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Paper Buff Bohlen - Subgroup February 2, 1993

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United States Department of State

Assistant Secretary of State for Oceans and
International Environmental and Scientific Affairs

Washington, D.C. 20520

February 19, 1993

*pls file
NEC - NAFTA
subgroup*

MEMORANDUM

TO: Department of Commerce - Richard Morningstar
Department of Agriculture - Joe O'Meara
Department of Justice - Webster Hubbell
Department of Interior - Tom Collier
Department of Energy - Rich Williamson
Environmental Protection Agency - Alan Hecht
Food and Drug Administration - Dr. Stuart
Nightingale
Department of Justice - Myles Flint
Office of the U.S. Trade Representative - Brian Samuels
Office of Management and Budget - Gordon Adams
Office of the Vice President - Leon Fuerth
Office of Environmental Policy - Katie McGinty
Council of Economic Advisers - K. C. Fung
National Security Council - Eileen Claussen
National Economic Council - Bo Cutter
Department of State - Joanna Shelton
Donna Hrinak

FROM: *[Signature]*
Curtis Bohlen *for*

SUBJECT: NAFTA/Environmental Issues

As requested by the National Economic Council working group on the NAFTA, I will be chairing an interagency meeting to address environmental issues surrounding the NAFTA at 3:30 P.M. on Friday, February 19, in room 1105 in the State Department. We need to consider ways of making progress on environmental issues that have been raised in connection with the NAFTA and, particularly, to reach agreement on the elements that should be included in revised negotiating instructions for the North American Commission on the Environment (NACE). The attached paper, prepared by EPA and State, will provide a basis for our discussion.

It would be helpful, if possible, to limit attendees to no more than two per agency. Please call 202-647-1555 to let us know who will be attending from your agency.

Attachment: as stated.

DRAFT OPTIONS PAPER

For Consideration by
Sub-group on Environment,
Ad Hoc Working Group on NAFTA,
National Economic Council.

THE NAFTA; POSSIBLE OPTIONS FOR ADDRESSING ENVIRONMENTAL ISSUES

This draft paper presents a framework for decision-makers to approach the environmental concerns expressed by environmental NGOs, Congress, U.S. Government Agencies and/or the President about environmental issues raised in connection with the North American Free Trade Agreement (NAFTA) but not addressed in the Agreement itself. The first category below, entitled "Assumptions/Considerations", lists matters that presumably will inform how all "Concerns" are addressed. Next, each major concern that needs to be addressed by the Administration (because it is valid and/or politically necessary) is identified and discussed. Beneath each concern, which may be broken down into a set of related concerns, is a set of "Possible Options," not intended to be exhaustive, followed by "Factors" that may assist decision-makers in choosing among these or other "Options."

ASSUMPTIONS/CONSIDERATIONS:

o President Clinton has said the NAFTA text will not be reopened to further negotiation (a copy of the relevant NAFTA sections is attached for reference);

o The NAFTA countries agree that economic development flowing from NAFTA shall be undertaken "in a manner consistent with environmental protection and conservation" and that the development promoted by the Agreement shall be "sustainable development;"

o A principal environmental objective of NAFTA is "to strengthen the development and enforcement of environmental laws and regulations;"

o The extent to which environmental, health, safety and conservation (hereinafter "environmental") concerns are addressed may determine whether NAFTA is approved. How supplemental or "parallel track" environmental initiatives and agreements help ensure that the NAFTA is both an engine for economic growth and an affirmative force for environmental protection, restoration

and enhancement, will shape Congressional response to creation of a North American free trade area;

- o Certain environmental concerns are related to the stage of development of the Mexican economy and how existing conditions may be exacerbated or improved by NAFTA;

- o The proposed timing of submission of implementing legislation to Congress and the up-or-down vote on that legislation is such that if side agreement(s) are to be considered concurrently, their negotiation must be concluded by June 1, 1993;

- o There is a range of available foreign policy tools (bi and trilateral agreements or initiatives and unilateral actions) that the U.S. may use, concurrently if necessary (i.e., they are not mutually-exclusive), to address regional environmental concerns;

- o Agreement(s) reached with Mexico and/or Canada to address environmental concerns will likely be "reciprocal", meaning that the U.S. will itself be subject to the same conditions that it succeeds in imposing on the other NAFTA countries;

- o Each NAFTA country, including the U.S., is concerned with the measure of "sovereignty" it will surrender in reaching agreement on how environmental concerns are to be addressed;

- o Subnational authorities in each NAFTA country retain certain authority over environmental enforcement and standards development;

- o There are limitations on what the U.S. could accept with respect to enforcement within its national jurisdiction, given its system involving significant prosecutorial discretion, Constitutional rights of due process and concerns related to the commitment of resources;

- o The content of any agreement that the U.S. reaches with Mexico and/or Canada will influence the form of the agreement (e.g., executive agreement, treaty requiring two-thirds approval by the Senate, Agreement and/or its implementing legislation rolled into NAFTA implementing legislation);

- o The U.S., Mexican and Canadian legal systems are different from one another (e.g., Mexico's reliance on administrative action as opposed to litigation and Canada's generally non-litigious system);

- o Institutions or mechanisms created in the NAFTA context may be viewed as a models in other multilateral fora;

o There are budgetary constraints on the ability of each NAFTA country to address every environmental concern raised in connection with the NAFTA; the effectiveness of any new institutions or mechanisms created and Mexico's willingness/ability to take additional environmental measures could be dependent upon the commitment of additional financial resources from the U.S./Canada;

o With respect to the issue of working toward the harmonization of standards, it should be noted that the United States has recognized, most recently in Principle 11 of the Rio Declaration, that "[e]nvironmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries."

PRINCIPAL ENVIRONMENTAL CONCERNS RAISED BY THE NAFTA:

Set forth below, not necessarily in order of priority or importance, are major environmental "Concerns" [capable of being addressed without reopening NAFTA negotiations] expressed by environmental non-governmental organizations (NGOs), the Congress, U.S. Governmental Agencies in their preparation of an Environmental Review of the NAFTA, and/or President Clinton during the recent campaign. (The President's October 4, 1992 statement is attached).

CONCERN # 1: Closer economic integration with Mexico will have significant negative transboundary effects on the U.S. environment.

-- Transboundary Concerns Related to Border Environmental Conditions

o Increased trade flows and economic development caused by free trade may place strains on the U.S.-Mexico Border Region with its inadequate infrastructure and already-degraded conditions that may further negatively impact the U.S. environment.

-- Transboundary Concerns not Limited to the Border:

o Free trade should lead to increased industrial development in Mexico beyond the Border Area that may negatively impact the U.S.

Environment: increased polluting industrial activity in Mexico beyond the border may have negative environmental effects in the U.S. (e.g., increased industrial activity may lead to air quality and surface water pollution problems as well as pollution from wastes and additional hazardous waste disposal problems).

- o Effects of NAFTA on land use and a shared ecosystem extending beyond the Border Area may affect human, animal and plant life or health. Increased agricultural production could lead to clearing and deforestation which, together with increased use of pesticides affecting non-target species and other factors, may lead to loss of wildlife habitat, wildlife and biodiversity, and loss of useable surface and groundwater supplies.

- o Severe human health problems, including some that cannot be confined to the border, may be related to environmental degradation exacerbated by increased trade flows and industrial development. Hepatitis A and B and tuberculosis are rampant on both sides of the U.S. border. Cholera has reached the Mexican side of the Rio Grande. These diseases, caused by inadequate sewage and waste disposal in areas where populations are expected to grow even more rapidly with free trade, are easily spread in any mobile society. High rates of Anencephaly (a failure of the brainstem to develop) among babies born in the Brownsville, Texas area have been traced to folic acid deficiencies but environmental factors have not been ruled out.

Possible Options:

-- Bilateral Approaches:

- o Adopt new annexes to the U.S.-Mexico 1983 Border Environment Agreement
- o Execute the new bilateral agreement on environmental pollution, initialled last August, which constructs a framework for bilateral cooperation and assistance activities throughout Mexico
- o Strengthen implementation of the 1989 EPA/SEDUE (now SEDESOL) Mexico City Agreement under which several work groups have been formed to deal with the pollution issues of the capital

region but which have not met regularly or developed joint programs

- o Strengthen implementation of the Department of Energy's agreement with Mexico on Cooperation for the Protection and Improvement of the Environment in the Mexico City Metropolitan Area.

- o Fully implement the first phase (1992-1994) of the U.S. Mexico Border Plan; Address additional issues in development and implementation of the second phase of the Plan (1995-1997)

- o In the development of phase two of the Border Plan, include greater involvement by HHS (Public Health Service) and the Center for Disease Control as well as state and local health authorities

-- Trilateral Approaches

- o An institution such as the NACE could be given authority to promote and facilitate cooperation between and among all NAFTA countries, including with respect to the provision of technical and cooperation assistance.

- o An institution such as the NACE could be empowered to discuss, and make recommendations on, any aspect of the North American Environment, including on environmental issues related the viability of natural resources and public health concerns.

Factors:

- o Increased trade flows generate additional resources which, if properly directed, may improve environmental conditions. Trade liberalization need not necessarily result in environmental degradation.

CONCERN # 2 Mexico does not adequately enforce its environmental laws, regulations and standards:

- o Disparity in Environmental Enforcement Levels Between the U.S. and Mexico Could Lead to the Creation of Pollution Havens. Non-enforcement or waiver or derogation from established levels of environmental protection to retain domestic investment or attract foreign investment may cause U.S. industry (and jobs) to relocate to Mexico and deprive the U.S. economy of expected NAFTA benefits.

o Mexico's failure to enforce its environmental laws is a "brown subsidy" that creates a unlevel playing field and harms competitiveness of U.S. goods. Mexican failure to enforce its environmental laws, regulations and standards, will give to certain Mexican exports an unfair advantage over similar U.S. goods produced under far more strict and costly environmental standards that are enforced, rendering them less competitive.

o Mexico's failure to enforce its environmental laws and decentralize enforcement policy making will lead to further environmental degradation that adversely impacts the United States. Mexico, with every incentive to improve enforcement, has made only modest strides toward improving enforcement and decentralizing decision making. Failure to fully participate in bilateral initiatives, lack of data sharing, etc. suggest once the NAFTA "carrot" is gone, this beginning trend may not continue. Failure to check growing pollution problems could have a negative impact on the U.S. environment.

o NAFTA countries have no meaningful recourse against any other NAFTA country that frustrates achievement of NAFTA's environmental goals due to failure to enforce its environmental laws, regulations or standards.

Possible Options:

-- Bilateral Approaches:

o Cooperative efforts already underway (e.g., in the form of bilateral enforcement workgroups formed under the 1983 La Paz Agreement and the U.S.-Mexico Border Plan) could be enhanced or expanded in scope.

o Technical assistance (e.g., including training of enforcement personnel)/ provision of targeted financial resources could be increased.

o The U.S.-Mexico bilateral agreement on environmental pollution issues, which provides for enforcement cooperation beyond the border area, could be signed as is or in modified form.

o Because Mexican environmental enforcement is so highly centralized, enforcement cooperation could become a focus of the 1989 Mexico City Agreement.

-- Bilateral or Trilateral Approaches:

yes
o Encourage Mexico (and possibly Canada) to commit in a legally binding agreement to adopt community-right-to-know laws which promote citizen involvement, the dissemination of important information to the public and governmental responsiveness to public concerns.

yes
some extent
o Encourage Mexico (and possibly Canada) to commit in a legally binding agreement to permit suits by their citizens to enforce Mexican (and possibly Canadian) environmental laws and regulations and to provide for other rights and remedies (possibly modeled after provisions of the NAFTA on Intellectual property, 17.14-17.17)

-- Trilateral Approaches:

o Reach agreement with Mexico and Canada that a trilateral environmental institution such as the proposed North American Commission on the Environment (NACE) should:

yes
-- have authority to monitor, and report regularly and publicly on, how the NAFTA countries are meeting that Agreement's environmental objectives (one of which is "to strengthen the development and enforcement of environmental laws and regulations"), thus providing for periodic review of the environmental impacts of its implementation;

yes
-- play a role in the implementation of the NAFTA investment provision that NAFTA countries "recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures" and providing for consultation in the event "a Party considers that another Party has offers such encouragement";

-- provide environmental expertise to NAFTA dispute settlement panels; *(yes)*

-- generally discuss/report on (including to the NAFTA Free Trade Commission) any environmental issues related to the NAFTA; *(yes)*

-- be granted what has been termed broadly "enforcement authority", which could mean one or more of the following:

yes plus domestic process relevant if agreed to

o the ability to receive complaints from the public. Rights of citizens from a NAFTA country to complain could be limited to matters regarding enforcement of their own country's laws or to transboundary enforcement concerns, i.e., environmental impacts in one NAFTA country caused by lax or nonenforcement in another;

nb

o some degree of inspection authority, e.g., the ability to conduct fact-finding and investigations in the three NAFTA countries;

(no)

o some authority to impose penalties -- for example, trade measures against another NAFTA country -- upon a determination that it has relaxed or waived its environmental requirements to attract or retain investment; and/or

(no)

o functioning only as the initial point of consideration for complaints, leaving both enforcement and retaliation for lack of enforcement with national authorities (Senator Baucus);

-- Unilateral Approaches

(no)

o Amend U.S. trade law to provide that countervailing duties may be applied to goods produced abroad in pollution havens, or without enforcement of comparably strict environmental standards.

Factors:

o With respect to granting any supranational institution certain enforcement authorities, e.g. authority to impose trade or other sanctions or penalties, serious legal concerns would be raised for the U.S. In addition, the composition of the institution (i.e., whether members are government representatives) would likely be affected by the inclusion of such powers;

o Mexico has declared at the highest levels its intention never to become a pollution haven. Recent efforts at improved enforcement and commitment of financial resources to environmental enforcement, often in response to Mexican public opinion, suggest that this is the general trend in Mexico;

*not
the
NAFTA
sourced.*

o There is uncertainty and debate concerning the precise impact that industrial and agricultural development related to NAFTA will have on Mexico's natural resources, including forests and wildlife habitat and the resulting harm to the global commons.

o Mexico has been unwilling to sign the new bilateral on environmental pollution pending conclusion of the NACE negotiations and achieving a better sense of Clinton Administration views; 17

o Provision for citizen suits in NAFTA countries coincides with Principle 10 of the Rio Declaration which, in the context of public participation and environmental issues, states that "effective access to judicial and administrative proceedings, including redress and remedy, shall be provided";

o Mexico's commitment to adopt community-right-to-know laws would be consistent with Principle 10 of the Rio Declaration which provides that "[E]ach individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes;"

o Dependence by the U.S. on Rio Declaration language to leverage U.S. interests carries risks, as the full text of the Declaration makes apparent.

o There are numerous ways that inspection activities could be conducted depending upon the degree of intrusiveness considered desirable and legal; *Y. Kaplan*

Could limits to enforcement be done?
o If the U.S. added to those actions by other countries which are countervailable, the failure to enforce comparably strict environmental standards, it could then be argued that a range of other actions contributing to an unlevel playing field should also be countervailable. U.S. trading partners could presumably be counted upon to expand those actions against which they could countervail against U.S. goods (e.g., imposition by the EC of countervailing duties on U.S. goods because of insufficient energy taxes).

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CONCERN # 3: Insufficient bilateral and trilateral institutions and/or oversight mechanisms exist to ensure that increased economic activity associated with NAFTA does not harm human, animal and plant life and health

o Increased public involvement in addressing environmental concerns in each NAFTA country is needed and

CONCERN # 5: There is a need for the U.S., Mexico and Canada to begin working toward the development of certain "minimum environmental standards" which each would agree to enforce within its own jurisdiction.

Possible Options:

o Reach trilateral agreement on common "minimum" environmental standards, which would act as a floor and not a ceiling, which would promote enforcement of such standards throughout the region. Each NAFTA country would remain free to set higher than minimum standards.

Factors:

o There is the concern with respect to enforcement of any "minimum" North American environmental standards, that such an agreement could lead to lower standards than those currently mandated under Mexican law (but not necessarily enforced) and could also lead to pressure in the U.S. for downward harmonization resulting in lower levels of protection;

o Mexico's environmental laws, regulations and standards, as written, are broadly comparable to those of the United States but in Mexico, one finds much less monitoring of compliance with, and enforcement of, those laws.

CONCERN # 6 The total cost of addressing key environmental concerns, including border clean-up, is unknown but generally believed to be in the several billions of dollars. Adequate funding of initiatives and agreements to address environmental concerns is not yet assured by the NAFTA countries. Some means, whether unilateral, bilateral or trilateral must be developed to provide each NAFTA country with resources to fund its share of environmental preservation, restoration and enhancement costs.

Possible Options:

o Creation of a special North American Development Bank (President Salinas);

o Assessment of a fee or charge (one percent under some proposals) on goods and/or investment crossing the border and application of proceeds to border environmental restoration (Baucus/Gephardt/de la Garza);

- o Reallocation of a portion of duties collected on Mexican and Canadian goods entering the United States during the period that duties are phased out under NAFTA (up to 15 years) to environmental purposes including border infrastructure;

- o Commitment of a portion of general tax revenues to border environmental issues;

- o Creation of a binational border finance corporation with bonding authority, capitalized through initial contributions by both Governments, to fund border environmental infrastructure (Richardson); and

- o Earmarked increase in corporate income taxes (Hufbauer);

- o Technology partnerships (private sector).

Factors:

- o Any redirection of duties or other funds anticipated and allocated would involve reallocation, away from their dedicated use

- o It is unclear what the U.S. Government is willing to commit to environmental concerns in the way of financial resources; to what extent, if any, is the U.S. prepared to commit funds to help Mexico address its environmental problems. There is some expectation on the part of the Mexico that the U.S. will provide it with assistance. Canada has given no indication of any intention to contribute substantially to U.S.-Mexico border clean-up.

- o Mexico is limited in its ability to absorb rapidly large resources directed toward environmental clean-up and enforcement of environmental laws, regulations and standards;

- o Border fees and other surcharges will add to the cost of goods (even increase them in the short run) at a time when duty elimination is to be phased in;

- o A border finance corporation would be most suitable for only those projects that have the potential to provide a return on investment (e.g., through application of user fees);

- o Any "earmarking" of funds circumvents the normal budget process and does not permit a sorting out of priorities at particular times.

OTHER CONCERN: NAFTA establishes no criteria for the use of trade measures to affect environmentally harmful production and process methods (PPMs). Within the NAFTA free trade area, no country can discriminate among like imports according to how they are produced, whatever harm that process may pose to its environment, the regional environment, or the region's "slice" of the global commons. Under NAFTA (and GATT rules) countries may only discriminate among like products according to their inherent characteristics.

Possible Options:

- o This concern should be addressed through U.S. Government efforts at GATT reform within the Uruguay Round, or through complementary efforts in other fora such as efforts to develop trade and environment "Guidelines" now underway at the OECD.

Factors:

- o Once the manner in which goods are produced is considered, a "slippery slope" is created inviting consideration of child labor and human and animal rights issues, to name only a few. If imports may be banned for these or other reasons, international trade flows could be substantially affected.

OTHER CONCERN: Conflicts seem to exist between the spirit of the NAFTA and existing bilateral agreements relating to the Border Area: One example is the apparent conflict between creation of a free trade area, and the burden that will continue to be placed on many U.S. exports to Mexico if Annex III to the La Paz Agreement is not amended. Currently, the wastes generated in the production of many Mexican products must be disposed of by the U.S. (in the U.S.) if delivered to the border. This runs counter to the notion of free trade and does little to encourage Mexico to develop its own disposal facilities, with the help of U.S. service and technology providers.

Possible Option:

- o Renegotiate Annex III to the 1983 La Paz Agreement which has been "grandfathered" in its current form by the NAFTA. Hazardous waste disposal rules could be phased out together with tariffs and in the interim notification requirements could be clarified.

Factors:

- o Mexico is not eager to change the terms of Annex III.

*no - but
high
commission
here*

re-negotiate of NAFTA?