

## Standoff at the Border: The Debate on Environmental Regulation in the NAFTA

*by Alison Stewart*

Maquiladoras are foreign-owned manufacturing plants that operate along the 2000 mile border zone between Mexico and the United States. The Mexican government encouraged the growth of the maquiladora industry for the purpose of generating jobs and increasing foreign investment in the border region.<sup>1</sup> Under the maquiladora plan, the Mexican government allows foreign businesses to set up manufacturing plants in the border region, import parts and equipment from the United States or other countries, hire Mexican workers to assemble the parts, and pay import duties only on the value added by the labor to the finished product. Since the inception of the program, American and Japanese businesses of all kinds have set up plants in the border region. The maquiladora industry has been encouraging American business expansion into Mexico and employing workers there for over twenty years.

In recent years, however, the maquiladora industry has become quite controversial. Accused of environmental excesses and labor violations, the industry has been besieged by claims that it only benefits American big business, hurts American labor, and brings environmental and social degradation to Mexico. Critics of the proposed North American Free Trade Agreement (NAFTA) assert that the NAFTA will only bring more environmental excesses to Mexico as American companies take advantage throughout the country of the financial incentives now available only in the border region.

In March 1993, the San Diego chapter of the National Lawyers Guild offered a tour of the maquiladora region in Tijuana. What I saw on that tour convinced me that the critics have good reason to be

concerned about increased American activity in Mexico under the NAFTA. Before the Mexican government permits the kind of American "investment" that occurs in the border region to spread any farther into Mexico, certain environmental safeguards must be included within the NAFTA to prevent the kind of degradation that has been occurring in the border region to occur elsewhere. This article will describe the conditions I observed in the maquiladora region of Tijuana and offer a suggestion for strengthening environmental controls in the NAFTA.

### THE MAQUILADORAS

Our first stop in Tijuana was a visit to a shut-down furniture manufacturing plant. About a year ago, the owner of the maquiladora decided that it was no longer profitable to run his factory. He deserted the factory, leaving about 140 workers without half a year's salary or severance pay. Since the owner's departure, the workers have been attempting to recoup

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their lost wages. They have confiscated and hope to sell the equipment that the owner left in the factory for compensation. However, they fear retribution from the Los Angeles-based parent company if they sell the equipment.

According to workers from the factory, working conditions inside the plant were not bad. However, the factory's

operation did have a serious effect on the environment around it. Towards the back of the factory, the workers used to drain used solvents and other wastes down a hill and out of sight. Directly downstream from the plant is a local dairy, where the dairy animals consumed water and vegetation tainted with the solvent run-off.

This situation was not uncommon. We drove by maquiladoras that had chutes and pipes extending down hillsides to discard of used wastes of unknown character in ravines and streams. Because of the recent rain, the city was full of small rivulets of unnaturally colorful water. Many of these streams flowed along the edges of maquiladora sites. Some were quite obviously used for disposal purposes.

We saw various other kinds of environmental abuses. One small American-owned lead smelter plant sits on a hill above a school. Piles of used car batteries sit to one side of the yard and piles of cracked

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batteries and other lead wastes sit to the other. According to Jose Bravo of the Environmental Coalition in San Diego, the watershed in Tijuana is only 4-8 feet deep. Lead run-off from those piles of waste thus not only flows down the hillside to the school grounds, but also leaches down to the watershed for the entire immediate area. According to Bravo, the EPA has sent investigators to this particular plant. However, that EPA has not done any testing yet at this particular plant.

Our last visit was to a lead recycling plant that closed down three years ago when its owner, Los Angeles-based Alco Pacifico, declared bankruptcy. Five years before its closure, the plant sold other maquiladoras the right to dispose of their hazardous waste

on its property. Consequently, the plant site has the dubious honor of being the most contaminated site in the border region.<sup>2</sup> Before the shut-down, 14 cows mysteriously died at the dairy next door to the plant. At the plant, piles of highly toxic lead sulfate were still spread out over the plant grounds. According to Bravo, large amounts of battery acid had leached through to the groundsoil at the plant and had ignited underground fires that had been burning continuously for nine months.<sup>3</sup>

#### APPLICABLE MEXICAN LAW

Mexico does have environmental laws to guard against the kind of abuses that occur in the border region. For example, Mexico's 1988 comprehensive environmental law, the General Law of Ecological Equilibrium and Environmental Protection (the General Ecology Law)<sup>4</sup> requires that all start-up industries submit an environmental impact report before beginning operations. According to many commentators, the General Ecology Law is very advanced.<sup>5</sup> But SEDUSOL, Mexico's environmental protection agency, has only 200 inspectors to cover over 2,000 maquiladoras in the border region. Consequently, the law is laxly enforced.<sup>6</sup> Although SEDUSOL has the authority to fine or close down plants for violations of environmental laws, any fines are usually minuscule. It is often more cost effective for a plant to be closed down for one day or pay a fine than to comply with the environmental laws.<sup>7</sup>

In addition to Mexico's domestic laws, Mexico has entered into agreements with the United States to protect the common environment in the border region. In 1983, Mexico and the United States entered the Agreement on cooperation for the Protection and Improvement of the Environment in the Border Area (the La Paz Agreement).<sup>8</sup> Annexes to the agreement provide for cooperative action regarding five specific projects on the Mexico/California

border.<sup>9</sup> Under the La Paz Agreement, all hazardous wastes produced by American companies in Mexico must be exported back to the United States. According to Jose Bravo, however, only about 5% of the waste that American companies generate in Tijuana gets exported back to the United States. The rest of the waste "gets lost" along the way.

Recently, the U.S. EPA and SEDUSOL's predecessor, SEDUE, agreed on a comprehensive environmental plan for the border based on the 1983 La Paz Agreement. Under the Integrated Border Plan,<sup>10</sup> the EPA has agreed to cooperate with Mexican environmental authorities to develop environmental priorities and construct the infrastructure Mexico needs to enforce its environmental regulations. Both countries will contribute financially to the Border Plan. However, the Border Plan is extra-legal in nature and contains no environmental enforcement provisions.

SEDUSOL is unable to effectively monitor the activities of American companies in the maquiladora region of Tijuana, let alone the entire interior of Mexico. Before NAFTA eliminates all barriers to businesses opening up in Mexico's interior and encourages increased American expansion into Mexico, certain safeguards must be put in place.

#### **A SUGGESTION FOR INCREASED ENVIRONMENTAL PROTECTION**

The Clinton administration has promised to negotiate a supplemental agreement that will address environmental concerns in the NAFTA. As part of that supplemental agreement, the administration plans to establish a North American Commission on the Environment (NACE), a trilateral environment commission that will ensure that Mexico, Canada, and the United States enforce their own environmental laws. According to Mickey Kantor, the United States Trade Representative, the NACE would be "a forum for reviewing and

analyzing environmental issues on this continent."<sup>11</sup>

The commission would have the authority to investigate complaints about lax enforcement of domestic environmental laws in each of the three countries. The commission would have the power to request information on environmental enforcement activities in each country and publicize the results to encourage compliance.<sup>12</sup> The governments would be obligated under the agreement to be cooperative. Says Kantor, "We want to set up a system where [NAFTA countries] have to enforce their environmental laws."<sup>13</sup>

As an additional measure to include environmental controls in the NAFTA, Rep. George Brown, Jr. (D-CA) introduced a bill on March 24, 1993 to link fundamental environmental and agricultural standards to the NAFTA.<sup>14</sup> According to Brown's press release, he is the first member of Congress to offer a specific approach for negotiating "common, enforceable trade-

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related standards with Mexico and Canada that can be organically linked to any NAFTA." The H.R. 1445 proposes that fundamental labor rights and environmental and agricultural standards (such as freedom of association and full public disclosure of toxic chemical and hazardous substance discharges) be incorporated in the NAFTA. It also proposes that systematic denial or violation of those rights and standards in order to gain competitive advantage in trade should be treated as an actionable unfair trade practice. Finally, the bill proposes that the three NAFTA nations establish trilateral commissions on labor and the

environment with the authority to investigate, adjudicate, and issue binding judgments on environmental and labor disputes in a timely manner.

Recently, however, the administration has indicated that the NACE will not have the authority to impose sanctions or enforce its decisions.<sup>15</sup> This decision stems from the principle that the exercise of law enforcement discretion is a matter reserved exclusively to each sovereign government.<sup>16</sup> In fact, Mexico and Canadian officials have stated that those two countries will resist parallel agreements that impinge on Mexican sovereignty to enforce its own laws.<sup>17</sup> A Canadian official has stated that Canada only supports the creation of trilateral commissions that work based on cooperation between the three countries.<sup>18</sup> Carlos Sandoval, the president of the National Council of Environmental Industries in Mexico city, says that any commission that has actual enforcement powers would violate Mexico's constitution.<sup>19</sup>

Mexico's resistance to a NACE with enforcement capabilities is misguided. It stems from the fact that Mexico is years behind the United States in enforcement of

its own environmental laws. However, establishing a commission with effective enforcement capabilities would provide the impetus Mexico needs to protect its own environment. The United States should push for the creation of a commission on the environment with teeth.

## CONCLUSION

American companies have an ethical duty to operate responsibly in Mexico. At the Mexico-U.S. border, many companies have not shouldered that responsibility. By failing to obey Mexican environmental laws,

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It is clear that environmental abuses are occurring in Mexico. To prevent further environmental degradation, American negotiators must ensure that environmental safeguards are included in the final NAFTA agreement. Legally, such guidelines will be hard to negotiate. Adopting H.R. 1445 and establishing an effective environmental commission would be a step in the right direction.

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## ENDNOTES

1. For an in-depth discussion of the origins of the maquiladora industry, see E. Rose, Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras, 23 *Int'l Law* 223 (Spring 1989).

2. For a detailed description of the Alco Pacifico plant and the conditions surrounding its shutdown, see Joel Simon, Dirty Work, *California Lawyer*, February 1993, at 40.

3. Id.

4. General Law of Ecological Equilibrium and Environmental Protection, Diario Oficial (January 28, 1988) (English translation on file with author).

5. Indeed, some language in the 1988 law appears to have been lifted directly from the Clean Water Act and the Clean Air Act. See Simon, supra note 2 (quoting Jorge Vargas, professor of international law at University of San Diego School of Law).

6. See U.S. General Accounting Office, *Assessment of Mexico's Environmental Controls for New Companies* (August 1992) (stating that none of six new U.S. maquiladoras establishing plants in Mexico between May 1990 and July 1991 had prepared required EIA statements).
7. *Id.*
8. Aug. 14, 1983, T.I.A.S. No. 10827, 22 I.L.M. 1025 (1983).
9. The annexes provided for cooperative action regarding: (1) water sanitation in the Tijuana area; (2) discharges of hazardous materials in the border area; (3) transboundary shipment of hazardous wastes and substances; (4) concerns surrounding transboundary air pollution; and (5) monitoring of toxic emissions at the border.
10. U.S. Environmental Protection Agency and Secretaria de Desarrollo Urbana y Ecologia (SEDUE), *Integrated Environmental Plan for the Mexico-U.S. Border Area, (First Stage, 1992-1994)* (1992).
11. Commission Should Ensure Enforcement of Environmental Laws, Kantor Testifies, *International Trade Reporter (BNA)* (March 17, 1993).
12. *Id.*
13. *Id.*
14. H.R. 1445, 103d Cong., 1st Sess. (1993).
15. NAFTA Commissions' Powers Seen as Limited To Oversight Under U.S. Plan, Official Says, *International Trade Reporter (BNA)* (April 14, 1993).
16. *Id.*
17. Canadian Official Says NAFTA Side Pacts Should Not Impinge on Mexico's Sovereignty, *International Trade Reporter (BNA)* (March 31, 1993). Sandra Fuentes, Mexico's new ambassador to Canada, has said that Mexico might withdraw from the NAFTA if the United States and Canada try to establish trilateral commissions to control Mexico's labor and environmental standards. *Id.* Said Fuentes, "NAFTA is a trade pact between three distinct countries. It is surprising that one of the signatories to the deal [the United States] is now starting to talk about creating commissions and tribunals that might try to supersede Mexican law." *Id.*
18. *Id.*
19. Browner Meets with Mexican Officials, Says Mexico Ready to Negotiate Side Deal, *International Trade Reporter (BNA)* (March 17, 1993).