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A Background to the BECC and its Impact on Mexico's Right to Development

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Student Editorial Board*

In response to perceived environmental problems along the United States-Mexico border, President Clinton signed the BECC-NADBank Agreement establishing the Border Environmental Cooperation Commission (BECC) and the North American Development Bank (NADBank).¹ These new institutions address border environmental issues by affording US and Mexican border communities the opportunity to work with local, state and federal government to solve problems and secure funding from both the public and private sectors.² While created to facilitate environmentally conscious development, it is arguable that infrastructural development may be hindered through the BECC's espousal of the concept of sustainable development. Sustainable development requires a country to focus attention on human rights and the environment. While this will not have a drastic effect on the developed American border communities, it is arguable the Mexican side of the border may struggle.

The BECC is a joint U.S.-Mexican organization which (1) assists states, localities, national and international institutions, public agencies and private investors in coordinating environmental infrastructural projects, (2) evaluates the technical, financial, social and economic strengths and weaknesses of projects, and (3) secures financing for projects through the NADBank or other private sector sources.³ The BECC will not manage projects once they are completed. The highest priority projects will address water pollution, waste water treatment and municipal solid waste management.⁴

1. Mexico-United States: Agreement Concerning the Establishment of a Border Environment Cooperation Commission and a North American Development Bank, November 16, 18, 1993, 32 I.L.M. 1545 [*hereinafter* BECC-NADBANK AGREEMENT].
2. U.S. Environmental Protection Agency, Office of Wastewater Management, "BECC and the NADBank - Financing Environmental Infrastructure on the U.S.-Mexico Border", May 3, 1995 [*hereinafter* BECC-NADBANK FINANCING].
3. BORDER ENVIRONMENTAL COOPERATION COMMISSION, 1995 GENERAL INFORMATION PAMPHLET (1995).
4. Border Environmental Cooperation Commission Guidelines, 60 Fed. Reg. 183, 48982 (1995) [*hereinafter* BECC GUIDELINES].

The General Manager and a Deputy General Manager supervise the BECC's daily activity.⁵ Final decisions on project certification are made by a 10 member bi-national Board of Directors. The public and an Advisory Council assist the Board in making certification decisions. A decision by the Board requires approval by a majority of its members.⁶

The Board consists of 2 ex-officio members, one Commissioner from the International Boundary and Water Commission, one Administrator from the Environmental Protection Agency and their Mexican counterparts.⁷ Each member of the Board has expertise in the environment, engineering, and either economics or finance.⁸

If necessary, the Board may consult a bi-national Advisory Council. The Council consists of 18 members, 9 from each country, who serve 2-year terms.⁹ Members are representatives from local community groups and the public. The Council is required to meet quarterly, but the Board can request that the Council meet more often.¹⁰

The BECC gives the public the opportunity to participate in creating guidelines for project certification and the review of individual project applications.¹¹ Through a public outreach program, the BECC holds monthly public meetings to evaluate projects.¹² The Board of Directors holds quarterly public meetings and receives complaints from groups that have been effected by approved projects or are pending certification.¹³ Moreover, the BECC's annual report is available to the public.¹⁴

Before engaging in a project study, applicants will want to make sure there is local support for the project. Learning to operate within the community's political and social structure by working with environmental groups, local government officials and the public are crucial in this regard. Therefore, an understanding of the public policy law is important since an attorney's clients will almost always be municipalities. In order to handle these intricate details, an attorney in the United States will probably want to retain local Mexican counsel. Moreover, cultural considerations and the administrative laws must be taken into account. Applicants can also consult detailed community reports retained by the BECC describing the local political structure and environment for assistance.

5. BORDER ENVIRONMENTAL COOPERATION COMMISSION, *supra* note 3.

6. BECC-NADBank Agreement, 32 I.L.M. at 1551.

7. *Id.* at 1551.

8. Barbara Weiss, *NAFTA and Environmental Infrastructural Projects*, 10 GOV'T FIN. REV. 49 (1994).

9. BORDER ENVIRONMENTAL COOPERATION COMMISSION, *supra* note 3.

10. BECC-NADBank Agreement, 32 I.L.M. at 1553.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

I. Outline of the Certification Process

A. Initial contact with the BECC¹⁵

B. Step I--The applicant completes a project proposal form providing general project information. The information requested includes: project title, project type, sponsorship information, the name of the project's contractor and project location. If the applicant cannot provide all the information needed to complete the application, the applicant should indicate a date when the information will be available.

C. The applicant requests technical assistance from the BECC to develop the project and assess its feasibility.

D. Step II--Detailed project information is submitted after conducting engineering, environmental, economic, financial and social studies. These studies should specifically address the environment and human health, technical feasibility, economic and financial feasibility, social issues, community participation in the project, operation and maintenance, and sustainable development. The BECC does not require completion of all project specifications at this point, but expects the applicant to provide an estimation of the total cost of the project for the NADBank. Thirty days subsequent to receiving

Step II, the BECC will send the applicant an acknowledgment letter.

II. General Project Description

The Board will only consider projects that fall within 62 miles of the border. If the project does not fall within 62 miles, the BECC will only consider the project if it directly effects the border region.¹⁶ The Applicant must specifically state the environmental condition to be addressed by the project and an assessment of alternatives to the project. In drafting the application, care must be taken to provide an objective assessment which addresses project weaknesses and explains why the project proposed is the best alternative.

III. Sustainable Development

The BECC ties economic development to environmental protection through the concept of sustainable development. Sustainable development is "that which meets the needs of the present without compromising the ability of future generations to meet their own needs".¹⁷ Sustainable development focuses on the concerns of human beings and a state's exercise of the right to development with an eye towards environmental protection.¹⁸ The BECC adopted the language of the 1992 Earth Summit to draft its provision on sustainable development. Sustainable development is now a "fundamental requirement" to obtain BECC certification. This strict language corresponds with Article 1 of the United Nations Declaration Right to Development.

15. Project proposals should be sent to: Border Environmental Cooperation Commission, Blvd. Tomas Fernandez # 7940, Torres Campestre, 6th floor, Cd. Juarez, Chihuahua. C.P., Mexico Telephone (011-52-16) 29 23 95, Fax (011-52-16) 29 23 97, E mail becc1@leagle1.com; the General Manager of the BECC is Roger Frauenfelder and the Deputy Manager is Luis Raul Dominguez.
16. BECC Guidelines, *supra* note 4, at 48989.
17. *Id.* at 48988.
18. *Id.* at 48988.

Although the modern view is to tie the right to development with economic development, the traditional notion of economic development existed independently of other rights. In 1986, the United Nations recognized the right to development as an "inalienable human right".¹⁹ In making this declaration, the United Nations has expanded the definition of the right to development to include social and cultural rights such as, education, free speech and the right to participate in the political process.²⁰ These rights are enforced through the international law of development (hereafter ILD), which was created by the United Nations.²¹

ILD exists in order to change state practice.²² Pursuant to ILD, development to be "people centered and participatory", "protect human beings" and promote environmental protection.²³ The criteria of sustainable development parallel those of ILD. Therefore, one can argue the BECC is a quasi-human rights organization.²⁴

The BECC's adoption of sustainable development and ILD raises several ethical questions? For instance, is it correct to impose ILD and sustainable development on Mexico and other less-developed countries? In order to industrialize, the United States and other industrialized nations did their share of environmental damage. Why shouldn't Mexico and other countries be allowed to do the same in order to develop? Is it really possible for a nation to industrialize without causing environmental harm? Until this question can be affirmatively answered, ILD and sustainable development may be nothing more than concepts worthy of academic consideration.

The following subheadings were developed by the BECC in consideration of the characteristics of sustainable development and are used by the BECC in making decisions regarding project certification: (1) environmental and human health; (2) technological feasibility; (3) economic and financial feasibility; (4) community participation; and (5) operation and maintenance.²⁵

A. Environment and Human Health

The BECC exists to "preserve, protect and enhance the environment in a sustainable manner in order to improve the quality of life in the U.S./Mexico border region".²⁶ All projects must comply with local, regional, state and federal laws and international agreements before receiving approval.²⁷ Moreover, all projects must comply with land use and zoning regulations. For this reason, project applicants must submit an environmental assessment. Projects promoting sustainable development in this area are ecosystem management and recycling programs.²⁸

19. Rhoda E. Howard, *Human Rights, Development and Foreign Policy*, in *Human Rights and Development* 213 (David Forsythe ed., 1989)

20. *Declaration on the Right to Development*, U.N. GAOR, 41st Sess. Agenda Item 101, 9th plen. mtg., U.N. Doc. A/Res/41/128 (1987).

21. James C.N. Paul, *The United Nations and the Creation of the International Law of Development*, 36 *Harv. Int'l L.J.* 307, (1995).

22. *Id.* at 327.

23. *Id.* at 322.

24. Interview with Scott Flukinger, David Dean and Associates, Associate in Domestic and International Public Policy Administrative and Regulatory Law, in Dallas, TX (Nov. 8, 1995).

25. BECC Guidelines, *supra* note 4, at 48988.

26. *Id.* at 48985.

27. *Id.* at 48985.

28. *Id.* at 48988.

B. Technical Feasibility

Applicants must conduct a detailed technological feasibility study of their project which involves hiring outside engineers and environmental technicians. An attorney should instruct the engineer to prepare the study with an eye towards showing the positive impact to both sides of the border. The study must include the projected water consumption of the project.²⁹ Also, if the project is designed to treat waste, the amount and quality of wastewater and municipal solid waste the project will treat should be stated.³⁰

The BECC gives the highest priority to projects that transfer technology.³¹ For an attorney, technology transfer raises important issues regarding patent law. NAFTA provides its own provisions on intellectual property which an attorney should be familiar with before exporting equipment or material.³² The exporter of the technology will also want to be certain that this technology is not too advanced for the local community.³³

The study must include a quality control plan addressing equipment quality control and personnel training along with the criteria used to select the technology used in the project. These criteria should address the adaptation of the technology to the local community and its efficiency.³⁴ Also, an investment timetable that describes each stage of the project development and how the applicant plans to finance each stage must be described on a bar graph.³⁵

C. Economic and Financial Feasibility

Projects must be financially feasible since loans will need to be repaid to the NADBank or another private funding source.³⁶ Applicants must submit financial information that includes: cash flow, a balance sheet, an income statement, fixed and variable costs and sources of financing. In addition, a break-even analysis and an analysis showing the economic benefits of the project is necessary.³⁷ An important financial criteria is that revenues cover debts and operation and maintenance costs.³⁸

D. Social Issues

Applicants must submit information on the size of the population, population growth rate and a description of environmental services already provided to the community (i.e. wastewater treatment). Information regarding the effects on the local population are crucial. Therefore, the applicant should address issues relating to local economic develop-

29. *Id.* at 48986.

30. *Id.*

31. Border Environment Cooperation Commission Draft Guidelines, 60 FR 112, 30866, 30869 (1995) [*hereinafter* BECC DRAFT].

32. North American Free Trade Agreement, drafted Aug. 12, 1992, revised Sept. 6, 1992, U.S.-Can.-Mex., 32 I.L.M. 605 (entered into force Jan. 1, 1994) [*hereinafter* NAFTA].

33. BECC-NADBANK FINANCING, *supra* note 2, at 2.

34. *Id.* at 10.

35. *Id.* at 10.

36. *Id.* at 10.

37. *Id.* at 10. (A break-even analysis shows the minimum level of revenues needed to recover fixed variable costs).

38. *Id.* at 11.

ment, the creation of employment, education, job training and general quality of life. Moreover, the project must be in compliance with certain cultural regulations. For example, a project cannot be built on top of a historical or archeological site. Projects promoting sustainable development in this area are wildlife habitat preservation, park improvement, job creation and clean drinking water programs.

E. Community Participation

A fundamental BECC criteria is that the project demonstrates promise to provide "long-term" support to the community.⁴⁰ The applicant must submit a Comprehensive Community Participation Plan to the BECC which shows how the community will participate in the project.⁴¹ The Community Participation Plan must include a local steering committee, meetings with local organizations and a public meeting.⁴² Upon completion of the Community Participation Plan, a report including a list of local steering committee members, a list of local meetings, a copy of the notice for the public hearing, and the minutes from the public hearing is sent to the BECC.⁴³ Subsequent to project certification, the applicant develops a post-certification community participation plan to generate public support for the project after its completion.⁴⁴

The local steering committee assists the applicant in promoting community participation in the project.⁴⁵ Members of the committee can be representatives from business, government, academia, civic organizations, non-profit organizations and environmental groups.⁴⁶ The responsibilities of the local committee include the distribution of information about the project, encouraging community participation in the project, education and media campaigns.⁴⁷

One criticism of the BECC is the lack of community veto power or the right of communities to make recommendations before a project is certified.⁴⁸ This criticism may be unfounded since the public is allowed to voice comments at the mandatory public meeting.⁴⁹ A notice 30 days prior to the meeting which includes the date, time, place and agenda is required.⁵⁰ Also, the applicant must meet with local organizations representing individuals who will be affected by the project to provide information.⁵¹ An example of a project that promotes sustainable development in this area is environmental education.⁵²

39. BECC Guidelines, *supra* note 4, at 48987.

40. *Id.* at 48987.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. BECC Postpones Approval of Criteria for Project Certification Until Late August, Int'l Env't Rep., August 9, 1995, at 605.

49. BECC Guidelines, *supra* note 4, at 48987.

50. *Id.*

51. *Id.*

52. *Id.*

F. Operation and Maintenance

This category exists to ensure the detection and correction of potential problems.⁵³ The Applicant must submit a start-up operation program, an operation and maintenance program, a pollution prevention plan, an occupational health and safety plan, and a facility closure plan.

The Start-Up Operation program describes how different phases of project operation will begin. This program must describe how potential problems will be corrected in the start-up phase.⁵⁴

The Operation and Maintenance Program should describe training and certification of employees and the preparation of the operation and maintenance instruction manuals.⁵⁵ The applicant must also provide information as to how the program will be financed.⁵⁶

The Pollution Prevention Plan must state the type of pollutants the project will release and measures that will be taken to minimize or prevent this release. In addition, the treatment and disposal of waste upon project termination is addressed in the Closure and Post-Closure Plan for Landfills.

IV. Project Financing

A major role of the BECC is to serve as a gatekeeper to NADBank funding. The NADBank provides a funding option for projects that meet BECC criteria. However, the relationship between the NADBank and BECC is questionable considering the high interest rates on NADBank loans. An alternative to the high interest rates of the NADBank for a municipality with a good credit rating is to acquire a loan at a lower interest rate through a private institution. However, the NADBank does serve an important role for those cities with a poor credit rating which may have a difficult time obtaining funds from local private sources.⁵⁷

Over the next 10 years, approximately \$8 billion dollars will be available for border environmental projects.⁵⁸ State and federal grants and loans, state revolving funds, and tax-exempt bonds will provide \$2 billion dollars. Another \$2 billion will become available through the World Bank, the International Development Bank and private financing.⁵⁹ The remaining \$4 billion dollars is available through joint financing mechanisms.⁶⁰ The Environmental Protection Agency will provide grants for project start-up and supplement project funding the NADBank, government or the private sector cannot completely finance. Finally, the EPA and the Mexican government are creating the *Border 2000 Plan* to improve funding through the BECC and NADBank.⁶¹

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Interview with Scott Flukinger, *supra* note 24.

58. BECC-NADBANK FINANCING, *supra* note 2, at 2.

59. *Id.*

60. *Id.* at 3.

61. *Id.*

V. Conclusion

The following projects have either been approved or are being considered as of October 1995. The BECC's main project is a new wastewater treatment plan in El Paso, Texas designed to reduce the strain on the Mesilla Bolson aquifer. The total cost of the project will be \$11.7 million dollars. Projects that may be considered are: an upgrade of water distribution and sewage collection in Arizona, a tire recycling plant in Mexicali, and a project addressing pollution of the Tijuana River.

Because the BECC has only been in existence since October 1995, an evaluation of its effectiveness is premature. It is arguable the border will not derive immediate benefits from the BECC due to sustainable development. Although sustainable development will ideally lead to projects sensitive to the economic, social and cultural needs of local communities, this sensitivity may prevent or at least curb the development of projects which could potentially benefit these communities. While community participation in projects, local economic growth and cultural preservation are certainly important social issues, the BECC was specifically created to address environmental preservation. Therefore, the BECC should re-evaluate the use of sustainable development in its criteria to determine if it is realistic or even necessary to tie environmental preservation to these broader social issues.
