

**TRANSBORDER WATER POLLUTION POLICY  
REQUIRES NEW LAW FOR GLOBAL PARTNERSHIPS**

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## **TRANSBORDER WATER POLLUTION POLICY REQUIRES NEW LAW FOR GLOBAL PARTNERSHIPS**

### **Abstract**

*Water pollution from industrial and human waste on the California Mexico Border--a serious concern in the past--has bubbled over into its current crisis situation today. Health and safety costs spill over onto local financially-strapped communities, such as Imperial County, California. This county must deal with the consequences stemming from the "dirtiest river in the United States"—a reference to The New River--which enters the U.S. from Mexico. While NAFTA has promoted the growth of industry in the region—economic progress has added to existing pollution. NAFTA's environmental regulations, aid rather than hinder corporate default, and have weak enforcement mechanisms. The negative environmental impacts of NAFTA constitute hollowing of our nation's democratically-derived environmental legislation. How can the U.S. deal with the issue? This paper offers three suggestions: an amended and tougher environmental law; biological solutions, and a careful application of the Kaldor-Hicks criterion of equity.*

### **INTRODUCTION:**

The New River which flows into Mexico from out of the Colorado River in the United States, and then flows out back again into the Imperial County, California, is an example of a common pool resource or CPR<sup>1</sup> that is in imminent danger of destruction due to the high levels of pollution in its journey back to the United States. It now has the dubious honor of being "*the dirtiest river in the United States*, (New River Committee, Video, 2003). Government, via democratically-decreed "coercion" and police power (its administrative legal sanctions) can preserve common resources to some extent. Such a law (albeit with its weak enforcement strategy) that

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<sup>1</sup> A common pool resource is something like land, water, and air, that is a public good. It differs from other public goods in that its attributes are subtractive. In other words consumption of a CPR contributes to decline in what is available to others. Private property is part and parcel of the life support of the commons, but there is no guarantee that private ownership of a CPR will result sustainability.

pertinent to the issue of the New River, is the North American Free Trade Agreement (NAFTA)

The signatories of NAFTA's environmental provisions and its side agreement on the environment, consent to its provisions, and agree to be coerced into compliance. Yet, there is always the risk that even one user that defaults on the agreement can destroy the resource. In actuality, many users are likely to do so, and as each individual user looks to maximize his own economic self-interest within NAFTA, he has the inclination to use more of the common pool than legally or morally dictated. Herein lies Hardin's "tragedy of the commons" (ibid, 1968). Aristotle's dictum on the commons, "what is common to the greatest number has the least care bestowed upon it," (Ostrom, 1990), is as valid today as it when he delivered it. In the case at hand, manufacturing plants that have sprung up in Mexicali (on the California-Mexico Border) as a result of NAFTA has caused a severe environment tragedy, and health crisis, due to dumping of industrial and other wastes into the New River. NAFTA and its environmental side-agreement attempted, has come to be seen by its critics as a very blunt policy instrument.

Furthermore, to evaluate the environmental impacts of the NAFTA compact, vis-à-vis the pollution of the New River, one must look the twin concepts of *rights* and *values* as implied in American law. The notion of "unalienable rights" of the people, as stated by the Founders of the democratic republic, refers to three values--"life, liberty and the pursuit of happiness."<sup>2</sup> When codified into law by our policymakers, however, such values can then become rights as well as responsibilities, that then can approximately be measured and appraised. Nevertheless, lest it be forgotten, the *real*

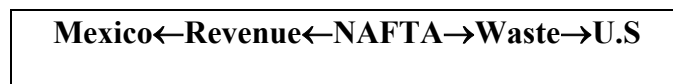
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<sup>2</sup> See Declaration of Independence, July 4, 1776.



Prior to 1994, when the North American Free Trade Agreement was being drafted, concerns were raised that pre-existing environmental and health conditions in Mexico<sup>3</sup> could be exacerbated by increased industrial activity as a result of this new trading arrangement. For this reason the NAFTA document contained two side agreements, one of which specifically dealt with environmental protections<sup>4</sup>. The North American Agreement for Environmental Cooperation or NAAEC was set up to encourage environmental cooperation between the three NAFTA nations; to oversee implementation of environmental agreements; and to mediate disputes. The Commission on Environmental Cooperation (CEC) was simultaneously formed to serve as the action arm of NAAEC. This agreement provided the legal and administrative frameworks to prevent U.S. natural resources, as mandated by its laws on environmental rights from being diluted by companies operating in Mexico. Yet, enforcement standards were weak, allowing the critics to show a plausible model:

**Figure 1.2: Value Streams**



**2.1. Weaknesses of the Agreement:** While NAFTA and the NAAEC specify the “eco” concerns of the member nations, yet, the meaning of the “eco” prefix refers more to the economic than the environmental. There is a specific provision in NAFTA that gives corporations the “right to sue governments” when corporate profits are threatened

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<sup>3</sup>Speculation was that multinational subsidiaries would be located in Mexico more than in any of the other countries, due to cheaper labor costs, and lax environmental protections. This has proved since then to be true.

<sup>4</sup>The North American Agreement for Environmental Cooperation or NAAEC was set up to encourage environmental cooperation between the 3 NAFTA nations; to oversee implementation of environmental agreements; and to mediate disputes. As the action arm of NAAEC, the Commission on Environmental Cooperation (CEC) was simultaneously formed.

by the laws of a member state. NAFTA, thus gives corporations legal standing to sue governments, whereas in the past governments only sued other governments. Its investor-to-state dispute resolution mechanisms also gives corporations the same standing to sue for corporate “ill-health” as individuals who claim the same for human health risks. The most well known of these suits is the \$241 million dollar Ethyl Corporation’s claim in 1979, which successfully forced the Canadian government to kill a major public health law (Appleton, 1996)<sup>5</sup>. Polluter protection<sup>6</sup> for corporate America is becoming increasingly common. Proposition 300, passed in 1994, in the state of Arizona, demands that environmental legislation detrimental to local ecosystems, be superceded when such regulations infringe on the value of their investments. Similar legislation has been passed in 12 states<sup>7</sup> (Hale, 2004)

Another take on this kind of protection is the “takings” argument, derived from the Fifth Amendment’s “Takings” clause: “nor shall private be taken for public use without just compensation.” This has been interpreted by the Courts to mean that an owner is entitled to compensation when government attaches “unreasonable” or “disproportionate” permit conditions on use. The keywords here are unreasonable and disproportionate—both of which can be interpreted circumstance by circumstance.

In the situation with NAFTA, its laissez faire approach to enforcement of environmental laws in Mexico begs for a new administrative law better targeted to preserving states’ interests and preventing states’ hollowing (Coates, 2004, Rhoades, 1994, 1995; Holliday, 2000). The worries about economic special interests of mega

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<sup>5</sup> The *Ethyl v. Government of Canada* case was a response to a law passed by the Canadian Parliament banning the import and transport of MMT—a hazardous substance used in gasoline.

<sup>6</sup> As President Clinton dubbed such legislation (Hale, 2004).

<sup>7</sup> Mississippi, Utah, Florida, Delaware, Missouri, Virginia, Idaho, North Carolina, Washington, Indian, Tennessee, and West Virginia .

corporations overcoming common interests for their own special interests has resulted in an overall decline in the standard of living. The case of the New River profiled in this paper, is evidence for that argument.

While it is recognized that environmental pollution of the border region can be linked to other causes besides NAFTA, since the agreement was promulgated in 1994, environmental degradation has been exacerbated. Due to NAFTA there has been a proliferation of industrial companies, known as maquiladoras, in the border city of Mexicali. A chain reaction has ensued. With maquiladora growth come population growth. Today this population increase has overwhelmed the already declining infrastructure capacity in the region. This has resulted in turn in much higher industrial pollution. In turn, the waste discharge into the New River has increased exponentially, and the waste then flows into the United States. Each of these issues will be addressed below.

### **III. MAQUILADORA GROWTH & NEGATIVE SPILLOVER EFFECTS:**

*31. The raison de etre for the Maquiladoras:* “Maquiladora” is a term that denotes a subsidiary of a non-Mexican company, that benefits from the low regulatory standards (including environmental standards) and the low wages paid in Mexico. (These were precisely what the earliest concerns over NAFTA focused upon.) The maquiladora is the offspring (or subsidiary) of a parent company that outsources the labor-intensive assembly processes of its value chain to the subsidiary. The parent company provides the technological aspects of production, while the Mexican partner provides the local personnel. Maquila management is performed by expatriate executives who are directed

by the parent company (Gonzalez Baz, Uri). The majority of the maquiladoras are located in Mexicali—a city that lies on the border with the United States. Due to the proximity of Mexicali, to its northern neighbor, maquilas maintain high trade levels with the United States. This is so despite cheaper markets that have opened up—such as China—that are geographically more distant than the border city of Mexicali.

Today the industry has ten basic sectors of production: food, textiles, leather goods, furniture, chemicals, transportation equipment, machinery, electronics, toys, and services. Vargas notes that maquilas have attracted workers from the Mexican hinterland in the areas of electronics, textiles and transportation equipment. These sectors dominate the employment scene, with 34.2%, 20%, and 19.4%, respectively (ibid, 1998b).

**3.2. Economic Contributions of the Maquilas:** Maquiladoras have appeared to flourish after the implementation of NAFTA in 1994. Although correlation between them is fiercely debated, the industry experienced a growth from 580,000 in 1994 to 1.3 million in 2000. In 1993, there were 130 maquilas in operation in Mexicali. The number rose to 180 in 1998.

**Table 3.1.: Projected Growth of Maquiladoras**

<b>Year</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Total	3,192	3,267	3,349	3,442	3,558

**Source:** InterMex News, August 11, 2003

**Table 3.2.: Projected Employee Growth (thousands)**

<b>Year</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>
Total	1,096.4	1,133	1,175	1,228.8	1,285.3

**Source:** InterMex News, August 11, 2003

In 1993, the year preceding the NAFTA compact, Mexico imported 41.5 billion dollars<sup>8</sup> in goods and exported 40 billion . Following the agreement, in 1996, Mexico had reversed the negative trade balance, dramatically to a surplus of 17 billion dollars. Even while the U.S. experienced an economic downturn in 2000-01, Mexican exports came to the U.S. at the rate of 135 billion dollars. Their trade balance surplus was then 40 billion dollars (U.S. Census, 2004). Maquilas have played an important role in the economy of Mexico, and their output is now the major contributor to Mexican exports, surpassing the Mexican oil industry in 1998 (Vargas, 1998a ). These exports are linked to the growth of the maquiladoras following NAFTA.

The main cause of population growth in Mexicali stems in-migration of workers from the interior of the Mexican hinterland in response to the job opportunities provided by the Mexicali maquilas. In April 2003, the United States and Mexico signed an agreement, called “Border 201”, to tackle pollution problems along the U.S. Mexican border. This compact calls for reduction in water, air, and land damage to the 2,000-mile border region (ibid, 2003). The agreement, however, is once again a blunt policy instrument, due to its lack of the correlative financial commitment from both countries.

**3.4. Negative Spillovers on Infrastructure:** The population in 2002 was estimated at 764,396 individuals. By 2020, it is projected that the population of Mexicali will rise to 19 million, overburdening the area’s infrastructure thereby increasing pollution and mortality unless sharp policy intervention is undertaken immediately.

Many of the immigrants live in *colonias* or unincorporated communities without running water, drinkable water, and sewage systems. The region has been plagued with

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<sup>8</sup> U.S. dollars

infrastructure inadequacies since the mid-twentieth century. Today with greater economic development has come greater environmental damage.

#### IV. THE NEW RIVER:

**4.1. Genesis of the New River:** The New River was formed in the early part of the last century, 1905-07, when the Colorado River washed out diversionary works, and moved into the Salton Sea basin, forming the Salton Sea, the New River and Alamo River channels. The New River today flows from the Colorado through Mexico for about 13 miles and then enters the United States through Calexico. Prior to entering Mexican territory, the Bureau of Reclamation at Yuma, through a reverse osmosis process cleans the water before it is delivered to Mexico.

**4.2. Pollution and Its Impacts:** While the Bureau of Reclamation pumps cleaned water into Mexicali, the New River in Mexicali is being used as a disposal site for industrial and human waste, and agricultural drainage. The common pool resource, thus is being subtracted as a resource drop by drop and is turning into a toxic sewer (Stein, 1978) that constraints pesticides, heavy metals, and volatile compounds.. Currently twenty-eight known viruses exist in the water.

**Table 4.1.: Biological, Organic, Heavy Metals, and Pesticides In the New River**

Biological	Volatile Organic Compounds		Heavy Metals		Pesticides <sup>9</sup>
Fecal coliform	Tetrachloroethylene	EPTC	Uranium	Lead	Alrin e
Fecal streptococci	Methylene Chloride	DCCA	Arsenic	Cadium	4,4'-DDD
Tuberculosis	Carbofuran	Atrazine	Mercury	Vanadium	DDE
Encephalitis arbovirus	1,4-dichlorobenzene	Xylene	Thallium	Selenium	Chlordane
Polio	p-isopropyltoluene	Carbaryl	Antimony	Chromium	DDD
Cholera	n-Nitrosodiphenylamine	Propanil	Molybdenum	Boron	DDT
Hepatitis	Chlorpyrifos	Simazine	Manganese	Barium	PCB
Typhoid	Metribuzinsencor	Fonofos	Nickel	Zinc	Malathion
Salmonella	Pendimethalin	Disulfoton			Heptacholor epoxide
Shigellosis	Diethyl atrazine	Benfluralin			

**Source:** City of Calexico, New River Committee, 2003

<sup>9</sup> Pesticides leach into the land, into fruits and vegetables, and into ground water.

The Imperial County Health Department officials report that the New River has become an extreme health and safety hazard to humans, wildlife, and to the land itself. “Ingestion and dermal exposure to New River water poses a threat to public health” (New River Committee, 2003)<sup>10</sup>.

**Table 4.2.: Morbidity in the Population of Mexicali, 1999**

<u>Cause</u>	<u>Number</u>	<u>Rate/100,00 persons</u>
Respiratory Infections	734	93.8
Intestinal Infections	549	70.2
Diverse Traumas	374	47.8
Acute Otitis Media	302	38.6
Arterial Hypertension	195	24.9
Asthma	182	23.3
Forms of Helminthiasis	119	15.4
Diabetes Mellitus	118	15.2
Urinary Tract Infections	116	15.0
Chicken Pox	105	13.6

**Source:** *Instituto de Servicios del Estado de Baja California*

Each night scores illegal aliens float through the river into California<sup>11</sup>, carrying with them the health hazards that churn in that poisonous soup. Contacts with these people in turn spreads disease north of the border into Imperial Valley, into the state of California and into the nation as a whole. The sickest of the illegals who are apprehended by the Border Patrol must be treated prior to release, which costs,

<sup>10</sup> An example of the extreme toxicity of the water comes from a case study of a man who was found in the river. He had been murdered, and dumped in the river. Police at first thought that he had been burned to death, so scarred was his body. Later it was discovered that the toxic chemicals in the water had simply devoured the flesh from the bones (Case 142, 2003).

<sup>11</sup> Even though NAFTA has created jobs the growth in income per person in the low-and middle-income countries dropped sharply over the past 20 years (1980-2000) compared to the previous two decades (1960-1980). One million Mexicans join that country’s labor force each year, but the incentives to stay at home in Mexico are diminished (Weisbrod, 2002; National Center for Policy Analysis, 2003).

resource-poor, Imperial County<sup>12</sup>. For instance, Imperial County absorbed an estimated \$2.2 million dollars in costs of providing emergency medical care to undocumented aliens in 2002 (Farmer, 2003). The Emergency Medical Treatment and Active Labor Act of 1996, requires hospital and emergency personnel to treat anyone who seeks emergency medical care regardless of their income or immigration status. Thus, in 2002, the El Centro Regional Medical Center spent \$900,000 on the treatment of 564 undocumented aliens who had come into contact with federal agencies—such as the Border Patrol. In addition the facility spent \$642,000 on 209 undocumented aliens who came to the hospital on their own (Farmer, 2003). The other major medical facility, Pioneers Memorial Healthcare District in Brawley, spends \$650,000-\$700,000 a year on undocumented aliens. Many of these people become violently ill because of their contact with the water in The New River.

Fish in the river show high levels of DDT and other chemicals. The pollution has also impacted the survival of certain species such as the Desert Pupfish. The embryos of the Black-Necked Stilt have been reduced by 4% due to selenium from farm run-offs. During the winter of 1992, 150,000 Eared Grebes died of the same causes.. Salinity of the water has also increased due to other agricultural wastes. Salinity is likely to kill the fish population entirely if not reduced soon. The Salton Sea also adversely affects migratory bird populations that pass through it seasonally. Congressman Duncan Hunter of San Diego predicted that the costs of clean-up could

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<sup>12</sup> **Per capita Personal Income: Imperial County vs. United States, 1990-2000**

	Dollars		Percentage Growth
	1990	2000	1990-2000
Imperial County	16,069	18,469	14.9
California	21,882	32,149	46.9
United States	19,572	29,469	50.6

*Source:* California Center for Border and Regional Economic studies, February 2003, Vol. 4, No. 2

become prohibitive if permanent solutions are not undertaken within the decade (1995). In addition the air and land surrounding the river has a noxious odor, that waxes and wanes, but never goes away.

Key stakeholders that participate regularly in the problem-solving discourse on the issue include:

**Table 4.3.**  
**Key Stakeholders With Interests in the Pollution Issue**

<b>United States</b>	<b>Mexico</b>	<b>Joint-Agencies</b>
City of Calexico	City of Mexicali	NADBank (NAFTA)
County of Imperial	State of Baja California	U.S./Mexico Federal Governments
Riverside County	Secretariat/Soc. Develop (SEDESOL)	Border Environmental Coop Comm. (BECC) (NAFTA)
State of California	Comite Ciudadno Pro Restuar. Del Canon del Padre y Servicios Comunitarios	Internat. Boundary Water Comm (IBWC)
U.S. Department of Justice		Environmental Health Coalition
U.S. Fish and Wildlife Services		
Environmental Protect Agency		
California Dept of Health Servs.		
Calif. Reg. Water Quality Ctr. Bd		
Colorado River Reg. Water Ctr. Bd		
Southwest Network/Envir. & Econ. Justice		
California State Water Res. Ctr. Bd.		
California River Basin Region		
Regional Water Quality Control Board		

**Source:** New River Pollution in Mexico Case #142, 2003

Despite major efforts on the parts of the above entities over the years, accountability and problem-solving ultimately have come down to economic values such as aggregate cost and productivity; while non-economic values dealing with human values such as, life, liberty and justice—and ultimately democracy, take a distant second place.

## **V. ANALYSIS:**

**5.1. Paying People to Do the Right Thing:** Paying polluters, and carriers of hazardous materials to desist from doing so, is akin to bribing them to *what they should be*

*doing anyway*. The Ethyl case highlighted earlier is a prime example of what President Clinton dubbed as a “polluter protection law.” It is a bizarre twist on the Hicks portion<sup>13</sup> of the Kaldor-Hicks theory, that winners should compensate losers. Here the corporation is viewed as the “loser” if it suffers losses as a result of environmental regulation, and hence deemed entitled to be compensated for them. It can be argued that paying off those who would do the wrong thing to keep them from doing, it is a terrorist tactic that is a widely used model throughout the world—most recently witnessed in Iraq.<sup>14</sup> Hostage-takers demand compensation for not murdering the hostage. Murderers in our country could demand similar favors—indeed, one might easily observe that there is no limit to collective harm that can be visited upon society by invoking this paradigm.

Related to the above worldview, is the “takings” argument proffered by private owners who object to government regulations on their property. Here again the government faces lawsuits for simply requiring people to do the right thing, and must “give back” these losses to individuals who are the “losers”—never mind that the so-called victim/ landowner could have made a living from his land in an alternative manner. We know that versions of this theory presently apply in laws of states such as Mississippi, Utah, Florida, Delaware, Missouri, Virginia, Idaho, North Carolina,

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<sup>13</sup> Kaldor-Hicks efficiency occurs only if the economic value of social resources is maximized, but with the stipulation that winners (theoretically) must compensate losers. The Kaldor criterion is an efficiency test from the viewpoint of the winner. It says that an outcome will contribute to social optimality (Pareto Criterion) if the maximum amount that winners are prepared to pay is greater than the minimum amount that the losers are prepared to accept. The Hicks criterion is an efficiency test from the viewpoint of the loser. It states that an outcome will contribute to social optimality, if the maximum amount that losers are prepared to pay winners in order to prevent the outcome to occur, is less than the minimum amount the winners are prepared to accept as inducement (bribe) the change (Wikipedia, 2004)

<sup>14</sup> U.S., Philippines, Bulgaria, Pakistan, Australia and India, to name a few countries that have had their citizens held as hostages, and even killed, while hostage-takers make demands on their lives. These are cases of payment for the “harm principle” i.e., the dictum: “do no harm.”

Washington, Indiana, Tennessee, and West Virginia<sup>15</sup>. The ramifications of this kind of thinking could be carried forward to the point of absolute absurdity<sup>16</sup>.

**5.2. NAFTA, Special Interests, & the Borderless<sup>17</sup> World:** That NAFTA was promulgated by *special* interests representing markets and the economic well being of such, is a frequent argument of critics of the compact. Private corporations inevitably have the profit motive in mind, with loyalty to a special interest group—i.e., their shareholders. Within this context *short-term variables* such as profit (Likert, 1967) play important parts. In contrast, government traditionally must look out for the public welfare and the *demos* as a whole—and, not just for present, but also for future generations. This is the explicit and implicit deontological ethical contract inherent in democratically-elected governments. Attention to *long-term intervening variables*, such as synergization and development of human and environmental health and welfare concerns, are essential to sustainability of life on this planet for present and succeeding generations. However, the coercive tools of government are weakened as corporations, guerilla groups, terrorists, etc., have infringed upon the government’s legitimate powers to force compliance.

Furthermore, “national borders have effectively disappeared and, among them, the economic logic that made them useful lines of demarcation in the first place.” (Ohmae, 1995). As a result there is, what has come to be known as, “a democracy deficit” (Aman, 2003), associated with globalization in a world that could be saying it prefers a *laissez faire* attitude towards the environment, in opposition to proaction demanded by

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<sup>15</sup> In the form of “Impact Assessment Laws, Compensation Laws, Conflict Resolution Laws, Amortization Laws (SERC, 2004).

<sup>16</sup> What about would be murderers demanding payment not to murder—as is now done by hostage takers.

<sup>17</sup> (Ohmae, 1990).

democratically-derived law. The Ethyl Corporation's suit has clearly shown that NAFTA can be a threat to national sovereignty (Harvey, 2004).

Having said this what should be done now? Might a new administrative law might respond by assuring public forums for citizen input and debate and a flow of information that can help create a meaningful politics around the decisions of private actors (Coates, 2004). What criterion of justice should be its underlying theme? A possibility is to look back to the Kaldor-Hicks criterion which states: that one social state is better than another if net welfare is maximized, then and winners compensate losers—in this instance, however, arguing that the corporation is the winner, and the people are losers.

### ***5.3. Recommendation/Interventions:***

- 5.3.1. Jail sentences for polluters at the highest corporate headquarters level not just for the local manager of the subsidiary.
- 5.3.2. Reintegrative public shaming<sup>18</sup> of CEOs that violate the commons<sup>19</sup>.
- 5.3.3. Remedial corporate action at the polluted site to clean up what was contaminated, plus additional clean-up requirements for allowing the pollution to occur in the first place.
- 5.3.4. Leadership role from federal government representatives of polluted areas.
- 5.3.5. Funding for Research and Development on pollution issues.
- 5.3.6. Development of new legal standards for transborder pollution issues.
- 5.3.7. Creation of more wetlands projects<sup>20</sup>
- 5.3.8. Revoke "Polluter Protection" laws.

### **VI.CONCLUSION:**

While it is clear that heftier administrative law is needed to prevent the hollowing of our nation's democratically-derived consensus for a clean water<sup>21</sup>, the question also

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<sup>18</sup> (Barnard, 1999; Rock, 1997; Williams, 2002)

<sup>19</sup> See Coates, B.E., "Is a Heftier Administrative Law Required to Prevent State Hollowing? The Issue of Transborder Water Pollution" International Journal of Sociology and Social Sciences, 2004.

<sup>20</sup> such as seen in El Centro, where the New River is being cleaned by the process of passing it through a series of cleaning ponds.

<sup>21</sup> Clean Water Act, 1977.

arises as to whether we have the stomach to push for new administrative law and risk multinational flight to other more accommodating regions of the world, or live with the status quo and its serious human and environmental consequences.

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