policy reform of transboundary environmental management regimes, many of which have been incorporated (at least in principle) into the NAFTA and the

31 Gregory and Kamp, *supra* note 28.

NAAEC, and some of which have gained support independent of the NAFTA.

Whether the NAFTA is ratified, rejected or renegotiated, the fundamental orientation of NGBEOs is unlikely to change greatly. NGBEOs are likely to address the increasing need for locally generated border projects involving cross-border collaboration between governments, academic institutions, community groups and NGOs, such as Right-to-Know programs, environmental education, air and water monitoring, and hazardous materials tracking. Though unable to support the final negotiated agreement, NGBEOs are likely to continue to advocate further negotiations on the NAAEC and other transboundary policy options to strengthen natural resource protections, support Mexican environmental management and enforcement, create environmental funding mechanisms with strong community involvement, and establish programs for effectively addressing the negative impacts of increased trade and investment along the border and throughout North America.

RECOMMENDED READINGS

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- Michael Gregory, "Environment, Sustainable Development, Public Participation, and the NAFTA: A Retrospective," *Journal of Environmental Law and Litigation*, Vol. 7, Summer 1992.
- Tom Barry *et al.*. *The Challenge of Cross-Border Environmentalism*, Interhemispheric Educational and Resource Center and Border Ecology Project, Fall 1993.
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