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# TRANSBOUNDARY WASTE DUMPING: THE UNITED STATES AND MEXICO TAKE A STAND

## INTRODUCTION

Over the past few decades the industrialization of our society has generated increasing amounts of hazardous waste. Hazardous waste is the unwanted by-product of the day-to-day industrial processes, resulting from the manufacture of goods and services that society demands.

The U.S. Environmental Protection Agency (EPA) estimates that each year 50-60 million metric tons of hazardous waste are produced.<sup>1</sup> The vast majority of this waste is disposed of in ways that cause significant environmental damage.<sup>2</sup>

The chemicals found in hazardous waste can also pose threats to public health even when present in only small amounts.<sup>3</sup> These chemicals can cause birth defects, cancer, leukemia, and other serious diseases.<sup>4</sup> They have also contaminated drinking water supplies for whole communities.<sup>5</sup>

Unfortunately, market incentives encourage businesses to dispose of these wastes unsafely. Unsafe disposal methods are cheaper and more convenient.<sup>6</sup> Therefore, businesses have employed "midnight dumpers"<sup>7</sup> to dispose of their waste. Midnight dumpers provide the more convenient, cheaper means of disposal.

According to the EPA, millions of tons of hazardous waste are being disposed of illegally each year.<sup>8</sup> This is not being done in one-time acts

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1. *Hazardous Waste Contamination of Water Resources: Hearings before the Subcommittee on Investigations and Oversight of the Committee on Public Works and Transportation*, 97th Cong., 2d Sess. 1 (1982) (Statement of Elliot H. Levitas, Chair of the Subcommittee).

2. *Id.*

3. *Id.* at 2.

4. *Id.*

5. *Id.*

6. Safe disposal methods may cost up to \$200 per fifty-five gallon drum. Illegal dumping may cost as little as \$5 per ton. Friedland, *The New Hazardous Waste Management System: Regulation of Wastes or Wasted Regulation*, 5 HARV. ENVTL. LAW REV. 89, 93-94 (1981).

7. The term "midnight dumper" refers to those who unsafely and illegally dispose of hazardous wastes.

8. S. REP. NO. 657, 98th Cong., 2d Sess. 37, *Profile of Organized Crime: Great Lakes Region*, (1984), (hereinafter *Profile of Organized Crime*).

There are allegations of organized crime involvement in the hazardous waste disposal industry. See *Profile of Organized Crime: Mid-Atlantic Region, Hearings Before the Subcommittee on Investigations of the Committee on Governmental Affairs*, 98th Cong., 2d Sess. (1984). See also *Profile of Organized Crime: Great Lakes Region, Hearings Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs*, 98th Cong., 2d Sess. (1984)

of desperation, but in a systematic fashion by both reckless waste haulers and sophisticated corporate officials.<sup>9</sup> The problem of unsafe disposal has also extended beyond national boundaries. On April 22, 1986, the United States Attorney's Office unsealed an indictment charging two American businessmen, a retired U.S. Army major, and an associate in Mexico with unlawfully exporting and illegally dumping hazardous waste near a Mexican village.<sup>10</sup> More than 100,000 gallons of liquid wastes and other solids were dumped in a field southeast of Tecate.<sup>11</sup> The alleged illegal disposal in Tecate raises questions as to the efficacy of United States laws to prevent illegal disposals of hazardous waste beyond our national borders.

This comment will analyze the laws and regulations that environmental officials can use in their efforts to stop unsafe disposals of hazardous waste both here and abroad.

This comment will discuss the 1976 Resource Conservation and Recovery Act (RCRA),<sup>12</sup> its 1980 and 1984 amendments and the newly enacted regulations promulgated by EPA in November of 1986. In addition, this comment will discuss the Agreement between the United States and Mexican governments to combat the problems of transboundary shipments of hazardous waste.

#### LEGISLATIVE BACKGROUND OF RCRA

Realizing the need for regulations governing the disposal of solid and hazardous wastes on land, Congress enacted the Resource Conservation and Recovery Act of 1976 (RCRA). RCRA is the main regulatory scheme dealing with hazardous waste. The Act governs the entire hazardous waste cycle—from its production to its disposal.

Congress announced two objectives in enacting RCRA: to promote protection of human health and the environment, and to conserve valuable material and energy resources.<sup>13</sup> RCRA begins with statements of Congressional findings and objectives,<sup>14</sup> and contains several provisions addressing the general solid waste disposal problem. To deal with the exceptional nature of hazardous waste problems, Congress enacted the Hazardous Waste Management Provision<sup>15</sup> which is the cornerstone of RCRA.<sup>16</sup> RCRA's Hazardous Waste Management provision establishes

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9. *Profile of Organized Crime*, *supra* note 8.

10. *United States v. Duisen*, No. 86-0401, Crim. (D. So. Cal.) (Aug. 14, 1986).

11. *San Diego County News*, April 23, 1986, at 1.

12. 42 U.S.C. § 6901 (1982).

13. 42 U.S.C. § 6902 (1982).

14. 42 U.S.C. §§ 6901-6907 (1982).

15. 42 U.S.C. §§ 6921-6934 (1982).

16. This provision is often referred to as the "cradle to grave" hazardous waste management program.

a scheme by which EPA issues regulations for identification and listing of hazardous wastes.<sup>17</sup>

Regulations apply to generators, transporters, and owners and operators of hazardous waste treatment, storage, and disposal facilities in the U.S.<sup>18</sup> The provision also requires certain record keeping and labeling practices, use of a manifest<sup>19</sup> system, and the design, construction, operation, and maintenance of hazardous waste facilities.<sup>20</sup>

RCRA also provides the enforcement mechanism for the federal and state equivalent programs.<sup>21</sup> Penalties are varied to "permit a broad variety of mechanisms to stop illegal disposal of hazardous wastes."<sup>22</sup>

The administrative and civil enforcement process begins with a notice of a violation from the EPA Administrator to the violator.<sup>23</sup> The Administrator may then issue a compliance order and specify the time limit for compliance.<sup>24</sup> If the violator fails to comply the Administrator may initiate a civil action for a fine of \$25,000 per day of continued noncompliance.<sup>25</sup> The Administrator may also initiate proceedings for appropriate relief, including an injunction.<sup>26</sup>

Criminal penalties are also available to the Administrator.<sup>27</sup> The statute makes it a crime for any person who "knowingly transports hazardous waste to a facility without a permit or who knowingly treats, stores, or disposes of any hazardous waste without a permit."<sup>28</sup> Violation of any of these requirements is a felony with penalties ranging up to a \$50,000 fine and/or five years imprisonment.<sup>29</sup>

In addition, the statute imposes a maximum of a year's imprisonment and/or a \$50,000 fine for knowingly filing documents containing false material statements, or for knowingly destroying, altering or concealing any reports required to be maintained by the statute.<sup>30</sup> Finally, if in violating any of the above requirements, one knowingly places another person in imminent danger of death or serious bodily injury, the violator may be subject to fifteen years imprisonment and/or \$250,000 in fines.<sup>31</sup>

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17. 42 U.S.C. § 6921 (1982).

18. 42 U.S.C. §§ 6922-6924 (1982).

19. A manifest is the form used to identify the quantity, composition, origin, routing, and destination of hazardous waste during its transportation from point of generation to the point of disposal, treatment, or storage. 42 U.S.C. § 6903(12) (1982).

20. 42 U.S.C. § 6925, 6927, 6933-6934 (1982).

21. 42 U.S.C. § 6928(a)(2)(1982).

22. H. R. REP. NO. 1491, 94th Cong. 2d Sess. 31 (1976).

23. 42 U.S.C. § 6928(a)(1) (Supp. II, 1984), *supra* note 21.

24. 42 U.S.C. § 6928(a)(1)(c) (Supp. II, 1984).

25. 42 U.S.C. § 6928(a)(3) (1982).

26. 42 U.S.C. § 6928(a)(1) (1982).

27. 42 U.S.C. § 6928(d) (1982).

28. 42 U.S.C. § 6928(d)(2) (1982).

29. *Id.*

30. 42 U.S.C. § 6928(d)(3) (1982).

31. 42 U.S.C. § 6928(e) (1982).

When RCRA was enacted in 1976, there were no provisions dealing with the potential problem of exporting hazardous wastes outside the United States. On February 26, 1980, EPA promulgated regulations dealing with the export of hazardous waste to supplement the 1976 Act.<sup>32</sup> These regulations placed certain requirements on generators and transporters regarding exports of hazardous waste in light of the special circumstances involved in international shipments. These regulations required that any person exporting hazardous waste comply with the requirements generally applicable to generators, such as initiating the manifest, using proper labels and containers, and complying with record keeping requirements of RCRA.<sup>33</sup> Generators were also required to notify the EPA prior to any shipment of hazardous waste to a foreign country.<sup>34</sup>

On November 8, 1984, President Reagan signed into law amendments to RCRA. These amendments are known as the Hazardous and Solid Waste Amendments of 1984 (HSWA).<sup>35</sup> Provisions in these Amendments specifically address hazardous waste exports.<sup>36</sup> The export of hazardous waste is prohibited unless: 1) the person exporting the waste notifies the EPA Administrator; 2) the government of the receiving country consents to accept the waste; 3) a copy of the receiving country's written consent is attached to the manifest which accompanies the waste shipment; and 4) the shipment conforms to the terms of such consent.<sup>37</sup> The Amendments required EPA to promulgate regulations "beginning 24 months after November 8, 1984" in order to carry out these mandates.<sup>38</sup> The Amendments also altered the enforcement provision to provide criminal penalties for those who knowingly export hazardous waste without the consent of the receiving country or in violation of an existing international agreement between the United States and the receiving country.<sup>39</sup>

In March of 1986, EPA proposed new regulations governing the exportation of hazardous wastes to conform to the statutory language set out in HSWA.<sup>40</sup> The regulations were promulgated and became effective as of November 9, 1986.

The new regulations governing international shipments of hazardous waste are not the only step the EPA has taken to control the problem of international hazardous waste shipments. In September of 1986, United

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32. 45 Fed. Reg. 12722 (1980).

33. 51 Fed. Reg. 8744 (1986) (to be codified at 40 C.F.R. § 262.50(e)).

34. *Id.* (to be codified at 40 C.F.R. § 262.50(b)(1)).

35. 42 U.S.C. § 6938 (Supp. II, 1984).

36. *Id.*

37. 42 U.S.C. § 6938(a)(1)(A-D) (Supp. II, 1984).

38. 42 U.S.C. § 6938(a) (Supp. II, 1984).

39. 42 U.S.C. § 6928(d)(6) (Supp. II, 1984).

40. 51 Fed. Reg. 8744(1986) (to be codified at 40 C.F.R. § 262).

States and Mexican government environmental specialists agreed to combat the problems of transboundary shipments of hazardous waste.<sup>41</sup> The agreement by the two countries added new promises of bilateral cooperation to a 1983 agreement covering a wide variety of environmental problems along the 2,000-mile United States-Mexico border.<sup>42</sup>

Article Two of the Agreement requires the parties to establish a "Program for the Detection and Control of Transborder Shipment of Hazardous Wastes."<sup>43</sup> The purpose of this program is to implement cooperative means of preventing the transborder movement of hazardous waste.

Article Three requires the Parties to develop procedures for detecting transborder shipments of hazardous waste.<sup>44</sup> Article Three further emphasizes that these procedures are to prevent the occurrence of hazardous waste shipments.<sup>45</sup>

### ANALYSIS

#### *RCRA Amendments Designed to Regulate Hazardous Waste Exports*

When RCRA was enacted in 1976, EPA had no authority to regulate the export of hazardous waste. The 1980 Amendments attempted to close this gap primarily by requiring that notice be sent to the EPA prior to any shipment of hazardous waste.<sup>46</sup>

The notification requirement in the 1980 Amendments was inadequate. Notification of the quantities of waste, frequency of shipment, or the manner in which the waste was to be shipped was not required. Consent of the receiving country also was not required. Thus, EPA had no authority to prohibit the export of hazardous waste even if the receiving country objected. Any action to prohibit shipment of hazardous waste had to be taken by the receiving country. In 1984, Congress attempted to close this regulatory loophole by enacting the Hazardous and Solid Waste Amendments (HSWA) as amendments to RCRA. The provisions of these Amendments pertaining to exports of hazardous waste avoided the stringent and more expensive requirements which govern the disposal of hazardous wastes in this country.<sup>47</sup> Unfortunately, these provisions were inadequate as an immediate means of regulating international shipments of hazardous waste.

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41. The News (Mexico City), Sept. 6, 1986, at 4.

42. Annex to the Agreement between the United States of America and the United Mexican States on the Protection and Improvement of the Environment in the Border Area, Department of State (1986).

43. *Id.*

44. *Id.*

45. *Id.*

46. 42 U.S.C. § 6928(d)(4) (1982).

47. 129 CONG. REC. H 8163 (daily ed. Oct. 6, 1983) (stmt. of Rep. Mikulski).

First, Congress allowed EPA 24 months before the Administrator was to promulgate the regulations necessary to implement the statutory provisions.<sup>48</sup> Thus, companies were allowed for 24 months to comply with existing regulations which were inadequate in dealing with the problems of transboundary shipments. The statutory language cited in the Amendments, for example, clearly requires written consent from the receiving government prior to shipment.<sup>49</sup> Existing regulations on the other hand, merely require that the "foreign consignee confirm the delivery of the waste in the foreign country."<sup>50</sup> The consignee need not be the government of the receiving country.

Second, the notification requirement was not specific enough in the 1984 Amendment. The statutory language requires notification be given to the EPA "before such hazardous waste is scheduled to leave the United States,"<sup>51</sup> but the statute does not specify the timing of such notification. Thus, according to one government official, exporters notify the EPA months after the export has taken place, if at all.<sup>52</sup>

In light of the inadequacies in the existing regulations, EPA enacted new regulations. They were proposed March 8, 1986 and became effective November 9, 1986.<sup>53</sup> These regulations correct the inadequacies of the previous regulations.

First, the timing of the notification to the EPA of the intent to export is specified at 60 days.<sup>54</sup> Second, for the first time, express written consent is required by the receiving government prior to shipment.<sup>55</sup> Furthermore, the written consent must be attached to the manifest and presented to U.S. Customs officials prior to departure from U.S. borders.<sup>56</sup>

The 60 day advance notification requirement mandates all exporters notify EPA of intent to export 60 days prior to the the actual shipment.<sup>57</sup> This 60 day advance notification represents EPA's best estimate of the amount of time it would take to notify a receiving country, obtain objection or consent, and transmit the response to the exporter.<sup>58</sup>

The Department of State is in charge of transmitting notification of the impending export to the government of the receiving country.<sup>59</sup> The no-

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48. 42 U.S.C. § 6938(a)(1) (Supp. II, 1984).

49. 42 U.S.C. § 6938(a) (Supp. II, 1984).

50. 40 C.F.R. § 262.50(b)(2) (1985). The term "consignee" refers to the ultimate treatment, storage, or disposal facility to which the hazardous waste will be sent in the receiving country.

51. 42 U.S.C. § 6938(c) (Supp. II, 1984).

52. Interview with anonymous government official.

53. 51 Fed. Reg. 28664 (1986).

54. 51 Fed. Reg. 28683 (1986) (to be codified at 40 C.F.R. § 262.53).

55. *Id.* (to be codified at 40 C.F.R. § 262.52).

56. *Id.* (to be codified at 40 C.F.R. § 262.54(i)).

57. *Id.* (to be codified at 40 C.F.R. § 262.53(a)).

58. 51 Fed. Reg. 28672 (1986).

59. 51 Fed. Reg. 28673 (1986) (to be codified at 40 C.F.R. § 262.53(e)).

tification to the receiving government is to include a request for a response to the notification which either expresses consent or objection to the hazardous waste export.<sup>60</sup> The notification must also include a description of federal regulations which apply to the treatment, storage, and disposal of the hazardous waste in the United States.<sup>61</sup>

Shipment of hazardous wastes to a foreign country cannot take place until the receiving country has consented to accept the waste.<sup>62</sup> Additionally, a copy of the EPA acknowledgement of consent to the shipment must accompany the hazardous waste shipment, and be attached to the manifest.<sup>63</sup>

These new regulations should make it easier for U.S. Customs officials to check for possible illegal exports of hazardous waste. The United States Customs Service has independent authority to stop, inspect, search, seize, and detain suspected illegal exports of hazardous waste.<sup>64</sup> A strong cooperative effort between the EPA and the U.S. Customs Service is needed in order to provide an effective program to monitor and spot check international shipments of hazardous waste to assure compliance with the new regulations.

#### *U.S.-Mexico Agreement on the Control of Hazardous Waste Exports*

In addition to the new regulations, the Agreement between the United States and Mexico made in September of 1986 will help control hazardous waste exports. The two countries agreed to undertake procedures and mechanisms for detecting the existence of transborder shipments of hazardous waste.<sup>65</sup> Furthermore, the two countries agreed to implement programs that will control and prevent the transborder movement of hazardous waste.<sup>66</sup> The regulations promulgated by EPA are one means by which the United States intends to fulfill the stated goals in the Agreement. Thus, the agreement between the U.S. and Mexico is a major step toward ending the international hazardous waste disposal problem.

#### CONCLUSION

The most recently promulgated regulations are an indication that the United States is making some effort to remedy the potentially serious nature of transborder hazardous waste shipments. Furthermore, the U.S.-Mexico Agreement is yet another means by which both countries can

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60. 51 Fed. Reg. 28675 (1986)

61. 51 Fed. Reg. 28670 (1986).

62. 51 Fed. Reg. 28683 (1986) (to be codified at 40 C.F.R. § 262.52(b)).

63. 51 Fed. Reg. 28683 (1986) (to be codified at 40 C.F.R. § 262.52(c)).

64. 50 U.S.C. § 2411 (Supp. III, 1985).

65. See *supra*, note 42.

66. *Id.*

work together in preventing the transborder movement of hazardous waste. Should EPA, United States Customs Service officials, and Mexico cooperate, an effective solution to the international hazardous waste disposal problem could be in the making.

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