

**Expanding the Mandate:
Should the Border Environment Cooperation Commission and
North American Development Bank go beyond Water,
Wastewater and Solid Waste Management Projects and How Do
They Get There?**

"Comments on *Utilizing the Lending Capacity of the NADB*"

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- ◆ **The NADBank financing process can be or should be de-linked from the BECC certification process.** The transparency and public participation that has been fostered by the BECC process is critical to avoiding the types of problems that have plagued lending by the World Bank and the InterAmerican Development Bank. This link is an integral part of the institutions' design and any de-linking would require Congressional action in the U.S.
- ◆ **We do not support granting "open-ended" discretion to the NADBank Board (and/or BECC Board) on what types of loans it might consider.** Instead, BECC and NADBank should develop a specific list of the types of projects that will be considered as "related matters" or "environmental infrastructure" specifically authorized by the agreement. As this document makes clear, it is our belief that some of the sectors discussed in NADBank's draft document -- such as individual water and wastewater home installations, housing improvement to meet codes, industrial hazardous waste projects, and some of the air quality projects are worthy of consideration as either "related matters" or "environmental infrastructure."
- ◆ **We do not support geographic expansion at this time.** The expansion would pit communities within the 100 kilometer zone against wealthier communities in the 300 kilometer zone, including Los Angeles, San Antonio, Phoenix and Monterrey. In addition, such a geographic expansion would require additional resources and staff for adequate financial and technical review of projects. Instead, BECC and NADBank should consider projects outside the 100 kilometer border region that would help resolve an environmental or health problem within the border region, as the current charter agreement allows.
- ◆ **The BECC and NADBank should tread carefully into the expansion issue, in the meantime not losing sight of the priorities with which they were chartered -- water pollution, wastewater treatment and municipal solid waste.** These priority areas will continue to require grant funding, as the NADBank draft document makes clear.
- ◆ **The BECC and NADBank will need to identify additional resources and a financial mechanism to pay for the adequate administration and review of new project areas.** There are several options available, including requesting additional funds from both Congresses, instituting an application fee and using NADBank interest to supplement BECC' s budget.

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I. Introduction

Since its first full-scale quarterly public meeting in April of 1995, the Border Environment Cooperation Commission has moved steadily forward to meet its goals of reviewing and certifying environmental infrastructure projects - water, wastewater treatment, solid waste management and "related matters" - within 100 km of the U.S. - Mexico border. Currently, 40 projects have been certified by the BECC - potentially providing a benefit to over 8 million border residents. Together, these projects have either received funding or commitments of funding totaling more than \$1 billion. In addition, the BECC currently has a portfolio of hundreds of projects in the development stages,

about 25 of which could be ready for certification in the course of the next year. Moreover, through a new technical assistance program called PDAP, the BECC has earmarked almost \$20 million dollars in grants to communities and their consultants to move projects through the certification process. Finally, and perhaps most importantly, the BECC has brought a new commitment of sustainability, accessibility and public participation to the border region which has enhanced local abilities and culture. Thus, a five-year review of the institution might conclude that the BECC, its staff, Board of Directors and Advisory Council deserve credit for progressing so far, so fast.

Nonetheless, for a variety of reasons, there are voices, chief among them BECC's sister institution, the North American Development Bank, calling for an "expansion" of the mandate of the types, and possibly, the geographic area of projects eligible for BECC certification and thus far NADBank monies. To further this viewpoint, the North American Development Bank issued a draft document entitled *Utilizing the Lending Capacity of the NADB* and organized an "experts" workshop to discuss the paper on July 10th. The document makes three recommendations:

- A. That the NADB Board of Directors urge the two Governments to grant the Bank's Board discretion with respect to the infrastructure sectors to be financed with the Bank's capital, in coordination with the BECC, within the confines of available resources and the principles set forth in the Charter and concepts discussed in this document. ³
- B. That the Board urge the two Governments to consider expanding the geographic jurisdiction for the use of the Bank's resources to 300 km (from the current 100 km) north and south of the U.S.-Mexico border.
- C. That the Board direct Bank management to continue identifying additional tools and sources of funds for U.S.-Mexico border infrastructure projects and determine how to coordinate their use with the Bank's lending capacity.

While Recommendation A does now specifically contemplate a role for the BECC ("in coordination with the BECC"), absent from the paper is any **detailed** discussion of how NADBank would coordinate with BECC in either this "discretionary" identification of the infrastructure sectors or geographic expansion or even what type of process is envisioned to certify and fund these projects -- except a call for bundling projects and an expedited certification process.

According to the charter which created BECC and the NADBank, the institutions can only consider environmental infrastructure projects and should "give priority" to projects related to "water pollution, wastewater, municipal solid waste and related matters." From some viewpoints -- including that of NADBank's current directorship -- this is too narrow considering the vast needs along the border. Even the current mandate in itself is not entirely clear. What exactly was meant by related matters? Should it be interpreted narrowly or broadly? Would the entire charter need to be revised in order to expand the mandate to areas that NADBank is advocating such as public transportation systems, water transfers, paving roads, and home mortgages? What role -- if any -- should the U.S. and Mexican Congressional bodies have in a decision to expand the BECC/NADBank mandate?

³ The document states: "This recommendation would require the identification of the availability of needed resources prior to a new infrastructure project being developed. This would include the identification of any needed grant resources that might be bundled with the Bank's loan proceeds. Similarly, resources supporting its proper design, construction and operations must be identifiable at the time a decision is made by the Bank's Board. This policy of identifying available resources, prior to a Board decision, would reasonably limit the universe of new infrastructure projects being considered to those that are financially and technically viable. In the process of structuring loan transactions, the Bank's investment banking services would be made available to all border communities who simply lack the ability to properly develop a viable and needed project."

Furthermore, throughout its short history, the BECC has struggled to define to what extent it would certify (and thus make eligible for NADBank funding) projects which have a private industry component. Recently, the BECC certified a wastewater treatment system for a paper recycling plant which will also serve some nearby communities in Coahuila. It has been under increasing pressure to look at new private projects, such as a tire recycling project in Tijuana and a glass recycling plant in Mexicali. Do such projects qualify for certification by the BECC and loans from the NADBank? If so, under what circumstances? How should the BECC prioritize such projects? And, if some kind of mandate or geographic expansion should occur, how should BECC handle private projects which fall outside of the three main areas eligible for priority certification and financing?

This position paper considers four issues related to the possible mandate expansion: (1) why the expansion may be necessary; (2) what issues any expansion must consider; (3) what criteria should guide any such expansion; and (4) how and in what way the expansion should proceed. The paper also briefly discusses how to make NADBank loans more affordable, whether or not there is a sector or geographic expansion. This paper is intended to contribute to the on-going discussion of these issues and hopefully offer some ideas for building a broad consensus about the type of expansion -- if any -- which should occur and what process should be set up to make that happen.

II Conditions driving the mandate expansion discussion: Why Now?

Perhaps the single largest reason there have been calls for an expansion of the mandate is that the present system has not led to the use of NADBank's resources. Currently, the U.S. and Mexican governments have contributed a total of \$304 million in paid-in capital to the NADBank in equal shares. When combined with the callable capital, this adds up to a lending capacity of approximately \$2 billion. Although NADBank has approved financing for 29 infrastructure projects, the loan components of these have been minuscule, with the vast majority utilizing grants or monies from other sources. Of the approximately \$265 million in loans and grants approved by NADBank, more than \$253 million has been in the form of grants from the Border Environmental Infrastructure Fund (BEIF). Loans total only \$11.2 million. In simple terms, NADBank is not making loans and, for a variety of reasons, it is unlikely that the loan component of financing will increase substantially in future water, wastewater or solid waste projects.

There has been an increasing interest in freeing up some of this money to finance other environmental infrastructure projects along the border. This interest has been expressed by the Border Trade Alliance, the President's Inter-Agency Task Force on the Economic Development of the Southwest Border, and some local government officials, among others. More importantly, members of NADB's board, especially members from Hacienda and SECOFI, have insisted that such large amounts of resources must be used and the NADBank must increase its lending to be considered a success.

Many communities have asked why the BECC/NADBank can not look at other environmental infrastructure issues, such as air quality, road paving and the siting of new and clean-up of abandoned hazardous waste sites. In addition, some communities outside of the 100 km zone have been disappointed that they have not been able to access BECC/NADBank process. Some private industries have approached the NADBank for funding of both recycling and disposal of hazardous wastes.

In the recent GAO review of the BECC and NADBank, the GAO called upon BECC to become a planning leader along the border by producing a Border Infrastructure Strategic Plan (BISP) which would include:

- ◆ a needs assessment (i.e. environmental infrastructure) along the border;
- ◆ strategies for addressing impediments to infrastructure development;
- ◆ and a statement of measurable goals with milestones so that progress can be assessed. ⁴

⁴ US GAO, *U.S. -Mexico Border: Despite Some Progress, Environmental Infrastructure Challenges Remain*, 29.

While the GAO recommendation focuses on water, wastewater and solid waste infrastructure, such a BISP could begin to look at a wider range of environmental infrastructure projects.

The two institutions must also consider what extent an expansion might make both more financially solvent. Currently, BECC must depend upon appropriations each year from the respective countries, a process which each year has been difficult, and has led to an actual drop in BECC's budget even as the institution has taken on more and more projects and responsibilities. If the expansion of the mandate were tied to increased funds, such an expansion might actually help the institutions survive on a more permanent footing. Obviously, however, unless BECC and NADBank coordinate the expansion and share the resources, BECC will be put in a very precarious financial position.

III. What issues must be considered in any expansion?

A. The Charter

1. Role of the BECC in an “expanded mandate”

A clear analysis of the Charter establishing the BECC and the NADBank is vital to understanding whether and how NADBank funds might be lent for projects outside of the current “preferences” for “water pollution, wastewater treatment, municipal solid waste and related matters.” Unfortunately, the “mandate expansion” discussion initially was carried throughout the border with virtually no participation from or discussion of the role of the BECC. Thus, based on the experts meeting on July 10, 2000 and other comments we have heard, it appears that a number of organizations, local governments and individuals supporting the “expansion of NADBank’s mandate” have not yet considered the role of BECC in any expanded NADBank loan portfolio. We recognize that is beginning to change, but we believe it is important to be very clear about the BECC’s role.

The Charter establishing BECC and NADBank is clear and unambiguous: outside of the community adjustment programs in the U.S. and Mexico,⁵ **NADBank can only finance projects that are first certified by the BECC.**⁶ It is our position that legally and politically, any change from this procedure would require Congressional authorization in the U.S.

While it is true that the “Parties” (i.e. the U.S. and Mexican governments) can modify or add to the BECC/NADBank agreement,⁷ the ability for the parties to do so without Congressional approval appears to be limited to four specific areas, none of which would let the Parties authorize NADBank funding of environmental or other infrastructure projects not certified by BECC.⁸ Specifically, the Charter provides:

Article II Amendment

*The Parties may agree on any modification of or addition to this Agreement. **In particular**, the Parties shall from time to time consider whether to make such modifications of or additions to this Agreement as would be necessary to:*

*Expand the functions of the **Commission** to include other kinds of environmental or other projects⁹;*

Expand the geographic scope of the Commission;

⁵ Agreement Between the Government of the United Mexican States and the Government of the United States of America Establishing the Border Environment Cooperation Commission and the North American Development Bank, Chapter II, Art. I (1)(b), (c) (financing for Community Adjustment projects).

⁶ *Id.*, Ch. II, Art I(1)(a) (financing for BECC-certified projects); Art. III (1) (NADBank resources and facilities shall be used exclusively to implement purposes and functions laid out in Article I of Chapter II).

⁷ *Id.*, Ch. III, Art. II.

⁸ With the exception of projects that fall in the Community Adjustment programs in either the U.S. or Mexico.

⁹ We note that in Appendix J of the NADBank Draft report, the “Charter Analysis” states that the Parties could “expand the functions of the BECC/NADB”. The Agreement, however, speaks in terms of expanding the functions of the “Commission” (i.e. BECC). This makes it clear that the Agreement contemplates BECC certification of projects before NADBank financing and that the BECC is the critical link in the process.

Give the Commission the capacity to raise capital so that it might issue loans or guarantees for environmental or other infrastructure projects; or

Change the environmental preferences expressed in Article II, Section 2(b) of Chapter I of this Agreement.

*When so agreed, and approved **in accordance with the applicable legal procedures** of each Party, a modification or addition shall constitute an integral part of this Agreement.¹⁰*

The question of what constitutes “in accordance with the applicable legal procedures” is somewhat difficult. At first blush, it could be interpreted as requiring U.S. Congressional approval for all modifications or additions to the Agreement. In the NAFTA Implementation Act, however, Congress “authorized” the U.S. to “participate in the” BECC “in accordance with” the Agreement”.¹¹ This would seem to have authorized the Executive Branch to agree to modifications within the scope of the Agreement (i.e. the four areas laid out in Ch. III, Art. II). At a minimum, however, modification of the Agreement would seem to require the clear stated concurrence of the Chief Executive in each country, rather than just a decision of the BECC and NADBank Boards of Directors.¹²

Moreover, the entire structure of the agreement is based on BECC certification of environmental infrastructure. To modify that structure would be a major change from what Congress believed it was authorizing the U.S. to participate in and, thus, any such modification should be presented to Congress.

2. Types of projects

The NADBank Draft report and concurrent discussions of specific examples of new types of projects that might be funded essentially contemplate certification of and lending for projects in three categories “beyond” the preferential categories of water pollution, wastewater treatment and municipal solid waste:

1. Certification and financing of projects that fall into the “**other related matters**” addition to the water pollution, wastewater treatment and municipal solid waste preference language of Chapter I, Art. II(b) of the Agreement;
2. Certification and financing of “**environmental infrastructure projects**”¹³ beyond those related to water pollution, wastewater treatment and municipal solid waste; and
3. Certification and financing of “**other infrastructure**” projects.

The existing agreement clearly authorizes BECC to certify and NADBank to certify and fund infrastructure projects in the “other related matters” and “environmental infrastructure” categories. The question really is: does a particular project fall into the “other related matters” or “environmental infrastructure” definition. **Table 1** provides our analysis of whether the types of new projects discussed in the NADBank Draft fall into one of these categories. The BECC and NADBank could choose to answer this question on a project-by-project basis or they could set out at least some general criteria for the types of projects they will consider as “other related matters” or “environmental infrastructure.”

¹⁰ Id., Ch. III, Art. II. (emphasis added).

¹¹ 19 U.S.C. 3473; codification of Sec. 533 of the NAFTA Implementation Act, Pub. L. 103-182, Dec. 8, 1993, 107 Stat. 2164.

¹² See, also, Executive Order 12916, 59 Fed. Reg. 25779, May 13, 1994, requiring the Agreement setting up the BECC and NADBank to be implemented “to advance sustainable development, pollution prevention, environmental justice, ecosystem protection and biodiversity protection in a manner that promotes transparency and public participation in accordance with” NAFTA and the Agreement itself.

¹³ “Environmental infrastructure project means a project that will prevent, control or reduce environmental pollutants or contaminants, improve the drinking water supply, or protect flora and fauna **so as to** improve human health, promote sustainable development, or contribute to a higher quality of life.” Ch. III, Art. V. (emphasis added).

We believe that a specific list of the types of projects that would be considered in these categories—at least over the next few years—is essential for a policy, political and efficiency reasons. If this is not done, BECC and NADBank risk giving border communities the idea that any project might make it through and that would lead to a lot of wasted time and effort on both the part of the institutions and border communities. Moreover, Congress and the public are going to want to know what priorities the institutions have for certifying and financing projects and why those priorities are appropriate for the border’s conditions at this point. That was clearly the point of the GAO’s recommendation that the BECC approach the infrastructure issues with a clear “Border Infrastructure Strategic Plan.”¹⁴

Even if it were to be argued that the Agreement gives the Parties authority to modify the Agreement beyond the four specific areas laid out, without Congressional approval, it would seem *politically* unwise to pursue such a course of action. Congressional discussions surrounding the BECC and NADBank focused on two things: environmental infrastructure needs at the border and the need for adjustment aid in communities adversely affected by NAFTA. Extending the functions to such areas as housing mortgages would seem to go far beyond what was contemplated in Congressional discussion and authorization of the Agreement and its allocation of funds to NADBank and BECC.

It is our position that certification and financing of “other infrastructure” projects cannot be done until the Parties formally agree to modify the Agreement. From a political perspective in the U.S., that would seem to require at least Congressional discussion, if not Congressional approval. And, for that to occur, it seems to us that the BECC and NADBank will **have to be specific about exactly which “other” infrastructure projects they want to consider certifying and financing.**

¹⁴ U.S. GAO, p. 29.

**Table 1. Categorization of Example New Projects
Discussed in NADBank Draft Report**

Project	“Related” to Water Pollution, Wastewater Treatment or Municipal Solid Waste	“Environmental Infrastructure” as defined in Agreement (Ch. III, Art. V)	“Other” Infrastructure
Agricultural to Municipal Water Transfers (1) ag conservation (2) financial intermediary		(1) X	(1) X ¹⁵ (2) X
Individual water and wastewater home installations	X		
Industrial hazardous waste (1)hazardous waste “infrastructure” projects (2)new disposal facilities (3)waste reduction and recycling/waste exchange		X	
Air quality- (1)air pollution reduction from specific facilities; (2) vehicle emission reduction projects (i.e. I and M program); (3) rail projects (4) street paving;		(1) X (2) X (4) X	(3) X ¹⁶
Municipal Urban Roads and Public Transportation (1)vehicle transportation projects to reduce congestion (commuter lanes and urban bypass) (2) vehicle transportation to provide mass transit (light rail and/or improved bus network)			(1)X ¹⁷ (2) X ¹⁸
Housing Projects (1) housing improvements (2) self-help housing construction (3) middle-income mortgages		(1) X ¹⁹	(2)X (3)X

B. Institutional Implications

Perhaps the biggest concern with expansion is whether the BECC actually has the time, expertise and necessary administrative ability to adequately review projects beyond the current priorities established in the charter. Even if some new types of projects -- whether it be hazardous waste infrastructure or air pollution control -- may be financially viable, if the BECC-NADBank experiment -- as the Charter intended -- is to ensure sustainability, public participation and support and transparent project review and public participation processes are necessary.

¹⁵ The definition of environmental infrastructure relates to “improving drinking water supply”, which seems to imply improving the quality of the drinking water supply, not “developing” new sources of water through conservation or water marketing. It might be read to include infrastructure for agricultural conservation of water if the conserved water were to clearly be an addition to a municipal drinking water supply. Acting as a “financial intermediary” in water marketing does not appear to qualify as any type of “infrastructure” project.

¹⁶ At least for cargo rail projects; while such projects might reduce truck congestion at a border crossing, their primary purpose is moving cargo, not improving the environment.

¹⁷ While these projects might result in overall reduction of air pollution because they ease congestion, their primary purpose is to facilitate movement of cargo or people.

¹⁸ Again, their primary purpose is to facilitate movement of people, not reduce air pollution.

¹⁹ If housing improvements were implemented to meet building and plumbing codes to allow homes to hook up to new or existing water and wastewater systems, housing improvements could be considered an environmental infrastructure project or even a related matter.

Currently, BECC is underfunded to do more than a cursory review of water, wastewater and solid waste projects, where it does have considerable expertise. In other words, despite a budget, experts and time, BECC has not perfected the review of the current scope of projects, although the process has improved considerably since 1995.

It is clear that expansion would help NADBank resolve its financial "difficulties" -- the difficulties of lending money. But for BECC such an expansion actually represents a serious financial problem, especially because, unlike the NADBank, it does not have an assured source of funds.

Therefore, any expansion of the types of projects considered would necessitate creating some kind of financial mechanism to assure an adequate BECC review, administration of that review and the required public participation component. Possibilities include:

1. All applicants would have to pay for the certification services, just as currently in the U.S. wastewater dischargers must pay a fee when they apply for a permit. This is specifically authorized by the agreement, and the resulting money could be used to hire the necessary staff;²⁰
2. Only "private" projects would need to pay a fee and the fee might be higher depending upon whether the project was a private-public partnership or a private-only project (see next section) ;
3. Interest from NADBank's paid-in capital could be used to either increase BECC's budget to cover issues beyond the three priority areas or actually hire an outside consultant with expertise in the area. Whether or not the review was conducted by the BECC staff or an outside consultant, the BECC Board ultimately would make a determination whether or not to certify; and/or
4. Seek more money from both Parties to substantially increase BECC's budget in order to hire additional staff to deal with review and certification of a broader array of environmental infrastructure projects.

In any case, any expansion would need to be accompanied by identification of a revenue stream to support adequate BECC review and certification.

C. Private Sector Participation

When the BECC Board of Directors considered certifying the wastewater treatment plant for the FINSA industrial park in Matamoros, it received considerable opposition from communities, some political leaders and NGO representatives. Why? Because these individuals believed that the BECC process and NADBank financing should not be devoted to providing funds for "private" sector projects that were being implemented to meet strictly pollution control regulations.

Shortly after certifying the FINSA wastewater project, BECC developed its "Private Sector Project" guidelines. These guidelines later became part of the Project Certification Criteria. According to these guidelines, "a private sector project must address the human health and environmental needs of the surrounding community." Also, BECC divided private projects into three categories: public/private partnerships; private-only projects designed specifically to address local communities or regional infrastructure needs; and private-only projects designed specifically to address the private sponsor's own pollution problems.

An example of the first category would be a municipal wastewater treatment plant built and operated by the private sector, and eventually turned back to the municipal entity. An example of the second would be a landfill built by a private company but used to dispose of municipal waste through user fees. Finally, an example of the third category would be a private wastewater treatment plant such as the FINSA case. While the first two categories are eligible for BECC certification (and NADBank loans), the third case would only be eligible if they also addressed the "human health and environmental needs of the surrounding community." In the third case, BECC could even require that a "community environment infrastructure fee" be paid by the applicant in order to be eligible for BECC certification.

²⁰ Agreement Between the Government of the United Mexican States and the Government of the United States of America Establishing the Border Environment Cooperation Commission and the North American Development Bank, Chapter I, Art. II, Section 5.

While the private sector project guidelines have helped the BECC clarify to potential applicants what private sector projects are eligible for certification, these guidelines have not completely resolved the private project issue. First, while the general principle that private projects provide a "substantial community benefit" is sound, sometimes in practice it is difficult to determine what constitutes a substantial community benefit. It is also sometimes difficult to determine whether a proposed project is an example of a private project designed to address local or regional needs or simply to meet a company's own pollution control needs. Another difficulty is that the BECC may not have the staff expertise to credibly examine and review private projects, which often differ substantially from municipal-type projects.

Two recent applications to the BECC highlight some of the problems associated with private projects. Recently, the International Glass Group of Mexicali, Inc., a subsidiary of a U.S. glass recycling company, submitted a Step I application and developed an initial Step II application with the BECC to build a state-of-the-art glass recycling operation in Mexicali. The facility would take some recyclable glass from the community. The glass recycling and fiberglass manufacturing facility would then sell its product to a local maquiladora, which would in turn sell resulting fiberglass insulation to the Boeing Corporation.

How should the BECC classify such a private sector project? Is it a "private-only project designed specifically to address local communities or regional infrastructure needs?" While it is providing a place to recycle local glass, it is not designed to benefit the local community but to provide an input to a local maquiladora (a Type 3 private project). At the same time, it may provide some local benefits to the environment by taking some glass out of the waste stream and helping to create local markets for recycled materials.

Similarly, BECC recently received a Step I application for a tire recycling plant in Tijuana, Baja California. The plant would apparently shred and recycle tires from California and Baja California and turn them into roofing product. Does this project meet a community need? Is it helping to lessen the presence of tires in landfills? Or is it merely a private business, an operation that has little to do with the priorities of BECC? One can come up with dozens of examples of projects where BECC will have difficulty determining how to proceed.

In fact, for more than a year, BECC and its Board of Directors have been developing proposed modifications to the Private Sector Guidelines. These modifications are intended to help spur private sector involvement and eliminate the confusion with the present guidelines. Specifically, the new guidelines would add another category to attempt to allow companies like the glass and tire recycling facilities to more easily meet the private project guidelines. Thus, both the BECC and NADBank are united in their view that the private sector should play a more important role in improving the border environment and that this should be facilitated by BECC and NADBank. One of the goals appears to be to create an environmental service sector in Mexico, as has existed in the U.S. for several decades. However, there may be differences in how NADBank and BECC think about private sector involvement, with BECC seeing a role for the private sector which contributes to the development of a working environmental infrastructure, and NADBank more narrowly interested in increasing its lending capacity.

There are benefits to gaining more private-sector participation in BECC/NADBank projects, including the private sector's relatively greater ability to take on and pay back loans. However, loans to private industrial projects which do not demonstrate environmental benefit for the community in which they are located and lack community-wide support should not gain access to NADBank loans, which are by their nature public funds. We believe there are other sources of capital for such projects.

D. Expansion to "other related matters"

Under the charter agreement, the BECC is required to give priority to projects related to:

- A. Water Pollution
- B. Wastewater Treatment
- C. Municipal Solid Waste Management; and
- D. Related matters.²¹

But just what are these "related matters?" One way of interpreting the language is to require that other projects directly relate to the three other categories. Thus, an industrial wastewater pretreatment program could be certified by the BECC because it is directly "related" to municipal wastewater treatment. Such a pretreatment program could focus both upon actual end-of-pipe controls at companies as well as upon pollution prevention -- eliminating the creation of chemicals and polluted water at the source. Similarly, a project to assess and protect groundwater from pollution -- for example by buying up and preserving land -- is related to water pollution since it would help protect the water supply from contamination. An industrial recycling operation which used part of the municipal solid waste stream -- glass or paper -- might be related to overall municipal solid waste management. Thus, in this interpretation, the "related matter" project would have to be directly related to the three priority matters.

Formulating a clear application of the "related matters" test is difficult, however. One applicant, Servicios Ambientales Ford, a private company, proposed using NADBank money to build a used oil and liquid hazardous waste recycling operation in Ciudad Juárez. It proposed to blend the waste and sell it to local cement kilns for "alternative" fuel. While the project seemed to have little to do with BECC priorities, the project sponsor and others argued that the project was "related" to wastewater treatment since such an operation would help divert used oils from the wastewater treatment plant into a facility where it could be properly "managed."

No matter what decision or interpretation of "related matters" is reached, it is clear that BECC and NADBank by charter **should keep the focus on environmental infrastructure**. In addition, **any expansion into "related matters" should add to and not lessen the current focus on the three priority areas**.

E. Expansion into other "environmental or other infrastructure projects"

The first recommendation of NADBank's draft is intended to expand the mandate of the institutions beyond the three priority areas -- by giving the Board "discretion" to consider other infrastructure projects. While this recommendation would seem to be very broad, in the document the NADBank discusses seven new fields which they would like to consider financing. It is unclear, however, if the expansion is limited to these areas. The specific sectors cited in NADBank's draft report are:

- * Water Transfers (Agricultural to municipal)
- * Water and Wastewater Home Installations
- * Industrial and Hazardous Wastes
- * Air quality projects: general
- * Air quality projects: street paving
- * Municipal urban roads and public transportation
- * Housing improvements and mortgages

What factors should be used to determine whether BECC and NADBank should expand their activities to these types of criteria? It is our view that BECC and NADBank should limit the expansion to sectors that are either clearly a "related matter" or meet the definition of "environmental infrastructure."

1. Water Transfers

²¹ Agreement Between the Government of the United Mexican States and the Government of the United States of America Establishing the Border Environment Cooperation Commission and the North American Development Bank, Chapter I, Art. II, Section (2) ©.

While water transfers are obviously related to water supply in general they are not related to water pollution per se, one of the priorities in the agreement. Nor are water transfers -- the transfer of water from agricultural to municipal users -- examples of environmental infrastructure projects because they are simply a mechanism rather than "infrastructure." Moreover, at least on the U.S. side, water transfers can be difficult legally and politically, potentially embroiling the BECC and NADBank in legal and controversial hurdles.

On the other hand, financing agricultural and urban water conservation infrastructure would obviously help extend a limited resource and have important beneficial impacts both for downstream users and aquatic life. It is our view that loans to irrigators or municipalities to buy equipment (i.e. infrastructure) which help conserve water could be considered "environmental infrastructure."

2. Water and Wastewater Home Installations

Water and wastewater home installations are obviously a vital and important area of expansion. In fact, some of the recent BECC-certified projects have included hook-up programs, including a recently certified project sponsored by the State of Texas to hook up colonias to existing water and wastewater systems. In fact, BECC and NADBank can probably proceed in this area without any further need for discussion as it is directly related to water pollution and wastewater treatment.

3. Industrial and Hazardous Waste

Industrial and hazardous wastes -- both past and present -- is probably the most difficult of the issues addressed in the NADBank draft. Certainly, some hazardous waste projects could qualify as environmental infrastructure projects since they would help "prevent, control or reduce environmental pollutants or contaminants."²² Throughout its short history, in fact, proponents of broadening BECC and NADBank's priorities have argued that the BECC should begin to look at one of the management of hazardous wastes. Traditionally, of course, private industry is legally responsible for properly managing its hazardous wastes and private industry has developed landfills, incinerators, recycling and treatment facilities when needed. However, given the lack of properly managed facilities in the border region, some have argued that the BECC should become more involved in jumpstarting these facilities.

To become involved, however, the BECC -- and NADBank -- would need to substantially increase their staff and expertise in hazardous waste management. In addition, until a proper hazardous waste needs assessment -- and proper reporting of hazardous waste -- are conducted throughout the border, it will be very difficult for the BECC to get involved in an informed matter and assure that projects meet BECC sustainability criteria and have community support.²³

One possibility is to tie the establishment of expansion into hazardous waste facilities to the preparation of a borderwide needs assessment of hazardous waste capacity. In other words, before accepting applications to certify hazardous waste projects -- in particular commercial facilities -- BECC would need to commission such a study, which by necessity would involve greater compliance with hazardous waste reporting requirements along the U.S. -Mexico Border.²⁴

In addition to new facilities for the confinement and disposal of hazardous waste, the NADBank document specifically mentions promoting and implementing pretreatment programs, waste reduction and recycling programs. This may be an area in which the BECC and NADBank could move more easily. As already mentioned, pretreatment programs could already be considered "related matter," as they are directly related to the proper functioning of municipal wastewater

²² Id., Ch. III, Art. V.

²³ For a full discussion of some of the difficult issues related to hazardous waste management along the U.S. - Mexico border, see Texas Center for Policy Studies, La Neta and RMALC, *Hazardous Waste Management in the U.S. -Mexico Border States: More Questions than Answers*, 2nd Edition (Austin, TX: March 2000).

²⁴ For example in the U.S., each state is required to conduct such an assessment to help determine whether proposed facilities are actually needed. In Texas, the Texas Natural Resource Conservation Commission conducts such an assessment every two years.

treatment plants. Individual plant recycling and waste reduction programs might also be considered. In fact, in terms of future applications involving hazardous waste management, BECC could require as a prerequisite that materials utilized and hazardous waste generated be reported as a condition for the loan to assure the pollution prevention plan and infrastructure is actually leading to verifiable reductions. This might help jumpstart community "right-to-know" reporting of toxic releases and waste generation in Mexico, at least along the border.

Beyond the proper management of currently generated hazardous wastes, some have called for the BECC to become involved in the clean-up and remediation of solid and hazardous waste sites, an area not specifically covered by the NADBank document. For example, illegal, clandestine sites with solid wastes -- most of which are not considered hazardous wastes -- can be found throughout the border. Nonetheless, there are currently no regulations in Mexico for handling these solid wastes.

In addition to these solid waste sites, Mexico has hundreds of abandoned or near-abandoned sites contaminated with hazardous wastes, solvents and heavy metals. Recently, PROFEPA announced it will create a trust fund to pay for studies and remediation projects for some 166 abandoned sites where no responsible party has been found. There are more than 1,000 other sites in industrial areas which companies are cleaning up under voluntary agreements with PROFEPA. Mexico and EPA have discussed the possibility of jointly cleaning up sites. Can the BECC and NADBank play a role in reviewing and financing the clean up of these sites? Could the land be used as collateral for a loan in the case where either a responsible party or "redeveloper" could be identified?

4. Air Quality Projects

Some of the air quality projects mentioned in the NADBank draft document could be considered environmental infrastructure projects since they are designed to control and prevent contamination. Expansion into this area, however, would require much greater expertise in air quality, fuel conversion and other issues as well as dedicated funding to support the review and certification of such projects. Finally, some of the rail and highway projects might actually encourage further and future growth rather than mitigate the problems of present growth. (In fact, their primary purpose is not to reduce air pollution but to move cargo and/or people more efficiently.)

In our view, BECC and NADBank should at this time only consider expanding into air quality projects that are directly and primarily intended to provide air quality benefits -- such as vehicle emission reduction programs and air pollution reduction from specific facilities or industries (e.g. brick oven conversion or recycling used tires). Rail projects such as the San Diego and Arizona Eastern Railway, on the other hand, are designed to move cargo, not improve the environment, even though there may be some incidental air quality benefits.

Similarly, street paving outside current urban boundaries may also further growth and urban sprawl. Without better neighborhood planning, enforcement of zoning and urban limit lines, such projects could actually undermine improvements in air quality. On the other hand, if BECC could adapt its certification criteria to consider these impacts, perhaps street paving could be considered as certifiable, especially if it were part of providing water and wastewater services. TCPS believes street paving within urban limits and designed to lessen air quality impacts and improve water and wastewater hook-ups could be added to the list of sectors eligible for the BECC/NADBank process.

5. Municipal Urban Roads and Public Transportation

Again, municipal urban roads, by-passes and public transportation systems in our view lie outside "related matters" or "environmental infrastructure." The projects could lead to unsustainable sprawl and growth and their primary purpose is to move people and congestion. Similarly, BECC may lack the expertise or funding mechanism to acquire the expertise to properly review such proposals.

6. Housing

Finally, housing improvements and home mortgages is an area which falls outside of both "related matters" and environmental infrastructure. However, it does make sense to tailor loans and grants to improve existing housing to meet plumbing and building codes to be able to hook up to water

and wastewater treatment systems and thus could be considered "related matters." Outright home mortgages for maquila workers and new self-help housing is beyond the scope of what the BECC/NADBank charter envisioned. Whatever the merits and needs of affordable housing, we believe expansion into this area would require a broader public debate and, at least in the U.S., Congressional consideration.

7. Summary

In summary, it is our view that BECC and NADBank should, at least at this time, limit the expansion to a few types of specified projects which can be considered either related matters or environmental. These sectors could include agricultural and municipal water conservation infrastructure, individual water and wastewater home installations, industrial hazardous waste projects, industrial air pollution and vehicle emission reductions projects, and street paving and housing improvements which are tied to meeting codes in areas lacking basic environmental infrastructure. Water transfers, projects intended primarily to reduce congestion or move cargo, municipal urban roads, public transportation projects, new housing mortgages and self-help housing, on the other hand, are "other" infrastructure projects which would take BECC and NADBank far beyond the current charter agreement.

Beyond the criteria of whether the concept of "related matters" or "environmental infrastructure" is whether or not such projects could more likely afford NADBank loans than current priority projects. This is, after all, the driving force for the expansion in the first place. Whereas some of the projects discussed might lead to identifiable revenue streams -- such as pollution prevention or industrial waste facilities -- others such as street paving present a more difficult challenge and may ultimately have to rely on grants

F. Geographic Expansion

The NADBank draft document also recommends expanding consideration to projects located beyond the admittedly arbitrary 100 km line by redefining the border region to 300 kilometers.²⁵ As previously discussed, the Charter specifically makes mention of the Parties modifying the agreement to "expand the geographic scope of the Commission."²⁶ The NADBank recommendation -- which makes no mention of BECC despite this specific language of the charter -- would increase the number of people potentially served by NADBank loans from 10.6 to 41 million and include the cities of Chihuahua, Monterrey, Phoenix, San Antonio and Los Angeles, among others. Based upon our analysis of the Charter, we believe the proposed expansion would require at a very minimum the concurrence of the Chief Executive in each country (see *Charter Analysis*).

Even if such a political decision could be reached, the geographic expansion, however, is very challenging. It would require considerably more staff and travel time to adequately review projects up to 300 kilometers away. In addition, the purpose of the agreement which established the BECC and NADBank was to bring a much needed focus and funding to the immediate border area, which is historically poor and lacks basic environmental infrastructure. To potentially put these communities in competition with wealthier communities like Los Angeles, Phoenix and Monterrey might undercut the very objectives for which the institutions were established in the first place. Certainly, as NADBank's own analysis has shown, there is considerable needs still to be met within the current 100 kilometer region.

It is also worth noting that even without a modification, the charter already allows the BECC to certify projects which fall outside of the 100 kilometer border area if the EPA and SEMARNAP find that a project would "remedy a transboundary environmental or health problem."²⁷ Certainly, in

²⁵ NADBank, *Utilizing the Lending Capacity of the NADB*. The specific recommendation states: "That the Board urge the two Governments to consider expanding the geographic jurisdiction for the use of the Bank's resources to 300 km (from the current 100 km) north and south of the U.S.-Mexico border."

²⁶ *Ibid.*, Ch. III, Art. II.

²⁷ *Ibid.*, Ch. I, Art. II, Section 2. "The Commission, with the concurrence of the United States Environmental Protection Agency and the Mexican Secretaria de Desarrollo Social, may carry out these functions with respect

regards to water pollution it makes sense to consider "upstream" projects which could benefit the people and the water resources within the 100 kilometer zone. To date, BECC and NADBank have not considered such a possibility. ***BECC and NADBank should more actively consider and seek such projects rather than automatically expanding the geographical region for project eligibility.***

IV. Project Certification Criteria

No matter what type of expansion into "related matters" or "environmental infrastructure projects" or even "other infrastructure projects" might occur, the Charter requires -- and many interested parties desire -- that the BECC certification process be applied to these new projects. Thus, BECC certification should continue to be a prerequisite for NADBank financing. If not, the danger is that like most development banks, environmental assessments will be a cursory review rather than a fundamental part of the process, and that concepts of sustainability, appropriate technology and public participation and approval will not be considered.

More specifically, NADBank's draft document discusses the need for sector or geographic "bundling" and an expedited certification procedure for some types of projects. This is potentially very troublesome as it would remove incentives for careful, on the ground review of projects and involvement of the public.

While the present Certification Criteria could probably be used as a template for most of the types of projects envisioned under an "expanded mandate," there may be a need to specifically address some kinds of projects by modifying the Certification Criteria. For example, any move to certify projects involving hazardous wastes would likely necessitate additional certification criteria.

In the end, however, the BECC Board of Directors must be ultimately responsible -- and responsive to the public -- for certifying projects.

V. Process for Considering and Implementing Expansion.

It is unacceptable for expansion of the mandate to proceed by a unilateral action by the NADBank (although it is appropriate for NADBank to examine and consider the possibility without taking action). Expansion should occur only after both BECC and NADBank have considered the ramifications, hopefully in a coordinated fashion. It is encouraging that NADBank's draft document acknowledges in both its charter analysis as well as in its first recommendation that an expansion requires coordination with the BECC.

Obviously, if it is determined that a revision or annex to the present Charter is needed -- as would be the case to either expand the mandate geographically or consider "other " infrastructure projects such as home mortgages or light rail proposals -- such a process would entail diplomatic action between the present or new governments of Mexico and the U.S. It may be politically difficult to reopen the Charter presently given the arrival of new administrations, a factor which the BECC and NADBank must consider.

Alternatively, if no revision of the Charter is needed, and the parties agree to limit the expansion to "related matters" and perhaps some additional "environmental infrastructure projects", then such an interpretation should be publicly discussed. One possibility is that following the present public comment period, BECC's and NADBank's Boards could jointly develop a specific list of the types of projects that will be considered as "related matters" or "environmental infrastructure." This decision could then go out for further public comment as the official position of the BECC and NADBank Boards.

In addition, depending upon the scope of the expansion, BECC may want to engage in a Border Infrastructure Strategic Plan, as envisioned in GAO's recommendation. Such a Plan could lay the basis for the expansion, by also examining issues like a hazardous waste management needs

to an environmental infrastructure project outside the border region upon finding that the project would remedy a transboundary environmental or health problem."

assessment. The plan, by necessity, would need to involve a variety of actors, including NADBank, and could be established through a BECC/NADBank Joint Planning Committee.

Another way to proceed might be to begin a "pilot" project and look at one area -- such as wastewater pretreatment programs, individual water and wastewater installations, or even a pollution prevention program, all of which can clearly be "related matters" -- before opening up to more difficult projects such as the siting and construction of a commercial hazardous waste landfill.

As stated above, we are opposed to the geographic expansion at this time. Instead, BECC and NADBank could clearly state that they will begin actively considering some types of "upstream" projects beyond the 100 kilometer zone which clearly impact residents within the border zone. This might, in the process, increase NADBank's lending capacity.

VI. Making NADBank Loans More Affordable

From our viewpoint, the most important recommendation in the NADBank document is to identify new financial tools and mechanisms to make NADBank loans more accessible to communities. While it is not unreasonable to consider a mandate or geographic expansion, the highest priority should be to examine how NADBank loans might be utilized to cover financing for the three present priority sectors -- water pollution, wastewater treatment and municipal solid waste management. Are there means by which NADBank could increase the loan component of project financing for these priority areas?

NADBank's draft document mentions specific tools to increase its lending, including creation of an "Equity Development Fund." There is insufficient information provided, however, to fully understand how and for what types of projects such a tool might be applied. Other tools and mechanisms include creating a non-profit organization and seeking tax-exempt status. Both of these ideas appear to be valid ones for enhancing NADBank lending, but again need further elaboration.

What is missing in the NADBank document is a careful analysis of NADBank's charter and present lending criteria. The Bank's charter requires that it "charge appropriate interest rates and service fees," and that it "receive suitable compensation for risk it incurs."²⁸ To meet this charter, the Bank has been charging an interest rate at least 1 percent above U.S. Treasury rates for securities with a similar maturity date. Has the Bank's Board correctly interpreted the charter in developing these lending criteria? Could the Bank's charter and/or lending criteria be changed to make funding more affordable?

Indeed, the GAO report suggests:

Congress might wish to consider directing the Secretary of the Treasury to work with Mexico's Treasury Department to amend the Bank charter to allow it to create lower cost financing mechanisms that make funding more affordable to border communities for environmental infrastructure.²⁹

²⁸ U.S. GAO, *Ibid.*, 23.

²⁹ *Ibid.*, 29.

While it is beyond the scope of this present position paper to declare that the Bank should amend its charter and/or criteria, we do believe that the NADBank should explore that option. Just as we should not limit our view of the role of the BECC and NADBank to simply certifying and financing water pollution, wastewater treatment and municipal solid waste projects, we should also not consider NADBank's lending criteria and charter sacrosanct.