

# **The National Environmental Policy Act (NEPA) and Mexico's General Law of Ecological Balance and Environmental Protection (LGEEPA):**

## **Barriers or Facilitators of Border Sustainability?**

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### **Abstract**

The National Environmental Policy Act (“NEPA”) and Mexico’s General Law of Ecological Balance and Environmental Protection (“LGEEPA”) contain many provisions that could go a long way helping the U.S. – Mexico Border promote human and economic development in an environmentally sound manner. NEPA and LGEEPA should be facilitators of Border Sustainability, but in practice unexpected barriers for the implementation of both statutes have occurred, affecting indirectly the sustainability of the U.S. – Mexico Border. This paper briefly discusses some probable reasons why LGEEPA and NEPA’s potential has not been fully reached as promoters of the border sustainability.

Most of the barriers present on the border’s sustainability law practice could be remediated by modifying the implementation of NEPA and LGEEPA (in the area of environmental impact) without changing these statutes. Barriers related to the implementation of LGEEPA (in the area of environmental impact analysis) and NEPA include: 1. Tendency to “overstudy issues” and becoming serious regulatory barriers in the U.S. Border negatively affecting the decision-maker’s perception of the process, and as a result, agencies try to avoid NEPA’s applicability rather than embracing it as a valuable tool; 2. Tendency to limit the scope of the studies due to lack of resources or time in the Mexican side of the Border, causing also perverse consequences against the border sustainability; and 3. Insufficient pool of skilled, available professionals in the U.S. – Mexico Border area: Although the body of NEPA and LGEEPA expertise has grown, agencies and ministries often do not assign their most effective and efficient personal to NEPA or LGEEPA tasks. Even though the head of the agency or ministry may be deeply involved in the trade-offs and the decisions affecting a proposal, the project driver's may be absent in the LGEEPA or NEPA processes<sup>2</sup>.

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<sup>2</sup> Environmental Policy and NEPA: Past, Present and Future. “Creating a User-Friendly NEPA”. P. Offringa.

## Origin of the NEPA and the LGEEPA as Promoters of Sustainable Development of the U.S. and Mexico

NEPA requirements are invoked when proposals for airports, buildings, military complexes, highways, parkland purchases, and other federal activities take place. Similarly, prior to initiating operations in Mexico, several activities under federal jurisdiction, including petrochemical, mining, and electricity generation industries, as well as hazardous waste treatment and disposal activities, must obtain an Environmental Impact Authorization (EIA) according to LGEEPA.

Figure 1 shows a general idea of the American Executive Power Structure. Figure 2 shows the main idea of the Mexican Executive Power Structure for a better identification about which authorities are in charge, directly or indirectly, of environmental affairs for each country.

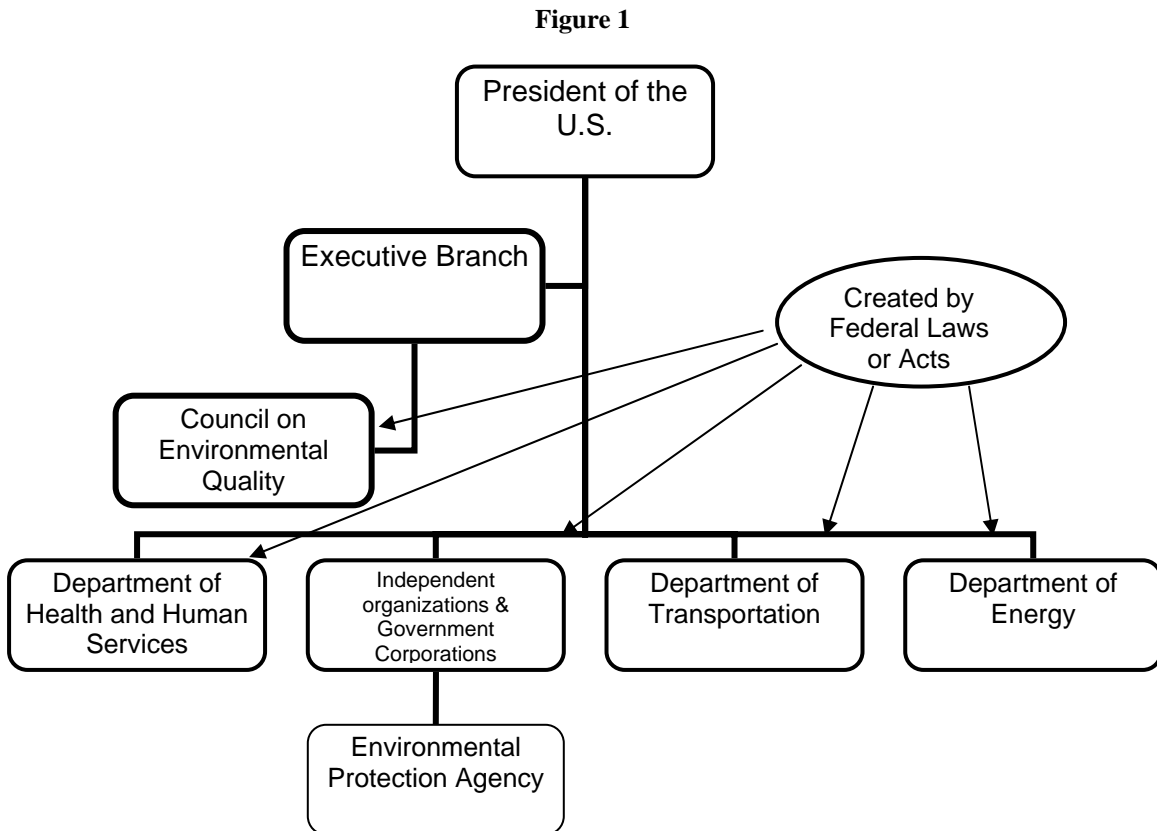
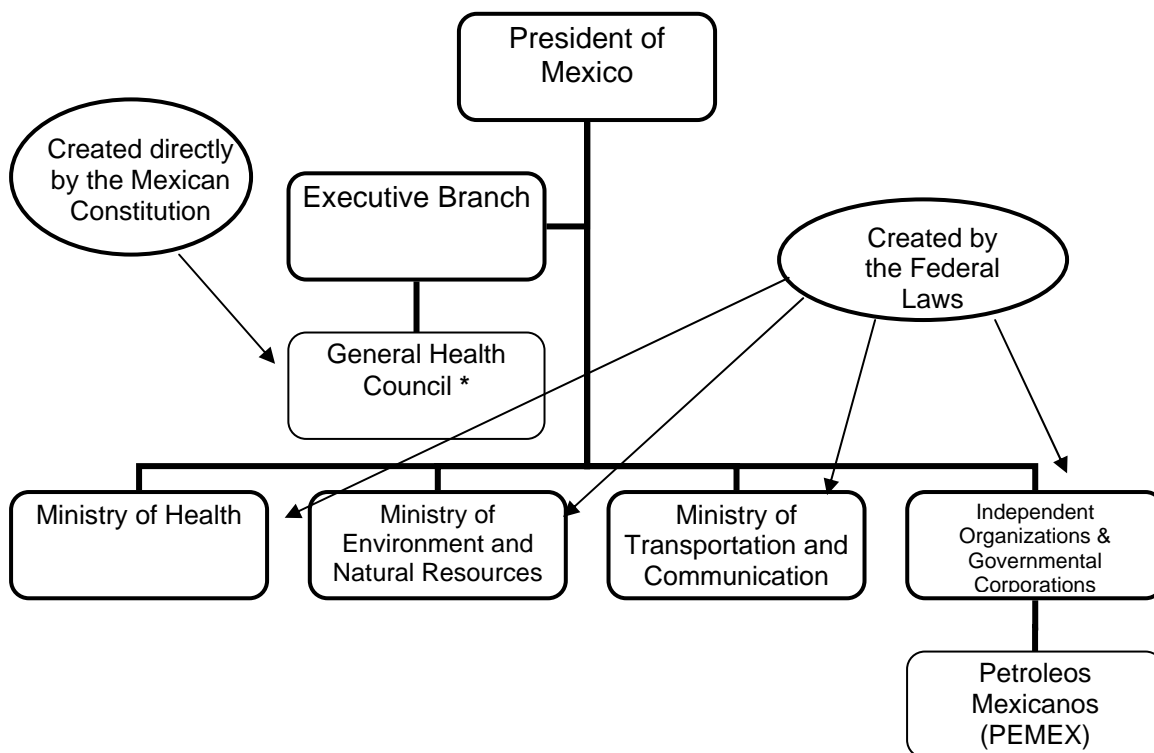


Figure 2



*\*In practice, the General Health Council is not relevant in the area of environmental impact affairs. The Ministry of Environment and Natural Resources (SEMARNAT) has the practical control of such issues.*

In December of 1969, the United States Congress enacted NEPA, which was signed into law by President Richard Nixon on January 1st, 1970. NEPA was the first major environmental law in the United States and is often called the “Magna Carta” of environmental laws. Moreover, NEPA established a broad environmental national protection framework<sup>3</sup>. The general regulations governing implementation of NEPA, published by the Council on Environmental Quality (CEQ), are the most helpful elaboration on the bare requirements of the NEPA. These regulations are set forth in the Code of Federal Regulations pts. 1500 – 1508<sup>4</sup>. Each federal agency also has its own regulations, which are typically published in the Code

<sup>3</sup> U.S.EPA. “Summary of the NEPA”. <http://www.epa.gov/lawsregs/laws/nepa.html>

<sup>4</sup> NEPA is codified in 42 U.S.C. §§4321 – 4370.

of Federal Regulations or in their internal manuals. They describe in greater detail their policies for compliance with NEPA<sup>5</sup>.

Similarly, on March 21, 1971 the first federal environmental law in Mexico, the Federal Law for the Prevention and Control of Environmental Pollution<sup>6</sup>, was published in the Federal Official Gazette. Three *Reglamentos*<sup>7</sup> (Regulations) were enacted to implement this law: The Regulations to Prevent and Control Air Pollution; Regulations to Control Water Pollution; and Regulations to Prevent and Control Marine Pollution. In 1982, the Mexican Congress abrogated this law and enacted the Federal Law for the Protection of the Environment<sup>8</sup>. Subsequently, this second law was abrogated in 1988 by the General Law of Ecological Balance and Environmental Protection (*Ley General del Equilibrio Ecológico y la Protección al Ambiente* –LGEEPA).

The LGEEPA is the fundamental environmental law in Mexico. This law has experienced several amendments. It sets forth chapters concerning environmental impact permits, prevention and control of air and water pollution. It also provides enforcement procedures and other provisions concerning the respective responsibilities of the federal and state governments<sup>9</sup>. It is important to clarify LGEEPA is not a federal law. It is a “General” Law, which according to Mexican Law it means that is a Law applicable to the all municipalities, states, and the federation.

NEPA requires that all federal agencies prepare an Environmental Impact Statement (EIS) on major federal actions that significantly affect the quality of the environment. On the other hand, according to the Regulations on LGEEPA regarding environmental impact, SEMARNAT is the only federal agency that has specific obligations and goals regarding environmental impact evaluation. For specific projects, obligations to other federal ministries and interested parties in Mexico regarding the environmental impact assessment are set forth in other laws and regulations.

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<sup>5</sup> PERCIVAL V., Robert. “Environmental Regulation: Law, Science, and Policy”. 1996. p. 1108.

<sup>6</sup> *Ley Federal para Prevenir y Controlar la Contaminación Ambiental*, in Spanish.

<sup>7</sup> *Reglamentos* are mandatory provisions to detail how to implement a specific law.

<sup>8</sup> (*Ley Federal de Protección del Ambiente*, in Spanish.

<sup>9</sup> Baker & McKenzie Abogados, S.C. “Doing Business in Mexico” 2006. p. 30.

The following table summarizes various of the similarities and differences that exist between NEPA and LGEEPA:

**Table 1**

<b>NEPA</b>	<b>LGEEPA</b>
<p>Recognition of the potential transboundary environmental impact of the projects in the U.S. Executive Order 12114 (Environmental Effects Abroad); and the Guidance on NEPA analyses for Transboundary Impacts.</p>	<p>SEMARNAT also recognizes it. Sections III and IV of the Article 5 of the LGEEPA.</p>
<p>Notice of Intent: Brief notice issued by the “lead agency”, which announces proposal action and possible alternatives, and other relevant information. Time for preparation of Notice of Intent: Variable.</p>	<p>Preventive Notice: “Project Developer” (public or private investor) may request a ruling or submit a Preventive Notice (similar to the Notice of Intent) before SEMARNAT, in order to announce proposed action. Time for preparation: Variable.</p>
<p>Scoping process is started by the “lead agency”. Average (desirable) time for scoping: 30 – 90 days. More time may indicate poor management of the lead agency.</p>	<p>SEMARNAT has 30 days to determine if a specific project requires the preparation of an Environmental Impact Manifest (EIM). Article 35 of the LGEEPA.</p>
<p>“Lead agency” in average invests 90 – 270 days preparing the Draft EIS. Once the document is prepared, the “lead agency” may spend between 30 – 90 additional days in internal revision. (Usual reason for delay). 40 CFR 1506.10 (c) and 40 CFR 1508.22.</p>	<p>When an EIM authorization is required by SEMARNAT (or when it is voluntarily issued before SEMARNAT by Project Developer), the Project Developer is responsible of preparing this document. Once submitted the EIM by the Project Developer, SEMARNAT must issue a resolution within the next 60 days (under extraordinary circumstances, 120 days to issue a resolution is allowed). Article 35-BIS of the LGEEPA</p>

<p>Scoping and public involvement in the United States: Draft EIS is circulated for public review for at least 45 days. The incorporation of agency comments require by 15 – 45 days before filling of final EIS with EPA. Once submitted the final EIS, law states 30 days of mandatory waiting period in order to make the Record of Decision available to the public<sup>10</sup>. Sec. 101 [42 USC § 4331], and Sec. 205 [42 USC § 4345] of the NEPA.</p>	<p>Scoping and Public involvement in Mexico: EIM filed by the Project Developer is circulated by SEMARNAT for public review. When a person requests to SEMARNAT the performance of a public consultation of the EIM filed, SEMARNAT may start public consultation period (20 days). In addition, SEMARNAT may request to the Project Developer to publish in a newspaper part of the EIM filed. Once the abstract is published in the newspaper, people has 10 days to formally request to SEMARNAT the public access of the entire EIM. When public health or the environment are in potential high risk due to the project, SEMARNAT may coordinate with local authorities a public meeting to discuss the project publicly. Article 34 of the LGEEPA.</p>
<p>Possibility to perform binational environmental impact studies related to a proposed action. Section 2-3 of the Executive Order 12114.</p>	<p>This possibility is not explicitly stated in the LGEEPA or in its Regulations.</p>

With respect to the fundamental differences between the legal systems of Mexico and the United States, it is important to point out that Mexico is a civil law jurisdiction while forty-nine states of the U.S. use the common law system<sup>11</sup>. Predominantly, the civil law system is based on statutes and laws. In contrast, the U.S. common law system is based on case law where judges set precedents for future cases.

<sup>10</sup> Time estimation regarding the NEPA process was adapted from the original estimation prepared by Ray Clark (The Clark Group, LLC).

<sup>11</sup> The exception is Louisiana, which uses the civil code.

The Constitution of the United States of America (“U.S. Constitution”) does not provide any right in favor of the environment<sup>12</sup>. On the other hand, the Article 4 of the Mexican Constitution set forth that “every person has the right to health protection” as well as “the right to an environment adequate for their development and wellness”. Only Mexican Constitution states these rights expressly, probably because Mexican legal system (civil law system) requires significant level of written detail<sup>13</sup>.

## **Transboundary application of NEPA and LGEEPA: current provisions issued to promoting Border Sustainability**

### **a. International Law**

In the United States, it has been customary law since the 1905 Trail Smelter Arbitration that no nation may undertake acts on its territory that will harm the territory of another state<sup>14</sup>. This rule of customary law has been recognized as binding in Principle 21 of the Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration on Environment and Development. This concept, along with the duty to give notice to others to avoid or avert such harm, is incorporated into numerous treaty obligations undertaken by the United States. Analysis of transboundary impacts of federal agency actions that occur in the United States is an appropriate step towards implementing those principles<sup>15</sup>.

It is evident that there is a significant bilateral nature to many transboundary issues between the United States and Mexico. In fact, Mexico and the United States have executed interesting international environmental agreements. However, none of these agreements have duly considered the environmental

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<sup>12</sup> *Idem*

<sup>13</sup> Analogy to solving criminal cases in Mexico is forbidden by Article 14 of the Mexican Constitution. Such Article means it is mandatory to comply strictly with the wording of the law.

<sup>14</sup> *Trail Smelter Arbitration*, U.S. v. Canada, 3 UN Rep. Int’l Arbit. Awards 1911 (1941). The case involved a smelter in British Columbia that was causing environmental harm in the state of Washington. See: American Law Institute’s Restatement of the Foreign Relations Law of the United States 3d, Section 601, (“State obligations with respect to environment of other States and the common environment”).

<sup>15</sup> CEQ “*Guidance on NEPA analyses for transboundary impacts*”. July 1, 1997.

<http://www.gc.noaa.gov/documents/transguide.pdf>

impact concerns in the U.S. Mexico Border Region from a holistic perspective (socioeconomic impact, scoping and public involvement, environmental justice, science and technology implementation).

For instance, one of the consequences of the lack of such international legal agreement is the reduced possibility to build sustainable major infrastructure in the U.S.-Mexico border. However, this lack of international legal agreement should not be considered as the unique reason why NEPA and LGEEPA are perceived, sometimes, as barriers against the sustainable development of the U.S. – Mexico Border. Other reasons will be discussed later.

Notwithstanding that when the governments of the United States, Canada, and Mexico entered into the North American Agreement on Environmental Cooperation (NAAEC), they made a firm commitment to create a North American Agreement on Transboundary Environmental Impact Assessment (NAATEIA), after fifteen years there remain few concrete signs of a NAATEIA being negotiated under the auspices of the Commission for Environmental Cooperation (CEC)<sup>16</sup>. NAATEIA would require each country to assess any significant transboundary environmental impacts of actions or projects located in the U.S. – Mexico Border.<sup>17</sup> These negotiations require the three countries to develop an agreement to:

- Assess the environmental impacts of proposed actions or projects in any of the three countries party of the North American Free Trade Agreement (NAFTA) which would be likely to cause significant adverse transboundary impacts within the jurisdiction of any of the other parties.
- Develop a system of notification, consultation, and sharing of relevant information between countries with respect to such projects.
- Consider measures to mitigate the potential adverse effects of such projects.

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<sup>16</sup> Alastair Neil Craik. Transboundary Environmental Impact Assessment in North America: Obstacles and Opportunities; School of Environment, Enterprise and Development, University of Waterloo. 20 October 2008. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1285509](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1285509)

<sup>17</sup> <http://www.mms.gov/eppd/compliance/nepa/procedures/trans/index.htm>

The negotiations relating to the Draft NAATEIA have remained in abeyance since 1998, notwithstanding that the Joint Policy Advisory Committee has on numerous occasions called for a 're-energizing' of the negotiations,<sup>18</sup> and according to Jan Gilbreath some Mexican environmental officials had seemed willing to extend the limits of public involvement on transboundary issues. The parties have committed to negotiate a new NAATEIA by 2007, although to date no details of this initiative have been disclosed<sup>19</sup>. The NAATEIA would require federal authorities to notify their counterparts across the border of any project proposal they receive that has potential for significant adverse environmental impact in the neighboring country. Authorities and citizens in the other country then would have a chance to provide input during the decision-making about the expediency of granting the environmental authorization. If the NAATEIA is implemented, it will mark the first time NAFTA partners have a positive influence in each other's granting of permits for projects affecting the environment<sup>20</sup>.

In parallel of the NAATEIA negotiations, Mexico and the United States have stated national provisions which allow their Federal Governments to consider those environmental impacts caused outside of their countries due to infrastructure projects. Therefore, herein it is briefly describe what those national provisions in force in Mexico and the U.S. are and which should be duly implemented as facilitators of the Border Sustainability.

## b. Transboundary applicability of LGEEPA

Section III of Article 5 of the LGEEPA states that: It is competence of the Federation the awareness of actions (projects) which were originated outside of the country, but affects the ecological balance of the national territory.

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<sup>18</sup> Stephen Siciliano, 'Nafta United Urges North America to Step up Transborder EIA Negotiations' *International Environmental Daily*, December 17, 2002, online available through, <http://international.westlaw.cm>> (BNAInternational Environment Daily).

<sup>19</sup> Alastair Neil Craik. *Idem*.

<sup>20</sup> GILBREATH, Jan. "The Environment and Trade: Predicting a Course for the Western Hemisphere Using the North American Experience". A joint publication of the Mexico Project, Americas Program Center for Strategic and International Studies and Sustainable Americas Project Yale Center for Law and Environmental Policy. 2001. p. 16.

Moreover Section IV of Article 5 of the LGEEPA considers that: It is competence of the Federation the awareness of actions (projects) originated inside of the country, when such project is affecting the ecological balance of other country(ies). Both provisions define clear competence to the Federal Government of Mexico in the transboundary environmental impact concerns.

Section XVII of Article 15 of the LGEEPA establishes that: The Nation is interested that the activities developed inside the country do not cause affectation to the ecological balance of foreign countries. The Federal Government must follow this as principle for environment preservation, restoration and protection.

### c. Transboundary applicability of NEPA

Section 102(2)(C) of the NEPA requires federal agencies to assess the environmental impacts of and alternatives to proposed major federal actions significantly affecting the quality of the human environment. The U.S.Congress also recognized the “worldwide and long-range character of environmental problems” in NEPA and directed agencies to assist other countries in anticipating and preventing a decline in the quality of the world environment. Neither NEPA nor the CEQ regulations implementing the procedural provisions of NEPA define agencies’ obligations to analyze effects of actions by administrative boundaries. Rather, the entire body of NEPA law directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects caused by the action when such effects are reasonably foreseeable, including growth-inducing effects and related effects on the ecosystem, as well as cumulative effects<sup>21</sup>.

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<sup>21</sup> CEQ “*Guidance on NEPA analyses for transboundary impacts*”. July 1, 1997.  
<http://www.gc.noaa.gov/documents/transguide.pdf>

Executive Order 12114 (Environmental Effects Abroad)<sup>22</sup> of Jan. 4, 1979, which appears at 44 FR 1957, 3 CFR, 1979 Comp., p. 356, unless otherwise noted, requires federal agencies to analyze in NEPA documents the significant impacts of proposed projects on the environment outside the United States. The purpose of this Executive Order is to enable responsible officials of federal agencies to have ultimate responsibility for authorizing and approving actions encompassed by this Order, to be informed of pertinent environmental considerations and to take such considerations into account, with other pertinent considerations of national policy, in making decisions regarding such actions. While based on independent authority, this Order promotes the NEPA and other laws<sup>23</sup> consistent with the foreign policy and national security policy of the United States, and represents the United States government's exclusive and complete determination of the procedural and other actions to be taken by Federal agencies to further the purpose of the NEPA, with respect to the environment outside the United States, its territories and possessions. The following types of documents are to be used in conjunction with actions described in this Order (Section 2-3):

- Environmental impact statements (including generic, program and specific statements);
- Bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations, or by an international body or organization in which the United States is a member or participant; or
- Concise reviews of the environmental issues involved, including environmental assessments, summary environmental analyses or other appropriate documents.

The NAATEIA would provide clarification to Mexico and the United States regarding how to apply NEPA and LGEEPA transboundary provisions in a coordinated and equitable way. Under the context of negotiations undertaken between the three North American governments (Canada, United States and Mexico), on 1 July 1997, the CEQ issued the Guidance on NEPA analyses for Transboundary Impacts. The purpose of guidances is to clarify the applicability of the NEPA regarding those proposed federal actions in the United States, that may have transboundary effects extending across the border and affecting another

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<sup>22</sup> <http://www.archives.gov/federal-register/codification/executive-order/12114.html>

<sup>23</sup> Marine Protection Research and Sanctuaries Act and the Deepwater Port Act

country's environment. While the guidance arises in the context of negotiations undertaken within these three governments in connection with the NAATEIA, the guidances issued by CEQ pertains to all U.S. federal agency actions that are normally subject to NEPA, whether covered by an international agreement or not<sup>24</sup>.

In the context of international agreements, the parties may set forth a specific process for obtaining information from the affected country which could then be relied upon in most circumstances to satisfy agencies' responsibility to undertake a reasonable search for information. It is important to state the matters to which this guidance is addressed and those to which it is not<sup>25</sup>.

The CEQ noted that many proposed federal actions will not have transboundary effects, and Federal agencies should use the scoping process to identify such actions. For those actions which have the potential to cause transboundary impacts, case law interpreting NEPA has reinforced the need to analyze these impacts regardless of geographic boundaries. The CEQ concludes, "NEPA requires agencies to include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States. Such effects are best identified during the scoping stage, and should be analyzed to the best of the agency's ability using reasonably available information. Such analysis should be included in the Environmental Assessment (EA) or EIS prepared for the proposed action".<sup>26</sup>

## **How are NEPA and LGEEPA applied in the U.S. – Mexico Border?**

NEPA requires agencies to undertake an assessment of the environmental effects of their proposed actions prior to making decisions. Two major purposes of the environmental review process are better informed decisions and citizen involvement, both of them should lead to implementation of NEPA's policies<sup>27</sup>.

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<sup>24</sup>CEQ "Guidance on NEPA analyses for transboundary impacts". July 1, 1997.

<http://www.gc.noaa.gov/documents/transguide.pdf>

<sup>25</sup> Idem.

<sup>26</sup> <http://www.mms.gov/eppd/compliance/nepa/procedures/trans/index.htm>

<sup>27</sup> [http://www.nepa.gov/nepa/Citizens\\_Guide\\_Dec07.pdf](http://www.nepa.gov/nepa/Citizens_Guide_Dec07.pdf)

Section 2-3 of the Executive Order 12114 lists actions which shall be taken into consideration by Agencies:

(a) major federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation; (b) major federal actions significantly affecting the environment of a foreign nation not participating with the United States and not otherwise involved in the action; (c) major federal actions significantly affecting the environment of a foreign nation which provide to that nation; and (d) major federal actions outside the United States, its territories and possessions which significantly affect natural or ecological resources of global importance designated for protection under this subsection by the President, or, in the case of such a resource protected by international agreement binding on the United States, by the Secretary of State.

Notwithstanding Section 2-3, several actions are exempt from such Executive Order, including for example: (a) actions not having a significant effect on the environment outside the United States as determined by the agency; and (b) actions taken by or pursuant to the direction of the President or Cabinet officer when the national security or interest is involved or when the action occurs in the course of an armed conflict.

Application of the NEPA in the U.S. – Canada Border has been different than the application of the same law in the U.S. – Mexico Border. Such inequity would have an adverse effect on sustainability of the U.S. – Mexico Border. Case law interpreting NEPA (in the U.S. – Canada Border), has reinforced the need to analyze impacts regardless of geographic boundaries within the United States, and has also assumed that NEPA requires analysis of major federal actions that take place entirely outside of the United States but could have environmental effects within the United States. Specifically, in *Swinomish Tribal Community v. Federal Energy Regulatory Commission*, Canadian interveners were allowed to challenge the adequacy of an EIS prepared by the U.S.FERC in connection with its approval of an amendment to the City of Seattle's license that permitted raising the height of the Ross Dam on the Skagit River in Washington State. Assuming that NEPA required consideration of Canadian impacts, the court concluded that the report had taken the requisite "hard look" at Canadian impacts. Similarly, in *Wilderness Society v. Morton*, the court granted intervener status to Canadian environmental organizations that were challenging the adequacy of

the trans-Alaska pipeline EIS<sup>28</sup>. The court granted intervener status because it found that there was a reasonable possibility that oil spill damage could significantly affect Canadian resources, and that Canadian interests were not adequately represented by other parties in the case. In sum, based on legal and policy considerations, CEQ has determined that agencies must include analysis of reasonably foreseeable transboundary effects of proposed actions in their analysis of proposed actions in the United States<sup>29</sup>.

A difference between Canada and Mexico, is that Canada has provisions for a participant funding program to help individuals and organizations to involve themselves in public reviews of projects<sup>30</sup>. Above all, however, the strength of the legal system in favor of the common environment and ecosystems located in the borders, in this case the U.S. – Mexico Border, depends upon the base of public environmental concern and vigilance.

## **The reduced success of the NEPA and LGEEPA as promoters of Border Sustainability**

### Creation and application of the Law

In theory, the requirements of NEPA<sup>31</sup> and LGEEPA<sup>32</sup> are relatively straightforward. NEPA and LGEEPA both set forth as the continuing policy of the federal governments the use of all practicable means to create and maintain conditions under both man and nature can exist in productive harmony. However, there is currently an ongoing debate, mainly in the U.S., about the efficiency and effectiveness of NEPA. The perception of the effectiveness and efficiency of the environmental impact provisions stated by LGEEPA in Mexico, is not much better than the perception of NEPA in the U.S. This debate stems from commonly

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<sup>28</sup> Northern Alaska Environmental Center v. Lujan, 961 F.2d 886, 890 (9th Cir. 1992).

<sup>29</sup> CEQ “*Guidance on NEPA analyses for transboundary impacts*”. July 1, 1997.  
<http://www.gc.noaa.gov/documents/transguide.pdf>

<sup>30</sup> CLARK, Ray. “Environmental Policy and NEPA: Past, Present and Future”. p. 100.

<sup>31</sup> “Environmental Policy and NEPA: Past, Present and Future. Creating a User-Friendly NEPA”. P. Offringa. p. 290.

<sup>32</sup> Regulations to the LGEEPA in the Area of Environmental Impact published in the Federal Official Gazette on May 30, 2000.

held perceptions that (1) NEPA requires extensive resources, (2) the time and costs of these laws are inappropriate, and (3) NEPA and LGEEPA seldom affects actual decision making, because of the quality of a LGEEPA or NEPA analysis is adversely affected by a lack of resources (economic and human) and time<sup>33</sup>.

SEMARNAT published on June 7, 1988 the Regulations on LGEEPA regarding environmental impact, but due to efficiency and effectiveness concerns of the same, SEMARNAT concluded the debate publishing new regulations on May 30, 2000. However, the applicability of these new regulations on LGEEPA is still problematic, because these new regulations grant excessive power of discretion to the Federal Government regarding how to coordinate the public involvement.

The creation of NAATEIA would increase the communication level between Mexico and the United States for the development of environmental impact analyses of superior quality. However if the original spirit of the NEPA and LGEEPA is deviated, such international agreement will have almost null effectiveness. Discretionality power granted in favor of national authorities in Mexico and the U.S. regarding how to apply these relevant laws might be a barrier against the sustainable development of the U.S. – Mexico Border. **Exhibit “A”** includes two petitions filed by citizens of the U.S. – Mexico Border before the Council of Environmental Cooperation (CEC), arguing discrete application of environmental impact laws in Arizona and Baja California.

Other important reason why neither NEPA nor LGEEPA have succeeded in fulfilling their sustainable development objectives is because the regulations to implement these statutes are almost exclusively limited to one small portion of the law. Conscientious consideration of the environment remains critically important when decisions are made that could affect it, but LGEEPA and NEPA have limits:

- Regulations on LGEEPA in the area of environmental impact is limited to analyzing and authorizing projects under federal jurisdiction.

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<sup>33</sup> Increasing the Efficiency and Effectiveness of NEPA through the use of technology. R. Webster. p. 215 and 226.

- NEPA is largely limited to analyzing project-level environmental impacts of federally sponsored projects, its potential to help government and citizen decision makers contemplate what social, economic, or infrastructure development should take place in a region over time<sup>34</sup>.

Environmental issues can often generate an increased number of alternatives. NEPA, LGEEPA and LGEEPA Regulations provide mechanisms for addressing the significant, important concerns within this potential surplus of options. Therefore, it is believed that if decision makers were presented with an array of choices and explicit trade-offs; they would choose the environmentally preferable path, if it did not hamper the ability to execute their mission. If appropriately used, these laws put discipline, logic, and information into the decision-making process, forcing a framework with specific milestones and publicly available credibility. Unfortunately, government officials from the U.S. and Mexico, as well as the private and public developers who file project proposals retain the ultimate word to make the final decision. As long as they demonstrate that the potential environmental impacts have been thoroughly reviewed and considered in the formation of that decision; which means the most environmentally preferable path would not be selected. This discretionary power has the limits stated by the internal legal systems in force in Mexico and in the United States, respectively<sup>35</sup>, but discretionary power may not ensure sustainability in the U.S. – Mexico Border, notwithstanding such power has been supported in numerous instances of case law in both countries. On the other hand, the courts have required that decision makers strictly adhere to the procedural matters relating to the NEPA and LGEEPA processes. As a result, most of the successful claims against federal agencies under NEPA and LGEEPA have been based on such identified procedural shortcomings. Documents thus become more important than analysis and decision making process<sup>36</sup>.

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<sup>34</sup> The Role of NEPA in Sustainable Development. H. Kaufman. p. 315.

<sup>35</sup> A Mexican Court issued a resolution regarding the limits of the discretionary power of SEMARNAT during the application of provisions stated by the LGEEPA in the area of environmental impact. Location: 9th Period; T.C.C.; S.J.F. and its Gazette; XXII, July, 2005; p. 1441; [T.A.]

<sup>36</sup> “Environmental Policy and NEPA: Past, Present and Future. Creating a User-Friendly NEPA”. P. Offringa. p. 290 - 293.

One way to improve awareness of these laws and public participation is to enhance consultation with representatives of science, industry, agriculture, labor, conservation organizations, state and local governments, and others<sup>37</sup>.

**Barrier #1: The United States and Mexico federal, state and local governments often have different interests that result in different priorities.** Moreover, there is no direct link in the United States between the binational planning process and the federal budget process. Thus, even when U.S. and Mexican interest coincide and officials responsible for border planning can agree on a project, the United States or Mexico may not be able to implement the proposed action. It is essential that all processes (federal, state, local) processes operate in conjunction to avoid the development of unsustainable projects or the inaction when action is required. For example, at the March 2004 meeting of the Binational Group on Bridges and Border Crossings, U.S. and Mexican officials agreed to assign a top priority to the new San Luis II crossing on the Arizona – Sonora border, with the goal of opening the new port of entry in late 2007/early 2008. Based on this agreement, in December 2004, Mexico launched a process to identify a concessionaire to build its facilities. However, the U.S. president’s FY-06 budget proposal to Congress did not include the project<sup>38</sup>.

**Barrier #2: Inadequate funding for binational projects which may facilitate sustainability in the U.S. – Mexico Border.** In 2000, the Border Trade Alliance (BTA), a prominent private-sector organization promoting commerce between the United States and its neighbors, worked with U.S. federal inspection agencies and U.S. General Services Administration to produce an assessment of the needs in the border infrastructure. The resulting report, based on an official assessment of these needs, revealed that nearly \$460 million were needed for infrastructure in the southern border. Although the terrorist attacks of 9/11 focused attention on the urgency of improving homeland security –including improvements at the ports of entry –new resources have been directed primarily to the northern U.S. border with Canada<sup>39</sup>.

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<sup>37</sup> The Role of NEPA in Sustainable Development. H. Kaufman. p. 316 and 317.

<sup>38</sup> GNEB. Ninth Report of the Good Neighbor Environmental Board to the President and Congress of the United States. “Remaining Barriers, Next Steps”. March 2006. p. 10 - 11

<sup>39</sup> Idem. p. 12 - 13

**Barrier #3: Timing for the development of binational projects is not standardized.** Proposals related to Ports of Entry, for example, have be affected by this barrier.

**Barrier #4: Public Involvement (based on Environmental Justice Principles) and Scoping process is not enough efficient.** Information is not commonly public or share with interested parties in a sound manner. Moreover, inefficient scoping is evident when an issue is “overstudy”. In both scenarios, public and decision maker’s perception of the process is negatively affected. As a result, agencies and Project Developers try to avoid LGEEPA or NEPA's applicability rather than embracing them as valuable tools.

**Barrier #5: Excessive discretionary power granted to Mexican and American governmental authorities.** It is recommended to reduce such power in Mexico in order to increase transparency regarding how to start and maintain public involvement once filed the EIM by the Project Developer before SEMARNAT. This recommendation would be implemented amending the LGEEPA. Moreover, it is also adivsable to reduce discretionary power in the United States regarding what projects might be exempted of the EIS due to national security or other reasons.

**Barrier #6: EIA in the U.S. and EIM in Mexico, generally, do not consider all transboundary environmental impacts.** Environmental impacts of buildings, for example, occur throughout all life stages of a building – site selection, design, location, construction, use, renovation, and demolition. Direct environmental impacts that result from the construction and operation of buildings include greenhouse gases and other air emissions related to energy use, water use and discharge, storm water runoff, impact related to building materials, solid waste from various stages of a building’s life, and indoor air quality. For further information, see **Exhibit “B”**. Secondary impacts are generally associated with building product life-cycles, infrastructure development, and transportation systems<sup>40</sup>. Transboundary environmental impacts related to building projects under the LGEEPA or NEPA process should be developed using Green Building criteria in order to minimize transboundary environmental impacts during life-cycle of the project.

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<sup>40</sup> CEC. “Green Building in North America: Opportunities and Challenges”. 2008. p.22 and 23

**Barrier #7: Cumulative Effects caused by Population Growth and Socioeconomic Impact Analysis are not efficiently considered in EIM or EIS.** Population growth is rising at unsustainable rates at the U.S.-Mexico Border. According to the Center for Strategic and International Studies (CSIS), by 2030 the population in the watershed region of El Paso del Norte will increase dramatically; population of the city of El Paso, TX doubles every 25 years. Other subbasin regions in the U.S. – Mexico Border are also increasing dramatically. According to the CSIS efforts should be undertaken to discourage population growth in areas experiencing difficulty sustaining a sufficient water supply<sup>41</sup>.

**Barrier #8: More capacity building is required:** Although the body of LGEEPA and NEPA expertise has grown, there is still an insufficient pool of skilled, available professionals. Additionally, agencies and ministries often do not assign their most effective and efficient personal to Environmental Impact tasks. Even though the head of the agency or ministry may be deeply involved in the trade-offs and the decisions affecting a proposal, the project driver's may be absent in the LGEEPA or NEPA processes<sup>42</sup>.

Most of the barriers described above could be remedied by modifying the implementation of NEPA and LGEEPA without changing the laws. However, even though NEPA and LGEEPA eloquently articulate national sustainable development policies and provide ways to implement them in the United States and Mexico, respectively, there are at least two significant reasons why NEPA or LGEEPA cannot serve as nation's only read map to a sustainable society by itself:

- Neither NEPA nor LGEEPA cannot address social inequity and poverty. NEPA and LGEEPA must be implemented to work with other policies and social institutions which together will fix these gaps.

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<sup>41</sup> CSIS. "U.S.-Mexico Transboundary Water Management: The Case of the Rio Grande / Rio Bravo. Recommendations for Policymakers for the Medium and Long Term. A report of the U.S.-Mexico Binational Council". 2003. p. 17.

<sup>42</sup> "Environmental Policy and NEPA: Past, Present and Future. Creating a User-Friendly NEPA". P. Offringa. Page 295.

- NEPA and LGEEPA have limitations as tools for sustainable development. NEPA and LGEEPA limited implementation have prevented them from achieving their full potential to help Mexico and the United States to develop in a sustainable manner. If policies were adhered to and CEQ and SEMARNAT had and used their authority to see that all sections of the statutes were implemented, NEPA and LGEEPA would more than adequately provide a sound, comprehensive, binational framework for sustainable development in the U.S. – Mexico Border<sup>43</sup>.

## **How to increase their Efficiency and Effectiveness in the U.S. – Mexico Border: Recommendations for a sustainable scenario in 2030**

Becoming “sustainable” requires that LGEEPA and NEPA’s ecologically focused principles are to be applied in a deliberate process of integration for both urbanization and ecology. Doing so will mean informing citizens, specialists, lawyers, and leaders alike by the use and teaching of Mexican and American society’s wealth of interdisciplinary approaches<sup>44</sup>. In order to reduce current barriers against the Border Sustainability provoked mainly due to the inadequate implementation of the LGEEPA and NEPA processes, it is recommended to consider the following:

<b>Ten recommendations for the sustainability of the NEPA and LGEEPA in the U.S. – Mexico Border</b>	Is this recommendation applicable to both countries?
1. Make the process more transparent and simple.	✓ Yes
2. Reduce the influence of single-purpose players and increase awareness of environmental justice affairs, including Tribal and <i>Ejido</i> Consultation and Involvement <sup>45</sup> .	✓ Yes
3. Increase law enforcement and vigilance.	✓ Yes
4. Consider Greenhouse Gas Emissions and Climate Change in the	✓ Yes

<sup>43</sup> The Role of NEPA in Sustainable Development. H. Kaufman. Pages 318 and 319.

<sup>44</sup> NEPA’s interdisciplinary mandate: redirection for sustainability. A.F. Euston. Page 321.

<sup>45</sup> The Role of NEPA in Sustainable Development. H. Kaufman. p. 318.

environmental impact analysis.	
5. Successfully conclude negotiations to create NAATEIA.	✓ Yes
6. Establish more public-private partnerships to increase both funding and staffing levels.	✓ Yes
7. Better use of emerging technologies, including developing a system to predict environmental effects caused by cumulative effects.	✓ Yes
8. Develop public policies to improve population growth control based on Socioeconomic Impact Analysis <sup>46</sup> .	✓ Yes
9. Undertake border security efforts with recognition of the need to protect cultural and natural resources <sup>47</sup> . In fact, the Security and Prosperity Partnership (SPP) of North America was created in 2005 to advance the common security and prosperity of the United States, Canada and Mexico. To meet the SPP goal, the partners work to expand cooperation and harmonization of immigration, border and security policies. SPP's environmental agenda calls for improving air quality, enhancing water quality, and protecting biodiversity <sup>48</sup> . SPP should be considered as expert in LGEEPA and NEPA processes.	✓ Yes
10. Make "green building": All governmental building projects should be certified by the Green Building Rating System or by other equivalent organization. Other alternative should be to offer a fast track permitting for green building in the U.S. – Mexico Border. Actually, in 2005 the American Institute of Architects (AIA) issued the 2030 Challenge, which establishes a target and schedule to be achieved by carbon-neutral buildings by 2030 using no-fossil fuel energy to operate. In addition,	✓ Yes

<sup>46</sup> Education programs, incentives to small families, etc.

<sup>47</sup> GNEB. Ninth Report of the Good Neighbor Environmental Board to the President and Congress of the United States. "Recommendations at a Glance". March 2006. p. iii.

<sup>48</sup> [www.spp.gov](http://www.spp.gov)

some cities as Santa Fe, NM, have adopted it as law. [www.architecture2030.org] <sup>49</sup>	
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<sup>49</sup> CEC. “Green Building in North America: Opportunities and Challenges”. 2008. p.37

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**Exhibit “A”**

ID Number	Petition (case)	Date of Petition	Party	Status of the Process
SEM-96-004 / The Southwest Center for Biological Diversity and others	Petitionaries argued the United States is falling in omissions for the effective application of its environmental law, specifically the NEPA, in connection with the U.S. Army operations in Fort Huachuca, Arizona.	November 14, 1996	United States	Process concluded because the petitionaries gave up on June 5, 1997.
SEM-98-007/ Environmenta l Health Coalition and others	Petitionaries declared Mexico has breach the environmental laws in Tijuana, Baja California. Case: An abandoned lead smelter, which represents high risk for the health of neighbor communities and the environment.	October 23, 1998	Mexico	On May 16, 2000 the Council decided by unanimity to request to the Secretariat the elaboration of a Fact File <sup>50</sup> .

**Exhibit “B”**

Buildings are responsible for	Percentage in the United States	Percentage in Mexico	Average Reduction in Green Building
All energy used in the country	40 percent	17 percent	30 percent
All electricity used in the country	68 percent	25 percent	Not available
All carbon dioxide emissions	38 percent	20 percent	35 percent
All potable water consumption	12 percent	5 percent	30 – 50 percent
All waste generated	60 percent	20 percent	50 – 90 percent <sup>51</sup>

<sup>50</sup> CEC. “Lecciones aprendidas: Peticiones ciudadanas relativas a los artículos 14 y 15 del ACCAN”. 2001.

<sup>51</sup> CEC. “Green Building in North America: Opportunities and Challenges”. 2008.