11/30/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Chemical Reclamation Services,	)	Docket No. RCRA-VI-104-H
	)	
	)	
Respondent	)	

Resource Conservation and Recovery Act -- 40 C.F.R. § 264.12(a) and maquiladora operations -- Complainant moved for partial accelerated decision regarding liability for Respondent's failure to give the advance notice required by this section for "a facility that has arranged to receive hazardous waste from a foreign source." Respondent raised three defenses to the charge.

(1) Respondent's defense that hazardous waste from maquiladora plants in Mexico is not "from a foreign source" was rejected because:

(a) the special U.S.-Mexican legal regime for maquiladora operations was held not to affect the notice requirement of 40 C.F.R. § 264.12(a); and

(b) a contrary statement in an EPA booklet was held not to bind EPA or Complainant.

(2) Respondent's defense that it had not "arranged" to receive the waste in question because a broker had arranged the import was rejected on the ground that it was enough for 40 C.F.R. § 264.12(a) to apply that Respondent had arranged to receive the waste, even if Respondent itself had not arranged for the waste to be from a foreign source.

(3) Respondent's defense that a "genuine issue of material fact exist[ed]" as to the actual origin of the hazardous waste was upheld, and Complainant's motion was denied on this basis only.

RULING GRANTING IN PART AND DENYING IN PART COMPLAINANT'S AND RESPONDENT'S MOTIONS FOR PARTIAL ACCELERATED DECISION

This Ruling addresses motions for partial accelerated decision filed by Complainant--the Director of the Hazardous Waste Management Division, Region 6, U.S. Environmental Protection Agency ("EPA")--and by Respondent Chemical Reclamation Services. Complainant initiated this case under the authority of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k, and regulations promulgated pursuant to RCRA at 40 C.F.R. Part 264 ("the Regulations").

Respondent is a Texas corporation that operates a hazardous

waste management facility at Avalon, Texas. The March 6, 1991 Complaint charged that Respondent arranged to receive at that facility 54 hazardous waste shipments from Mexico without having given the required advance notice to the proper U.S. authority. For these alleged infractions, the Complaint sought a civil penalty of $229,500.

The notice requirement that Respondent is charged with violating is Section 264.12(a) of the Regulations, which provides in pertinent part as follows.

> 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.[1]

Respondent advanced basically three defenses, two essentially legal, and the third essentially factual. Respondent's first legal defense was that the hazardous wastes received at its facility were not "from a foreign source" within the meaning of Section 264.12(a) because, to the extent that they were from Mexico, they originated in maquiladora plants in Mexico. The second legal argument was that, even if Respondent had received the hazardous wastes at issue, it had not "arranged to receive" them. Thirdly, the essentially factual argument was that the manifests of the wastes identified in the Complaint failed to show that their source was Mexico.

Procedurally, the parties initially tried unsuccessfully to negotiate a settlement, and then engaged in a Prehearing Exchange. Complainant next filed a Motion for Partial Accelerated Decision, arguing that Respondent had admitted all the facts necessary to

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[1] Section 264.12(a) provides in full as follows.

> 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 source is not required.

According to the Complaint and to Complainant's Prehearing Exchange, Texas has a state program authorized to carry out a hazardous waste program under RCRA, and therefore Respondent's notification should have been made to the Executive Director of the Texas Water Commission. Complaint at 2, 4-12 (March 6, 1991); Complainant's Prehearing Exchange at 10-11 (October 16, 1991).

Complainant's cause of action.[2]

In its reply, Respondent acknowledged its receipt of most of the hazardous wastes in question, but opposed Complainant's Motion on two grounds. First, Respondent contended that it was factually unclear whether these wastes had originated in Mexico. Second, Respondent filed its Motion for Partial Accelerated Decision, requesting a ruling that any such wastes originating in a Mexican maquiladora plant were not "from a foreign source."[3]

Respondent had previously argued in its First Amended Answer that it had not "arranged to receive" these wastes within the meaning of Section 264.12(a). Each of these issues raised by the parties' Motions and Respondent's First Amended Answer is reviewed below.[4]

"Foreign Source" and the Maquiladora Program

As to the phrase "from a foreign source" and the maquiladora program, the issue between the parties was joined in two stages. In the first stage, Complainant urged that the phrase be given its "plain meaning."[5] Respondent, on the other hand, claimed that various international and national provisions connected with the program mean that hazardous wastes from Mexican maquiladora plants are not subject to the notice requirement of Section 264.12(a). In the second stage, the parties discussed how the question is affected by an EPA booklet stating that "hazardous waste generated by ... processing ... [in a Mexican maquiladora plant] is considered to be U.S. hazardous waste and not an import."[6]

As described chiefly by Respondent,[7] the maquiladora program

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[2] Complainant's Motion for Partial Accelerated Decision (November 8, 1991).

[3] Respondent's Motion in Response to Complainant's Motion for Partial Accelerated Decision (November 22, 1991).

[4] First Amended Answer (August 13, 1991).

[5] Complainant's Response to Respondent's Motion for Partial Accelerated Decision and Cross-Motion for Partial Accelerated Decision, at 4 (December 13, 1991).

[6] National Enforcement Investigations Center, Denver, Colorado, Office of Enforcement and Compliance Monitoring, United States Environmental Protection Agency, Enforcement Strategy--Hazardous Waste Exports, at 11 (March 1988).

[7] See generally Respondent's Prehearing Exchange (Oct. 16, 1991).

started in 1965. It combines an American need for less expensive labor with the Mexican need for jobs, and reflects also the interest of both countries in encouraging Mexican workers to remain at home and to learn American industrial skills. Under the program, American companies operate processing and assembly plants in Mexico near the U.S. border. Raw materials are shipped to these plants from the United States, and the finished products are then returned to the United States. Each plant in Mexico is often matched with a plant of the American company located just inside the United States.

To facilitate these maquiladora arrangements, the Mexican government does not impose duties on the equipment and raw materials imported for the Mexican plants. Similarly, when the finished products are returned to the United States, the U.S. government assesses a duty only on the value added to the products by the processing in Mexico.

To regulate environmental problems along their border, in 1978 the U.S. and Mexican governments signed a Memorandum of Understanding, which in 1983 was formalized into a bilateral executive Agreement of Cooperation between the United States and Mexico.[8] Annex III to this Agreement, signed in 1987, addresses transboundary shipments of hazardous wastes and hazardous substances.[9]

International and National Provisions

Respondent's Position. Respondent's position rested on an asserted "characterization of the waste generated at a Maquiladora plant as U.S.-owned by the international agreements between Mexico and the United States, and by the regulations of the Mexican [environmental regulation agency] Secretaria de Desarollo Urbano Y Ecologia ("SEDUE")."[10] Because of this characterization, Respondent argued that such maquiladora waste could not constitute Section 264.12(a) hazardous waste "from a foreign source."

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[8] Agreement Between the United States of America and the United Mexican States On Cooperation For the Protection and Improvement of the Environment in the Border Area (August 14, 1983).

[9] Agreement Between the United States of America and the United Mexican States Regarding Transboundary Shipments of Hazardous Wastes and Hazardous Substances (January 27, 1987).

[10] Respondent's Motion to Amend Original Answer and Request for Hearing (August 13, 1991), Exhibit B, July 15, 1991 Letter to Ms. Siciliano and Mr. Barra, U.S. Environmental Protection Agency, from Ms. Hurst, Jenkins & Gilchrist, at 2.

Respondent found this characterization mainly in the contrast between two provisions of the 1987 U.S.-Mexican Annex III. Article IX, according to Respondent, obligates the United States to admit hazardous waste generated by maquiladora plants utilizing American raw materials. Article III, on the other hand, again according to Respondent, obligates the Mexican government to provide the U.S. government an advance diplomatic notice of hazardous waste exports when Mexican law requires U.S. consent to the export, and EPA then has 45 days to consent or object to the export.

Respondent stated that Mexican law does not require U.S. consent for the export of hazardous waste from maquiladora operations, that Mexico contends that such exports do not need diplomatic notice, and that in fact diplomatic notice for such exports is given "only sporadically," as acknowledged by EPA.[11] Thus, claimed Respondent, hazardous wastes from maquiladora operations are actually treated by neither the Mexican nor the U.S. government as from a Mexican source, and consequently the source should not be treated as "foreign" to the United States for purposes of Section 264.12(a).

Respondent explained its reasoning in more detail as follows, beginning with a reference to the 1987 U.S.-Mexican Annex III.

> Pursuant to this Article [XI], hazardous waste generated in the processes of economic production, manufacturing, 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.
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> Article III of Annex III obligates the Mexican government to provide 45 days' advance notice (the "diplomatic notice") to the U.S. government if an export of hazardous waste to the U.S. in all situations where Mexico law requires U.S. consent to the export. The diplomatic notice must include the following information: [an enumeration of detailed information regarding the exporter, the consignee, the waste, and the transportation].... The EPA must consent or object within 45 days from the date of acknowledgment of receipt of the diplomatic notice....
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> Mexico contends that Annex III does not require diplomatic notice with respect to "in-bond" maquiladora wastes returned to the U.S. and consequently the U.S.

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[11] Respondent's Memorandum in Support of CRS' Motion in Response to EPA's Motion for Partial Accelerated Decision, at 6 (November 22, 1991).

> receives the diplomatic notice for maquiladora waste shipments only sporadically [citation to a 1991 telephone interview with an EPA official].... Mexico's position on this matter seems justified--why should Mexico be required to notify the U.S. in advance of waste shipments that the U.S. is obligated to accept? As discussed below, Mexico's laws do not require that the consent of the U.S. be obtained for the return of maquiladora waste and Article XI appears to create an exception to Article III of Annex III.[12]

Respondent then explained how Mexican domestic regulations treat the export of hazardous waste from maquiladora plants differently from the export of hazardous waste generally.

> Mexican generators of hazardous waste cannot export waste to the U.S. without first obtaining the prior authorization of ... SEDUE ... Generally, no authorization will be granted to export hazardous waste solely for disposal abroad without the specific consent of the receiving country.... However, hazardous waste generated by the maquiladora industry in the manufacturing, transformation or production processes, which results from raw material brought into Mexico under the system of temporary importation, must be returned to the country of origin.... Otherwise, the wastes must be nationalized, a process which allows the wastes to become Mexican waste. Nationalization of in-bond wastes, which is rarely permitted, must be approved by the Mexican government and requires that importation duties be paid....[13]

(citations omitted)

Using these U.S.-Mexican Annex III and domestic Mexican provisions, Respondent proceeded to its conclusion that hazardous wastes received from a maquiladora plant are not "from a foreign source" within the meaning of Section 264.12(a).

> Based on Article XI to Annex III and the Mexican regulations cited above, it is evident that the maquiladora waste is regarded as U.S. domestic waste by the U.S. and Mexican governments. The U.S./Mexico Environmental Agreement provides an advance reporting mechanism, the diplomatic notice, for the shipment of "true" foreign waste from Mexico to the U.S. The diplomatic notice is required further in advance and

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[12] Id. at 6-7.

[13] Id. at 7.

contains more detail than the Section 264.12(a) notice. However, the U.S. government either agrees with or has acquiesced to SEDUE's position that the diplomatic notice does not apply to shipments of maquiladora waste because such waste is not "foreign". It is therefore inconsistent and inappropriate for the EPA to seek to enforce Section 264.12(a) with regard to such waste.[14]

Complainant's Position. Complainant opposed Respondent's position with three arguments. The first was that the "plain meaning" of "foreign source" includes origins in Mexico;[15] the second was that the U.S.-Mexican agreements provide that they are to be implemented in accordance with each country's domestic provisions; and the third was that Mexico's practices under the U.S.-Mexican agreements and its application of Mexican law are irrelevant to the proper interpretation of Section 264.12(a).

Complainant argued firstly "that the term 'foreign source' as used in 40 C.F.R. § 264.12(a) is unambiguous and is to be given its plain meaning"[16]--"a 'foreign source' is a point of origin geographically located outside of the United States."[17] Therefore hazardous wastes originating in Mexico are, according to Complainant, from a "foreign source," because they are from somewhere outside the United States.

Respondent's position, contended Complainant, "ignore[s] the plain language of the regulation."[18] More concretely, Complainant contended that Respondent's position confused the "nationality" or "status" of the waste with its "geographic origin" or "source."[19] Respondent's position, suggested Complainant, at most claimed merely that the maquiladora situation may have conferred some U.S. "nationality" or "status" on the waste. But Section 264.12(a), Complainant emphasized, speaks specifically of the "source" of the hazardous waste, rather than of its "nationality" or "status." A plant located in Mexico, concluded Complainant, is clearly a "foreign source" under the plain meaning of those words.

Complainant argued secondly that the U.S.-Mexican agreements, relied on so strongly by Respondent, provide expressly that their

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[14] Id.

[15] Complainant's Response, supra note 5, at 4.

[16] Id.

[17] Id. at 3.

[18] Id.

[19] Id.

provisions are to be implemented in compliance with the national enactments of the two countries. Thus Complainant quoted from Article XI of Annex III, the particular article in the agreements that, per Respondent, specifically addressed the maquiladora situation, as follows (emphasis added by Complainant).

> 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.[20]

Complainant quoted as well from Article II of the Annex, which "sets out the general obligations of the two countries," as follows (emphasis added by Complainant).

> 1. Transboundary shipments of hazardous waste and hazardous substances across the common border of the Parties shall be governed by the terms of this Annex and their domestic laws and regulations.
>
> 2. Each Party shall ensure, to the extent practicable, that its domestic laws and regulations are enforced with respect to transboundary shipments of hazardous waste and hazardous substances . . . .[21]

The Annex containing these Articles XI and II, quoted immediately above, was, as described further above,[22] a 1987 compact executed as an annex to a 1983 U.S.-Mexican Executive Agreement. Complainant quoted also from two articles in the 1983 Executive Agreement.[23] Article 5 was quoted by Complainant as follows (emphasis added by Complainant).

> The parties agree to coordinate their efforts, in conformity with their own national legislation and existing bilateral agreements to address problems of

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[20] Id. at 6.

[21] Id.

[22] See supra text accompanying notes 8-9.

[23] In addition to quoting from Articles 5 and 7 of the Agreement, as set forth infra in the text, Complainant quoted also from Article 3, which states that annexes to the Agreement may be concluded for technical matters. It was pursuant to this Article 3 that the 1987 Annex was concluded.

air, land and water pollution in the border area.[24]

Article 7 also was quoted by Complainant, as follows (emphasis added by Complainant).

> The parties shall assess, as appropriate, in accordance with their respective national laws, regulations and policies, projects that may have significant impacts on the environment of the border area, so that appropriate measures may be considered to avoid or mitigate adverse environmental effects.[25]

Thirdly, Complainant argued that Mexico's practices under Annex III and its application of its own laws are irrelevant to the interpretation of Section 264.12(a), a U.S. regulation. Thus Complainant observed that any requirement for Mexico to give diplomatic notice for exports of hazardous waste from Mexican maquiladora operations is, per Article III of Annex III, a function of Mexican law. That Article, as quoted by Complainant, states as follows (emphasis added by Complainant).

> 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 . . . .[26]

Therefore, contended Complainant, any failure by Mexico to give diplomatic notice for hazardous waste exports from Mexican maquiladora plants reflects only Mexico's application of its own laws and regulations. Such Mexican application of Mexican laws and regulations is, Complainant insisted, hardly determinative of U.S. regulation. The contrary view suggested by Respondent would, Complainant averred, allow Mexico to "eviscerate U.S. domestic regulatory requirements otherwise applicable to hazardous waste imported from Mexico simply by deciding that diplomatic notice was not required for ... [such] shipments."[27]

Ruling. Since the phrase "foreign source" in Section 264.12(a) is defined neither in RCRA nor in the Regulations, it should be "construed in accord with its ordinary or natural meaning." Smith v. United States, 124 L.Ed.2d 138, 148 (1993).

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[24] Complainant's Response, supra note 5, at 4.

[25] Id.

[26] Id. at 7.

[27] Id. at 8.

A common dictionary definition of "foreign" is "situated outside ones own country, province, locality, etc." and of "source" is "that from which something comes into existence, develops, or derives."[28]

These dictionary definitions supply an "ordinary or natural meaning," or, as requested by Complainant, a plain meaning for the phrase at issue. By these definitions, hazardous waste from maquiladora plants in Mexico clearly has a source--"that from which ... [it] comes into existence, develops, or derives"--that is foreign to the United States--i.e., that is "situated outside" the United States. Therefore such hazardous waste is "from a foreign source" within the meaning of Section 264.12(a).

The first argument advanced by Complainant was thus well taken. As claimed by Complainant, Respondent's position suggests a U.S. "nationality" for the Mexican maquiladora hazardous waste because of the special bilateral maquiladora legal regime. Complainant, on the other hand, posited a "geographic" meaning for "foreign source," regardless of the "nationality" of the waste itself. Complainant's position is more persuasive. The plain meaning of "foreign source" in Section 264.12(a) is an origin located geographically outside of the United States. If the Section were intended to focus instead on the "nationality" of the waste itself, some language more directly indicating that status could easily have been used.

Respondent has supplied no reason to depart from the "ordinary or natural" or plain meaning for "foreign source." Respondent referred extensively to the 1987 U.S.-Mexican Annex III. But relevant provisions of the Annex, as well as of the 1983 U.S.-Mexican Executive Agreement, state expressly that these documents are to be implemented in accordance with the national regulations of the two countries. Nothing Respondent cited in the Annex contradicted these statements.

Mexican practice on giving diplomatic notice for hazardous waste exports to the United States, cited especially by Respondent, appears unrelated to the proper construction of Section 264.12(a). By the terms of Article III of Annex III, the requirement to give diplomatic notice for such exports depends on Mexican law. Respondent has offered no persuasive reason as to why Mexico's application of its own law should dictate the interpretation of a U.S. regulation. Thus both Complainant's second and third arguments, relating to the bilateral agreements and to Mexican law, have merit.

With respect to the purpose of RCRA, sufficient reason exists for EPA to require advance notice of hazardous waste shipments

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[28] Webster's New World Dictionary (Third College ed. 1988).

from maquiladora plants in Mexico, even if they may be routinely admitted. Such notice affords EPA the opportunity to impose on such shipments any appropriate U.S. conditions. Entirely aside from this opportunity, the notice enables EPA to monitor such hazardous wastes entering this country; and monitoring hazardous wastes is an important EPA function in administering RCRA. In conclusion, hazardous waste received in the United States from maquiladora plants in Mexico is "from a foreign source" as that phrase is used in Section 264.12(a), unless the EPA booklet discussed immediately below dictates a contrary decision.

EPA Booklet

In the second stage of the parties' briefings, they discussed the significance of the following paragraph that appeared in an EPA booklet.

> 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.[29]

(emphasis added)

The EPA booklet containing this paragraph is a 39-page document titled "Enforcement Strategy--Hazardous Waste Exports." It was issued in 1988 by EPA's National Enforcement Investigations Center, of the Office of Enforcement and Compliance Monitoring.

The focus of this booklet, as suggested by its title, is exports of hazardous waste from the United States, and achieving enforcement of the relevant legal requirements. This focus is made clear in the lead paragraph of the booklet's introduction, which states as follows.

> Exports of hazardous waste to Canada, Mexico, and overseas for recycling or disposal have been occurring for many years. Both the number and volume of export shipments have increased in recent years as the costs of domestic treatment or disposal of this waste have increased. While most of these shipments are in compliance with applicable statutes, regulations and international agreements, there are indications that some waste is being exported illegally. Current

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[29] Enforcement Strategy--Hazardous Waste Exports, supra note 6, at 11.

> regulations, which were effective November 8, 1986, imposed a number of new requirements on hazardous waste exporters. Full compliance by the regulated community with these new requirements has been slow. This document sets forth an EPA strategy to improve the level of compliance by the regulated community and to ensure that appropriate enforcement actions are vigorously pursued.[30]

The booklet does, however, address also imports into the United States. One paragraph of the booklet's introduction states in pertinent part as follows.

> Subsequent to promulgation of the revised regulations, bi-lateral agreements were signed with both Canada and Mexico. These agreements basically parallel the regulatory requirements but do set up slightly different notification procedures and a few other different requirements. These agreements also establish notification requirements for imports of hazardous waste from Mexico and Canada and for transit shipments through Canada, Mexico or the U.S. to third countries.[31]

(emphasis added)

A five-paragraph section of the booklet is titled "Mexico" and contains the paragraph on which issue has been joined in the instant case and that is quoted above.[32] The lead paragraph of this section states as follows.

> A bi-lateral agreement concerning the transboundary shipments of hazardous waste and hazardous substances between the U.S. and Mexico was signed on November 12, 1986.... The agreement slightly modifies the notification procedure and also covers the import of hazardous waste into the U.S. from Mexico and transit shipments through the U.S. and Mexico. Special provisions apply to hazardous waste generated by U.S. companies with manufacturing facilities in Mexico.[33]

(emphasis added)

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[30] Id. at 1.

[31] Id. at 2.

[32] See supra text accompanying note 29.

[33] Enforcement Strategy--Hazardous Waste Exports, supra note 6, at 10.

Respondent's Position. Respondent's position on the significance of this EPA document's statement that hazardous waste from Mexican maquiladora operations "is considered to be U.S. hazardous waste and not an import" can be succinctly set forth. Respondent claimed that this statement is "dispositive" as to whether this waste is from a "foreign source" for Section 264.12(a).[34] Of course, if hazardous waste received by Respondent from maquiladora plants in Mexico were to be treated as "U.S. hazardous waste and not an import," it should make inapplicable Section 264.12(a)'s notice requirement for "hazardous waste from a foreign source."

Complainant's Position. Complainant's position was more complex. Complainant averred that the EPA document should be read in the context of the 1987 Annex III, with its Article XI providing that hazardous waste from Mexican maquiladora operations shall be admitted into the United States in accordance with U.S. law.[35] More specifically as to the document itself, Complainant observed that its "focus ... is clearly the [U.S.] hazardous waste export regulatory program" (emphasis in original).[36]

The key question naturally is the sentence in the booklet asserting that hazardous waste from Mexican maquiladora operations is "considered to be U.S. hazardous waste and not an import." Here Complainant contended that "the word 'import' ... was used to refer to importation to Mexico and not importation to the United States."[37] Complainant supported that contention as follows.

> [[I]]t is EPA's [[Complainant's]] position that the paragraph in question reflects Mexico's interpretation and understanding of what has to be done with raw materials that come from the United States into Mexico. Because said materials are moved from the U.S. into Mexico "in-bond", these materials generally do not pay any Mexican duties, importation taxes, and/or customs fees. After the raw materials are processed at the "maquiladoras", any hazardous waste generated has to be returned to the country of origin, in this case the United States, and cannot legitimately remain in Mexico.
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> The last sentence of the ... paragraph ..., as well

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[34] Respondent's Response to Order for Comments, at 2 (July 31, 1992).

[35] See supra text accompanying note 20 regarding Article XI.

[36] Complainant's Response to Order for Comments, at 2 (August 19, 1992).

[37] Id.

> as the whole paragraph itself, has to be read in the context of the Mexican government regulatory perspective. EPA [[Complainant]] interprets this sentence, in the context of the whole paragraph, as stating that the Mexican government's regulatory program considers any hazardous waste generated from the processing of U.S. raw materials by the maquiladoras to be a U.S. hazardous waste (waste which, under Mexican law, is required to be returned to the United States) and, thus, cannot be considered an import to Mexico since it cannot legitimately remain in Mexico (because no duties were paid to Mexico in relation to the U.S. raw materials). "A [Mexico] Presidential Decree prohibits the import of hazardous waste into Mexico for disposal." [[citation to the next paragraph of the EPA booklet]] ...
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> In essence, in the context of the language used in ... [[this paragraph of the EPA booklet and the preceding paragraph of the booklet]], the word "import" is used as referring to importation to Mexico and not to the United States.[38]

(emphasis and bracketed insertions in original; double bracketed insertions added)

Ruling. Complainant's proffered interpretation is resourceful, but it is rejected. It is less consistent with the thrust of the whole EPA booklet and with the language of the particular paragraph at issue than the alternative, viz., that "import" means import into the United States.

The booklet itself is written essentially from the U.S. standpoint. The reason is not simply its U.S. authorship, but more particularly its purpose. As stated in the booklet's lead paragraph, "This document sets forth an EPA strategy to improve the level of compliance by the regulated community and to ensure

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[38] Id. The preceding paragraph of the EPA booklet that is referred to in the double bracketed insertion in the text paragraph accompanying this note states as follows.

> The [U.S.-Mexico] agreement requires either country to notify of any transboundary shipments of hazardous waste that may move through the other's territory enroute to a third country. No specific time frame or form is prescribed for these notices.

(bracketed insertion in original)

that appropriate enforcement actions are vigorously pursued."[39] The thrust of the booklet throughout is to discuss how U.S. parties are to comply with U.S. law.

Complainant quoted the sentence from the booklet that follows the sentence at issue: "A [Mexico] Presidential Decree prohibits the import of hazardous waste into Mexico for disposal" (bracketed insertion in original).[40] That sentence by itself might suggest viewing the situation from the Mexican standpoint. But in fact it is just the first sentence of a two-sentence paragraph, which concludes: "Current legal exports of hazardous waste to Mexico are thus only for recycling purposes."[41] Consequently, the first sentence of the paragraph merely sets the stage for the second sentence, which contains the point of the whole paragraph and is written from the U.S. standpoint.

Not only the whole booklet's approach to each situation from a U.S. standpoint, but also the very wording of the paragraph at issue suggests that the "import" in question is an import into the United States. The subject of the crucial sentence is "This waste," which refers to "hazardous waste" identified in the preceding sentence as "generated by such processing," meaning processing by a maquiladora plant in Mexico.[42] Because the hazardous waste came into existence only in Mexico, it itself would not likely be viewed as an import into Mexico.

More logically, since the "hazardous waste ... is to be returned to the U.S. for disposal," this waste would be seen as an import into the United States (absent the special consideration injected by the booklet, viz., that it will be treated instead as "U.S. hazardous waste"). If anything in this booklet paragraph might be viewed as an import into Mexico, it would be the subject matter of the second sentence preceding the sentence at issue, viz., "[r]aw materials [that] are moved from the U.S. into Mexico."[43]

In sum, Complainant's position is rejected. In the sentence

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[39] For this entire lead paragraph, see supra text accompanying note 30.

[40] See supra text accompanying note 38.

[41] Enforcement Strategy--Hazardous Waste Exports, supra note 6, at 11.

[42] See supra text accompanying note 29 for a full statement of these two sentences.

[43] See supra text accompanying note 29 for this booklet paragraph.

in the EPA booklet stating that "This waste is considered to be U.S. hazardous waste and not an import," the word "import" and the accompanying phrase "hazardous waste" are taken to mean an importation into the United States.

Rejecting Complainant's position does not, however, signal an acceptance of Respondent's position. The question remains as to whether this statement in this EPA booklet is binding upon EPA.

The legal status of administrative agency statements of policy that have not been promulgated through the Administrative Procedure Act's notice-and-comment process (5 U.S.C. § 553) has arisen in various judicial cases. When it comes to internal guidelines and manuals, the courts have generally declined to bind the agency to them.[44] Those cases in which the agency has been held to such a document have usually had an element of reliance by the private party;[45] no reliance on the booklet is claimed by Respondent here.

This EPA booklet appears from its title, from its statement

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[44] See Industrial Safety Equipment Ass'n v. EPA, 837 F.2d 1115 (D.C. Cir. 1988) (EPA report regarding types of asbestos protection respirators could not be characterized as a substantive rule in that it did not change any law or existing policy in effect, was advisory in nature, and was not published in either the Federal Register or the CFR); Rank v. Nimmo, 677 F.2d 692 (9th Cir. 1980) (handbook published by Veterans Administration to guide lenders in processing loan applications did not bind Veterans Administration); Vietnam Veterans of America v. Sec'y of the Navy, 843 F.2d 528 (D.C. Cir. 1988) (memorandum issued by Defense Department regarding drug use is nonbinding because the Department retains the right to use its own discretion); Oregon NRDC v. Devlin, 776 F.Supp. 1440, 1447 (D. Ore. 1991) (manual provisions and internal agency guidelines for implementing statutes are generally not binding on agencies).

[45] See Klepper v. Dept. of Energy, 598 F.Supp. 522 (D.D.C. 1984) (agency was bound by a letter to parties giving them a choice of method in calculating absorption of overpricing where there had been clear reliance on the letter); Teleprompter Cable Communications v. FCC, 565 F.2d 736 (D.C. Cir. 1974) (agency was bound by previous rule granting "grandfathering-in" exception to new FCC regulations).

As for the instant case, the existence of the EPA booklet was called to the attention of both parties by the Order for Comments of July 10, 1992; and Respondent has not alleged any reliance on (or prior awareness of) the booklet.

of purpose quoted above,[46] and from its general contents to be an internal EPA guideline or manual on how to improve enforcement. Had the booklet been intended instead to instruct the public in how to comply, it would more likely have had something about compliance in its title, rather than bearing its present title of "Enforcement Strategy--Hazardous Waste Exports." In addition, Respondent has pointed to nothing in the booklet to suggest that the booklet was intended to alter the notice requirements of Section 264.12(a) otherwise applicable to hazardous waste imports from maquiladora plants in Mexico.

Consequently, the statement in question from this EPA booklet is held not to bind EPA and Complainant in this case. Respondent's position that the statement is "dispositive" of the issue is thus rejected.

Consequently, the conclusion reached above on the basis of the parties' briefings in the first stage remains intact.[47] It will thus be ruled that hazardous waste received from maquiladora plants in Mexico is "from a foreign source" within the meaning of Section 264.12(a).[48]

"Arranged to Receive"

Respondent's Position

Respondent's second legal argument centered on the phrase "arranged to receive" in Section 264.12(a). By its terms, the section applies to "[t]he owner or operator of a facility that has arranged to receive hazardous waste from a foreign source." Respondent acknowledged that it was an owner or operator of a facility that had received hazardous waste from a foreign source (if its maquiladora argument was rejected), but denied that it had

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[46] See the paragraph of the booklet quoted supra in the text accompanying note 30.

[47] See subsection supra of this Ruling titled "Ruling" within the section titled "'Foreign Source' and the Maquiladora Program."

[48] Accord: In re: Rollins Environmental Services (TX), Inc., RCRA-VI-106-H, Order Denying Motion for Accelerated Decision or Alternative Motion to Dismiss (June 16, 1994); aff'd on other grounds, 1995 RCRA LEXIS 15 (EAB, March 10, 1995). In Rollins, discussed in more detail in infra note 54, the presiding judge relied on dictionary definitions in holding that "Mexico is prima facie a foreign source ... [and] 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." Id. at 14, 17.

"arranged" to receive such waste.[49]

To support this denial, Respondent advanced essentially two reasons, one relating to its own practical situation, and the other to the history of Section 264.12(a). The practical problem was that, according to Respondent, it had obtained all the shipments at issue through an intermediary waste broker. The practice, as described by Respondent, was for the broker to give Respondent a waste sample for analysis and pricing, without informing Respondent of the waste generator's location.

Further according to Respondent, if the broker, after possibly seeking other price quotes, chose to accept Respondent's price, the broker typically would not tell Respondent until just a few days before sending the waste, to confirm acceptance of the deal. In light of this practice, argued Respondent, it really lacked enough information regarding its receipt of these hazardous waste shipments in time to have given four weeks advance notice of them. Consequently, Respondent suggested that it was unrealistic for Section 264.12(a)'s notice obligation to be imposed upon it.

For the history of Section 264.12(a), Respondent noted that it was issued in 1980 as a corollary to an export notification requirement previously promulgated (citing 45 Fed. Reg. 33155, 33179 (May 19, 1980)). That requirement (currently in 40 C.F.R. § 262.53) is for advance notice to EPA before an export of hazardous waste.

Respondent described how this notice requirement was imposed in the initial regulation on the generator of the hazardous waste to be exported, and in a later revision on the person preparing the manifest. Respondent's point was that this notice requirement has subsequently been imposed also on "any intermediary arranging for the export" (40 C.F.R. § 262.51), because any such intermediary (e.g., a broker) would know the information needed for the notification (citing 51 Fed. Reg. 28664, 28667-28668 (Aug. 8, 1986)).

Respondent accordingly argued that, for imports of hazardous waste, the notice obligation should logically again be placed on the party with the requisite information, viz., the party that arranges the import, whether it be the treatment facility itself or an intermediary (or broker). Respondent contended further that the obligation should not be placed on a party without that information in advance, viz., a treatment facility that merely receives such waste.

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[49] See First Amended Answer, at 3 (August 13, 1991), and Exhibit B thereto, at 4-8 (July 15, 1991); Respondent's Prehearing Exchange, at 2, 6-10 (Oct. 16, 1991).

It is significant for Respondent that Section 264.12(a) speaks "of a facility that has arranged to receive" (emphasis added), not simply "of a facility that has received." To accord "arranged" a reasonable function in the sentence, Respondent would attribute to it its meaning in the export section, i.e., "any intermediary arranging for the export" (emphasis added). By this interpretation, Section 264.12(a) would apply only to somebody who (1) is "[t]he owner or operator of a facility" (and) (2) "that has arranged to receive hazardous waste from a foreign source"; Respondent would be thus excused because it satisfied only (1).

Respondent itself observed that, per its interpretation, where a broker arranges an import of hazardous waste to a treatment facility, nobody would be responsible for giving notice. (The broker would not be "a facility ... receiv[ing] hazardous waste," and the receiving facility would not have "arranged to receive hazardous waste from a foreign source.") This outcome, Respondent suggested, would be simply a result of defective regulatory draftsmanship.

Complainant's Position

For Complainant, it was enough that Respondent "arranged to receive hazardous waste" and that the hazardous waste, whether or not because of Respondent's arranging, turned out to be "from a foreign source." Complainant explained its position as follows.

> The regulation applies to facilities who 'arrange to receive' hazardous waste from a foreign source. The issue is not who arranged the shipments of waste into the United States. Complainant believes the evidence will show that Respondent made arrangements to accept the waste shipments alleged in the Complaint prior to the arrival of those shipments at its facility and that those waste shipments were from foreign sources.[50]

Ruling

The Federal Register notice announcing the regulation at issue described the rule in simple, direct terms:

> Required Notices. Sections 264.12 and 265.12 require that the owner or operator of a facility notify the Regional Administrator at least four weeks in advance of the date of any shipments of hazardous waste from foreign sources.[51]

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[50] Complainant's Prehearing Exchange, at 2, 6-10 (Oct. 16, 1991).

[51] 45 Fed.Reg. 33153, 33179 (1980).

This description of Section 264.12(a) clearly places the obligation of notice on the "owner or operator of a facility" that receives "any shipments of hazardous waste from foreign sources." It thus supports Complainant's position--that it suffices that Respondent arranged to receive the hazardous waste--and is inconsistent with Respondent's position--that Respondent must also have arranged the foreign source origin of the hazardous waste. This description, and Complainant's position, are also the most reasonable reading of the language of Section 264.12(a).

As to Respondent's suggested practical problem, Respondent made no showing that it could not have contracted with its broker in such a way as to assure that notice had been timely given for those deals where its price quote was accepted. Respondent argued that "in light of its intended purpose [Section 264.12(a)] must be construed to impose a notice requirement only where a facility has undertaken a sufficient degree of advance planning to endow him with the knowledge necessary to make the notification in a timely manner."[52] But it would seem illogical and unfair to reward those who fail to expend the effort to do such advance planning by exempting them from the notice obligation.

Respondent's interpretation would also have the undesirable consequence, again described by Respondent itself, of depriving EPA of any notice of hazardous waste imports where a broker arranged the import and a facility received them. Such an outcome contrasts sharply with the underlying scheme of RCRA, which is to create a comprehensive "cradle-to-grave" system for regulating hazardous waste.[53]

Of course, that Respondent's proffered interpretation would have illogical, unfair, or undesirable consequences is no cause for rejecting the interpretation if it is the most reasonable reading of the regulatory language. But the wording of Section 264.12(a), especially as amplified by its Federal Register description, supports Complainant's interpretation. Therefore Respondent, by virtue of having arranged to receive the hazardous waste at issue, is subject to the notification requirement of Section 264.12(a).[54]

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[52] Respondent's Prehearing Exchange, at 7 (Oct. 16, 1991).

[53] See, e.g., City of Chicago v. Environmental Defense Fund, 128 L.Ed.2d 302, 307 (1994); Chemical Waste Management v. Hunt, 119 L.Ed.2d 121, 129 n.1 (1992).

[54] This issue has also been considered and resolved in a case that Respondent apparently believes parallels the instant proceeding. The "arrange to receive" issue was described in detail in a letter (Exhibit B to the First Amended Answer) written on behalf of several "collective respondents," including both

Factual Issue: Origin of Hazardous Waste

Respondent raised two particular factual questions about the alleged Mexican origin of the hazardous waste shipments identified in Complainant's Motion. Respondent claimed particularly that most of the waste manifests showed only a U.S. address for the waste generator. In addition, for several of the generators, according to Respondent, notices of registration at the Texas Water Commission showed no hazardous waste generation in Mexico during the relevant time period.

Procedure for this case is governed by EPA's Consolidated Rules of Practice, 40 C.F.R. Part 22. Pursuant to Section 22.20(a) of these Rules, an accelerated decision (or partial accelerated decision) may be granted only when "no genuine issue of material fact exists." Respondent's questions regarding the actual origin of the hazardous waste shipments listed in the Complaint create a sufficiently "genuine issue of material fact" that Complainant's Motion for Partial Accelerated Decision will be denied on this ground.

Respondent's questions do not appear to cover all of the alleged shipments, however, and it may be that a partial accelerated decision can be granted as to some of them. Complainant may make such a request in a reply to the questions raised by Respondent that identifies the shipments to which the request applies.

Respondent in this proceeding and Rollins Environmental Services (TX), Inc. In the Rollins proceeding, the presiding judge specifically considered and rejected the "arrange to receive" theory advanced by the "collective respondents," as follows.

> 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.

In re: Rollins Environmental Services (TX), Inc., RCRA-VI-106-H, Order Denying Motion for Accelerated Decision or Alternative Motion to Dismiss (June 16, 1994) at 18, aff'd on other grounds, 1995 RCRA LEXIS 15 (EAB, Mar. 10, 1995). The presiding judge, focusing on the plain language of the word "arrange" as applied to the conduct of the receiving facility, reached the same result as is reached in the instant proceeding.

Ruling

Hazardous waste from a maquiladora plant located in Mexico is ruled to be "from a foreign source" as that quoted phrase is used in Section 264.12(a) of the Regulations. The request in Complainant's Motion for Partial Accelerated Decision for this ruling in thus granted, and the request in Respondent's Motion for Partial Accelerated Decision for a contrary ruling is thus denied.

Respondent is ruled to have "arranged to receive" the hazardous waste shipments identified in Complainant's Motion as that quoted phrase is used in Section 264.12(a) of the Regulations. The defense on this point submitted in Respondent's First Amended Answer is thus denied.

Complainant's Motion for Partial Accelerated Decision is denied because a "genuine issue of material fact exists" as to the actual origin of the hazardous waste shipments identified in the Motion.

Thomas W. Hoya
Administrative Law Judge

Dated: November 30, 1995

CERTIFICATE OF SERVICE

I hereby certify that the original of this ORDER RULING GRANTING IN PART AND DENYING IN PART COMPLAINANT'S AND RESPONDENT'S MOTIONS FOR PARTIAL ACCELERATED DECISION was sent to the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on November 30, 1995.

Shirley Smith

NAME OF CASE: Chemical Reclamation Services
DOCKET NUMBER: RCRA-VI-104-H

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