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# An U.S. Perspective on the Import and Export of Hazardous Wastes: Towards More Effective International Control

Jane Seigler

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*Jane Seigler**

I plan, this afternoon, to speak a little bit about the current legislative scene in Washington with regard to the issue of trans-boundary movements of wastes, in particular hazardous wastes and certain other kinds of wastes.

Currently under U.S. law, the federal authority to control the export of hazardous waste is exercised under Section 3017 of the Resource Conservation and Recovery Act ("RCRA"), which is the United States' primary waste management statute. This statute prohibits overseas shipment of hazardous waste unless the exporter gives the receiving nation advance notice of the shipment's composition and quantities and further gives a description of how the waste is to be handled. Also, the exporter must obtain written documentation of the receiving country's consent and must give prior notice of the shipment to the U.S. Environmental Protection Agency ("EPA").

In practice, the exporter provides notice of the intended shipment to EPA. EPA then processes the notice through the State Department to the receiving country, gets the receiving country's written consent and then gives the consent back to the exporter, who attaches the consent to the manifest for the shipment.

What has arrived on the scene and what presumably will change all that is the Basel Convention. The Basel Convention is similar in many respects to the approach taken by the United States in its hazardous waste export laws. It contains a requirement for notice and consent by the receiving country and by any transit country — that is, any country through which a shipment is going to pass, but not reside for the purpose of disposal. It also, however, contains an obligation, on the part of both the exporting and the importing countries, to prohibit a trans-boundary movement if it would result in the waste not being managed in an environmentally sound manner.

President Bush signed the Basel Convention on March 20, 1990, but the United States will not become a party to the Convention until it is ratified by the Senate. The Convention was submitted to the Senate for ratification on May 20, 1991. The Foreign Affairs Committee of the Sen-

* Government Affairs Counsel, Waste Management, Inc. (Washington, D.C.).

The following text was compiled from the transcript of the remarks made by Ms. Seigler at the Conference.

ate has held some ratification hearings, but the full Senate has not yet voted on ratification.

Australia recently became the twentieth country to ratify the Basel Convention, giving the Convention the required number of signatures to go into effect. This means that the Convention likely will go into effect before the United States has ratified it. The United States, however, has a very strong interest in ratifying having the Convention and becoming a party before it is implemented for two important reasons.

One reason is that trans-boundary movements could be interrupted, because parties to the Convention agree not to ship to nonparties absent an international agreement. Also, movement of a significant amount of recyclables that are shipped out of the United States could be disrupted by the United States' failure to ratify the Convention before it goes into effect. The U.S. may get a reprieve by the Organization for Economic Cooperation and Development ("OECD"), which is considering an agreement to allow nonparties to export recyclables. They have not yet adopted that agreement. I believe that they have been discussing it since last December, but have deferred final consideration of it.

The other and probably equally significant reason why it would be in the United States' interest to ratify the Convention before it becomes effective is that there will now be a number of meetings of the parties to try and work out the implementing protocols on several very important issues such as liability, financial obligations, and the definition of what is meant by "environmentally sound management". Until the United States ratifies the Convention, it may attend those meetings but will not have a voting voice on any of the definitions or implementing protocols that are discussed and worked out by the parties.

The President of the United States has taken the position that even if the Senate ratifies the Convention, he will not deposit the instrument of ratification — and therefore make the ratification effective as a practical matter — until Congress has given EPA a number of statutory authorities to allow it to implement the Convention within the United States.

There are three such statutory authorities on which the President has focused. The first is the authority to control shipments of all wastes subject to the Convention, including household wastes and the residue of the incineration of household wastes (*i.e.*, municipal solid waste and incinerator ash from municipal solid waste incinerators). The second is the authority to stop exports if there is a reason to believe that the shipment will not be managed in an environmentally sound manner. The third is the authority to require exporters to return exported wastes to the United States that are mismanaged abroad.

On May 6, 1991, the President's proposed implementing legislation was introduced. The Administration's legislation prohibits the export and import of all wastes subject to the legislation except those to and from countries with which the United States has entered into a bilateral

agreement. Thus, the Administration's bill basically tracks the requirements of the Basel Convention and requires that the bilateral agreement ensure that the waste will be managed in an environmentally sound manner. Consistent with the Convention, the Administration's bill defines two categories of waste that are subject to its requirements. One is hazardous waste that is either identified or listed under Section 3001 of RCRA, plus "additional wastes" (which are called "other wastes" in the Basel Convention). These "additional wastes" include municipal solid waste, ash from municipal incinerators and a few other wastes that are not currently regulated in the United States as hazardous wastes. These latter types of wastes, called special wastes or exempted wastes, would be covered by the Administration's bill. Certain wastes are excluded from the coverage of the Administration's bill or have special requirements. These are scrap metal, separated waste paper, scrap textiles, waste glass and waste plastic that are exported or imported for purposes of recycling.

The second category of waste covered by the Administration's Bill comprises mixed waste, which is to say something that falls into the definition of a hazardous or other waste that has been mixed with a radioactive material.

The Administration's bill contains several lists of requirements for exporters and importers. The requirements for exporters are that they must:

1) provide written notice to and obtain consent of the importing and transit countries;
2) document efforts to minimize waste;
3) enter into a written contract with the importer specifying that the waste will be managed in an environmentally sound manner;
4) accept, or notify the U.S. EPA of the refusal to accept, legal and financial responsibility for environmentally sound management of undelivered waste;
5) comply with the financial responsibility requirements of the United States, the importing country and the transit country; and
6) ensure that moving documents will accompany the shipment.

Similarly, importers are required to:

1) provide written notice from the exporting country and written consent from the President before participating in the import of the waste into the United States;
2) enter into a written contract with the exporter specifying waste management in accordance with the applicable federal law and state programs;
3) accept legal and financial responsibility for lawful management of the waste;
4) comply with the United States' and exporting and transit countries' financial responsibility requirements (a fairly significant requirement); and
5) ensure that the moving documents accompany the shipment.

There is also a special provision of the legislation providing that waste generated from U.S. government operations abroad can be returned to the United States for disposal. Some other basic provisions include a prohibition on exports to Antarctica, the authority to prohibit exports that would not be managed in an environmentally sound manner, authority for the U.S. to assume responsibility for managing any waste exported from the United States in violation of the legislation, a bilateral agreement or the convention, and a provision for the U.S. Government to recover its costs when it is forced to act under this latter provision.

The Administration's bill basically adds a layer to existing U.S. law by picking up the requirement of "environmentally sound management" from the Basel Convention. This has been an extremely controversial issue in the United States. The subject of to what extent the U.S. government can and should get involved in standards for management of wastes outside the United States has invoked much hot debate and many hearings, and we are now faced with having to decide the issue as a result of having signed the Basel Convention.

The Administration's bill admittedly would apply to less than ten percent of the hazardous waste that is currently being exported from the United States. It would not affect commerce between the United States and Canada or between the United States and Mexico, which accounts for over ninety percent of the hazardous waste exported from the U.S. This is because Canada and Mexico already have bilateral agreements with the United States. Under the terms of the Administration's bill, these agreements are grandfathered unless they are amended or renewed after promulgation of the implementing regulations under the Administration's bill.

According to a recent EPA press release, the amount of hazardous waste exported from the United States is less than one percent of the waste generated annually in the United States. In 1989, for example, 141,000 tons of hazardous waste were exported from the U.S. to nine countries. Canada received seventy-four percent of this waste in 1989.

A number of other bills have been introduced in Congress that relate to this issue. One is Congressman Synar's bill. This bill takes a much stricter approach to implementing the Basel Convention. It not only would require international agreements between the United States and importing countries and provide for prior consent, but would also require a fairly detailed exchange of information on how the waste will be managed and would require access to foreign facilities for inspection by U.S. inspectors. It would also set up an EPA administered permit program, which the Administration's bill does not do, that would allow for implementing a very strong command and control approach to how these wastes would be managed. The Synar bill would require generators to do a lot more in the area of waste reduction prior to export and would impose a standard that exports be treated and disposed of in a manner pro-

tective of human health, no less strict than that required in the United States.

The Synar bill would also require user fees that would defray the full cost of administering the waste export program. Although the Administration's bill also provides for fees, it does not require that the fees actually recover the full cost to the U.S. government of administering the program.

The Synar bill is clearly intended to provide stricter oversight of exactly what will be done with the waste in the foreign country — how it will be treated and how it will be disposed — and it is further intended to require that the standards be very, very similar to those that are used in the United States. Thus, the Synar Bill provides for a standard much more stringent than that in the Administration's bill. The Administration's bill merely adopts the environmentally sound language from the Basel Convention, and it excludes Canada and Mexico. Congressman Synar's bill would not exclude Canada and Mexico.

Another bill, currently not in play, was introduced by Congressman Towns. This bill would be an outright prohibition on export or import, except for baled wastepaper, scrap textiles or waste glass exported or imported for the purpose of recycling, provided they do not contain any substances regulated under the Toxic Substances Control Act ("TSCA") or Subtitle C of RCRA.

Finally, another bill was introduced by Senator Akaka from Hawaii that would require recipient nations to have signed bilateral agreements and the Basel Convention before receiving waste exported from the United States. It would require U.S. Customs to certify the volume, content and destination of hazardous cargo, and it would require the filing of disclosure statements with the U.S. Attorney General regarding the background of the generators, such as criminal record, compliance record, etc.

Currently, Congress is basically tying the fate of the Basel Convention to RCRA reauthorization. Last summer, EPA Administrator William Reilley testified in hearings on RCRA reauthorization, saying that the Administration saw no need to amend RCRA and, therefore, would not support Senator Baucus' major RCRA reauthorization bill (S976). Senator Baucus included in his RCRA bill implementing language for the Basel Convention. If Senator Baucus and Congressman Swift can successfully stall or kill the freestanding Basel bills, then theoretically President Bush would be forced to sign the RCRA reauthorization bill in order to get the Convention implemented. That is where we are right now in Washington.

The Basel language that Senator Baucus put in his bill is basically the same as the Administration's bill. Under his draft, the United States can only continue to export waste to or import waste from nations participating in a bilateral or regional agreement in compliance with RCRA

Section 3017. However, within two years of the bill's enactment, those agreements would have to be in compliance with requirements of the new legislation. In other words, there is a two-year grace period during which all of those agreements would have to be renegotiated and brought into compliance with the Basel Convention. New agreements would only be allowed with nations that have signed the Basel Convention.

The Baucus language would exempt some materials that are exported or imported for the purposes of recycling. The Baucus bill contains another interesting provision not in the Administration's bill: a provision that requires the President, before he signs a new bilateral agreement, to investigate and report on the status of environmental management and enforcement standards in the receiving countries and, to the extent possible and with the consent of the receiving country, report on some kind of inspection of the facilities of the receiving country.

One big issue that has emerged is the exportation of lead acid batteries for recycling. Certain interests are trying to get a provision that will exempt scrap metals from the legislation even if they are not expressly being exported for recycling, with the intent of freeing them from any kind of intensive regulation of how the lead is extracted from the batteries once they get overseas. The current thinking as of yesterday afternoon, before I left Washington, is that this issue may cause the Basel Convention language to be taken out of the RCRA bill before it goes to markup on April 29, 1992, because it really will not be ready for debate by then. It is not certain, but that is how things looked at about 4:00 yesterday afternoon.

On the House side, there is no real indication of when they are going to do anything on Basel implementation. Hearings have been held on the House RCRA bill, but no markup has been scheduled. The House RCRA bill, which is Congressman Swift's bill, currently does not contain any Basel implementing language.

I now want to discuss some issues that have not been addressed in the Administration's bill and some other needed improvements to that bill. In my view, the U.S. should adopt legislation to implement the Basel Convention, and the Administration's bill is generally a pretty good step in the right direction. It requires bilateral agreements and requires that persons shipping wastes underwrite the government expense. That seems reasonable. A number of revisions, however, are necessary to strengthen the Administration's proposal.

One revision deals with wastes covered by the legislation. All solid waste as defined by RCRA should be covered by the legislation. The Administration's bill just covers hazardous and certain additional wastes, but does not address solid waste produced by industrial processes, mining wastes and agricultural wastes unless they have actually fallen into the definition of RCRA hazardous wastes. There are huge volumes of wastes that do not fall under the definition of RCRA hazardous wastes or that have been exempted by other statutory provisions, and those

should really be included in the legislation. The most recent staff draft of the Senate Environment Public Works Committee, Senator Baucus' bill, corrects this deficiency by including those exempted wastes, but it is still unclear whether or not that provision will survive.

Next, the language regarding the exemption for exportation of materials intended for recycling should be strengthened. Right now, it does not contain a real definition, and it should be strengthened in order to get around essentially sham-type activities. For example, you may have seen or heard the press coverage of the incident involving untreated incinerator ash that was shipped around the world for several months, some of which was dumped on a beach in Haiti as "fertilizer". That kind of situation should be addressed.

Again, the legislation should really address the issue of defining what is "environmentally sound". The standards in the receiving country do not have to mirror what we have in the United States, but there should be some demonstration that the protection will be equivalent (equivalent ground water protection, equivalent air emission protection, etc.). A system could be set up under which the exporter, or EPA in negotiating a bilateral agreement, must either demonstrate that the requirements are the same or, if they are not the same, explain and demonstrate that the protection is equivalent.

On the issue of bilateral agreements, the grandfathering provision in the Administration's bill makes sense. It makes sense to allow some time for agreements to be revisited, but there should be some provision that eventually all of these agreements will have to be renegotiated and brought into line with the standards under the Basel Convention. There is no good reason to grandfather some agreements forever.

It probably makes sense that there be some kind of permit scheme, maybe not quite as detailed as that proposed by Congressman Synar. A permit scheme would establish a government mechanism to ensure that there is some enforcement capability on these kinds of shipments.

Finally and curiously, the Administration's bill and Senator Baucus' language are silent on a very specific requirement of the Basel Convention that appears to generally prohibit export by a country if domestic capacity is available. Article 4, Section 9, of the Basel Convention states that trans-boundary shipments should only be allowed if the state of export does not have the technical capacity, necessary facilities or suitable disposal sites to dispose of the wastes in an environmentally sound manner; if the wastes are destined as raw material for recycling; or if the trans-boundary movement in question is in accordance with "other criteria" to be specified by the Basel Convention.

The Administration's bill and Senator Baucus' language contain no discussion of that provision at all. Some attention must be paid to the question of what happens when you have an export from a country that clearly has domestic capacity to deal with the waste.