

Comment

CRIMINAL ENVIRONMENTAL LAW: STOPPING THE FLOW OF HAZARDOUS WASTE TO MEXICO

"If you wish to regulate the conduct of 10,000 people, you can watch 5,000 or 3,000 and punish them moderately—or you can catch one or two and boil them in oil."¹

INTRODUCTION

The United States shares 2,000 miles of common border with Mexico that is traversed by a number of rivers and streams, and for years these waterways have been greatly polluted.² However, a new conduit of pollution has recently come into focus in the border region: the roads that carry tons of hazardous waste from the United States into Mexico.

Pollution in America has been the subject of concern for some time now, but the problem has only recently become an issue of major importance between the United States and Mexico. Drug trafficking and illegal immigration have long held priority over pollution.³ The problem has only come to the forefront in recent years, as the United States has shipped more and more hazardous waste to Mexico.⁴ One reason for the increased hazardous waste shipments is the growth of the Maquiladora industry.⁵ Maquiladoras, or twin plants, are basically assembly plants for foreign corporations that take advantage of Mexico's cheap labor.⁶ The Maquiladora program began as an effort by Mexico to gain the economic advantages of its proximity to the United States while still maintaining its independence. Some critics say the program has backfired, however, and increased Mexico's dependence on the

1. Kasanof, *Environmental Show Trials*, NAT'L L.J., Jan. 21, 1991, at 13, col. 1.

2. See Keller, *Pollution Under Scrutiny at United States-Mexico Border*, Wash. Post, Oct. 24, 1989, at A27, col. 1.

3. *Id.* at A32, col. 1. Perhaps this is because drugs and immigrants come into the United States while hazardous wastes go out. *Mexican Environmental Rules 'Confusing,' Industry Representatives Claim at Seminar*, 12 INT'L ENVTL. REP. 549 (1989) [hereinafter *Mexican Environmental Rules*]. Some now think that environmental issues are next in priority to drug issues, at least from the Mexican perspective.

4. U.N.G.A. Doc. A/44/362 (1989) [hereinafter U.N.G.A.]. In 1989, the U.N. reported that 4,500 tons of spent mercury was shipped illegally from the United States to Mexico. *Id.*

5. Phillips, *Environmental Considerations for the Maquiladora Industry in the 1990's*, in 1990 TEXAS ENVIRONMENTAL SUPERCONFERENCE 1 (1990).

6. Juffer, *Dump at the Border*, THE PROGRESSIVE, Oct. 1988, at 24. This labor is often as low as \$25 for a 48 hour work week.

United States.⁷ The waste generated by the Maquiladora industries is supposed to be returned to the country of their origin, but much of it seems to disappear.⁸

Hazardous waste disposal costs in the United States are skyrocketing. The increased controls within the United States, to a large extent, caused economic incentives to traffic the hazardous waste to Mexico.⁹ Shipping to Mexico is simply much less expensive than following responsible disposal procedures in the United States.¹⁰

While environmental laws have been a major force in the United States for two decades, they are a relatively new concept in Mexico. And even with new laws in place, Mexico is still accused of lax enforcement, mainly due to lack of funds and incentive.¹¹

There are United States environmental law provisions concerning shipments

7. See generally N. HANSEN, *THE NATURE AND SIGNIFICANCE OF BORDER DEVELOPMENT PATTERNS IN THE U.S. AND MEXICO: BORDERLAND DEVELOPMENT AND THE NATIONAL ECONOMIES* (1985). Maquiladoras represent Mexico's second largest source of foreign currency. Juffer, *supra* note 6, at 24. This money is needed to help pay Mexico's foreign debt which was estimated at \$100 billion in 1989. *Joint U.S., Mexican Manufacturing Program May Be Causing Pollution in Texas, Arizona*, 12 INT'L ENVTL. REP. 306 (1989) [hereinafter *Mexican Manufacturing Program*].

8. Tolan, *The Border Boom: Hope and Heartbreak*, N.Y. Times, July 1, 1990, Magazine, at 16, col. 1. While many companies deny dumping, the sewers in many maquiladora towns contain pollutants well beyond the legal limits. Seepage into the groundwater from these plants is said to be the cause of contamination in two Arizona trailer parks.

The most contaminated river in the border region is the New River which begins in Mexico and flows into the U.S. At least 100 types of toxic chemicals have been found in it. These have been traced back to Mexicali, a border town with over 100 maquiladoras. Juffer, *supra* note 6, at 24.

In 1986, a survey of 772 maquiladoras revealed that only twenty had notified the EPA that they would be returning hazardous wastes to the United States, although 86% of them used some sort of toxic chemicals. Juffer, *Dump at the Border*, THE PROGRESSIVE, Oct. 1988, at 24. Moreover, people often store water used for drinking and bathing in discarded barrels from the maquiladora plants. One such barrel was found with the inscription: "Laboratory controlled circuit fab chemicals. This container hazardous when emptied." See Juffer, *supra* note 6, at 28.

9. See generally Semenoff, *Foreign Trade in Trash? Exporting Hazardous Waste*, 4 J. NAT. RESOURCES & ENV'T 14 (1989); UNGA stated that lack of space and rising costs is an important factor in the increase in transboundary shipments of hazardous waste. Another reason persons export their wastes from the United States is to avoid the potential for massive liability under environmental laws. Johnson, *The Basel Convention: The Shape of Things to Come for United States Exports?*, 21 ENVTL. L. 299, 316 (1991).

10. Dolan & Stammer, *Clandestine Toxic Waste Exports to Mexico on Rise*, L.A. Times, May 9, 1990, at A1, col. 5. The United Nations General Assembly fears that as more plants are proposed and more waste is generated, the Third world will be forced to accept more waste imports. See generally U.N.G.A., *supra* note 4.

11. Bath, *United States-Mexico Experience in Managing Transboundary Air Resources: Problems, Prospects, and Recommendations for the Future*, 22 NAT. RESOURCES J., 1147, 1157 (1982). The Third World normally regard pollution as a "natural part of the industrialization process."

But see Leonard & Morell, *Emergence of Environmental Concern in Developing Countries: A Political Perspective*, 17 STAN. J. INT'L L. 281, 283 (1981) (the authors suggest that Third World countries are paying more attention to environmental concerns).

of hazardous wastes domestically.¹² Criminal sanctions have been levied against those illegally shipping hazardous waste inside the United States. However, few of the laws concern international shipments. Lately, more effort has been made to stop the flow of hazardous wastes from the United States into Mexico.¹³ To help facilitate these efforts, criminal sanctions for violations of environmental laws have recently spread to the international level.¹⁴ Cooperation between the United States and Mexico is essential for enforcement on this level,¹⁵ and the mechanisms are in place to implement this cooperation.¹⁶

This Comment will briefly discuss the history of environmental law in the United States with special focus on the criminal side, and will give an overview of the most pertinent United States law and the tools used to extend its reach across the border. In addition, the Comment will give a brief review of Mexican environmental law and a detailed analysis of the most recent United Nations effort to create alternate routes for punishment of the illegal transboundary dumper.

II. ENVIRONMENTAL LAW HISTORY: THE UNITED STATES SIDE

Environmentalism started decades ago, but environmental law in the United States truly began in the 1970s.¹⁷ The creation of the Environmental Protection Agency (EPA) in 1970,¹⁸ the Amendments to the Clean Water Act¹⁹ and the enactment of the Federal Water Pollution Control Act Amendments of 1972²⁰, led the fight against pollution.²¹ At first, the EPA

12. See e.g., Hazardous Materials Transportation Act, 49 U.S.C. §§ 1801-1813, 1809(b)-(1988) (criminal sanctions meted out for willful violations and allowing for penalties of up to \$25,000 and five years in prison); Resource Conservation and Recovery Act §§ 6923 (1988) (standards applicable to transporters of hazardous waste); Comprehensive Environmental Response, Compensation, and Liability Act § 9607(4) (1988) (imposing liability for clean up costs on those who transported the hazardous waste to the site).

13. Semenoff, *supra* note 9, at 15-16.

14. *2 Men Are Indicted in Mexico Dumping*, N.Y. Times, May 11, 1990, at B6, col. 6.

15. *Three Environmental Agreements Signed by U.S., Mexico During Visit by Salinas*, 12 INT'L ENV'T. REP. 492 (1989), (quoting Roger Meacham, then EPA Region VI spokesman).

16. See *Mexico-United States: Agreement to Cooperate in the Solution of Environmental Problems in the Border Area*, August 14, 1983, reprinted in 22 I.L.M. 102 (1983) [hereinafter the Agreement].

17. Habicht, *The Federal Perspective on Environmental Criminal Enforcement: How to Remain on the Civil Side*, 17 ELR 10478 (1987) (Dec. 1987).

18. 35 Fed. Reg. 15,623 (1970).

19. 42 U.S.C. §§ 7401-7642 (1970).

20. 33 U.S.C. §§ 1251-1376 (1970).

21. Habicht, *supra* note 17, at 10478. "Under these laws, however, often it was cheaper to dump industrial wastes illegally, and pay the fines for breaking environmental laws than to spend money on properly processing wastes." Thornburgh, *Criminal Enforcement of Environmental Laws—A National Priority*, 59 GEO. WASH. L. REV. 775, 776 (1991).

shied away from criminal enforcement of the environmental laws.²² Adherence to the statutes and violation deterrence was implemented mainly through civil actions and consent decrees with time schedules for compliance.²³ When given at all, criminal sanctions usually took the form of fines and community service.²⁴ Beginning in 1981, the EPA and Department of Justice began a program of stricter enforcement of the criminal provisions of the environmental laws.²⁵ A number of early successful joint prosecutions²⁶ gave hope for the continued success of coordinated operations. The EPA began hiring professional special investigators, each of whom were fully deputized and armed with the powers of a United States Marshal.²⁷

A violator now faces the possibility of serving real time in prison. "As a sign of the government's commitment to criminal enforcement, the Environmental Crimes Unit was elevated by order of Attorney General Edwin Meese III to the status of a Section within the Land and Natural Resources Division in April 1987."²⁸

The primary purposes for enforcing criminal sanctions against violators of environmental laws are: (1) to deter potential misconduct and abuse of the

22. Habicht, *supra* note 17, at 10478. "Highly technical and unfamiliar statutes made it unlikely that the judiciary would have welcomed visiting criminal sanctions on the business community."

Furthermore, the public was not yet ready for criminal enforcement of environmental laws. See generally Starr, *Countering Environmental Crimes*, 13 B.C.J. OF ENVTL. AFF. 379, 379-80 (1986) ("Congress recognized the public's concern by providing criminal sanctions for violations of environmental laws.") *Id.* "Twenty years ago, none of the major environmental laws in effect contained significant criminal enforcement provisions." Thornburgh, *supra* note 21, at 776-77 (citations omitted).

23. See Habicht, *supra* note 17, at 10479.

24. See Phillips, *supra* note 5, at 2.

25. Habicht, *supra* note 17, at 10479. EPA created the Office of Criminal Enforcement and the Department of Justice created the Land and Natural Resources Division Environmental Crimes Unit. Former Attorney General Richard Thornburgh recently wrote: "Criminal enforcement of environmental laws is not merely a goal, it is a priority—one that has been developing over the past two decades." Thornburgh, *supra* note 21, at 776. James Moorman, then assistant attorney general, testified before the Senate Subcommittee on Environmental Pollution that a new era of enforcement was about to begin. Starr, *supra* note 22, at 903. Increased media attention and political support has made the public realize that harm to the environment is a serious matter. Starr, *Turbulent Times at Justice and EPA: The Origins of Environmental and Criminal Prosecutions and the Work that Remains*, 59 GEO. WASH. L. REV. 900 (1991).

26. See e.g., *United States v. Ralston-Purina, Inc.*, 12 ELR 20257 (W.D. Ky. 1982). Defendant discharged an explosive solvent into the Louisville, Kentucky sewer systems in violation of, *inter alia*, the Rivers and Harbors Act, 33 U.S.C. §§ 407, 411, Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1319(c), and 1342. The court ordered the defendant to pay a fine of \$62,500. *Id.*

27. Habicht, *supra* note 17, at 10479.

28. *Id.* Since the Unit's creation, "703 indictments and 517 convictions have been obtained; fines restrictions, and forfeitures totalling \$56,074,616 has been assessed; and more than 316 years of jail time have been imposed." Thornburgh, *supra* note 21, at 778. The environmental crimes unit served the dual purpose of providing justice with prosecutors solely concerned with environmental criminal cases and displaying to the nation that the department was committed to prosecuting environmental criminals. Starr, *supra* note 25, at 910. In its first year, the unit filed forty cases and received forty convictions. *Id.*

environment;²⁹ (2) to promote respect for environmental laws; (3) to seek just punishment for offenders of environmental laws;³⁰ and (4) to remove the competitive advantage and economic incentive realized from disregarding environmental laws.³¹ So, the situations most likely to trigger criminal prosecution are where: (1) a knowing or intentional transgression is made;³² (2) the amount of harm that flows from the violation is large;³³ (3) there is a large economic gain to the violator;³⁴ (4) the violations were aggravated or extensively repeated.³⁵ In general, if a company is diligent in reporting and quickly discloses when a problem does occur, criminal action will not be brought.³⁶ "Actions to conceal or mislead the government, along with a substantive violation of pollution laws, will virtually guarantee felony indictment and conviction."³⁷

II. RESOURCE CONSERVATION AND RECOVERY ACT

The Resource Conservation and Recovery Act (RCRA) is the most comprehensive regulation of hazardous waste in the United States.³⁸ RCRA governs hazardous waste through every stage of its life, from production to disposal.³⁹ Congress enacted RCRA in contemplation of two primary goals: (1) to promote the protection of human health and the environment, and (2)

29. Starr, *supra* note 22, at 383; Habicht suggests that the main goal is deterrence. He cites this as the primary reason that approximately three times as many individuals have been prosecuted than companies. "Corporation's can not go to jail, and they can easily pass the costs associated with a criminal fine along to consumers. On the other hand, individuals acutely feel the personal impact of imprisonment and a criminal record." Habicht, *supra* note 17, at 10480.

Deterrence seems to be most effective on those who have little or no experience with the criminal justice system and for whom prosecution or simply investigation can have severe consequences. See generally J.F. DIMENTO, ENVIRONMENTAL LAW AND AMERICAN BUSINESS (1986).

30. Habicht, *supra* note 17, at 10481. "Prosecutors are motivated by their desire first to do the right thing. Regardless of one's political perspectives, these goals of environmental protection and deterrence are critically important to our nation's well-being." Starr, *supra* note 25, at 901.

31. See Starr, *supra* note 22, at 381-82.

32. Habicht, *supra* note 17, at 10481.

33. Smith, *Criminal Liabilities for Environmental Liabilities*, in REAL ESTATE LAW AND PRACTICE HANDBOOK SERIES THE IMPACT OF ENVIRONMENTAL REGULATION ON BUSINESS TRANSACTIONS: A SATELLITE PROGRAM 4 (1988). "Criminal cases will be initiated where transgressions are major, involving grave harm, and not for *de minimis* violations." *Id.*

34. See *infra* notes 112-17 and accompanying text.

35. Habicht, *supra* note 17, at 10481.

36. "EPA seeks cooperation and voluntary compliance; continued violations in the face of repeated notices from EPA are therefore viewed especially seriously." *Id.*

37. Many companies make the mistake of trying to cover up violations, instead of taking on the posture of a caring member of the community and reporting the problem. *Id.*

38. Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6987 (1988).

39. Because it covers so much, RCRA is often called the "cradle to grave" regulation.

to conserve valuable material and energy resources.⁴⁰ RCRA's Hazardous Waste Management Provision establishes a scheme through which EPA is able to issue regulations for identifying and listing hazardous wastes.⁴¹ These regulations apply to generators of hazardous waste, owners and operators of hazardous waste treatment, storage and disposal facilities, and the transporters of hazardous waste.⁴²

When RCRA was first enacted in 1976, none of its provisions dealt with the international export of hazardous waste. This changed in 1980 with an EPA mandate that required exporters of hazardous waste to comply with the general requirements of generators.⁴³ RCRA requires generators to initiate recordkeeping practices, label their wastes so as to allow for accurate identification, and to use only those containers deemed appropriate by RCRA.⁴⁴ Furthermore, RCRA requires compliance with a complex manifest system and the filing of detailed reports with the Administrator.⁴⁵ Although thorough on their face, these regulations were generally considered weak and ineffective when applied to transporters of hazardous waste.⁴⁶

In 1984, Congress enacted the Hazardous and Solid Waste Amendments to RCRA.⁴⁷ These amendments proved to be a powerful weapon in the war on hazardous wastes, especially in the battle against illegal transboundary shipments of hazardous wastes. Administrative and civil penalties are now available in addition to criminal sanctions. For example, if a violator fails to take corrective action after being informed of his noncompliance with the statute, the Administrator may suspend or revoke any permit issued to the violator.⁴⁸ Also, a violator may be fined up to \$25,000 for each instance of noncompliance with the regulations.⁴⁹

RCRA contains criminal provisions which deal directly with exporting hazardous wastes.⁵⁰ In general, it is a criminal violation to export hazardous waste without first obtaining the consent of the importing country.⁵¹ An exporter is required to notify the EPA at least sixty days prior to making

40. RCRA § 6902. The Statute proposes to accomplish these objectives by: (1) assisting State and local governments to develop solid waste management plans through financial and technical means; (2) provide grants in occupations concerned with the design and manufacture of solid waste disposal systems; (3) prohibition on dumping; and (4) regulating the treatment, storage, transportation, and disposal of hazardous wastes.

41. RCRA § 6921.

42. RCRA §§ 6922-6924.

43. 45 Fed. Reg. 12724 (1980) (current version at 40 C.F.R. § 262).

44. RCRA § 6922.

45. RCRA §§ 6922(5)-(6).

46. Note, *Transboundary Waste Dumping: The United States & Mexico Take a Stand*, 27 NAT. RESOURCES J. 940, 945 (1987).

47. RCRA §§ 6921-6938 (1984).

48. RCRA § 6928(c)(3) (1990). This action is allowed even if the permit was issued by a State agency.

49. RCRA § 6928(g). The statute regards each day of a violation to be a separate offense.

50. RCRA § 6928(d)(6).

51. RCRA § 6928(d)(6)(A).

an international shipment.⁵² After the receiving country is notified of the impending export,⁵³ that country's written consent is needed before EPA will allow the shipment to proceed.⁵⁴ The consent document is then attached to the manifest.⁵⁵

If the export is to a country with which the United States has an international agreement concerning the transboundary shipment of hazardous wastes, then the terms of that agreement must also be satisfied.⁵⁶ RCRA requires that the international agreement establish "notice, export and enforcement procedures for the transportation, treatment, storage and disposal of hazardous wastes."⁵⁷ The United States-Mexico Border Agreement⁵⁸ meets the standards RCRA requires for relying on an Agreement's shipment procedures.

A. United States-Mexico Border Agreement

The 1983 Border Agreement between the United States and Mexico governs exchanges of hazardous substances between the countries. Therefore, shipments of hazardous waste must, according to RCRA, conform to the

52. RCRA § 6938(c) (Supp. 1991). RCRA requires the notification to contain:

(1) the name and address of the exporter; (2) the types and estimated quantities of hazardous waste to be exported; (3) the estimated frequency or rate at which such waste is to be exported; and the period of time over which such waste is to be exported; (4) the ports of entry; (5) a description of the manner in which such hazardous waste will be transported to and treated, stored, or disposed in the receiving country; and (6) the name and address of the ultimate treatment, storage or disposal facility.

RCRA § 6938(c)(1)-(6).

53. Within 30 days after the Administrator receives complete notification, the Administrator passes the information on to the Secretary of State who handles official communication between the United States and the receiving country. RCRA § 6938(d) (Supp. 1991).

54. RCRA § 6938(e). If the importing country does not agree to accept a shipment, EPA will not allow the substances to be transported. In notifying the receiving country of the impending export, the Secretary of State is required to: forward a copy of the notification; inform the receiving country that United States law prohibits exports of hazardous waste unless the receiving country agrees to accept it; request the country to furnish the Secretary with written acceptance or objection to the terms of the notification; advise the country of the Federal regulations which apply to the treatment, storage, and disposal of the waste in the United States. RCRA § 6938(d)(1)-(4).

Within 30 days after receiving the country's written consent or objection, the Secretary of State forwards the information to the exporter. RCRA § 6938(e) (Supp. 1991).

55. RCRA § 6938(a)(C). RCRA penalizes those who knowingly export without the consent of the receiving country, or in violation of an applicable international agreement, with a fine of up to \$50,000 for each day of the violation and up to two years in prison. RCRA § 6928(d)(6).

56. *Id.* §§ 6928(d)(6)(B), 6938(f). In this instance the exporter must meet only the reporting requirements of § 6938 and conform the shipments to the terms of the Agreement. *Id.* § 6938(f).

57. *Id.*

58. See the Agreement, *supra* note 16.

Agreement's requirements.⁵⁹ While the "border area" referred to in the title of the Agreement is specifically defined as the 100 kilometers on either side of the inland and maritime boundaries between the two countries,⁶⁰ the Agreement allows for enforcement projects outside of that area.⁶¹ In addition to the problems associated with hazardous wastes, the Agreement discusses other important environmental matters.⁶²

Specific to hazardous wastes, the Agreement contemplates a notice and consent procedure through which the parties can regulate transboundary shipments.⁶³ The Agreement requires the parties to ensure that their national laws regarding transboundary shipments of hazardous wastes are enforced.⁶⁴ Hazardous waste is "any waste, as defined by the applicable designated authority pursuant to national policies, laws or regulations."⁶⁵

The requirements to complete a shipment of hazardous waste are similar to the procedures used in RCRA. The exporting country must notify the country of import at least 45 days before the expected date of shipment.⁶⁶ The notification must include all of the following: information about the exporter;⁶⁷ a description of the substances;⁶⁸ the total quantity of the waste;⁶⁹ the point of entry in the country of import;⁷⁰ the means of trans-

59. *Id.* In its Preamble, the Agreement refers to the 1972 United Nations Conference on the Human Environment, and that Declaration's call on nations to cooperate in order to solve common environmental problems.

60. *Id.* art. 4.

61. *Id.* art. 1.

62. For example, the Agreement also deals with the issues of the border sanitation problem at San Diego and transboundary air pollution caused by copper smelters. *See Annexes I-IV, Mexico-United States: Agreement to Cooperate in the Solution of Environmental Problems in the Border Area*, August 14, 1983, reprinted in, 26 I.L.M. 18 (1987).

63. *See Annex III to the Agreement, Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances*, reprinted in, 25 I.L.M. 25 (1986) [hereinafter Annex III]. Mexico has not made much progress in regard to the transboundary shipments of hazardous wastes discussed in Annex III of the Agreement. Proper disposal of wastes in Mexico is difficult as there are few officially-approved facilities and only two plants capable of handling toxic wastes. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW 223, 240 (1989). *See also infra* notes 167-74 and accompanying text.

64. Annex III, *supra* note 63, art. II(2). Unfortunately, American owned companies in Mexico cannot be forced by the U.S. government to follow Mexican laws. An agreement simply does not confer the same power a congressionally ratified treaty does. Rose, *supra* note 63, at 241.

65. Annex III, *supra* note 63, art. I(2). The designated authorities are the EPA and the Secretariat of Urban Development and Ecology (SEDUE). *Id.* art. II(2).

66. *Id.* art. III(1)-(2). The notification is to be sent to the importing country's designated authority through diplomatic channels. Also, the notification is allowed to cover a series of shipments which may take place in the following year.

67. *Id.* art. III(2)(a). The information is to include the name, address and telephone number of the exporter, as well as any information the country of export would require for an international shipment. *Id.*

68. *Id.* art. III(2)(b). The Agreement requires the wastes to be identified by the "waste identification number(s) and the shipping description(s) required in the country of export." *Id.*

69. *Id.* art. III(2)(b)(iii).

70. *Id.* art. III(2)(b)(iv).

portation;⁷¹ and a description of the expected treatment and/or storage the waste will undergo.⁷² The country of import can accept, reject, or conditionally accept the shipment.⁷³ The Agreement also allows the importing country to withdraw or amend its acceptance at any time.⁷⁴ The country of import may require that a shipment be covered by insurance or bond.⁷⁵

A violation of the Agreement or any conditions imposed on the particular shipment may result in liability under RCRA. A first time offender can be fined up to \$50,000 per day of the violation and imprisoned for up to two years.⁷⁶ RCRA also contains a number of criminal provisions concerning recordkeeping requirements; these are directly applicable to waste shipments to Mexico as access to Mexican dump sites has usually been "furtive, often arranged through private parties and unknown to government authorities, and occasionally greased by official corruption."⁷⁷ Under the applicable RCRA sections, it is a criminal violation to knowingly make material false statements in any labels, manifests, reports or records required by the statute.⁷⁸ In this same vein, there are also pertinent sections of Title 18 U.S.C. § 1001⁷⁹ that apply. For example, it is a crime under Title 18 to

71. *Id.* art. III(2)(b)(v). This includes information regarding the mode of transportation as well as the type of container used. *Id.*

72. *Id.* art. III(2)(b)(vii).

73. *Id.* art. III(4).

74. *Id.* art. III(6). In order to stay informed of the decisions of the parties banning or restricting substances in their own country, the parties are to inform each other of such actions. *Id.* art. V(1). Included in the notification of a ban or restriction on a substance, the party taking the action is to give the name of the substance and the reasons for the regulatory action. *Id.* art. V(2)(a)-(c).

75. *Id.* art. XIV.

76. RCRA § 6928(d).

77. See J. LAURENTI & F. LYMAN, *TRANSBOUNDARY CONFLICTS FROM ONE EARTH, MANY NATIONS* 28 (1990).

78. RCRA § 6928(d)(3). For a discussion of the knowledge requirements in environmental laws see generally Harris, Cavanaugh & Zisk, *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203 (1988).

79. Crimes and Criminal Procedure 18 U.S.C. § 1001 (1988). In addition to criminal liability for false statements and fraud, Title 18 authorizes criminal aiding and abetting and conspiracy. 18 U.S.C. § 2. For example, in *United States v. Ward*, in addition to his conviction for unlawful disposal of PCB's under the Toxic Substances Control Act, the defendant was convicted of conspiracy under 18 U.S.C. § 2. *United States v. Ward*, 676 F.2d 94 (4th Cir.), *cert. denied*, *Ward v. United States*, 459 U.S. 835 (1982). In *United States v. Hoflin*, the defendant, Director of City Public Works Department, was convicted of unauthorized burial of paint wastes under RCRA and aiding and abetting the unlawful disposal of wastes. *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, *Hoflin v. United States*, 110 S.Ct. 1143 (1990).

Section 1001 authorizes criminal penalties for a wide range of false statements made to the government. These are in addition to submitting false reports in RCRA. Further, these false statements lead to liability even though not made under oath or in writing. However, the statements must be made knowingly or willfully or through concealment by trick, scheme or device.

Also, federal mail and wire fraud statutes activate where mail or interstate wires or airwaves are used to further a scheme to defraud. 18 U.S.C. § 1341 (mail fraud), § 1343 (fraud by wire, radio or television). See e.g., *United States v. Gold*, 470 F. Supp. 1336 (N.D. Ill. 1979) (Mail Fraud Act used to indict chemical manufacturer and its officers for making false representations

knowingly make a false statement to the government regarding hazardous waste.⁸⁰

B. "Knowing Endangerment" Under RCRA

The most serious crime under RCRA is that of "knowing endangerment."⁸¹ Individuals violate the knowing endangerment provision when they transport, treat, store or export hazardous materials knowing that in doing so they place another in imminent danger of death or serious bodily injury.⁸² This statute sets forth special rules governing the determination of a defendant's state of mind, as well as, general and affirmative defenses.⁸³ The first conviction under the knowing endangerment provision was upheld in *United States v. Protex Industries, Inc.*⁸⁴ Perhaps the most important aspect of that case is that the court upheld a jury instruction which allowed a finding of "knowledge" upon a determination that the defendant had a "reasonable expectation" that his conduct would cause death or serious bodily injury.⁸⁵ In criminal statutes, the term "knowing" is usually defined to mean "substantially certain." At least one commentator has interpreted this and similar cases under other environmental statutes as a change in judges' attitudes toward a willingness to manipulate legal concepts in order to find liability in cases involving environmental crimes.⁸⁶

to EPA).

80. 18 U.S.C. § 1001 (1987). Fines of up to \$10,000 are allowed and, more importantly, the statute authorizes imprisonment for five years. *See also*, 18 U.S.C. §§ 1341, 1343 (using the mails or wires to defraud the United States). Again, a five year prison sentence is possible as is a fine of \$1,000.

81. RCRA § 6928(e); *see infra* notes 117-24 and accompanying text.

82. The term "serious bodily injury" is defined as bodily injury which involves a substantial risk of death, unconsciousness, extreme physical pain, or disfigurement. RCRA § 6928(f)(6). "The nation's top law enforcement agency, the United States Department of Justice, stands ready to respond forcefully to all those who intentionally abuse the fragile, defenseless life that populates in air, water and land." Thornburgh, *supra* note 21, at 776.

83. RCRA § 6928(f). For example, it is an affirmative defense that the conduct with which the defendant is charged was consented to by the person endangered.

84. 874 F.2d 740 (10th Cir. 1989). For an in-depth discussion of the knowledge requirement, *see Barrett & Clarke, Perspectives on the Knowledge Requirement of Section 6928(e) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862 (1991).

85. *Id.* at 744. The court also said that "serious bodily injury" was not unconstitutionally vague as applied to the defendant upon a finding that its employees suffered from "psychoorganic syndrome" which could have damaged their mental facilities. *Id.* at 743.

86. *See Phillips, supra* note 5, at 2-3. RCRA also punishes for knowingly transporting or causing to be transported hazardous waste to a facility which does not have a permit. 42 U.S.C. § 6928(d)(1). In *United States v. Hayes*, the eleventh circuit faced the issue of what a defendant needed to "know" to be convicted for unlawful transportation of hazardous waste. *United States v. Hayes*, 786 F.2d 1499 (11th Cir. 1986). First the court determined that knowledge of illegality, meaning knowledge of the regulations prohibiting the conduct, was not an element of the offense. *Id.* at 1503. The court determined that "it is completely fair and reasonable to charge those who choose to operate in such areas with knowledge of the regulating provisions." *Id.* Next the court held that "it would be no defense to claim no knowledge that the paint waste was a hazardous waste within the meaning of the regulations." *Id.*

As the statute expressly mentions exporters of wastes, it is possible that if the person in charge of the shipment has information regarding the way in which the substances will be handled once they reach their destination, he will be responsible for harm that comes to persons in another country. The superiors in the shipping company may also be criminally liable.⁸⁷ Ignorance that a substance is regarded as a hazardous waste is generally no defense.⁸⁸ In fact, some argue that those who routinely handle hazardous waste will be presumed by the courts to have a high degree of knowledge in their business.⁸⁹

Because strict enforcement of environmental laws in the United States causes domestic disposal costs to rise, illegal transboundary dumping remains an enticing alternative. However, as cooperation between the United States

However, the court determined that knowledge that the facility to which wastes are transported is unlicensed is an element of the offense. *Id.* at 1504. This may seem like a heavy prosecutorial burden, however, the court added that "a defendant acts knowingly if he fails to determine the permit status of a facility." *Id.* The Hayes court did not want the government to have great hardship in proving a case of transporting hazardous waste to an unpermitted facility, or in environmental cases in general, for it continued and said:

In the context of the hazardous waste statutes, proving knowledge should not be difficult. The statute at issue here sets forth procedures transporters must follow to ensure that wastes are sent only to permit facilities . . . if a transporter does not follow the procedures, a juror may draw certain inferences. . . . It is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusually low price or under unusual circumstances, than a juror can infer that the transporter knows the wastes are not being taken to a permit facility. *Id.*

Therefore, to convict under section 6928(d)(1), the government must only prove that the defendant knew what the waste was (but not that it was hazardous) and that he knew the disposal facility had no permit.

This interpretation of the statute should easily apply to transboundary shipments. It is highly unlikely that many Mexican disposal facilities are licensed under RCRA. Further, it is widely known that companies ship hazardous wastes to Mexico for cheap, though unsafe, disposal. In a transboundary case under 6928(d)(1), these two factors should combine to make proving the transporter knew the disposal facility was not permitted a relatively easy task. Therefore, if the courts find the statute applies to shipping to disposal facilities outside the United States, this provision could criminalize much of the traffic in hazardous wastes to Mexico.

87. See *United States v. Conservation Chemical Co.*, 660 F. Supp. 1236 (N.D. Ind. 1987), later proceeding, 733 F. Supp. 1215 (N.D. Ind. 1989) (president and principal stockholder of landfill corporation is a person under section 6928(a) of RCRA and thus may be held personally responsible for the waste disposal violations of the corporation).

RCRA provides, however, that under section 6928, knowledge possessed by a person other than the defendant may not be attributed to the defendant. However, circumstantial evidence may be used in proving the defendant's actual knowledge. For example, showing that the defendant actively kept himself insulated from important information. RCRA § 6928(f)(2)(B).

88. See *United States v. Hayes Int'l Corp.*, 786 F.2d 1499 (11th Cir. 1986) (lack of knowledge that paint waste was a hazardous waste within the meaning of RCRA was no defense in prosecution under section 6928(d)(1)).

89. See *Harris, Cavanaugh & Zisk*, *supra* note 78, at 235. "[T]he public welfare character of these offenses justifies conviction no matter what the intent of the defendant for the sake of the public health, safety and welfare." Webber, *Element Analysis Applied to Environmental Crimes: What Did They Know and When Did They Know It?*, 16 B.C. ENVTL L. REV. 53, 61 (1988) (giving history of "knowing" element in public welfare statutes and suggesting guidelines for violations of environmental statutes with a "knowing" requirement).

and Mexico becomes more common, and as Mexico's attention to the environment grows, spurred in part by pressure from the United States, companies should expect indictment for their illegal dumping in Mexico.⁹⁰

C. Criticisms of RCRA

Whatever improvement RCRA was over existing law, its structure and implementation is the subject of recent criticism. Some argue that EPA is an agency still riddled with weakness.⁹¹ These critics point out that the agency often assesses fines so low that violators find it cheaper to pay the fines than to obey the law.⁹² Others argue that mismanagement of RCRA has all but dissipated the hope for a remedy to the hazardous waste problem.⁹³

The EPA's Program to Control Exports of Hazardous Waste was reviewed in the spring of 1988. The auditors of the program concluded that hazardous waste brokers could disregard the regulations with virtual impunity.⁹⁴ Further, cases need to be better targeted so that the degree of malfeasance and harm to the environment and public health are reflected in enforcement strategies.⁹⁵ The way cases are handled now depends largely on who is first informed of a violation. If it is an administrative officer, the case is usually maneuvered through administrative channels; if first given to a criminal investigator, the case will proceed criminally. This sends mixed signals to the regulated community and complicates their efforts at self-policing.⁹⁶ In large part this is due United States Customs Service. Customs officials on

90. See generally Kafin & Port, *Criminal Sanctions Lead to Higher Fines and Jail*, 12 NAT'L L.J. 20 (1990). In fiscal year 1989 the Justice Department indicted 101 corporations and individuals and 107 pleas and convictions were entered, resulting in \$12.7 million in fines and fifty-three years in prison sentences. This is a dramatic increase from the only 215 criminal indictments in the years 1982-86. See Habicht, *supra* note 17, at 10480. Sixty-five of these indictments were against corporations and 150 were against individuals. *Id.*

91. See generally Lavelle, *Enforcement and the EPA*, 13 NAT'L L.J. 1 (1990).

92. *Id.* at 4. Lavelle cites five cases from Indiana, Illinois and Ohio where fines were reduced 97%, from \$18.4 million to \$410,000, during negotiations. "According to one EPA official, 'many exporters don't bother to give notice because there isn't any enforcement.'" When they do, they often don't provide information regarding the intended handling and disposal of the waste. Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ELR 10171 (1989).

93. Wolf, *Hazardous Waste Trials and Tribulations*, 13 ENVTL. L. 367, 369 (1983).

94. Boroughs, *Dirty Job, Sweet Profits*, U.S. News and World Report, Nov. 21, 1988, at 54. In 1990, the EPA reorganized its enforcement sections in the hope of gaining increased compliance. CERCLA and RCRA enforcement is now separated. James M. Strock, assistant administrator for enforcement and compliance monitoring, said that under the reorganization, RCRA will receive more attention than it has in the past, and EPA will place more emphasis on pollution prevention. *EPA Reorganizes Enforcement Office: Strock Announces Eight International Directives*, ENV'T REP., April 27, 1990, at 2012 [hereinafter *EPA Reorganizes*]. Strock announced eight new directives, including: improved enforcement of criminal provisions and regulations through increased penalty authority and knowing endangerment prosecutions, increased criminal enforcement capabilities, and increased internal cooperation. *Id.*

95. Starr, *supra* note 25, at 913.

96. *Id.* at 913-14.

the United States-Mexico border generally focus their energy on searching for weapons, drugs and illegal immigrants coming from Mexico to the United States.⁹⁷ Traffic going south is not always subject to inspection. Even when southbound traffic is inspected, the officials often lack both the knowledge and the equipment needed for on-site testing which could identify hazardous waste.⁹⁸ The EPA itself simply lacks the number of people it would need to do an adequate job of preventing the flow of hazardous waste into Mexico. Two investigators cover four western States and the United States territories in the Pacific.⁹⁹ As the possibility of getting caught illegally shipping hazardous waste is low, a deterrent factor was recently implemented: making the Federal Sentencing Guidelines applicable to environmental crimes.¹⁰⁰

IV. ENVIRONMENTAL CRIMES AND THE SENTENCING GUIDELINES

Until recently, suspended sentences or community service were the expected forms of punishment for one convicted of a crime against the environment. This was changed recently when the Federal Sentencing Guidelines Manual was amended to take environmental crimes specifically into consideration.¹⁰¹ The Guidelines now require judges to follow specific procedures in sentencing violators of certain environmental crimes.¹⁰² As a result, sentences are more definite. The possibility of parole has virtually

97. See Henry, *The Poison Trail: How Environmental Cops Tracked Deadly Waste Across the Border*, L.A. Times, Sept. 23, 1990, Magazine, at 20. "Of all the studies done by EPA, the Government Accounting Office, and constant "armchair" analysts . . . , one recurring observation stands out: too much is being asked of too few of EPA's criminal investigators." Starr, *supra* note 25, at 913 n.78.

98. *Id.* With proper training and manpower, Customs would be a major obstacle to transboundary dumpers. The Export Administration Act Amendments of 1985 give Customs authority to stop and search shipments of hazardous waste if officials have reasonable cause to believe the shipment is illegal. Further, customs officials can detain or seize shipments on probable cause. Export Administration Act, 50 U.S.C. § 2411 (1969), as amended by the Export Administration Amendment of 1985 Pub. L. No. 99-64, 99 Stat. 120 (1985).

99. Henry, *supra* note 97, at 20. Henry quotes a special agent in EPA's San Francisco based office of criminal investigations as saying: "I've got people screaming at me to go to Guam and look what's going on there. . . . The job's so massive . . . I could keep 10 or 20 people busy." *Id.* Others argue that the RCRA permitting process is overly cumbersome and discourages responsible parties from entering the field of hazardous waste treatment. See also Feder, *Symposium on Waste Management Law and Policy: Failure of the Current Waste Management Policy: The Permit Application Process Under RCRA—A Lament*, 18 ENVTL. L. 671, 681 (1988). Feder argues that the permit process consumes an inordinate amount of a company's resources. The staff time, consultant time and dollars are often thought of as better spent in activities other than permit attainment. She concludes with the assertion that "regulatory resources should be directed toward those companies trying to avoid the regulatory process altogether, rather than used to penalize those facilities that try to operate responsibly." *Id.*

100. United States Sentencing Commission, *Guidelines Manual* (Nov. 1990) [hereinafter the Guidelines, the U.S.G.A. or the Rules].

101. It has been suggested that the Guidelines were amended to take environmental crimes specifically into account as a reaction against the imposition of fines, probation or suspended sentences for often serious crimes against the environment. Kafin & Port, *supra* note 90.

102. For example, mishandling of hazardous or toxic substances, U.S.G.A. § 2Q1.2.

been eliminated, so the sentence imposed on the criminal is the sentence that will be served.¹⁰³

The Guidelines determine an offender's sentence by the use of a numerical table. A crime is given a base offense level and this figure is added to or subtracted from depending on the surrounding circumstances of the crime.¹⁰⁴ Certain characteristics of the criminal are also brought into the equation, for example, prior criminal history.¹⁰⁵ Once the total offense level is computed, the time to be served by the particular defendant is ascertained from the sentencing table.¹⁰⁶ Probation may be awarded only when the minimum time to be served in prison is less than one month.¹⁰⁷ Community confinement is considered only for those defendant's whose minimum prison term would be between one and six months.¹⁰⁸

The Guidelines allow the sentence to be lowered at the judge's discretion in only two situations. The first is upon the government's motion "that the defendant has made a good faith effort to provide assistance in the investiga-

103. Serving "good time" however, can reduce the sentence up to fifty-four days per year. 18 U.S.C. § 3624(b) (1987). No longer can judges impose a sentence, then suspend it for probation as was common practice previously. "In 1990, fifty-five percent of individual environmental criminal were given jail time, and eighty-four percent of those actually served time." Thornburgh, *supra* note 21, at 779.

104. A person with an aggravating role in the crime may have his offense base level increased by two to four levels. U.S.G.A. § 3B1.1. On the other hand, a person who accepts responsibility or shows remorse may receive a downward adjustment in the base. U.S.G.A. § 3E1.1.

105. U.S.G.A. § 4A1.1. This section provides that three levels may be added for each prior sentence of imprisonment for over one year and one month. Under the Rules however, a defendant's status as a first time offender is a much less mitigating factor than previously.

106. For example, the Guidelines provide for an offense involving the mishandling of non-hazardous environmental pollutants carries a base offense level of six. U.S.G.A. § 2Q1.3. Without any aggravating circumstances, this offense alone could result in up to six months in prison as well as a \$5,000 fine. *Id.* Sentencing Table; § 5E1.2 (fine table for individual defendants). Further, if the offense resulted in a substantial likelihood of death or serious bodily injury, the base is increased eleven levels. *Id.* § 2Q1.3(b)(2). With no criminal history points, the Guidelines prescribe a twenty-four to thirty month jail term for this offense. *Id.* Sentencing Table. If the offense violated every part of § 2Q1.3, the total offense level would be thirty-one. For an offense level of thirty-one, the Sentencing Table provides for imprisonment from 108-35 months. *Id.*

107. U.S.G.A. § 5B1.1 (a)(1). A crime of this nature has an offense level of six or below. *Id.* Sentencing Table. A judge may grant probation if the term to be served is between one and six months; however, in this case the court must impose a "condition or combination of conditions requiring intermittent confinement, community confinement, or home detention." *Id.* § 5B1.1(a)(2). The Guidelines prohibit probation if the conviction is for a class A or B felony, § 5B1.1(a)(2). The Guidelines prohibit probation if the defendant is simultaneously sentenced to imprisonment for a different offense. *Id.* § 5B1.1(b)(1)-(3). As many environmental convictions are for more than one offense, this last provision prohibiting probation if the defendant is simultaneously sentenced to prison for a different offense, should result in very few environmental criminals receiving probation. "White collar criminals, who have no prior record and are 'first time offenders', historically have been given probation. Conduct subject to sentencing under the new sentencing guidelines has resulted in more serious consequences for first-time offenders." Thornburgh, *supra* note 21, at 777-78.

108. U.S.G.A. § 5C1.1(c)(2). This would be a crime with an offense level between seven and ten. *Id.* Sentencing Table. If the total time to be served is less than six months, and includes a term of supervised release, this sentence can be satisfied by community confinement, provided that the criminal spends at least one month in jail. *Id.* § 5C1.1(c)(3).

tion or prosecution of another person who has committed an offense.”¹⁰⁹ The second is when circumstances exist which were not taken into account by the Sentencing Commission.¹¹⁰ Allowing these manipulations with a criminal’s sentence provide added flexibility to the Guidelines.¹¹¹

In addition to the possibility of a prison sentence, the Guideline’s provide for a fine to be imposed in all cases.¹¹² There are also only two exceptions to this rule. First, a judge may waive the fine if: 1) the defendant establishes that he is unable to pay,¹¹³ or 2) if the defendant establishes that the fine will work an undue burden on his dependents.¹¹⁴ While the Guidelines provide a table from which to calculate fines which is similar to the sentencing table, the judge is given a greater amount of latitude in determining the amount of a fine.¹¹⁵

As a minimum fine, the Guidelines require the defendant to pay the greater

109. U.S.G.A., § 5K1.1. The court must state its reasons for the departure from the Rules, which reasons include, but are not limited to: the court’s evaluation of the defendant’s assistance, with consideration of the government’s evaluation of the assistance; the completeness and reliability of any information or testimony provided by the defendant; any injury suffered or danger to the defendant or his family as a result of his assistance; the timeliness of the defendant’s assistance. *Id.* § 5K1.1(a)(1)-(6).

110. U.S.G.A. § 5K2.0. The court may depart from the Guidelines even if they specifically consider the reason for the departure “if the court determines that, in light of the unusual characteristics, the guideline level attached to that factor is inadequate.” *Id.* However, before departing from the Guidelines, the court must determine that the factor “is present to a degree substantially in excess of that which ordinarily is involved in the offense.” *Id.*

111. For example, the Guidelines allow a reduction in sentence for one who recognizes and accepts personal liability. U.S.G.A. § 3E1.1. These allowances provide a controlled atmosphere in which a judge can interject his view of the criminal from a closer vantage point than the Rules.

The Guidelines also allow for discretionary upward adjustments in the sentence. First, if death resulted from the offense, the judge may authorize a sentence above the Guideline range. *Id.* § 5K2.1. In making this adjustment, the judge must consider factors that normally distinguish the different levels of homicide, including the defendant’s state of mind, and the degree of planning or preparation. *Id.* Other appropriate factors are: whether multiple deaths resulted, the means by which life was taken, the extent to which death was knowingly risked and the extent to which the offense level already reflects the risk of death. *Id.* § 5K2.2.

The Guidelines also allow for upward adjustment if the crime resulted in serious bodily injury. The extent of the increase depends on “the extent of the injury, the degree to which it may prove permanent, and the extent to which it may prove permanent, and the extent to which the injury was intended or knowingly risked.” *Id.* generally, the factors of § 5K2.1 apply. Due to the extremely dangerous character of some hazardous wastes, and depending on the degree of knowledge imputed to the defendant, these provisions could result in substantial penalty increases.

112. U.S.G.A. § 5E4.2. “The amount of a fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive.” *Id.* § 5E1.2(e). In 1990, the average fine assessed in environmental crime cases was \$181,000. Thornburgh, *supra* note 21, at 778-79.

113. U.S.G.A. § 5E1.2(f).

114. *Id.* If the court decides to waive the fine, the court should consider alternative sanctions and must impose a total combined sanction that is punitive. In situations where the court decides to impose alternate punishment, the Guidelines prefer community confinement. *Id.*

115. For example, if the defendant obtained monetary gain from the crime, or if another suffered pecuniary loss, the judge may levy a fine of twice the gain to the defendant or three times the loss to the third party. U.S.G.A. § 5E1.2(c)(2).

of either the fine specified in the sentencing table, or the pecuniary gain the defendant achieved by his act.¹¹⁶ The maximum fine is the greater of the following: the amount in the table for the specific crime, twice the pecuniary loss caused by the offense, or three times the gross pecuniary gain to all of the participants in the offense.¹¹⁷

The Guidelines contain two provisions that are especially helpful in dealing with individuals who illegally haul hazardous waste to Mexico. The first provision deals specifically with recordkeeping and the falsification of records.¹¹⁸ RCRA's notice and consent procedure combined with its manifest system, ensures that the international illegal waste hauler is identified. A single violation under this provision carries a stiff prison sentence of up to eight months¹¹⁹ and a fine of up to \$10,000.¹²⁰

The second provision which concerns the potential illegal transporter deals with knowing endangerment.¹²¹ Under the guidelines, knowing endangerment is the most severe environmental crime, carrying a sentencing base level of twenty-four. An upward adjustment for this sentence is allowed if death¹²² or serious bodily injury results.¹²³ This offense standing alone

116. U.S.G.A. § 5E1.2(c)(1). If the fine is calculated from the gain to the defendant, any restitution made or ordered is subtracted from the amount he is required to pay. *Id.* § 5E1.2(1)(B).

117. U.S.G.A. § 5E1.2(2). As there is often a great disparity between the cost of legitimate disposal and illegally shipping to Mexico, maximum fines could be quite large. As disposal costs continue to increase, so will the fine ceiling. *Id.* § 5E1.2(c)(2)(A)-(C).

118. U.S.G.A. § 2Q1.2.

119. This means that the offender may not even be eligible for probation if the full eight month sentence is imposed. *See supra* notes 107-08 and accompanying text.

120. U.S.G.A. § 5E1.2(c). The base level for this offense is eight. *Id.* § 2Q1.2. If the offense resulted in a continuous discharge, the offense level is raised by six. *Id.* § 2Q1.2(b)(1)(A). If the offense caused a substantial likelihood of death or serious bodily injury, the Guidelines increase the offense level by nine. *Id.* § 2Q1.2(b)(2). If public utilities were disrupted, or the offense involved transportation, treatment, or storage without or in violation of a permit, four points are added to the offense. *Id.* § 2Q1.2(b)(3)-(4). If the offense characteristics fit into every category under this section, the criminal would have an offense level of thirty-one. This carries a minimum jail term of 108 months and a fine between \$15,000 and \$150,000. *Id.* Sentencing Table; § 5E1.2(c)(3).

121. U.S.G.A. § 2Q1.1. *See infra* notes 81-89 and accompanying text. Of course, a problem in enforcing this provision in the context of the discussion herein is applying it to endangering persons who are not in the United States. When faced with a similar question, the D.C. circuit, in 1981, found that neither NEPA nor any nuclear regulatory act, required environmental impact statements from nuclear exports that might cause harm wholly within a foreign jurisdiction. *Natural Resource Defense Council, Inc. v. Nuclear Regulatory Com.*, 647 F.2d 1345, 1347-48 (D.C. Cir. 1981). If this holds true in the environmental field as well, then prosecutors will have to focus even more intently on the recordkeeping requirements.

122. U.S.G.A. § 5K2.1, p.s. The Policy Statement does not suggest the amount the sentence imposed should be increased if death is a result of the offense. Factors to consider are: (1) the defendant's state of mind; (2) the degree of planning or preparation; (3) the amount of risk that death would result; (4) and the extent the Offense level already reflects this risk of death. *Id.*

123. U.S.G.A. § 5K2.2, Policy Statement. Again, the Policy Statement does not suggest the amount which the sentence should be increased if serious bodily injury results from the offense. The Policy generally follows the same considerations as if death resulted.

can result in over five years in prison.¹²⁴ In addition, the judge may impose a fine of up to \$100,000.¹²⁵ When taken together, the two offenses of falsification and knowing endangerment can result in a prison term of over twelve years and a fine of up to \$175,000.¹²⁶ In order to impose these punishments, however, the criminal must first be caught, therefore cooperation between the United States and Mexico is essential.

V. UNITED STATES-MEXICO LEGAL ASSISTANCE TREATY

A tool in implementing further cooperation between the United States and Mexico is the Mutual Legal Assistance Cooperation Treaty.¹²⁷ The Treaty does not give one country the power to carry out, in the territory of the other, functions entrusted to its law enforcement authorities by the national laws of that country.¹²⁸ However, it does facilitate coordination between the two countries' legal authorities in preventing, investigating and prosecuting crimes.¹²⁹ Generally, the parties may deny a request for assistance only if: granting the request would require the requested authority to overreach the legal provisions in force in that State,¹³⁰ carrying out the request would jeopardize a party's security,¹³¹ or the request is of a political nature.¹³² The party requested may limit its assistance to comply with its domestic laws.¹³³

A request for assistance must be submitted in writing and in the language

124. U.S.G.A. § Sentencing Table. A base offense level of twenty-four carries a possible prison term of between fifty-one and sixty-three months.

125. U.S.G.A. Sentencing Table; § 5E1.2(c)(3). This is because, combined, the crimes of knowing endangerment and falsification carry a base level of thirty-two.

126. This is assuming, of course, that there are no aggravating factors. If a defendant had for example, thirteen Criminal History Points in this situation he could get up to nine additional years added to his sentence. *Id.* Further, if death or serious bodily injury resulted from either crime, and the defendant knowingly risked such death or injury, the Guidelines warrant a substantial increase in the penalty. *Id.* §§ 5K2.1; 5K2.2.

127. Mutual Legal Assistance Cooperation Treaty with Mexico, signed on Dec. 9, 1987, reprinted in, 27 I.L.M. 443 (1988) [hereinafter Treaty]. The assistance mentioned in the Treaty refers to legal assistance in criminal matters.

128. *Id.* art. 1(2).

129. *Id.* art 1(1). "The Parties shall cooperate with each other by taking all appropriate measures that they have legal authority to take, in order to provide mutual legal assistance in criminal matters, in accordance with the terms of this Treaty and subject to the limitations of their respective legal provisions." *Id.*

130. *Id.* art. 1(3)(a). In this case the parties are to explore alternative means for securing assistance.

131. *Id.* art. 1(3)(b).

132. *Id.* art. 1(3)(c). Furthermore, a request can be denied if it does not comply with the provisions of the Treaty. *Id.* art. 1(3)(e). Finally, a request can be denied if it relates to military offenses, unless the action is also prohibited under ordinary criminal law. *Id.* art 1(3)(d).

133. *Id.* art. 3. The Treaty requires the requested party, before it refuses assistance, to determine "whether there are conditions whose satisfaction would make possible the rendering of assistance." *Id.*

of the State receiving the request.¹³⁴ The Procuraduria General de la Republica and the Department of Justice are the authorities which coordinate and carry out any requests in their respective countries.¹³⁵ A request for assistance must include the name of the authority requesting the assistance, the subject matter of the investigation, a description of the evidence sought, the expected uses of the evidence, and the method through which the request should be executed.¹³⁶ Unless otherwise authorized, requests are kept confidential.¹³⁷

The Treaty authorizes a wide range of areas in which the parties are authorized to cooperate. A party may request assistance in: taking testimony;¹³⁸ providing documents or records;¹³⁹ executing searches and seizures;¹⁴⁰ taking steps to secure, immobilize or forfeit assets;¹⁴¹ transferring persons for testimonial or identification purposes.¹⁴² When the testimony of a person is requested, that person can be compelled to appear by subpoena and required to produce documents.¹⁴³ All claims of immunity or privilege under the laws of the state requesting the testimony are to be resolved by the competent authorities in the state from which the person or documents are requested.¹⁴⁴ The requesting party may specify persons to attend the taking of testimony.¹⁴⁵

Transferring persons is more restricted. A person need be transferred only if that person consents and the requested state has no reasonable basis to deny the request.¹⁴⁶ Once the requesting state has the transferred person,

134. *Id.* art. 4(1). A request may be oral in cases of urgent need so long as the request is later formalized into a writing. *Id.*

135. *Id.* art. 2(1).

136. *Id.* art. 4(2). If possible, the request should also include information regarding the identity and appearance of the person to be located, a precise description of the type of search to be conducted and the type of material seized, and any other information that would help implement the request. *Id.* art. 4(3)(a)-(e).

137. *Id.* art. 4(5). "If the request cannot be executed without breaching the required confidentiality, the Coordinating Authority of the requested Party shall so inform the Coordinating Authority of the requesting Party, which shall then determine whether the request should nevertheless be executed." *Id.*

138. *Id.* art. 1(4)(a).

139. *Id.* art. 1(4)(b).

140. *Id.* art. 1(4)(c).

141. *Id.* art. 1(4)(d).

142. *Id.* art. 1(4)(e).

143. *Id.* art. 7(1). The foreign person can be requested to testify or produce documents to the same extent as in all other criminal investigations in the requesting country. *Id.*

144. *Id.* art. 7(2). To accomplish this, after the requested state takes the testimony, it is forwarded to the requesting state where the claims are resolved by competent authorities. *Id.*

145. *Id.* art. 7(4). The requested party must authorize the presence of all such persons who will attend. To help facilitate this, the requested party is required to inform the requesting party of the date and place for the taking of the testimony, and when possible the Coordinating Authorities will consult to reach a mutually agreeable date. *Id.* art. 7(3).

146. *Id.* art. 8(1). This provision applies only to persons in the custody of the requested state and who is needed as a witness or for identification purposes. *Id.*

they must keep him in custody unless the requested state allows otherwise.¹⁴⁷ The person transferred is to be returned as soon as possible,¹⁴⁸ and the requested state does not need to initiate extradition procedures to ensure the persons return.¹⁴⁹ Finally, any time served in the custody of the requested state is to be credited to any sentence later imposed on the person in the country requesting assistance.¹⁵⁰ The above procedures help law enforcement agencies enforce their laws across the boarder; however, the process for enforcing United States law on the shipper who resides, or hides, in Mexico, is still cumbersome, and may be impossible, as the Treaty does not guarantee the transfer of persons.

Under the Treaty a request for search and seizure can be carried out so long as the request includes enough information necessary to justify such action in the requested state.¹⁵¹ One state may take it upon itself to inform the other when it believes that the spoils or instrumentalities of a crime committed in the other country are located in its territory,¹⁵² and can take action related to securing the items or the collection of fines.¹⁵³ Once a seizure is completed, the authority which executed the seizure may be requested to certify the items' identity, its condition, and the continuity of custody regarding the item, so that this certificate is admissible in evidence.¹⁵⁴ These provisions simplify the procedures for obtaining evidence against transboundary dumpers.

VI. MEXICAN ENVIRONMENTAL LAW

The Treaty can be utilized by Mexico as well as the United States, and the illegal shipper of hazardous wastes should realize the real future possibility of prosecution under the federal laws of Mexico. On March 1, 1988, Mexico passed the General Law of Ecological Equilibrium and Environmental Protection ("General Law").¹⁵⁵ This superseded the six-year-old Federal Law for the Protection of the Environment ("Federal Law").¹⁵⁶ The

147. *Id.* art. 8(2)(a).

148. *Id.* art. 8(2)(b). Alternatively, the Coordinating Authorities may agree to a time for the person's return. *Id.*

149. *Id.* art. 8(2)(c).

150. *Id.* art. 8(2)(d).

151. *Id.* art. 12(1). If the information is sufficient, the requested party can deliver any object acquired under the search to the requesting party, and the object is admissible in evidence. *Id.*

152. *Id.* art. 11(1).

153. *Id.* art. 11(2). In this regard, the Treaty requires the parties to assist each other "to the extent permitted by their respective laws." *Id.*

154. *Id.* art. 12(2). The requesting party can specify what information the certificate should contain. *Id.*

155. *New Law Takes Effect, Enveloping 1982 Law; Penalties Based on Norms Not Yet Developed*, 11 INT'L ENV'T. REP. 8 (1988) [hereinafter *New Law*].

156. Smith & Falzone, *Foreign Environmental Legal Systems—A Brief Review*, 11 INT'L ENV'T. REP. 621, 633 (1988) [hereinafter *Environmental Legal Systems*].

General Law attempts to administer Mexico's environmental policy in a more organized fashion. Unlike the old law, the General Law is specifically concerned with hazardous wastes.¹⁵⁷ For example, importation of hazardous wastes for the purpose of "deposit, storage, or containment" is prohibited.¹⁵⁸ Therefore, shipment to anywhere except a factory which has use for the waste is a violation.

The General Law metes out both administrative and criminal penalties for transgressions. Acts which endanger the public health and/or severely damage ecosystems are criminal.¹⁵⁹ Violation of these regulations can yield a prison term from three months to six years as well as fines ranging between 100 and 10,000 times the daily minimum wage.¹⁶⁰ If the environmental crime endangers a highly populated area, a jail sentence of up to nine years and a fine of up to 20,000 times the daily wage may be imposed.¹⁶¹ Furthermore, the 1988 law also authorizes prison terms and heavy fines for unauthorized discharge of hazardous waste and toxic substances.¹⁶²

Perhaps the most important aspect of the new law is that it criminalizes the unauthorized import of hazardous substances. A person convicted of this crime faces the possibility of imprisonment anywhere from three months to six years,¹⁶³ and imposition of a fine of between 1,000 and 20,000 times the daily wage.¹⁶⁴

The General Law is a much greater deterrent to international haulers of illegal wastes than was the Federal Law. Previously the closest thing to a prison sentence for a crime against the environment was the possibility of administrative arrest of up to thirty-six hours for failure to pay a fine.¹⁶⁵ Critics of Mexico's earlier environmental policy were encouraged when Manuel Camacho Solis was named secretary general of the ruling party in Mexico in 1988.¹⁶⁶ He was previously the ecology secretary and was instrumental in implementing the General Law.

157. *Id.*

158. *Id.* Imports of toxic substances is further prohibited if their use is not allowed in the country of manufacture. *Id.*

159. *New Law, supra* note 155, at 8.

160. *Id.* In 1988, the minimum wage in Mexico City was equivalent to \$3.38. *Id.*

161. *Id.*

162. *Id.* at 9. The new law imposes fines of between 1,000 and 20,000 times the daily minimum wage and prison terms from three months to six years for unauthorized discharges. *Id.*

163. *Environmental Legal Systems, supra* note 156, at 633. Under the new law, hazardous materials or residues cannot be imported solely for deposit, storage, or containment. *Id.* If properly enforced, this provision could be a major obstacle to waste exporters from the United States. Whether exporters can get around the word "solely" by putting the wastes through a process, whether sham or legitimate, and then disposing of them, remains to be seen.

164. *Id.*

165. While the fines could range as high as 20,000 times the daily minimum wage, neither the time nor the arrest implied criminal responsibility.

166. *Naming of Camacho Solis to Position Said to Show Intent to Make Environment Priority*, 11 INT'L ENV'T. REP. 500 (1988).

Though the General Law is considered a vast improvement over the old law, it is still criticized. There have been complaints that the law is confusing.¹⁶⁷ Part of this confusion is due to the difficulty of completing the heavy load of paperwork required by the law, especially for companies which must comply with the environmental regulations on both sides of the border.¹⁶⁸

Even with the General Law the Mexican government is still criticized for a lack of enforcement. Less than 25% of industry send in the required monthly reports.¹⁶⁹ Even though the General Law regulates hazardous substances, "tons . . . are thrown in municipal dumps, in . . . empty lots, rivers and pastures on a daily basis."¹⁷⁰ As a developing country, Mexico's need for increased economic growth has often thwarted enforcement.¹⁷¹ So while the General Law is superficially impressive, aggressive implementation is not encouraged, for doing so would hinder industrial expansion.¹⁷² The Mexican enforcement system also suffers from inefficiency and corruption.¹⁷³ The Mexican Secretariat of Urban Development and Ecology's lack of manpower, training and funding¹⁷⁴ only exacerbates the problem of operating in the highly centralized, bureaucratic Mexican government.¹⁷⁵ Once the General Law matures past its developmental stage and the government can better assess its environmental standing, more vigorous enforcement is expected.¹⁷⁶

VII. INPUT FROM THE UNITED NATIONS

There are a number of international treaties that deal with the problem of

167. *Mexican Environmental Rules*, *supra* note 3, at 549. The article cites one company's report after asking the government for advice on what to do with their wastes, environmental authorities said the substances could be treated as if they were as safe as distilled water. Freon was just one of the hazardous materials in the company's wastes.

168. *Id.*

169. *Mexican Environmental Rules*, *supra* note 3, at 549. *See infra* note 94 and accompanying text.

170. *Mexican Environmentalists Want International Environmental Court*, 13 INT'L ENVTL. REP. 462 (1990). The article was quoting a spokesman for the Federal Ecology Secretariat.

171. *Environmental Legal Systems*, *supra* note 156, at 621. This is true even though the Mexican government has recognized the great dangers of environmental damage. In an effort to boost their economy, the Mexican government invited U.S. asbestos companies to relocate there. Monetary problems place one limit on SEDUE's ability to act. Another limit was local opposition to planned waste disposal sites. Rose, *Transboundary Harm: Hazardous Waste Management Problems and Mexico's Maquiladoras*, 23 INT'L LAW. 223 (1989).

172. *Environmental Legal Systems*, *supra* note 156, at 621.

173. *Id.*

174. *Mexican Manufacturing Program*, *supra* note 7, at 306.

175. *Environmental Legal Systems*, *supra* note 156, at 621.

176. *Mexican Environmental Rules*, *supra* note 3, at 549.

transboundary movements of hazardous wastes.¹⁷⁷ The latest, and perhaps most important, of these agreements is the Basel Convention of the Control of Transboundary Shipments of Hazardous Wastes and their Disposal.¹⁷⁸ The Final Act of the Basel Conference was the result of six sessions of the *Ad Hoc* Working Group.¹⁷⁹ Representatives from over fifty organizations and experts from ninety-six countries participated in the Convention.¹⁸⁰ In addition to the organized meetings, the Executive Director of the Environment Programme conducted informal negotiations with Governments, organizations and industry in the long planning stage of the Convention.¹⁸¹

Basel established an international notice and consent structure for the management of transboundary hazardous wastes shipments.¹⁸² The types of wastes which Basel defines as hazardous are listed in the Annexes to the convention.¹⁸³ A party state which is contemplating an export of hazardous wastes is required to first notify the competent authority in the states concerned.¹⁸⁴ This notification is to contain specific information about the

177. For example, the United Nations Conference on the Human Environment: Final Documents, U.N. Doc. A/CONF.48/14 and Corr.1, June 16, 1972, *reprinted in*, 11 I.L.M. 1416 (1972).

178. United Nations Environment Programme Conference of the Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes: Final Act and Text of Basel Convention, U.N.E.P. Document IG.80/L.12, March 22, 1989, *reprinted in* 28 I.L.M. 649 (1989) [hereinafter *Basel*]. As of May 10, 1991, the United States had not yet ratified the Basel Convention. President Bush had sent Congress legislation which would ratify Basel on May 6, entitled, the Hazardous and Additional Waste Export and Import Act of 1991. *Administration Proposes Legislation to Ratify Basel Accord on Hazardous Wastes*, ENV'T REP., May 10, 1991, at 113. EPA officials suggest two reasons for ratifying Basel. First, most expect the European Community to ratify in the fall. *RCRA Bill on Basel Said To Have "High Probability"*, PESTICIDE & TOXIC CHEMICAL NEWS, May 1, 1991, at 10. The article cites an EPA waste export fact sheet as saying ratification of the bill will require consent by the Senate, implementing legislation, and promulgation of regulations. *Id.* at 11. If the United States does not ratify as well, implementation discussions will take place without American participation. Second, Basel dictates that if it does not ratify, the United States is prohibited to export hazardous wastes to or import from ratifying countries. *Basel*, art. 4. This exclusion from trade in hazardous wastes is a strong force moving the ratification of Basel forward. *RCRA Bill on Basel Said To Have "High Probability"*, PESTICIDE & TOXIC CHEMICAL NEWS, May 1, 1991, at 10. Further, the United States will not have a hand in developing protocols on such issues as liability and defining environmentally sound management. Due to the extreme importance of these provisions, the United States would be well advised to ratify Basel in time to play a part in defining these terms.

179. U.N.G.A. Doc. A/44/479 (1989).

180. *Id.*

181. *Id.*

182. *Id.* art. 6.

183. *Id.* Annex I. Annex III, goes on to list hazardous characteristics of wastes. RCRA and Basel do not regulate the same range of wastes. RCRA regulates only transboundary shipments of hazardous wastes, while Basel covers hazardous wastes, household waste and residues from the incineration of household waste. *Id.* art. 1, Annexes I-IV.

184. A "State concerned" is defined as a party which is the state of export or import or a state through which the shipment will pass. *Id.* art. 2(6). A "competent authority" is the governmental authority designated by a party to be responsible for receiving the notification of a transboundary movement and any information related to it. *Id.* art. 2(13). One difference between RCRA and Basel is types of the wastes covered. RCRA only limits exports of hazardous wastes while Basel's scope encompasses hazardous waste, household waste and residues from the incineration

shipment and must be written in a language acceptable to the country of import.¹⁸⁵ After receipt of notification, the state of import is to respond in writing by either granting or denying permission for the shipment of wastes.¹⁸⁶ Shipment is not supposed to commence until the state of export has received written confirmation that the state of import has consented in writing, and the exporter has a contract with a disposer which specifies that the waste in question will be managed in an environmentally sound manner.¹⁸⁷ In addition, the state of export is not allowed to move the waste until it has received the written consent of all transit states.¹⁸⁸ Basel gives states of transit sixty days in which to respond in writing.¹⁸⁹ If no response is received after that time, the state of export may allow the shipment to proceed.¹⁹⁰ Basel contains a simplified procedure for wastes which have the same physical and chemical characteristics as wastes which are regularly shipped through the same routes: the state of export may allow the generator or exporter to use a general notification if the states concerned agree.¹⁹¹ Basel requires the person who is responsible for the shipment to

of household waste. *Id.* art 1, Annexes I-III.

185. *Id.* art. 6(1). The information to be contained in the notification is outlined in Annex V(A). The Convention requires the state of export to provide such information as the reason for the waste export, the name of the disposer and the site of the disposal as well as identification of the carrier. In all, twenty-one separate categories of information must be satisfied.

186. *Id.* art. 6(2). The receiving nation may accept the shipment subject to any conditions it wishes to impose.

187. *Id.* art. 6(3). This particular provision seems more strict than RCRA's mere notification and consent requirement. "Environmentally sound management" is defined as "taking all practicable steps to ensure that hazardous wastes . . . are managed in a manner which will protect human health and the environment against adverse effects which may result from such wastes." *Id.* art. 2(8). "The Basel Convention took a step toward removing [the incentives of avoiding high waste management costs and avoiding liability under U.S. environmental laws] by requiring environmentally sound management of waste in the country to which waste is exported." Johnson, *supra* note 9, at 316.

188. U.N.G.A., *supra* note 179, art. 6(4). RCRA does not require the consent of countries through which the waste will travel prior to authorizing a shipment of hazardous waste. Further, RCRA does not give the EPA authority to halt shipments to which transit countries object. This requirement should help ease the apprehensions some have about the prospects of an international incident. "If I were United States Secretary of State," said Sen. George Mitchell (D-ME.) during the 1984 deliberations on HSWA, "I would want to be sure that no American ally or trading partner is saddled with United States wastes it does not want or does not have the capacity to handle in an environmentally sound manner." Handley, *Hazardous Waste Exports: A Leak in the System of International Legal Controls*, 19 ELR 10171 (1989).

189. U.N.G.A., *supra* note 179, art. 6(4). In the writing, the state of transit may consent "to the movement with or without conditions, deny permission for the movement, or request additional information." *Id.*

190. *Id.* art. 6(4). If a party decides not to require prior written consent, either generally or under specific conditions, then the exporting state may allow the shipment to proceed if no response is received sixty days after notification is sent to the transit state. However, the exporting state shall not allow the shipment to proceed until it has received written consent. *Id.*

191. *Id.* art. 6(6). Basel defines a "generator" as: "any person whose activity produces hazardous wastes or other wastes or, if that person is not known, the person who is in possession and/or control of those wastes." *Id.* art. 2(18). An "exporter" is defined as "any person under the jurisdiction of the state of export who arranges for hazardous wastes or other wastes to be exported." *Id.* art. 2(15). The manner in which states concerned agree to such a

sign a movement document either upon delivery or receipt of the shipment in question.¹⁹² The disposer must inform both the exporter and a competent authority in the state of export upon receipt of the waste and again at the time of actual disposal.¹⁹³ Finally, Basel requires all transboundary waste shipments to be covered by insurance.¹⁹⁴

Under Basel, a country may prohibit the import of hazardous waste for disposal in its territory.¹⁹⁵ When a country is notified of another's decision not to accept a waste shipment, the state of export "shall prohibit or shall not permit the export of waste . . . to the Parties which have prohibited their import."¹⁹⁶ Also, parties are required to prohibit the export of hazardous waste to a country that does not consent in writing to the *specific* import.¹⁹⁷ parties are further prohibited from exporting if the state of export believes or has reason to believe that the substances will not be handled in an environmentally sound manner.¹⁹⁸ Basel also requires the parties to inform the Secretariat of the Convention of any substances deemed hazardous under its national legislation and of any requirement regarding transboundary movements of these wastes.¹⁹⁹

Perhaps the most significant aspect of Basel is that "[t]he Parties consider that illegal traffic in hazardous wastes is criminal."²⁰⁰ Illegal traffic is any transboundary movement of hazardous waste: (a) without notification pursuant to the provisions of the Convention;²⁰¹ (b) without the consent of

process is governed by article 6(7).

192. *Id.* art. 6(9). This requirement applies to "each person who takes charge of a transboundary movement of hazardous wastes or other wastes." *Id.* This seems to mean that whenever the wastes change hands, even from one transporter to the next, that person must sign the movement document. This should help ease the tracking of hazardous waste shipments, *see infra* note 215 and accompanying text.

193. U.N.G.A., *supra* note 179, art. 6(9). If no such information is received, this section requires the state of export to notify the state of import.

194. *Id.* art. 6(11). This information must be provided to the state of import before the shipment is made. *Id.* Annex V (A)(12).

195. *Id.* art. (4)(1)(a). The country should inform the other parties of the decision as soon as possible. *Id.* art. 13(2)(c).

196. *Id.* art. 4(1)(b).

197. *Id.* art. 4(1)(c). This provision applies to the case where the state of import has not prohibited the import of the waste in question. *Id.*

198. *Id.* art. 4(2)(e). The Convention stresses this article as it applies to "developing countries." Under RCRA, the EPA has no authority to stop shipment of hazardous wastes once the receiving country agrees to accept the shipment. This is true even though EPA knows the waste will not be handled properly.

199. *Id.* art. 3(1). The Export Administration Act may give authority to halt shipments which the government believes will not be handled in an environmentally sound manner. 50 U.S.C. App §§ 2402-2420. The statute gives the President authority, which has been delegated to the State Department, to halt shipments to further the foreign policy of the United States or to fulfill declared international obligations. U.N.G.A., *supra* note 179, at § 2405. *See supra* note 186 and accompanying text. This applies to all wastes not already listed in Annexes I and II. *Id.*

200. U.N.G.A., *supra* note 179, art. 4(3). Article 2(21) defines "illegal traffic" as "any transboundary movement of hazardous wastes or other wastes as specified in Article 9." Article 9 then goes on to list those conditions which will cause a shipment of wastes to be deemed illegal.

201. *Id.* art. 9(1)(a).

a state concerned;²⁰² (c) with consent which was obtained through falsification or fraud;²⁰³ (d) that does not comply in a material way with the movement documents;²⁰⁴ or (e) is a shipment that results in the deliberate disposal of hazardous wastes in contravention of the convention.²⁰⁵

Basel assigns responsibility for illegal shipments according to whose conduct, the exporter or importer's, was the impetus for the movement. If an illegal international shipment is found to be the result of action on the exporter or generator's part, then the state of export is required to take responsibility for the shipment.²⁰⁶ The state of export must ensure that the particular waste is taken back by the exporter or generator.²⁰⁷ If this can not be accomplished, the state of export itself must take control of the waste²⁰⁸ and dispose of it in a manner consistent with the Convention.²⁰⁹ Basel requires that the above action take place within thirty days from the time the illegal traffic is reported to the state of export.²¹⁰

A similar situation arises for the state of import if the illegal transport of hazardous waste was the result of conduct by the importer or disposer of the shipment.²¹¹ Within thirty days after the state of import learns of the illegal shipment, it is required to ensure that the waste is disposed of in an environmentally sound manner by either the importer or disposer of the waste, or the state of import itself.²¹²

Basel also provides for situations in which responsibility for a shipment can be assigned to neither the exporter or generator nor to the importer or disposer.²¹³ In this situation, cooperation between countries is essential.²¹⁴ Basel calls upon not only parties concerned with the shipment, but

202. *Id.* art. 9(1)(b).

203. *Id.* art. 9(1)(c).

204. *Id.* art. 9(1)(d).

205. *Id.* art. 9(1)(e). Basel also refers to deliberate disposal as dumping. *Id.*

206. *Id.* art. 9(2).

207. *Id.* art. 9(2)(a).

208. *Id.* art. 9(2)(a).

209. *Id.* art. 9(2)(b).

210. *Id.* art. 9(2)(b). States concerned may agree on a different time period if they so desire. In regard to those States which will be concerned about the return of the wastes, for example, those States which the shipment must pass through in order to be returned to the State of export, Article 9 requires them to allow the shipment to pass through their territory and to not hinder its progress.

211. *Id.* art. 9(3).

212. *Id.* art. 9(3). Again, if needed, the States concerned are required to cooperate in any way necessary to ensure the wastes are disposed of in an environmentally sound manner.

213. *Id.* art. 9(4).

214. Article 10 of the Convention covers general areas in which the Parties should cooperate in besides dealing with illegal shipments of hazardous wastes which can not be assigned to a specific responsible Party. Such areas include: the monitoring of the effects of hazardous wastes on human health and the environment, and the development of new low-waste technologies and the improvement of existing technologies in order to reduce the generation of hazardous wastes.

Information and technology transfers are important and common features of many international Agreements, especially those concerning the environment. See the Agreement, *supra* note 16,

other parties as well, to the extent appropriate.²¹⁵ Through cooperation, the international community is required to dispose of the wastes in an environmentally sound manner as soon as possible.²¹⁶ This disposal need not be in the state of export or the state of import, but in any place "appropriate."²¹⁷ In this way, Basel tries to ensure the environmentally sound management of hazardous waste.

While the Basel Convention deals with the problem of hazardous wastes in a thoughtful and thorough manner, it too has been the object of some pointed criticism. Some critics contend that instead of being an obstacle to the transboundary shipment of hazardous wastes, Basel merely provides a system with which to better track these shipments.²¹⁸ Further, there are loopholes in the Final Act which may actually encourage illegal traffic in hazardous wastes. While Article 9 requires the state of export of an illegal shipment of hazardous wastes to reimpose the shipment if the exporter or generator is responsible for the shipment, the Article limits this requirement with the qualifying phrase "if practicable."²¹⁹ If reimportation is not "practicable," then the state of export must only ensure that the shipment is disposed of in an environmentally sound manner.²²⁰ This situation is aggravated by Basel's requirement that the state of import manage the waste in an environmentally sound manner in all circumstances.²²¹ Furthermore, the parties concerned must ensure that proper care is taken of shipments for which a responsible party can not be found.²²² This combination is believed to actually encourage illegal shipments, for if completed in such a manner that the exporter is unknown or reimportation to the state of export is "impracticable,"²²³ the exporter is assured of the disposal of the

arts. 6 and 16.

215. U.N.G.A., *supra* note 179, art. 9(4).

216. *Id.* art. 9(4).

217. *Id.* art. 9(4).

218. *Thirty-Four Countries Sign Convention on Transport, Disposal of Hazardous Wastes*, 12 INT'L ENVTL. REP., 159 (1989). These critics go on to assert that Basel grants industrialized nations formal permission to use developing nations as dumping grounds for their hazardous wastes.

219. U.N.G.A., *supra* note 179, art. 9(2)(a).

220. *Id.* art. 9(2)(b).

221. *Id.* art. 4(8).

222. *Id.* art. 9(4).

223. The Convention does not define this term, although, as seen in this context, its meaning is quite important. Webster's defines "impracticable" as: "not capable of being carried out in practice . . . not capable of being managed or dealt with." WEBSTER'S UNABRIDGED DICTIONARY 916 (2d ed. 1983). This definition strengthens the argument that Basel merely gives industrialized nations free license to dump on the Third World, as developing countries will generally not have the equipment necessary to transport the wastes safely out of their territory.

waste.²²⁴ The disposer, at least, is assured that the waste is now out of its hands, which is its goal in making the shipment in the first place.

CONCLUSION

Environmental awareness is spreading at an incredible rate. Added to this growing awareness is a growing body of law. Strict environmental statutes and criminal prosecution in the United States for environmental crime is gaining more acceptance. Mexico also has its own environmental laws, and with Basel, so does the world.

RCRA imposes stiff penalties for violations. However, EPA must learn to coordinate its efforts with other agencies, especially Customs in order to stop transboundary dumping of hazardous waste. To accomplish this, Congress must increase agency budgets. If the environment is a priority, then the agencies in charge of policing it must be given the power to operate efficiently and effectively.

Also, cooperation between the United States and Mexico is crucial. In this regard, the means for cooperation are already in place. The United States-Mexico Border Agreement gives the two countries a device with which they can monitor shipments of hazardous waste across the border. If this information is studied, authorities will know who is illegally disposing of the waste in Mexico, and falsifying records in the United States.

The United States-Mexico Legal Assistance Treaty can be utilized as well to help identify the persons involved in illegal transboundary shipping of hazardous waste. Through the Treaty, the countries can secure testimony and tangible evidence to use against the violator in court.

Nowhere in the process of stopping illegal shipments is cooperation more important than in the Basel Convention. The parties must work together to ensure that the Convention serves a higher purpose than a mere tracking device. Through strict adherence to the terms of the Convention, the United States and Mexico may at least ensure that hazardous waste, regardless of its final destination, is dealt with in a responsible manner. Without cooperation, however, Basel is all but useless.

As the United States and Mexico begin to work together, those who violate the regulations to unload their hazardous wastes cheaply in Mexico will find themselves facing long prison sentences and heavy fines. Industries producing hazardous waste will be left with only two alternatives; keep making its tremendous amounts of waste and simply pay the ever increasing disposal costs in order to comply with the law, or reduce the amount of waste they

224. Others believe the requirement of managing wastes in an environmentally sound manner is important "because it imposes a degree of responsibility on exporting countries for the management of their waste in receiving countries, and requires exporting countries to ensure that waste is not being exported from the country simply to avoid the high cost of managing the waste in an environmentally sound manner domestically. This may remove some of the incentive for exporting waste." Johnson, *supra* note 9, at 315.

produce. Through internal recycling and more efficient processing methods industry can lower its disposal costs,²²⁵ thereby removing the incentive to dump in Mexico. Surely this is the preferred solution. Meanwhile, an American or Mexican jail cell awaits the transboundary dumper.²²⁶

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225. See Gordon, *Legal Incentives for Reduction, Reuse, and Recycling: A New Approach to Hazardous Waste Management*, 95 YALE L.J. 810 (1986) (for a discussion of the legal incentives, and lack thereof, for source reduction of wastes and a discussion on the benefits of such). The author states that the 3M company has saved over \$150 million through source reduction worldwide, and small companies save by selling wastes through exchanges instead of paying for disposal. *Id.* at 820. Presently, only six states have source reduction legislation. *Id.* at 821. For an in depth discussion of European plans to minimize hazardous waste production see Williams, *A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste*, 14 B.C. ENVTL. AFF. L. REV. 165 (1987).

226. In 1990, the Department of Justice indictment rate for environmental crimes jumped thirty-three percent over 1989. The Department's conviction rate for environmental crimes was ninety-five percent. Thornburgh, *supra* note 21, at 778. "Of the 134 indictments returned in 1990, 98% have named corporations, presidents, owners, vice-presidents, directors, and managers as defendants." *Id.* at 779 n.21.

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