UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)
	)
Rollins Environmental Services (TX), Inc.,	) Docket No. RCRA-VI-106-H
	)
Respondent	)

ORDER DENYING MOTION FOR ACCELERATED DECISION OR ALTERNATIVE MOTION TO DISMISS

This proceeding under section 3008(a) of the Solid Waste Disposal Act, as amended, commonly referred to as the Resource, Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a), was commenced by the filing, on March 6, 1991, of a Complaint, Compliance Order and Notice of Opportunity for Hearing charging Respondent, Rollins Environmental Services (TX), Inc. (Rollins), with the receipt of hazardous waste from a foreign source (Mexico) on several occasions without notifying the Executive Director of the Texas Water Commission, presently the Texas Natural Resources and Conservation Commission, at least four weeks in advance as required by 31 TAC § 335.152(A)(1) (40 CFR § 264.12).[1] For these alleged violations, Rollins was ordered to comply with the cited regulation and it was proposed to assess it a penalty of $60,750.

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[1] The Texas regulation, 31 TAC § 335.152(A)(1), has been redesignated as 30 TAC § 335.152(A)(1) and adopts 40 CFR § 264.12 by reference.

Rollins answered, admitting the receipt of all but one of the shipments of hazardous waste identified in the complaint, denying knowledge that identified shipments originated in Mexico except where the manifests indicated otherwise and admitting that it had not notified the Executive Director at least four weeks in advance of receipt of the shipments. Rollins, however, denied any obligation to notify the Executive Director for the reason that the shipments were not from a foreign source, denied that it had made any arrangements to receive the wastes and requested a hearing.

In compliance with an order of the ALJ, Rollins served a motion for accelerated decision or, in the alternative, a motion to dismiss on January 14, 1994. Rollins alleged that there was no genuine issues of material fact and that it is entitled to judgment as a matter of law.

The regulation Rollins is accused of violating, 40 CFR § 264.12(a), requires that a facility which has arranged to receive hazardous waste from a foreign source must give the Executive Director four-weeks advance notice.[2/]

[2/] The cited regulation, § 264.12(a), provides:

> (a) The owner or operator of a facility that has arranged to receive hazardous waste from a foreign source must notify the Regional Administrator in writing at least four weeks in advance of the date the waste is expected to arrive at the facility. Notice of subsequent shipments of the same waste from the same foreign source is not required.

Rollins contends that the wastes referred to in the complaint, so-called "Maquiladora Wastes," are not wastes from a foreign source in accordance with Article XI of Annex III to the "Agreement of Cooperation Between the United States of America and the United Mexican States Regarding Transboundary Shipments of Hazardous Wastes and Hazardous Substances," hereinafter "Executive Agreement."[3/]

Rollins alleges that the hazardous wastes identified in the complaint were generated by American firms operating in the "border area" between the United States and Mexico--actually on the Mexican side of the border--commonly known as "maquiladora" assembly plants and that, in contrast to wastes permanently imported for which the consent of the importing country is required under Article III of Annex III of the Executive Agreement, "maquiladora" wastes must be returned to the United

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[3/] Article XI of Annex III of the Executive Agreement provides:

ARTICLE XI

Hazardous Waste Generated From Raw Materials
Admitted In-Bond

Hazardous waste generated in the processes of economic production, manufacturing, processing or repair, for which raw materials were utilized and temporarily admitted, shall continue to be readmitted by the country of origin of the raw materials in accordance with applicable national policies, laws and regulations.

States.[4/] According to Rollins, these wastes were generated from materials shipped to maquiladora plants and admitted into Mexico "in-bond," the wastes are classified as American hazardous wastes and must be returned to the United States. Moreover, Rollins maintains that there is no right of prior consent or right of refusal.

Rollins explains that "admitted in-bond" means that the materials are shipped to the American facilities in Mexico on a duty-free or tariff-free basis and that after the production, manufacturing, processing or repair activities are completed, the final products of these activities are returned to the United States with only the value added by the production activities subject to duty (Memorandum at 4, note 4). Thus, Rollins says that the materials are not permanently imported into Mexico, but only temporarily admitted on a "tariff-free" basis.

Rollins claims that the wastes at issue are at all times regarded by Mexican authorities as American hazardous wastes and that the Hazardous Waste Regulations of Mexico (Motion Exh B), which are enforced by the Ministry or Secretariat of Urban Development and Ecology (SEDUE), the Mexican counterpart to EPA, require that maquiladora wastes be returned to the United States. According to Rollins, the waste would only become

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[4/] Memorandum In Support of Motion at 2-4. Article 4 of the Executive Agreement provides that the "border area" refers to the area situated 100 kilometers on either side of the inland and maritime boundaries between the parties.

Mexican waste, subject to SEDUE's disposal regulations, if it were "nationalized" by actual permanent exportation to Mexico (Memorandum at 5, note 5). In support of these assertions, Rollins cites the Maquiladora Industries Hazardous Waste Management Manual, First Ed. (November 1989), a joint EPA/SEDUE publication ("Maquiladora Manual") (Motion, Exh D).

Next, Rollins points out that 40 CFR § 264.12(a) (supra note 2), was promulgated in the initial RCRA regulations, 45 Fed. Reg. 33154 et seq. (May 19, 1980). The preamble to this section states that the requirement is a corollary to the proposed § 250.20(C)(3) standard, which required generators who ship their wastes to foreign countries to inform the foreign government having jurisdiction over the facility to which the waste is to be sent (45 Fed. Reg. 33179).

In the Hazardous and Solid Waste Act Amendments of 1984, Congress required, inter alia, notice to the government of the receiving country of intent to export hazardous waste and consent of the receiving country prior to the export thereof (RCRA § 3017, 42 U.S.C. § 6938). An exception to these requirements is provided where there exists an international agreement between the government of the United States and the government of the receiving country and the shipment conforms to such agreement (RCRA § 3017(a)(2) and (f)). In this event, only an annual report to the administrator summarizing the types, quantities, frequency, and ultimate destination of all hazardous wastes exported during the previous calendar year is required

(RCRA § 3017(g)). Because § 264.12(a) is a corollary to the export notification requirements, Rollins argues that the terms of the Executive Agreement are controlling, that the wastes at issue must be returned to the United States, and, in effect, that the notice requirement of § 264.12(a) is superfluous and, therefore, is not applicable (Memorandum at 6, 7).

In further support of its position, Rollins asserts that this issue has already been addressed by EPA, which has declared that "maquiladora" generated waste is United States hazardous waste and not an import (Memorandum at 7). This assertion is based on a National Enforcement Investigations Center (NEIC) document entitled "Enforcement Strategy Hazardous Waste Exports" (March 1988), which reflects that it is a publication of U.S. EPA Office of Enforcement and Compliance Monitoring (Motion Exh C).[5/]

As additional evidence that EPA does not consider maquiladora waste to be from a foreign source, Rollins cites a passage from the Federal Register entitled "Protection of

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[5/] The passage relied upon (Id. 11) provides:

> A specific requirement unique to Mexico concerns the generation of hazardous waste by U.S. companies with twin plants in adjacent areas of Mexico and the U.S. Raw materials are moved from the U.S. into Mexico "in-bond" for further processing. Any hazardous waste generated by such processing is to be returned to the U.S. for disposal. This waste is considered to be U.S. hazardous waste and not an import.

Stratospheric Ozone; Labeling," 58 Fed. Reg. 8136 (February 11, 1993).[6]

Alternatively, and without prejudice to its position that maquiladora waste is not waste from a foreign source, Rollins maintains that 40 CFR § 264.12(a) is not applicable to it, because it did not "arrange to receive waste from a foreign source" (Memorandum at 9). Rollins alleges that it arranged to receive wastes from two American waste brokers which are clearly not foreign sources. Actually and logically, Rollins says that the "facility that has arranged to receive hazardous waste from a foreign source" within the meaning of § 264.12(a), refers to the facility that actually arranges to bring the waste back into the United States, i.e., the American counterpart to the maquiladora plant or "sister" facility, or, as in this instance,

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[6] The passage cited provides at 58 Fed. Reg. 8155:

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The other case involves products or containers introduced in bond at the Mexico border. Under the Maquiladora Agreement, the United States and Mexico established a free-trade zone along a segment of the U.S./Mexico border. Essentially, products are permitted to be transported across that zone without any U.S. Customs restrictions being imposed. Products manufactured with or containing controlled substances or containers charged with controlled substances within this zone established by the Maquiladora Agreement are not considered to be imported products. At the same time, such products or containers are being introduced into United States interstate commerce, and are therefore subject to the labeling requirements.

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by a broker or intermediary. Because the regulations (40 CFR § 262.60) require the importer to sign the manifest document necessary for movement of the waste, Rollin says that the importer is in the best position to know if the waste is to be received from a foreign source (Memorandum at 10). Rollins buttresses its position in this regard by pointing to findings made in connection with the Part 262 Subpart E, exports of hazardous waste rulemaking (51 Fed. Reg. 28664, August 8, 1986), to the effect that the person preparing the manifest for such shipments is in the best position to provide advance notification and that brokers are often similarly situated with generators in terms of knowledge of the details of a particular waste shipment (Memorandum at 11). From this, Rollins argues that the ultimate TSD facility, which in virtually every case is the last party to become involved in the transaction, is not the proper party upon which to place an advance notification requirement. According to Rollins, § 264.12(a) is poorly drafted, because it could be interpreted as placing the notification obligation on the last person to handle the waste rather than the first.[7]

Rollins argues that § 264.12(a) is vague and ambiguous and emphasizes that, as written, the regulation does not

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[7] As an example of why the regulation cannot logically be interpreted as applying to the disposal facility, Rollins posits a situation, which applies to several of the manifests herein, where it is named as an alternate disposal facility on a manifest and the waste arrives unexpectedly and unannounced on its doorstep.

specifically require the ultimate disposal facility to notify. Moreover, Rollins alleges that it has received conflicting advice from representatives of Region VI as to the interpretation of the notification requirement of the regulation at issue and is prepared to offer evidence to that effect. These facts, according to Rollins, bring this matter within the rule in Rollins Environmental Services (NJ), Inc. v. EPA, 937 F.2d 649 (D.C. Cir. 1991), wherein it was held on due process grounds that a regulation which did not give fair notice of its meaning could not support the imposition of a penalty. For all of the above reasons, Rollins argues that it is entitled to judgment in its favor as a matter of law (Memorandum at 14-17).

Complainant's Opposition

Under date of February 15, 1994, Complainant filed a motion in opposition to Rollins' motion ("Opposition"). Complainant emphasizes that the regulation (40 CFR § 264.12(a)) requires notice when waste is to be received from a foreign source, points out that the dictionary defines "foreign source" as a point of origin geographically located outside of the United States and asserts that, because the wastes identified in the complaint were generated at facilities located in Mexico, the wastes were foreign (Opposition at 2, 3).

While recognizing that the Executive Agreement between the United States and Mexico establishes a "border area" extending 100 kilometers on either side of the border (supra note 4),

Complainant notes that neither party relinquished sovereignty over its territory and that, among other provisions, Article II of Annex III specifically provides that "transboundary" shipments of hazardous waste and hazardous substances across the border shall be governed by the terms of the Annex and their [the parties'] domestic laws and regulations (Opposition at 5-7). Moreover, Complainant emphasizes that Article XI of Annex III (supra note 3), the provision primarily relied upon by Rollins, provides that the hazardous waste mentioned therein shall be readmitted to the country of origin in accordance with applicable national policies, laws and regulations. Therefore, Complainant asserts that the Executive Agreement and Annex III were not intended to alter domestic laws and regulations (Opposition at 8). Moreover, according to Complainant, compliance with § 264.12(a) is essential for the United States to fulfill its obligations under the Agreement to monitor compliance with transboundary shipping regulations.

Complainant contends that Mexico's laws, regulations and practices, relied upon by Rollins, are not relevant to the applicability of the unambiguous requirements of 40 CFR § 264.12(a) (Opposition at 9-11). Complainant emphasizes that in accordance with Article III of Annex III of the Executive Agreement the triggering of diplomatic notice requirements is

entirely a function of the domestic law of the country exporting the waste.[8]

Regarding Rollins' reliance on the quoted passage from the NEIC document "Enforcement Strategy Hazardous Waste Exports" (supra note 5), Complainant says that Rollins may not rely on this document, because it is an internal document not intended to provide guidance to the regulated community and is applicable only to hazardous waste exports (Opposition at 13, 14). Supported by the declaration of James R. Vincent, the individual who allegedly authored the NEIC document, Complainant states the passage cited by Rollins was intended only as a statement that Mexico considered the waste to be U.S. waste (Opposition at 14, 15).

Notwithstanding that the Executive Agreement requires that maquiladora hazardous wastes be returned to United States, Complainant says that EPA's interpretation has been that shipments may be temporarily denied entrance to the U.S. until all applicable RCRA requirements such as labeling, marking and an appropriate hazardous waste manifest are met (Opposition at 16). Similarly, if the wastes were destined for a facility not

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[8] Article III is entitled "Notification to the Importing Country" and provides in pertinent part:

> 1. The designated authority of the country of export shall notify the designated authority of the country of import of transboundary shipments of hazardous waste for which the consent of the country of import is required under the laws or regulations of the country of export, with a copy of the notification simultaneously sent through diplomatic channels.

authorized to receive such wastes, Complainant asserts that the wastes could be temporarily detained until a proper destination was supplied.

Complainant emphasizes that the "Maquiladora Manual" was designed to provide guidance to the regulated community and points out that the Manual states that, although EPA's acknowledgment of consent [to the import of hazardous waste to the United States] is not required, notification by the TSD facility to EPA, or to an authorized state, is required (Id. 7). The authority for this statement is 40 CFR § 264.12 or § 265.12.

Complainant contends that Rollins' reliance on CFC labeling regulations is misplaced, because pursuant to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer ("Montreal Protocol"), EPA promulgated an allowance system under Section 611 (actually § 604 as § 611 concerns labeling) of the Clean Air Act in order to control the production of ozone depleting substances, specifically CFCs and halons (Opposition at 18-23). As part of the program to eliminate the production of CFCs, annual consumption and production allowances were promulgated which included imports. Because CFCs of U.S. origin admitted to Mexico in-bond under the Maquiladora Program had already been counted toward U.S. production allowances, the Agency considered it appropriate that such materials could be readmitted to the United States without further expenditure of U.S. production or consumption allowances (57 Fed. Reg. 33754-798 at 33780, July 30, 1992).

Moreover, although the regulation (40 CFR § 80.104(j)) exempts from the definition of imports Class I or Class II substances of U.S. origin upon their return to U.S., when the substance, container or product had been introduced into Mexico in-bond, the Agency, nevertheless, required labeling of such products, because the products were being introduced into U.S. commerce. EPA proposed regulations to clarify that such labeling must be accomplished at the border and essentially repeated the explanation from the preamble to the Protection of Stratospheric Ozone rule summarized above (58 Fed. Reg. 69568-69583 at 69575-576, December 30, 1993).

Complainant rejects Rollins' contention that § 264.12(a) is not applicable, because the arrangements to receive the wastes were made through brokers and not a foreign source. Complainant contends that entering into a brokered transaction for the receipt of waste is nevertheless an "arrangement" and that there would be no receipt of hazardous waste, if Rollins had not "arranged" to accept it (Opposition at 11-13). As to Rollins' contention that it is not the proper party to give notice, Complainant points out that § 264.12 is in 40 CFR Part 264, which is applicable by its terms to "owners and operators of all facilities which treat, store, or dispose of hazardous waste" (§ 264.1((b)). Complainant denies that § 264.12(a) is in anyway vague or ambiguous and argues that Rollins' motion should be denied (Opposition at 23-27).

D I S C U S S I O N

Although appealing, Rollins' arguments are not accepted.

Section 264.12(a) (supra note 2) requires that the owner or operator of a hazardous waste facility, that has arranged to receive hazardous waste from a foreign source, notify the Regional Administrator/Executive Director at least four weeks in advance of receipt of the waste. Mexico is prima facie a foreign source and thus the regulation on its face applies to Rollins' action in receiving and accepting the wastes at issue.[9] Any exception to this requirement, if there is one, would necessarily stem from the position that materials and the resulting hazardous waste, temporarily admitted into Mexico, i.e., "admitted in-bond," under the Maquiladora Program were not Mexican imports. Movements of materials and/or hazardous waste between maquiladoras are regarded as exports and imports,[10]

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[9] "Foreign" is defined as "situated outside of one's own country" and among the definitions of source is "point of origin or procurement." Websters' Third New International Dictionary (1986).

[10] The "Maquiladora Manual" provides in pertinent part at 24:

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> The movement of materials between maquiladoras as allowed by the provisions of (Mexican) Customs and SECOFI, may NOT be made on the fringes of the environmental legislation in effect, and even when the General Law or its Regulations does not make specific mention of the movements of materials and/or hazardous wastes between maquiladoras, said movements should be considered as exports and imports, and therefore, the provisions of the General Law and its Regulations on

(continued...)

which tends to support the view that Mexican officials consider the maquiladoras as enclaves outside the purview of normal commerce between the United States and Mexico. Be that as it may, there is no indication that the United States takes a similar view of the status of maquiladoras. Indeed, the fact that the United States imposes tariffs or duties on the increased value resulting from the processing, assembly or manufacturing of the materials occurring in Mexico ("Maquiladora Manual" at 22), supports the view that the finished materials are considered to be imports into the United States.

There is, of course, no doubt that "maquiladoras hazardous wastes," that is, wastes generated by American firms operating in the "border area" as defined in the Executive Agreement (supra note 4) from materials temporarily imported into Mexico, i.e., "admitted in-bond," must be returned to the United States. This conclusion follows from Article XI of Annex III of the

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[10] (...continued)
the subject of import and export must be specifically complied with, and must have the corresponding "Guia Ecologica" for each movement of hazardous materials or waste.

Companies are still able to dispose of their wastes by exportation (which is the only viable option provided for under the environmental authorities and nationalization, which makes the waste, in effect, a Mexican waste subject to SEDUE disposal regulations.

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Executive Agreement (supra note 3) and from Mexican Hazardous Waste Regulations.[11]

It is clear, however, that neither the Executive Agreement nor any of its Annexes had the effect, or were intended, to alter the provisions of domestic laws and regulations. See, e.g., Article 18, which provides that: "Activities under this Agreement shall be subject to the availability of funds and other resources to each Party and to the applicable laws and regulations in each country."[12] Indeed, Article XI of Annex III, the provision relied upon by Rollins, provides that the waste described therein shall continue to be readmitted by the country of origin of the raw materials "in accordance with applicable national policies, laws and regulations" (supra note 3).

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[11] Article 55 of Chapter IV of the Mexico Hazardous Waste Regulations provides:

> ARTICLE 55: The hazardous wastes generated in the processes of production, transformation and manufacture under the maquila system that uses raw materials brought into the country under the system of temporary importation, must be returned to the country of origin.

[12] There can be no question but that "Activities under this Agreement" includes the transboundary shipment of hazardous waste and hazardous substances. The preamble to Annex III of the Executive Agreement reflects that the Parties seek to ensure that activities associated with the transboundary shipment of hazardous waste are conducted so as to reduce or prevent risks to public health, property and environmental quality. Article I, para. 4 of the Annex defines "activities" associated with hazardous waste or hazardous substances to mean, as applicable, their handling, transportation, treatment, recycling, storage, application, distribution, reuse or other utilization.

The foregoing doesn't directly address Rollins' argument that there being no right to refuse entry of the waste, the notice requirement of § 264.12(a) is superfluous, and therefore, is not applicable (ante at 6). Complainant, however, counters by alleging that compliance with § 264.12(a) is essential to the U.S. fulfilling its monitoring obligations under the Executive Agreement and that EPA has interpreted the Agreement as allowing temporary detention of the waste until, e.g., RCRA marking and labeling requirements have been complied with and a proper destination supplied on the manifest (ante at 11, 12). This seems eminently reasonable and § 264.12(a) not having been amended since its promulgation in 1980, the requirement of notice of the receipt of hazardous waste from a foreign source may not be disregarded upon the ground such notice is not necessary for maquiladora wastes.

Complainant has satisfactorily explained the reason "controlled substances" under the Montreal Protocol are considered not to be imports for the purpose of production and consumption allowances when readmitted to the United States under the Maquiladora Program, i.e., the initial production has already been credited against such allowances. Accordingly, the Federal Register provision on Protection of Stratospheric Ozone, cited by Rollins (supra note 6), provides no support for its position herein.

The quote from the NEIC "Enforcement Strategy Hazardous Waste Exports" document (supra note 5) does support Rollins'

position that maquiladora wastes are considered not to be imports. Moreover, Complainant's contention that this quote was intended only as a statement as to how Mexico viewed the wastes is seemingly contradicted by the statement itself, because from the Mexican point of view the wastes normally would be an export rather than an import. Nevertheless, the NEIC document has not been shown to be for the guidance of the regulated community, is considered to be an incorrect statement of the law because nothing in the Executive Agreement or in the Annexes thereto was intended or purported to change domestic laws or regulations and, in any event, the statement is not binding on the Agency. Therefore, the statement is disregarded.

For all of the above reasons, Rollins' contention that the wastes involved are not from a foreign source within the meaning of § 264.12(a) is rejected.

The cited regulation on its face applies to the owner or operator of a hazardous waste facility that has arranged to receive hazardous waste from a foreign source and, because there would be no receipt of the waste unless Rollins arranged or agreed to accept it, the fact that the arrangements were made through brokers or other intermediaries does not relieve Rollins of its obligation to provide the required notice. The situation, illustrated by several of the manifests, where Rollins is named as an alternate destination on the manifests may provide some practical difficulties in complying, but does not eliminate the obligation to comply.

Rollins is the owner or operator of a hazardous waste facility that received (arranged to receive) hazardous waste from a foreign source (Mexico) and, therefore, was required to provide the notice required by § 264.12(a). This is a clear and unambiguous requirement and Rollins' attempt to bring this matter within the rule in Rollins Environmental Services (NJ), Inc. v. EPA, supra is rejected. Rollins will of course, be permitted to introduce evidence that it received conflicting advice from EPA representatives as to the person required to provide the notification. Such evidence is relevant to the amount of the penalty, if any, which should be assessed.

O R D E R

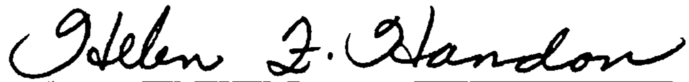
Rollins' motion for an accelerated decision, or in the alternative for an order dismissing the complaint, is denied.

Dated this 16th day of June 1994.

Spencer T. Nissen
Administrative Law Judges

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER DENYING MOTION FOR ACCELERATED DECISION OR ALTERNATIVE MOTION TO DISMISS**, dated June 16, 1994, in re: Rollins Environmental Services (TX), Inc., Dkt. No. RCRA-VI-106-H, was mailed to the Regional Hearing Clerk, Reg. VI, and a copy was mailed to Respondent and Complainant (see list of addressees).



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DATE: June 16, 1994

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