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Defenders - Letter to Kantor - Regarding NAFTA [North American Free Trade Agreement]/NACE
[North American Commission on the Environment] March 3, 1993

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WORKING DRAFT

Contact: Bill Snape, Defenders
Housman/Orbuch, CIEL

March 1, 1993

The Hon. Mickey Kantor
U.S. Trade Representative
600 17th Street, NW
Washington, D.C. 20506

Dear Ambassador Kantor:

As we all acknowledged on February 23, a number of environmental, health, and safety problems remain in the present NAFTA. We, the undersigned, hope that this letter clarifies the position of our groups with respect to the total NAFTA package. Successful resolution of these problems would not only promote sustainable hemispheric trade, but would also send a clear message to the Uruguay Round negotiators in Geneva.

We support the President's call for an "environmental" supplemental agreement that will establish a strong North American Commission on the Environment (NACE). However, such a supplemental agreement must clarify various other provisions of the existing NAFTA. In our opinion, these elements of a supplemental agreement should be in the form of a protocol, legally binding and of equal stature to NAFTA. We have drafted protocol language for the NACE, attached, and are presently drafting similar language for the protocol's other provisions including standards, international agreements, textual clarifications, funding, and investment.

I. ENFORCEMENT:

Trade should not be based on weak enforcement of established standards. Enforcement is a crucial issue. We should not subject U.S. citizens to economic, health, safety, or environmental injury as a result of weak enforcement of standards elsewhere. Nor should our NAFTA partners be harmed by a failure of U.S. enforcement. Sanctions, including both trade and non-trade measures, must be available to ensure compliance. Recognizing that sovereignty concerns exist, we propose that a trilateral mechanism, the North American Commission on the Environment (NACE), be established with sufficient powers to ensure adequate enforcement of existing and future laws.

II. NAFTA'S ENVIRONMENTAL OMISSIONS AND AMBIGUITIES:

We recognize the President's desire not to reopen the NAFTA text. Yet, there are provisions in the present text that are either contradictory or unclear, and work to the detriment of

environmental, health, and safety protection. The Bush NAFTA also completely fails to address several important concerns. Therefore, the topics listed below are areas where a NAFTA protocol must rectify present NAFTA omissions or ambiguities.

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Despite the fact that the several border agreements between the NAFTA parties have been considered separate from the present NAFTA, we do not believe that NAFTA should go forward until enforceable commitments have been made to clean up the border regions. Estimates for the U.S.-Mexico border clean-up range from \$ 5 to 15 billion. The U.S.-Canada border also suffers from trade induced problems.

B. FUNDING:

Throughout the three countries, a secure source of funding for proper infrastructure development, environmental enforcement, increased investigation, and clean-up is vital. Because national appropriations processes do not provide a secure source of funding, we believe that designated funding sources, based on fairness and the "polluter pays" principle, must be developed as a prerequisite to implementation of NAFTA.

Ideas that deserve attention include: a) "snap-back" tariffs applied to sectors with lax enforcement of existing standards, b) a small transaction fee on all goods and services that could be phased out over a specified number of years, c) a directed "green" fee, d) an environmental countervailing duty on economic activity that is environmentally unsustainably or below standard, e) "earmarked" tariffs, which could be phased out during the first 10-15 years of NAFTA, and f) development of a "green investment bank," which could utilize established trust funds to leverage additional money through bond proposals. Regardless of which funding scheme(s) is eventually utilized, we believe it is imperative to channel such funds back into environmental infrastructure improvements, enforcement, worker transition programs, and funding of the NACE itself.

C. INTERNATIONAL AND DOMESTIC PRODUCTION/PROCESS (PPM) STANDARDS:

Trade law must recognize that how a product is produced is just as important as the quality of the product itself. Although Article XX of the General Agreement on Tariffs and Trade (GATT), provides for health and natural resource conservation exceptions, these provisions have been clouded by recent GATT panel decisions. In addition, Article 14 of the GATT Standards Code permits dispute settlement whenever technical requirements are

stated in terms of production processes or methods. Without explicit clarification, NAFTA will repeat the mistake of GATT panels and the Dunkel draft by incorporating unacceptable provisions or interpretations of GATT (e.g., Article 103, NAFTA). The NACE Commission could also provide a schedule for periodic reviews of production methods, sector by sector.

Ironically, Mexico was the country that brought the GATT complaint against the U.S. and the Marine Mammal Protection Act (MMPA). During Congressional consideration of the International Dolphin Conservation Act in 1992, the Mexican government agreed to join the U.S. in enacting a global moratorium on the setting of nets on dolphins by tuna fishermen by March 1, 1994. Although the bill was signed in November 1992, the Mexican government has thus far failed to honor its side of agreement. Mexico's action is merely reinforcing skepticism about their government's commitment to environmental improvement. See IDCA, P.L. 102-523. In fact, we believe that the NAFTA protocol should require binding enforceable commitments to enact the global moratorium from acceding countries.

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As is implied by various other sections of this letter, U.S. environmental, health, or safety standards should in no way be weakened by NAFTA or any other trade agreement. The Waxman-Gephardt H.R. Resolution 246, passed unanimously by the House on August 6, 1992, states that "Congress will not approve legislation to implement any trade agreement (including the Uruguay Round of GATT and NAFTA) if such agreement jeopardizes U.S. health, safety, labor, and environmental standards." 102d Cong. 2d Session, 138 CONG. REC. H7698. See also Trade Act of 1974, as amended, 19 U.S.C. Section 2504 ("No provision of any trade agreement approved by Congress nor the application of any such provision to any person or circumstance, which is conflict with any statute of the U.S. shall be given effect under the laws of the U.S").

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A formal trading relationship between countries with significantly different environmental standards possesses predictable tensions. On the one hand, a country with high standards does not want its environmental quality or economic competitiveness to suffer as a result of weak (or non-existent) standards elsewhere. On the other hand, a country with lower standards does not want its sovereignty infringed upon by other countries. All standards should presumptively rise to the highest tri-national standard, unless compelling reasons exist otherwise. "Upward harmonization" could occur through NACE or through the standards committees established by NAFTA Articles 764 and 913. If the latter option was selected, these standards committees could be directly

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G. INTERNATIONAL AGREEMENTS:

At present, only three international environmental agreements clearly "prevail" if there is a conflict with NAFTA: CITES, the Montreal Protocol, and the Basel Convention. The Bush Administration's defense to this limit was that only these three agreements possess direct trade implications. Not only is this assertion false, but the logic behind the argument is also needlessly narrow. We strongly believe that the U.S. must possess the ability to implement and enforce any international agreement by imposing trade restrictions, if such restrictions are the only way to effectuate complete compliance with the agreement in question. Therefore, we believe all international agreements should be referenced in the protocol and added to Article 104, as soon as all three parties are signatories to such an agreement. In addition, a protocol must secure the right for any NAFTA party to appropriately enforce and implement any international agreement to which it is a signatory.

Furthermore, we propose that the 1942 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere be revitalized and specifically linked to NAFTA so that acceding countries to NAFTA make specific accommodations to habitat protection within their borders. The U.S., with its present system of public land protection, already satisfies the provisions of this Convention.

H. ENERGY:

We are concerned about Chapter 6's energy and basic petrochemicals provisions. Article 601.2 states that one of the goals

of NAFTA is to "strengthen the important role that trade in energy and basic petrochemical goods play." Furthermore, Chapter 6 allows continuation of existing or future subsidies for oil and gas exploration. While these subsidies may be a way to lessen extra-continental dependence upon petroleum products, the NAFTA must address efforts to reduce the continent's dependence upon fossil fuels, and allow for government sponsored programs to research and encourage the use of renewable energy sources. One solution might be for the U.S. to aggressively seek a protocol to UNCED's global climate change convention, with timetables for reduction of greenhouse emissions.

I. AGRICULTURE:

Without adequate monitoring and infrastructure assistance, NAFTA could threaten many farm programs on this continent and jeopardize the movement toward sustainable agriculture. The dismantlement of import restrictions, as well as pressure upon legitimate food-safety standards, should not be a catalyst for centralized agriculture, based exclusively on agricultural exports and without regard to the relationship between producer and consumer.

J. IMPACT ON STATE AND LOCAL LAWS:

Because states and localities are not parties to NAFTA, they cannot directly defend their standards under Chapter 7 or 9. Although the federal government is allowed to set standards it deems "appropriate," states and localities do not explicitly possess this right, and are thus dependent upon the federal government for defense. Furthermore, NAFTA Article 105 states "All parties shall ensure that all necessary measures are taken in order to give effect to the provisions of this agreement ... by state and local governments." This situation might present a problem for a state like California, which often has standards more stringent than the federal government. Although we would like the sub-federal problem to be addressed in the protocol, U.S. implementing legislation could also prohibit the federal government from lowering state or local standards.

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Like many other NAFTA provisions, Chapter 21's environmental "exceptions" incorporate GATT terminology and jurisprudence. Unfortunately, recent GATT panel decisions have interpreted the term "necessary to protect human, animal or plant life or health" as requiring "necessary" measures to be "least-GATT" or "least-trade" restrictive. Under this standard, many present federal and state trade measures could be found to be NAFTA-illegal, from bans on the trade in elephant ivory to state recycling mandates.

In addition, such standards have had a chilling effect on new legislation that attempts to incorporate appropriate trade restrictions as an enforcement mechanism.

The environmental exceptions in NAFTA, therefore, need to be both clarified and strengthened by incorporating the "precautionary principle" found in the Biodiversity Convention, as well as the listing provisions of CITES that directs the parties to err on the side of caution when what is "necessary" from an environmental perspective is unclear. See also NAFTA Article 754.1.

Also potentially problematic is NAFTA Article 903, which could be read to incorporate GATT provisions and jurisprudence in a way that diminishes this country's ability to protect environmental resources. Furthermore, Annex 2004's allowance to seek dispute settlement if a party feels "any benefit it could reasonably have expected to accrue it ... is being nullified or impaired" practically invites attack upon U.S. environmental standards. Similarly, the "based on" language of Articles 754, 755, 757, and 905 could needlessly threatens U.S. laws like the Delaney anti-cancer clause in the federal Food, Drug and Cosmetic Act, which bans the addition of any amount of cancer inducing substances; a clarifying standard should be adopted in the protocol that protects all U.S. environmental and health standards, so long as they are not arbitrary or disguised trade barriers.

L. SUSTAINABLE DEVELOPMENT:

While we laud the goal of "sustainable development" in the Preamble, we would like to see the promotion of sustainable development binding, and appear in Article 102's Objectives. The question of whether practices are sustainable, as well consistent with current standards, should also be raised and answered in NACE reports. If determinations of non-sustainability are made by NACE, alternative programs should be suggested to the violating party. By truly integrating the concept of sustainability into the NAFTA environmental protocol, the NAFTA parties will not only acknowledge that trade has profound impacts upon the environment, but also that these impacts need not and should not be negative.

III. THE NORTH AMERICAN COMMISSION ON THE ENVIRONMENT (NACE):

We support a NACE that will possess investigative, monitoring, and enforcement powers for all present and future parties of NAFTA, as well as a mechanism for meaningful public participation. A vibrant NACE would not only seize the tremendous opportunity to bring significant environmental and health bene-

fits to this continent, but would also identify and address degrading activities that create unfair competitive advantages or result in trade distortions. All activities of the NACE described will be public, except where stated otherwise.

STRUCTURE OF THE NACE:

1. NACE Commission:

The Commission will be ultimately responsible for all functions of the NACE. Each NAFTA party will select a NACE Commissioner who will possess authority to effectively implement NACE policies and perform NACE functions. In order to prevent a break-down in NACE's decision-making process, a majority rather than consensus will be the operative voting norm. The U.S. NACE Commissioner, equipped with a staff, should be selected by the President with Senate confirmation.

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A permanent Secretariat must also be created in order to realize NACE's substantial mandate. Thus, we recommend establishing a head of the Secretariat (Secretary General). The Secretary General, with staff, should possess responsibility for implementing NAFTA's environmental, health and safety provisions of the NAFTA package, though national courts would retain concurrent jurisdiction to enforce appropriate standards in their own courts. The Secretariat should also be responsible for submitting an annual public report to the parties on its various duties.

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The Commission will establish a roster of environmental, health, and safety experts with appropriate trade background for dispute resolution under NACE.

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A Public Advisory Committee will be formed, made up of four representatives from each country and one representative selected by the Secretariat. The four U.S. representatives should be picked by the President, and must include at least two individuals from non-profit environmental, health, and safety groups with appropriate trade expertise.

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involving environmental, health, or safety issues before the Commission. The Commission shall determine which cases shall be directly referred to a NACE dispute panel. In cases where the Commission declines a matter, the Public Advisory Committee will possess authority to compel the dispute resolution under NACE.

The NACE dispute settlement procedure will be the mechanism for NAFTA environmental, health, and safety enforcement. NACE will only enforce a party's own standards. If a dispute panel verifies a complaint by a party or individual, then that party or individual will be entitled to pursue the "snap-back" tariff provisions of NAFTA's Chapter 8 through the complainant's domestic trade agency. If a dispute panel determines that a party or individual has suffered an environmental, health, or safety injury as a result of lax enforcement in another country, yet no trade injury exists, then NACE will possess the authority to levy a fine upon the violating entity. Mechanisms should be developed to enable monies collected through the dispute process to be used for environmental compliance.

The Public Advisory Committee will also possess authority to bring complaints to NACE directly. Implementing legislation must also specifically acknowledge the right of U.S. citizens and groups to sue in federal court to invoke trade measures or other appropriate sanctions for violation of U.S. standards.

2. Investigation:

The NACE must possess authority to investigate environmental, health, and safety matters in all NAFTA countries. The NACE can commence an investigation on its own or the Public Advisory Committee.

3. Monitoring:

The Secretariat, in cooperation with the NACE Commissioners, will also possess authority to monitor the condition of the NAFTA parties' general environment. Consequently, the Secretariat will possess the authority to obtain information from the NAFTA parties' government and the general public.

4. NAFTA Amendments and Accession:

Because of the significant impacts that either NAFTA amendments or accession would have upon the environment, the NACE Commission should make recommendations to the parties on these matters. Any new party to the NAFTA must accede to the whole NAFTA package and must submit a report to the NACE on its environmental, health, and safety protection schemes, as well as the enforcement of those protections.

5. Cooperative efforts:

The NACE will promote cooperative efforts among NAFTA parties relating to trade and its environment, health, and safety implications for technology transfer, technical assistance, training, and education programs.

We appreciate the opportunity to brief you on these matters and look forward to working with you over the coming months and years. We hope that the protocol outlined in this letter is merely the beginning of a larger process to incorporate sound environmental oversight into the NAFTA process. Please do not hesitate to contact us if you have any questions.

Sincerely

cc: The Honorable Bill Clinton
The Honorable Al Gore
The Honorable Bruce Babbitt
The Honorable Carol Browner
The Honorable Mike Espy
The Honorable Ron Brown
The Honorable Warren Christopher
The Honorable Tim Wirth
The Honorable George Mitchell
The Honorable Max Baucus
The Honorable Daniel Moynihan
The Honorable Sam Gibbons
The Honorable Gerry Studds
The Honorable Richard Gephardt
The Honorable Dan Rostenkowski
The Honorable Ron Wyden
The Honorable Henry Waxman



WILLIAM J. SNAPE, III
Associate Counsel for Wildlife Policy

1244 19th STREET, N.W.
WASHINGTON, D.C. 20036



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FAX: (202) 833-3349

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involving environmental, health, or safety issues before the Commission. The Commission shall determine which cases shall be directly referred to a NACE dispute panel. In cases where the Commission declines a matter, the Public Advisory Committee will possess authority to compel the dispute resolution under NACE.

 The NACE dispute settlement procedure will be the mechanism for NAFTA environmental, health, and safety enforcement. NACE will only enforce a party's own standards. If a dispute panel verifies a complaint by a party or individual, then that party or individual will be entitled to pursue the "snap-back" tariff provisions of NAFTA's Chapter 8 through the complainant's domestic trade agency. If a dispute panel determines that a party or individual has suffered an environmental, health, or safety injury as a result of lax enforcement in another country, yet no trade injury exists, then NACE will possess the authority to levy a fine upon the violating entity. Mechanisms should be developed to enable monies collected through the dispute process to be used for environmental compliance.

The Public Advisory Committee will also possess authority to bring complaints to NACE directly. Implementing legislation must also specifically acknowledge the right of U.S. citizens and groups to sue in federal court to invoke trade measures or other appropriate sanctions for violation of U.S. standards.

2. Investigation:

The NACE must possess authority to investigate environmental, health, and safety matters in all NAFTA countries. The NACE can commence an investigation on its own or the Public Advisory Committee.

3. Monitoring:

The Secretariat, in cooperation with the NACE Commissioners, will also possess authority to monitor the condition of the NAFTA parties' general environment. Consequently, the Secretariat will possess the authority to obtain information from the NAFTA parties' government and the general public.

4. NAFTA Amendments and Accession:

Because of the significant impacts that either NAFTA amendments or accession would have upon the environment, the NACE Commission should make recommendations to the parties on these matters. Any new party to the NAFTA must accede to the whole NAFTA package and must submit a report to the NACE on its environmental, health, and safety protection schemes, as well as the enforcement of those protections.

5. Cooperative efforts:

The NACE will promote cooperative efforts among NAFTA parties relating to trade and its environment, health, and safety implications for technology transfer, technical assistance, training, and education programs.

We appreciate the opportunity to brief you on these matters and look forward to working with you over the coming months and years. We hope that the protocol outlined in this letter is merely the beginning of a larger process to incorporate sound environmental oversight into the NAFTA process. Please do not hesitate to contact us if you have any questions.

Sincerely

cc: The Honorable Bill Clinton
 The Honorable Al Gore
 The Honorable Bruce Babbitt
 The Honorable Carol Browner
 The Honorable Mike Espy
 The Honorable Ron Brown
 The Honorable Warren Christopher
 The Honorable Tim Wirth
 The Honorable George Mitchell
 The Honorable Max Baucus
 The Honorable Daniel Moynihan
 The Honorable Sam Gibbons
 The Honorable Gerry Studds
 The Honorable Richard Gephardt
 The Honorable Dan Rostenkowski
 The Honorable Ron Wyden
 The Honorable Henry Waxman