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# The Waste Export Control Act: Proposed Legislation and the Reagan-Era Legacy to International Environmental Protection

*Alan Neff\**

## I. INTRODUCTION

On May 31, 1989, four Representatives introduced in the U.S. House of Representatives the Waste Export Control Act ("WECA").<sup>1</sup> According to the bill's bipartisan sponsors, its purpose is to regulate the export of solid waste<sup>2</sup> from the United States to foreign countries more stringently than existing federal laws and regulations. Three House subcommittees<sup>3</sup> have held hearings in 1988 and 1989 on exports of solid wastes—in advance of, and since, introduction of the legislation discussed in this Article.

Section Two of this Article will review the events that precipitated the introduction of this bill, analyze the bill itself, and review the issues

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<sup>1</sup> H.R. 2525, 101st Cong., 1st Sess. (1989). The four representatives were: Mike Synar (D.-Okla.), John Conyers (D.-Mich.), John Porter (D.-Mich.), and John Porter (R.-Ill.).

<sup>2</sup> Solid waste has been defined as "useless, unwanted, or discarded material with insufficient liquid content to be free flowing." R. RODGERS, ENVIRONMENTAL LAW 619 (1977) (quoting NATIONAL ASS'N OF COUNTIES, BASIC ISSUES ON SOLID WASTE MANAGEMENT AFFECTING COUNTY GOVERNMENT, app. E, at 40 (1973) (definition of terms) (published under the auspices of the Environmental Protection Agency)).

<sup>3</sup> The Environment, Energy and Natural Resources Subcommittee of the Committee on Government Operations, chaired by Rep. Mike Synar [hereinafter the Synar Subcommittee]; the International Economic Policy and Trade Subcommittee of the Foreign Affairs Committee, chaired by Rep. Sam Gejdenson (D-Conn.) [hereinafter the Gejdenson Subcommittee]; and the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, chaired by Rep. Thomas Luken (D-Ohio) [hereinafter the Luken subcommittee].

raised in congressional hearings held recently on waste export and on the bill. Section Three will reflect on the Reagan era's legacy to international environmental protection and on the legislative process itself as it focuses on questions of international environmental protection.

This Article reviews legislative work-in-progress, which is unlikely to be enacted before the fall of 1990.<sup>4</sup> Thus, this Article assumes that Congress will subject the bill to further consideration, and that the bill may be amended or even abandoned before either chamber votes on it in any form. Nevertheless, the bill raises significant legal and policy issues in the field of international environmental law. For that reason, it is worthy of discussion in this Symposium.

## II. THE PROPOSED WASTE EXPORT CONTROL ACT

### A. The Social and Legal Context for This Proposed Legislation

Each year, the United States generates approximately 250 million tons of solid waste classified and regulated under U.S. law as "hazardous"—approximately one ton for each citizen of the United States.<sup>5</sup> This total amounts to approximately 90% of the "hazardous" waste annually generated worldwide;<sup>6</sup> of course, it represents only part of all solid waste generated in the United States or worldwide.

Most of this domestically generated "hazardous" waste is disposed of within the United States,<sup>7</sup> but approximately 160,000 tons of the total is being exported to foreign disposal sites.<sup>8</sup> Approximately 120,000 tons of the exported "hazardous" waste—75% of the total exported "hazardous" waste—goes to disposal sites in Canada. Transboundary shipments of "hazardous" waste between the United States and Canada and between the United States and Mexico are regulated by separate bilateral agreements between the United States and the other two nations.<sup>9</sup> The balance of the exported "hazardous" waste and other solid wastes are exported to other nations, including less developed countries ("LDCs").

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<sup>4</sup> According to spokespeople for all three House subcommittees charged with managing the bill.

<sup>5</sup> International Export of U.S. Waste: Hearing Before the Subcomm. on Environment, Energy, and Natural Resources of the House Comm. on Gov't Operations, 100th Cong., 2d Sess. 1 (1988) [hereinafter *Synar Subcomm. Report*] (statement of Chairman Mike Synar, U.S. House of Representatives).

<sup>6</sup> The Waste Export Control Act: Hearings on H.R. 2525 Before the Subcomm. on Int'l Econ. Policy and Trade and the Subcomm. on Human Rights and Int'l Organizations of the House Comm. on Foreign Affairs, 101st Cong., 1st Sess. (1989) [hereinafter *Gejdensen Subcomm. Report*] (statement of Chairman Sam Gejdensen, U.S. House of Representatives).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2.

The preceding two paragraphs could mislead readers unfamiliar with environmental law, so they require clarification. The figures above estimated trends in the domestic and foreign generation and disposition of solid waste, including waste that is, as stated above, "denoted and regulated under U.S. law as 'hazardous'." That expression, and the use of quotation marks around "hazardous" thereafter, is intended to underscore that "hazardous waste" is waste that U.S. legislators and administrators have agreed to define as "hazardous" under the Resource Conservation and Recovery Act ("RCRA") provisions<sup>10</sup> of the Solid Waste Disposal Act ("SWDA"),<sup>11</sup> after input from interest groups taking a multitude of positions on the nature and proper definition of "hazardous waste."

Even a cursory review of the hearings to date on this bill alone reveals that there is no social, political, or scientific consensus about what is or is not "hazardous" waste. Thus, one must recognize that the SWDA/RCRA-based regulatory definitions of "hazardous" and "non-hazardous" solid waste are politically derived. The definitions may be over- or under-inclusive (or exactly right) in relation to the actual "hazardous" or "non-hazardous" nature of the wastes so defined, but any relationship between legal characterizations of waste's hazards and their actual character is coincidental.<sup>12</sup>

This lack of consensus illustrates the difficult task of tracking and identifying actual hazardous waste, as distinct from other kinds of waste. Estimating the volume and character of waste generated and disposed of by export is further complicated by the fact that the exported volume of "non-hazardous" solid wastes—which may or may not actually be "non-hazardous"—is subject to no regulation and is therefore indeterminable. Consequently, the actual total volume, character, and disposition of exported solid waste—hazardous or non-hazardous—is likewise indeterminable.

This Article consequently and necessarily trades in regulatory trends for "waste" defined in a political arena, albeit with input from other social institutions. To paraphrase Raymond Carver, what we talk about when we talk about hazardous waste may or may not be hazardous.<sup>13</sup>

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<sup>10</sup> 42 U.S.C. §§ 6921-6931 (1983 & Supp. 1989).

<sup>11</sup> 42 U.S.C. §§ 6901 (1983 & Supp. 1989).

<sup>12</sup> See, e.g., WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 557 (1983) [defining "hazardous" as "involving or exposing one to risk" (as of loss or harm)].

<sup>13</sup> R. CARVER, WHAT WE TALK ABOUT WHEN WE TALK ABOUT LOVE (1981).

## B. Congressional Hearings on Waste Export Practices and Regulation

Three House subcommittees have held hearings on the proposed bill: the Environment, Energy and Natural Resources Subcommittee, chaired by Rep. Mike Synar, of the Committee on Government Operations; the International Economic Policy and Trade Subcommittee, chaired by Rep. Sam Gejdenson, of the Foreign Affairs Committee;<sup>14</sup> and the Subcommittee on Transportation and Hazardous Materials, chaired by Rep. Thomas Luken, of the Committee on Energy and Commerce. The Synar Subcommittee held its hearings in July of 1988, in advance of the introduction of the legislation; the Gejdenson and Luken subcommittees held their hearings in July of 1989 and concentrated on the proposed legislation.

In testimony on the international waste trade, these subcommittees have focused most of their attention on three topics: the overall efficacy of the existing U.S. regulatory program for waste exports; the export of U.S. wastes to less-developed countries ("LDCs"); and, in response to the first two topics, the appropriate form and content for WECA. The committees also heard testimony on the U.S. waste trade with Canada and other countries, and on the U.S. negotiating posture as to the recently signed Basel Convention for regulating transboundary shipments of hazardous wastes.

The committees have taken testimony from local, state, and federal officials involved in waste-export management, including the Inspector General of the Environmental Protection Agency ("EPA"), who recently audited the EPA's management of the existing waste-export regulatory program,<sup>15</sup> and also from officials of the EPA charged with managing the EPA's international activities. The committees also have heard testimony from representatives of individual waste exporters and waste-export trade associations and from representatives of national and international environmental groups.

Among other topics, the 1988 and 1989 hearings considered the efficacy to date of the EPA's existing program for enforcing the 1984 amendments regulating waste-export practices. To provide a context, this Article will briefly summarize the existing regulatory system.

The U.S. regulatory controls on exports of hazardous waste chiefly consist of notice-and-consent requirements, enacted under a section of

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<sup>14</sup> Gejdenson Subcomm. Report, *supra* note 6.

<sup>15</sup> OFFICE OF THE INSPECTOR GENERAL, U.S. EPA, REPORT OF AUDIT EID37-05-0456-80855: EPA'S PROGRAM TO CONTROL EXPORTS OF HAZARDOUS WASTE (Mar. 31, 1988) [hereinafter IG AUDIT] [on file at NW. J. INT'L L. & BUS. offices].

the Hazardous and Solid Waste Amendments of 1984 ("HSWA").<sup>16</sup> To satisfy the requirements of HSWA, the exporter must notify the EPA of its intent to export a shipment or shipments, describe how the shipment will be managed in the receiving country, and supply to the EPA the receiving country's consent in writing to accept the waste. The exporter must also attach a copy of the written consent to all shipping manifests and supply annual reports to the EPA about any actual shipments of wastes. Of course, any actual shipment of waste must conform to the terms of the receiving country's consent, and a receiving country may object to or reject a shipment for a variety of reasons.

HSWA allows waste exporters to comply alternatively with the terms of bilateral international agreements governing waste transshipments between the United States and recipient countries.<sup>17</sup> The terms of these agreements, regardless of their specific requirements, obviate compliance with all other provisions of HSWA, except for the requirement that the waste exporter file annual reports with the Administrator about actual waste exports.<sup>18</sup>

The penalties for non-compliance with HSWA can be severe. Any person who exports hazardous wastes without maintaining or filing the records and other documents required under HSWA, or without complying with the regulations promulgated by EPA under HSWA, may be fined up to \$50,000 or imprisoned for up to two years for each violation. Repeat violators may be fined \$100,000 or imprisoned for up to four years.

The EPA has other responsibilities in addition to managing the export permit system. The EPA must work with the U.S. Customs Office to develop a program for monitoring compliance by waste shippers. The EPA also will separately advise a receiving country about appropriate management techniques for any given shipment of hazardous waste, if it receives a request to consult from the receiving country. The EPA, however, has no authority to veto a proposed shipment, and its officers have testified that they interpret the amendments as giving them no authority to advise a potential recipient country of the wisdom of accepting or rejecting a particular shipment.<sup>19</sup>

Owing to increasingly stringent domestic regulation of solid hazardous and non-hazardous waste-disposal, exports of hazardous and other

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<sup>16</sup> 42 U.S.C. § 6938 (1983 & Supp. 1989).

<sup>17</sup> 42 U.S.C. § 6938(f).

<sup>18</sup> *Id.*

<sup>19</sup> See *supra* note 5.

solid waste appear likely to increase.<sup>20</sup> This prediction is supported by the increasing numbers of applications for permits to export hazardous waste under RCRA.<sup>21</sup> In testimony to the Synar Subcommittee, the Inspector General of the EPA said that the EPA's management of the program "needed major improvements,"<sup>22</sup> for several reasons. He found instances where shippers had failed to notify the EPA of their intent to ship,<sup>23</sup> had shipped wastes without filing notifications of intent to export,<sup>24</sup> had failed to supply annual reports to the EPA about actual shipments,<sup>25</sup> and had failed to supply adequate information to the EPA about the receiving country's proposed treatment of shipments.<sup>26</sup> The Inspector General also reported that the EPA had not established in conjunction with the Customs Office a nationwide monitoring program,<sup>27</sup> had not provided adequate guidance to exporters about how to comply with notification requirements concerning waste management practices in receiving countries,<sup>28</sup> had processed export notifications without full descriptions of the receiving countries' waste management practices,<sup>29</sup> and had not notified shippers of objections to shipments from receiving countries.<sup>30</sup> The Inspector General acknowledged in his testimony that the EPA had taken a number of steps that, if fully executed, would substantially improve EPA's performance under existing waste-export laws and regulations.<sup>31</sup>

The EPA officials responsible for the waste-export regulatory program asserted that the program had worked "... effectively to give countries notice of proposed shipments and the opportunity to reject them . . . ." <sup>32</sup> Yet they agreed that existing law gave the EPA no authority to

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<sup>20</sup> Gejdenson Subcomm. Report, *supra* note 6, at 1 (statement of Rep. Mike Synar). The number of hazardous waste export notifications increased from 12 in 1980 to more than 600 in 1988. Note, however, that notices of intent to export may exceed actual exports. Notices also may underrepresent actual exports, given that some exporters may ignore permit requirements or exceed permitted levels of export.

<sup>21</sup> *Id.*

<sup>22</sup> Synar Subcomm. Report, *supra* note 5, at 19 (statement of John C. Martin, Inspector General of the EPA). The IG AUDIT, *supra* note 15, provides the same basic information as Martin's testimony and prepared statement, but supplies substantially more detail.

<sup>23</sup> Synar Subcomm. Report, *supra* note 5, at 19.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 21.

<sup>26</sup> *Id.* at 23.

<sup>27</sup> *Id.* at 22.

<sup>28</sup> *Id.* at 22-23.

<sup>29</sup> *Id.* at 23.

<sup>30</sup> *Id.* at 25.

<sup>31</sup> *Id.* at 27.

<sup>32</sup> *Id.* at 277 (statement of Sheldon Meyers, Acting Associate Administrator for International Activities, U.S. EPA).

require prior informed consent for nonhazardous waste or to prohibit such shipments.<sup>33</sup> They also acknowledged that the program could be managed more effectively under existing law. Finally, they testified that the EPA was responding to the Inspector General's assessment of the EPA's management of the program by improving coordination among EPA Offices having jurisdiction over solid waste exports,<sup>34</sup> by strengthening enforcement of regulations,<sup>35</sup> and by reviewing the hazardous waste export notices for completeness and accuracy.<sup>36</sup> They also reported that they were reviewing the following options that might further strengthen the existing regulatory scheme: giving the United States authority to prohibit a hazardous waste shipment even if the recipient country consented to accept it;<sup>37</sup> case-by-case evaluation of receiving facilities before permitting waste exports to them;<sup>38</sup> and banning waste exports to countries with whom the United States has no bilateral agreement.<sup>39</sup>

The Synar Subcommittee also closely examined instances of actual exports and attempted exports of hazardous and non-hazardous solid wastes to developed countries and to LDCs that appear to be ill-equipped to manage those wastes. The Committee attempted to trace the disposition of the wastes already exported to LDCs and other countries, including highly publicized events involving shipments of waste that were rejected by recipient countries and other shipments that traveled extensively in unsuccessful attempts to find recipients for them. The 1988 hearings before the Synar Subcommittee focused specifically on the travels of a shipment of incinerator ash from Philadelphia on a ship called the *Khian Sea* to Haiti<sup>40</sup> and on a shipment of incinerator ash on a ship called the *Bark*.<sup>41</sup>

Witnesses testified to the Synar Subcommittee that some LDCs have been willing to accept the wastes because they need the hard currency,

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<sup>33</sup> *Id.* at 273.

<sup>34</sup> *Id.* at 278.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 280.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 121-240. Waste ash was improperly deposited on coastal wetlands in Haiti. After complaints from the Haitian government, a transporter removed most of the ash, but left behind about 2,000 tons, which was not contained or controlled as would be required by the United States. *Id.* at 117-18. The ultimate disposition of the *Khian Sea*'s wastes was unknown. *Id.* at 263.

<sup>41</sup> *Id.* at 263-64 (statement of Dr. Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environmental and Scientific Affairs). The *Bark*'s shipment initially went to Kassa Island, off the coast of Guinea. The government of Guinea ordered the waste removed after it determined that the export permits had been improperly issued.



because they intend to recycle the wastes in some way, or because they anticipate some other economic benefit associated with accepting the waste, such as increased employment in local waste-disposal or recycling industries.<sup>42</sup> The witnesses also testified that LDCs have in increasing numbers rejected such shipments.<sup>43</sup>

In remarks and testimony to the Synar Subcommittee, congressional representatives from both political parties and other witnesses objected on several grounds to the practice of exporting waste generally and specifically to LDCs.<sup>44</sup> Members and witnesses decried waste exporting as a kind of neo-colonial economic exploitation of the LDCs, in which the United States continues to extract the LDCs' resources (in this case, their waste-disposal capacity), without regard to the risk of adverse social, environmental, or health consequences for the waste recipients.<sup>45</sup> They noted potential adverse foreign relations consequences for the United States if such waste disposal results in an ecological catastrophe for a recipient nation.<sup>46</sup> Also, they regarded waste exporting as short-sighted management of our domestic environmental practices because it enables the United States and U.S. waste generators to defer investment in waste minimization processes (chiefly source-reduction and recycling), which would lessen the load our social practices impose on the global and national environment and resources.<sup>47</sup> The witnesses and congressional representatives also feared a boomerang effect: the United States might import from waste recipients products that are hazarously contaminated by pollution from our waste exports that have not been safely managed in the recipient nations.<sup>48</sup> Finally, they objected on the moral ground that the United States is hypocritically encouraging or condoning waste management practices in other countries that are no longer tolerated in the United States or other developed countries.<sup>49</sup>

In testimony to all three subcommittees, other witnesses endorsed

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<sup>42</sup> See, e.g., *id.* at 362-64 (statement of Pat Costner, Greenpeace International) (reporting offers by U.S. waste exporters of large sums of money to developing countries that accepted wastes), and at 369 (citing Brazil, Guinea, Haiti, Mexico, Nigeria, South Africa, and Zimbabwe as developing countries that have accepted wastes).

<sup>43</sup> *Id.* at 365 (reporting that the Organization for African Unity had declared a ban on all waste imports to Africa).

<sup>44</sup> See, e.g., *id.* at 1-3 (statement of Rep. Synar), 3-4 (statement of Rep. Clinger), 8-10 (statement of Rep. Conyers), 356-69 (statement of Pat Costner, Greenpeace International), and 343-52 (statement of Dr. William Y. Brown, Waste Management, Inc.).

<sup>45</sup> *Id.* at 358 (statement of Pat Costner, Greenpeace International).

<sup>46</sup> *Id.* at 365.

<sup>47</sup> *Id.* at 367.

<sup>48</sup> *Id.* at 30 (statement of Bonnie Ram, Bernard Schwartz Fellow in Energy and Environment, Federation of American Scientists).

<sup>49</sup> *Id.* at 6 (statement of Rep. Conyers).

the practice of exporting wastes for several reasons,<sup>50</sup> although none of them asserted that waste exports should be permitted to go to countries unprepared to deal with them. In supporting regulated, environmentally prudent exports of wastes, witnesses asserted that most of exported waste goes to Canada, which has waste management firms fully competent to manage the wastes as stringently as is required under U.S. law and which has facilities which meet or exceed U.S. legal requirements for hazardous waste management by disposal or recycling. They also asserted that many states' Capacity Assurance Plans ("CAPs"), required under CER-CLA, would be deficient legally if they could not include in their plans hazardous waste capacity provided by waste management operations in Canada.

The witnesses also observed that much of the waste exported to Canada is part of a regional and reciprocal pattern of transboundary waste shipments between Canada and the northeastern region of the United States, and that these transboundary shipments are sufficiently regulated by the bilateral agreement between the United States and Canada, in conjunction with each nation's domestic hazardous waste regulatory systems. They asserted that provisions of the proposed statute would violate principles of international law by ignoring or breaching the sovereign right of nations to conduct their domestic economic planning and activity as they see fit. Finally, they asserted that the provisions of the statute as proposed were unenforceable.

The Gejdenson and Luken subcommittees chiefly heard testimony on the value and specific content of the proposed bill. A review of the proposed legislation will provide context for discussion of the witnesses' comments on the bill.

### III. THE WASTE EXPORT CONTROL ACT

The Waste Export Control Act ("the Act" or "the bill") would amend the provisions of the Solid Waste Disposal Act ("SWDA"). Section one of the bill names the short title of the Act. Section two supplies the findings and purpose on which the Act is premised. The remaining

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<sup>50</sup> See, e.g., *id.* at 259-70 (statement of Dr. Frederick M. Bernthal, Assistant Secretary of State for Oceans, International Environment and Scientific Affairs); *Gejdenson Subcomm. Report*, *supra* note 6 (statement of Barry Malter, International Environmental Policy Coalition) (an association of U.S. and Canadian waste generators and waste management firms); at 3 (statement of Richard Fortuna, Executive Director of the Hazardous Waste Treatment Council). See also *The Waste Export Control Act: Hearings on H.R. 2525 Before the Subcomm. on Transportation and Hazardous Waste of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 109-38 (1989) [hereinafter *Luken Subcomm. Report*] (statement of Donald B. Bright, Chief Executive Officer of Environmental Audit, Inc.).

sections explain the regulatory machinery which would be established to serve the objectives of the Act. In summary, they establish two basic prerequisites for waste exports: "international agreements" between the United States and any nation that might agree to receive such wastes, and specific permits of waste exporters to authorize actual shipments of wastes. Unlike the current regulatory structure, the permits and international agreements would be cumulative, rather than alternative, requirements.

Section two supplies the findings on which the Act is premised and the purpose of the Act. Six findings prompted the bill. First, exports of solid waste from the United States are increasing, and in several instances the exported wastes have been disposed of in ways that would be impermissible under U.S. law.<sup>51</sup> Second, those disposal practices are creating foreign policy liabilities for the United States, and many pending proposals for additional shipments are unsafe.<sup>52</sup> Third, exports of solid waste from the United States are being undertaken to avoid treatment and disposal compliance-costs in the United States, and the exports contribute to the U.S. trade deficit.<sup>53</sup> Fourth, uncontrolled exports of solid waste detrimentally affect implementation of domestic environmental policy, which strives to encourage source reduction and recycling as optimal methods of waste management.<sup>54</sup> Fifth, exports should therefore occur only when all reasonable efforts to minimize waste generation have been exhausted.<sup>55</sup> Sixth, existing federal laws do not provide for review by the United States of the effects of waste exports on the environment of the recipient country.<sup>56</sup> Finally, uncontrolled export of waste and unsafe dumping of waste threaten coasts, oceans, and groundwater.<sup>57</sup> Section two then supplies the purpose of the Act: to protect human health and the environment by:

limit[ing] the export of solid waste from the U.S. to exceptional situations and to require that [waste] exports be conducted in accordance with an international agreement and strict domestic regulation . . . in a manner which is no less strict than that which would be required by the SWDA if the waste were managed in the United States.<sup>58</sup>

Sections 12001-12006—the remaining sections of the bill—would become Subtitle K, a new subtitle to the SWDA. They establish the re-

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<sup>51</sup> H.R. 2525, 101st Cong., 1st Sess. § 2(a)(1) (1989).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at § 2(a)(2).

<sup>54</sup> *Id.* at § 2(a)(3).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at § 2(a)(4).

<sup>57</sup> *Id.* at § 2(a)(5).

<sup>58</sup> *Id.* at § 2(b).

quirements for a waste exporter to earn authorization to ship wastes to a recipient country.

Section 12001 defines the kind of solid waste to which the bill would apply.<sup>59</sup> It also identifies the kinds of waste generators to which the bill would apply.<sup>60</sup>

Section 12002 would prohibit any export of solid waste from the United States unless the export satisfies three basic conditions:<sup>61</sup> an international agreement must exist between the United States and the receiving country, with specific content;<sup>62</sup> the waste export must conform to the terms of the international agreement;<sup>63</sup> and the exporter must be in compliance with the permitting and fee requirements established by the Act and with all regulations issued pursuant to the Act.<sup>64</sup>

Section 12002(b) sets out the key provisions of international waste-export agreements that would be required as a condition precedent for waste shipments. Such an agreement must have at least the following characteristics: a provision for notifying the receiving country of waste exports;<sup>65</sup> a provision for obtaining the consent of the receiving country to accept a waste shipment;<sup>66</sup> a provision authorizing an exchange of information between the United States and the receiving country about how the waste will be treated, stored, or disposed of in the receiving country, including mechanisms to assure the United States that the exported waste will be managed no less strictly in the receiving country than it would be managed in the United States and mechanisms that permit U.S. access to waste management facilities;<sup>67</sup> a provision for cooperation between the United States and the receiving country to ensure compliance with and enforcement of the agreement;<sup>68</sup> a provision for bi-

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<sup>59</sup> This subtitle applies to all "solid waste" as defined in section 1004(27) of [the SWDA], except that this subtitle shall not apply to baled waste paper, glass cullet, metals, or plastic that (1) have been separated by type from solid waste before export, (2) are exported from incorporation into new products with recycled content, and (3) are not a hazardous waste listed or identified under section 3001.

*Id.* at § 12001(a).

<sup>60</sup> For purposes of this subtitle, a person shall be considered a "generator" of solid waste if that person produces solid waste, except that in the case of solid waste collected by a city, county, or other local government, such city, county, or local government shall be considered to be the generator of the solid waste in lieu of the person producing the solid waste.

*Id.* at § 12001(b).

<sup>61</sup> *Id.* at § 12002(a).

<sup>62</sup> *Id.* at § 12002(a)(1).

<sup>63</sup> *Id.* at § 12002(a)(2).

<sup>64</sup> *Id.* at § 12002(a)(3).

<sup>65</sup> *Id.* at § 12002(b)(1)(A).

<sup>66</sup> *Id.* at § 12002(b)(1)(B).

<sup>67</sup> *Id.* at 12002(b)(1)(C).

<sup>68</sup> *Id.* at § 12002(b)(1)(D).

ennial, bilateral review of the agreement;<sup>69</sup> a provision for review and revision or suspension of the agreement if either party concludes that waste is not being managed in the receiving country in conformity to the agreement;<sup>70</sup> and a provision which prohibits further transports of waste from the receiving country without written consent of both parties to the agreement.<sup>71</sup>

Section 12002(b)(2) would grandfather in existing bilateral international agreements governing transboundary waste shipments, but it would also require that existing agreements conform within one year to the new requirements of this section.<sup>72</sup> Finally, the section specifically provides that the decision of the United States not to enter into an international agreement would not be judicially reviewable.<sup>73</sup> It does not specify, however, whether a decision to enter into an agreement would be reviewable.

Section 12003 of the bill sets out the expanded waste export permit requirements. The section begins by declaring that after enactment of WECA, no person may directly or indirectly export solid waste without a permit from the Administrator of the EPA.<sup>74</sup> The section then details the information required in an application for a permit: the name and address of the exporter;<sup>75</sup> the types, quantities, and concentrations of the waste designated for export;<sup>76</sup> the names and addresses of persons on whose behalf the waste will be exported, including the waste generators;<sup>77</sup> the estimated rate or frequency of waste export and the period of time over which the exports will occur;<sup>78</sup> the shipment's ports of exit and entry;<sup>79</sup> the name and address of the facility to which the waste will be sent;<sup>80</sup> the method of waste treatment, storage, or disposal to be used at the facility;<sup>81</sup> information demonstrating that the method of treatment will protect human health and the environment no less strictly than would be the case if the waste were managed in the United States;<sup>82</sup> evidence of the financial responsibility of the facility manager at least equal

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<sup>69</sup> Id. at § 12002(b)(1)(E).

<sup>70</sup> Id. at § 12002(b)(1)(F).

<sup>71</sup> Id. at § 12002(b)(1)(G).

<sup>72</sup> Id. at § 12002(b)(2).

<sup>73</sup> Id. at § 12002(b)(3).

<sup>74</sup> Id. at § 12003(a).

<sup>75</sup> Id. at § 12003(b)(1).

<sup>76</sup> Id. at § 12003(b)(2).

<sup>77</sup> Id. at § 12003(b)(3).

<sup>78</sup> Id. at § 12003(b)(4).

<sup>79</sup> Id. at § 12003(b)(5).

<sup>80</sup> Id. at § 12003(b)(6).

<sup>81</sup> Id. at § 12003(b)(7).

<sup>82</sup> Id. at § 12003(b)(8).

to that required under the SWDA of a facility operator in the United States;<sup>83</sup> evidence of the financial responsibility of the exporter adequate to pay for clean-up costs and other liabilities for which the exporter might be responsible, under the laws of the recipient state or of the U.S.;<sup>84</sup> extensive identification of the applicant for the permit, or of the applicant's owners, officers, directors, partners, creditors, and key employees if the applicant is a business concern;<sup>85</sup> a description of the waste-management-related credentials and experience of the applicant or the applicant's personnel;<sup>86</sup> a listing and explanation of the applicant's federal and state record of waste-management-related violations, prosecutions, administrative orders, and license or permit revocations for the ten years preceding the application;<sup>87</sup> a description of the waste minimization efforts of the waste's generators;<sup>88</sup> and any other relevant information requested by the Administrator.<sup>89</sup>

Section 12003 then would require the Director of the EPA's National Enforcement Investigations Center to prepare within 120 days a report on the applicant for the Administrator,<sup>90</sup> who could extend the time for delivery of the report on good cause.<sup>91</sup> It also would place the applicant under a duty to update the application<sup>92</sup> and a continuing duty to assist, inform, and cooperate with the Director.<sup>93</sup>

The Administrator would have to allow public notice and comment on the application before issuing a permit.<sup>94</sup> If the Administrator were to receive a written objection to the application during the notice-and-comment period, the Administrator would have to hold an informal hearing (including receipt of written and oral comments) on the question of issuing the permit.<sup>95</sup>

If the Administrator then decided to issue a permit, he or she could condition it as appropriate and set it for a term not to exceed five years.<sup>96</sup> The permit would remain fully reviewable, modifiable, and revocable

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<sup>83</sup> *Id.* at § 12003(b)(9).

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at § 12003(b)(10)-(b)(12).

<sup>86</sup> *Id.* at § 12003(b)(13).

<sup>87</sup> *Id.* at § 12003(b)(14).

<sup>88</sup> *Id.* at § 12003(b)(15).

<sup>89</sup> *Id.* at § 12003(b)(16).

<sup>90</sup> *Id.* at § 12003(c).

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at § 12003(e).

<sup>93</sup> *Id.* at § 12003(d).

<sup>94</sup> *Id.* at § 12003(f).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at § 12003(g).

during its term.<sup>97</sup> During the term of the permit, the permittee would have to submit annual reports of actual waste exports to the Administrator.<sup>98</sup> The reports would address many of the matters described in the application for the permit, including the waste-minimization efforts of the waste generators for whom waste has been exported.<sup>99</sup> Of course, the bill would authorize the Administrator to issue regulations relevant to the bill's purposes.<sup>100</sup>

Section 12003 also would prohibit the Administrator from issuing a permit unless several specific conditions were satisfied: the generators of the waste covered by the permit have made reasonable waste-elimination and -minimization efforts;<sup>101</sup> the receiving facility can manage the waste no less strictly than would be the case in the United States;<sup>102</sup> the application satisfies all the requirements of the permit provisions;<sup>103</sup> and the Administrator finds that the exporter and the operator of the receiving facility have demonstrated sufficient reliability, expertise, and competence to manage the waste as the bill requires.<sup>104</sup> If the Administrator refuses to grant a permit, Section 12003(j)(2) would authorize the applicant to request a Section 554 hearing under the Administrative Procedure Act.

Section 12003(k) would authorize the Administrator to inspect the facilities of the permittee and any other facilities used to manage the waste covered by the permit.

Finally, Section 12003(l) sets out the bases on which the Administrator may revoke a permit: failure to comply with any term or condition of the permit;<sup>105</sup> failure to comply with any other continuing duty of the permittee under the continuing-duty subsection;<sup>106</sup> any change in the permittee's conditions or circumstances which would have disqualified the permittee on the original application;<sup>107</sup> fraud, deceit, or misrepresentation in obtaining the permit or in any permitted activities;<sup>108</sup> conferring a benefit on any person to induce the person to violate WECA or any other solid or hazardous waste law, or offering or agreeing to confer a

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<sup>97</sup> Id.

<sup>98</sup> Id. at § 12003(h).

<sup>99</sup> Id.

<sup>100</sup> Id. at § 12003(i).

<sup>101</sup> Id. at § 12003(j)(1)(A).

<sup>102</sup> Id. at § 12003(j)(1)(B).

<sup>103</sup> Id. at § 12003(j)(1)(C).

<sup>104</sup> Id.

<sup>105</sup> Id. at § 12003(l)(1).

<sup>106</sup> Id.

<sup>107</sup> Id. at § 12003(l)(2).

<sup>108</sup> Id. at § 12003(l)(3).

benefit to induce violations;<sup>109</sup> using violence or economic reprisal to coerce a customer to use the services of a permittee,<sup>110</sup> and failure of the generator of the waste covered by the permit to make reasonable efforts to eliminate or reduce the volume of waste.<sup>111</sup> The revocation also could trigger a section 554 hearing.<sup>112</sup>

Section 12004 would authorize the Administrator to establish a user fee to defray "fully" the administrative costs of WECA.<sup>113</sup> The section directs that the fees should cover all administrative overhead related to enforcement of the act,<sup>114</sup> and that the Administrator should promulgate regulations to tailor the fees to individual circumstances.<sup>115</sup> Each applicant's fee would have two parts: an application component sufficient to defray the costs of processing applications, paid at the time of application,<sup>116</sup> and a permit component sufficient to defray the costs of overseeing compliance, payable on a schedule over the life of the permit.<sup>117</sup> The permit fee provision says specifically that "the fee schedule established shall ensure that at no time will expenses incurred by the Administrator exceed the amount of fees paid."<sup>118</sup>

Section 12005 would authorize a recipient country to bring an action in the United States under section 107 of CERCLA<sup>119</sup> for damages caused by mismanagement of exported hazardous wastes in the recipient country that would be covered by CERCLA if the damages had occurred in the United States. This section would afford to recipient countries all the rights that domestic plaintiffs would have under CERCLA for a domestic injury.<sup>120</sup> The section also declares that for purposes of Section 107(f) of CERCLA, the recipient country's government would have the same "authority and responsibility" with respect to its natural resources as the United States has with respect to its resources for purposes of Section 107(f).<sup>121</sup>

Finally, Section 12006, a savings provision, would allow foreign

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<sup>109</sup> Id. at § 12003(l)(4).

<sup>110</sup> Id. at § 12003(l)(5).

<sup>111</sup> Id. at § 12003(l).

<sup>112</sup> Id.

<sup>113</sup> Id. at § 12004(a).

<sup>114</sup> Id.

<sup>115</sup> Id.

<sup>116</sup> Id. at § 12004(b)(1).

<sup>117</sup> Id. at § 12004(b)(2).

<sup>118</sup> Id.

<sup>119</sup> The Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 (1990).

<sup>120</sup> Id.

<sup>121</sup> Id.



countries to impose additional liabilities and requirements on waste exports from the United States and on waste exporters. It also would incorporate WECA by reference into the criminal penalties provisions of the SWDA.

#### IV. TESTIMONY ON THE PROPOSED WASTE EXPORT CONTROL ACT

The witnesses who testified on the bill itself can be divided into three basic groups: those who thought the bill was a step in the right direction but was not tough enough, those who supported the basic purpose of the law but said the bill as drafted was too stringent, and those who averred that they basically supported the bill but offered amendments to strengthen or weaken the bill.

Because the bill would increase the regulatory costs of the waste-management industry, one should note that waste industry spokespeople have not been unanimous in proposing amendments that might be construed to weaken the bill. Although most industry spokespeople supported amendments to the legislation that would generally shorten its reach or reduce regulatees' compliance costs, Waste Management, Inc. ("WMI"), the world's largest waste-management firm, has supported the legislation in its current form throughout the hearings to date.<sup>122</sup>

Of course, WMI's position is not inconsistent with its economic self-interest. Its spokesman has asserted in the hearings that waste-export occurs partly to avoid costs of domestic disposal. Thus, WMI's position can be interpreted as at least in part an effort to protect its share of the domestic waste management market by increasing the costs of exporting waste and foreign waste-management. WMI could thereby reduce any cost disadvantage it might bear in domestic waste management relative to waste management firms who profit by exporting waste to foreign lower-cost waste management sites. The bill could thus reduce the alleged cost advantages that foreign waste-management operations could offer to U.S. generators of waste.

Another interesting reaction is that of spokespeople for environmental protection groups, which did not unanimously support further toughening of the bill. As might be expected, a Greenpeace representative testified before the Gejdenson Subcommittee in support of a total ban on all waste exports,<sup>123</sup> although the organization did not take the same position before the Luken Subcommittee.<sup>124</sup> The National Audobon Soci-

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<sup>122</sup> See, e.g., *Gejdenson Subcomm. Report*, *supra* note 6, at 27-34 (testimony of Dr. William Y. Brown).

<sup>123</sup> See *id.* at 362-64 (testimony of Pat Costner).

<sup>124</sup> See *Luken Subcomm. Report*, *supra* note 50, at 75-155 (testimony of Jim Vallette).

ety, in contrast, did not support a total ban on waste exports.<sup>125</sup>

In support of these various positions, the witnesses offered different rationales. To present these in an orderly way, this Article will offer first the witnesses' objections to the legislation, with some discussion of their merits. Then, the Article will review the amendments proposed to date and comment on their likely efficacy.

## V. OBJECTIONS TO THE PROPOSED BILL

The simplest position to consider is that of Greenpeace, which in the Gejdenson Subcommittee hearing objected to the bill on the ground that it would permit continued waste exports.<sup>126</sup> Greenpeace proposed instead a total ban on waste exports.<sup>127</sup> In support of this position, Greenpeace argued that merely regulating waste exports would authorize continued waste exports to lower-cost waste-management sites in foreign countries. In Greenpeace's view, institutionalizing waste exports would produce four undesirable results:<sup>128</sup> the industrialized countries would continue to produce hazardous wastes; U.S. waste generators could defer investment in waste minimization; foreign waste-management operations still could pollute recipient-countries' environments with U.S. wastes, no matter how carefully the facilities might be operated; and it would allow waste exports to countries where, even though the waste facilities might satisfy U.S. waste-management requirements, the local social infrastructure might be unprepared to deal with the social burdens associated with the waste management. Greenpeace also argued that the conduct of the United States in the negotiations leading to the Basel Convention and the contents of the resulting Convention demonstrated that this country preferred to legalize international waste trade without adequate controls on the potential for harm to less-developed countries that could not themselves adequately regulate waste management within their borders.<sup>129</sup>

Greenpeace's position, in short, was that permitting waste trade encourages short-term, environmentally dangerous waste trade at the expense of long-term, more environmentally benign waste minimization: "A system that regulates—rather than prevents—waste exports will, by its nature, permit the inevitable degradation of the quality of life and the environment of world's [sic] dumping grounds. A wall only works if all

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<sup>125</sup> See Gejdenson Subcomm. Report, *supra* note 6, at 343-52 (testimony of Frances Spivy-Weber and V. Ann Strickland of the Audubon Society).

<sup>126</sup> See *id.* at 12 (statement of Pat Costner).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* at 13-14.

<sup>129</sup> *Id.* at 9-11.

doors are shut."<sup>130</sup>

This position makes a great deal of sense if one makes two assumptions. First, one must assume that waste generators are economically rational actors driven only by their analysis of and conclusions about the comparative costs and benefits of domestic and foreign methods of waste management. Second, one must assume that *no* defensible justification exists for any international waste trade.

Certainly, the costs of domestic waste management have steadily increased in recent years. Increased domestic regulation of domestic waste management has also increased domestic generators' costs of waste management. Thus, one could reasonably conclude that faced with increasing short-term domestic waste management costs, domestic generators will seek lower-cost waste-management alternatives wherever they can find them. Increasing numbers of waste export notifications are evidence that the international waste trade consequently is increasing, owing to these economic considerations.

Greenpeace's first assumption thus seems justifiable: exporting waste seems to provide an economically attractive alternative to domestic waste management for some waste generators, at least in the short run. Waste trade thus could diminish short-term incentives among waste generators to find or develop further economically justifiable domestic alternatives to waste trade, such as source reduction by recycling.

Greenpeace's second assumption—that *no* defensible justification exists for international waste trade in any form—seems more disputable. While one might concede that the only long-term domestic and global solution to growing waste burdens is comprehensive and pervasive waste minimization, the short term presents a different problem. The United States is grappling with its waste burdens and must do something now with the wastes it is generating, and it must manage those wastes while it is developing and implementing innovative methods of waste minimization.

Moreover, the United States is not the only developed country seeking solutions to an increasingly burdensome waste management problem. Other developed countries also have significant waste management problems and consequently have established private and public mechanisms to reduce their waste burdens. Other developed countries also have developed, to varying degrees, more comprehensive methods of waste reduction than are currently available in the United States.<sup>131</sup>

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<sup>130</sup> *Id.* at 14.

<sup>131</sup> See, e.g., Begley, *Teeing Off on Japan's Garbage*, NEWSWEEK, Nov. 27, 1989, at 70 (citing Japan's waste recycling practices, which recycle approximately 40% of Japan's solid wastes, as com-

For the short-term, then, while waste-minimization practices continue to develop in the United States and around the world, the United States and other developed countries must have relatively safe havens for wastes developed while their economies shift to more optimized waste minimization. These safe havens probably can exist only in developed countries which have the social infrastructure necessary to prevent or protect themselves from environmental harm from their domestic and imported wastes—if they choose to use their infrastructures for that purpose.

Thus, a sensible option in the short run is to permit developed countries to exploit and trade their existing comparative advantages in waste management, rather than forcing those countries to forego feasible and safe waste management alternatives. The developed countries generate the overwhelming majority of the waste produced on this planet, and they have the technical and social capacity to deal with their waste, as well as informed publics ready and willing to protect themselves from waste mismanagement. Having those characteristics, the developed countries should be permitted to allocate their short-term waste management requirements among themselves, subject to a condition that they refrain from exploiting the waste management capacity of nations that are unprepared to manage wastes, whether generated by domestic or foreign sources.

Moreover, a total prohibition on waste trade might reduce incentives in developed countries to develop their waste management practices. Waste management is a lucrative industry in the developed countries. Several of the reputable and economically successful firms involved in waste management in the developed countries are also involved in waste-minimization research; their revenues from waste management—including management of traded wastes—help support their research and development of innovative waste management techniques. Thus, eliminating the waste trade altogether might reduce revenues to waste management firms in developed countries that manage waste in socially-desirable ways, and consequently might reduce options for waste minimization to the developed countries.

In other words, the developed countries have created the bulk of the existing waste and have the social capacity necessary to manage and min-

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pared to 11% of solid waste in the United States); *Gejdenson Subcomm. Report, supra* note 6, at 8 (statement of Dr. Frederick Bernthal, Assistant Secretary of State for Oceans, International and Environmental Affairs) (citing existence of waste recycling and reclamation technologies at facilities in the Federal Republic of Germany and the United Kingdom, technologies which are unavailable in the United States).

imize wastes innovatively and to protect themselves from the environmental risks associated with their waste generation—so long as they keep their waste trade to themselves, regulate closely their waste management and trade, and strengthen their domestic and international incentives for waste minimization. Thus, a total ban on international waste trade seems premature.

The balance of the objections to date to WECA do not relate to whether a total ban on waste is desirable. Most of the remaining testimony concerned the findings that prompted the bill and the mechanisms the bill would employ to regulate waste.

At least one witness before the Gejdenson Subcommittee objected to the factual findings on which the bill is premised. Barry Malter, the spokesman of the International Environmental Policy Coalition ("IEPC"), an association of U.S. and Canadian waste generators and exporters,<sup>132</sup> asserted that, at least with respect to waste trade with Canada, there was no evidence of increasing foreign liabilities resulting from the waste trade,<sup>133</sup> no evidence that waste trade with Canada was increasing,<sup>134</sup> and no evidence that waste exports to Canada were occurring to avoid U.S. waste management compliance costs imposed on domestic waste generators.<sup>135</sup>

Mr. Malter asserted that Canada regulates waste management at least as stringently as does the United States, if not more stringently in some ways, although with a different permutation of regulatory and technical requirements.<sup>136</sup> Therefore, he argued that no risk exists of unexpected foreign policy liabilities resulting from waste-related environmental harm, because the United States and Canada are fully aware of the risks associated with waste trade and are competent to trade in such wastes. In fact, he argued that passage of WECA in its current form might *create* a foreign policy problem with Canada, because that government has tentatively objected to some of the provisions of WECA on the ground that they would infringe on Canadian sovereignty to regulate its domestic waste management activities as it believes it should.<sup>137</sup>

Mr. Malter's first argument about the U.S.-Canadian waste trade

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<sup>132</sup> *Gejdenson Subcomm. Report*, *supra* note 6, (statement of Barry Malter, spokesperson of the International Environmental Policy Coalition).

<sup>133</sup> *Id.* at 4.

<sup>134</sup> *Id.* at 8.

<sup>135</sup> *Id.* at 10.

<sup>136</sup> *Id.* at 4-7.

<sup>137</sup> *Id.* at 4 (statement of D.H. Burney, Canadian Ambassador to the United States) (urging Congress to take into account in its legislation differing national standards regarding waste treatment, to respect the sovereignty of foreign nations when considering foreign facility inspection provisions).

ignores a significant issue: whether the *actual* regulation of waste in either country is as stringent as it appears to be on paper. Even if Canadian waste management regulation is adequate, U.S. regulation of domestically managed waste has not achieved its goals: the media report frequent deficiencies in federal and state regulation of domestic waste management. The number of waste generators in the United States relative to the regulatory resources available to monitor their practices may be too high to ensure safe waste management in the United States of U.S. or foreign wastes. Moreover, admitted deficiencies are present in U.S. control of waste exports, and specifically of waste exports to Canada, if the Inspector General's report is accurate.<sup>138</sup>

With respect to Canada, Mr. Malter also challenged the finding that waste trade was increasing. He conceded that applications for waste export permits are increasing, but he asserted that the actual volume of waste was substantially below the permitted limit and that several varieties of waste were being shipped from the United States to Canada in decreasing quantities.<sup>139</sup>

These trends, however, do not prove that waste exports to Canada will *not* increase; they demonstrate only a trend that may nevertheless justify tougher regulation if wastes *do* increase at some later time. Moreover, these Canadian trends are without significance in regard to shipments of wastes to other nations, or in regard to other nations' competence to manage such wastes.

Finally, again with respect to Canada, Mr. Malter challenged the finding that U.S. waste generators were exporting waste to Canada to avoid higher waste management costs in the United States. He acknowledged that he did not have comprehensive information of comparative pricing of waste management in the United States and Canada,<sup>140</sup> but he did assert that treatment in Canada was more expensive in some instances than in the United States.<sup>141</sup> Even assuming that management costs were uniformly lower in Canada than in the United States, Mr. Malter contended that exports were not necessarily undertaken to avoid U.S. compliance costs. He argued that pricing differentials instead could reflect relatively lower demand for waste management capacity in Canada relative to waste-treatment capacity;<sup>142</sup> Canada, after all, has a population substantially smaller than that of the United States and thus

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<sup>138</sup> See IG AUDIT, *supra* note 15, at 17 (reporting examples of exporters who intended to ship significant amounts of hazardous wastes to Canada but did not file annual reports with the EPA).

<sup>139</sup> Gejdenson Subcomm. Report, *supra* note 6, at 8-9 (statement of Barry Malter).

<sup>140</sup> *Id.* at 10.

<sup>141</sup> *Id.* at 10-13.

<sup>142</sup> *Id.*

generates less waste requiring disposal. He noted that 40,000 to 60,000 tons of Canadian waste were exported from Canadian generators to U.S. treatment facilities, and concluded that it was unlikely that these shipments entered the United States in pursuit of *higher* disposal costs.<sup>143</sup>

This argument by Mr. Malter simply proves that waste does migrate to the least-cost treatment option for any specific kind of waste. If anything, it suggests that regulation is necessary to ensure that waste migration to least-cost treatment sites should occur only under safely controlled circumstances.

Finally, Mr. Malter argued that waste trade between Canada and the United States was part of a broad regional pattern of waste trade.<sup>144</sup> He noted that most of the wastes crossing the U.S.-Canadian border was generated in the Northeastern and North Central states and the contiguous Canadian provinces, for whom transboundary waste trade represented the most economically and socially rational solution to waste management.<sup>145</sup>

This is an indisputably significant issue. National borders are artificial boundaries; they in fact may create economic market dislocations that would be absent if the boundaries did not exist. In light of the recent free trade agreement enacted by the United States and Canada, one might regard transboundary waste trade between these two developed countries as geographically based regional trade patterns that should be carefully regulated but might otherwise be left to the parties. After all, the parties have substantial interests in conducting their waste trade in ways that do not harm each other, and they are competent to regulate the trade if they devote adequate resources to regulation. The last "if" clause, however, seems a significant precondition. Whether the United States is prepared to regulate its waste exports carefully enough to minimize harm to recipient countries is not yet clear.

The remaining objections to WECA fall roughly into five categories. In the first category are objections to the language at the core of the statute. That language would require treatment of waste exports from the United States in a receiving country to be "no less strict" than would be the domestic treatment of the waste. This language was attacked on several related grounds. Mr. Malter, on behalf of the IEPC, objected that this language was impossible to implement administratively, given the absence of a scientific or technical consensus on waste-treatment

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<sup>143</sup> Id. at 13.

<sup>144</sup> Id. at 11-14.

<sup>145</sup> Id.

practices.<sup>146</sup> Richard Fortuna, executive director of the Hazardous Waste Treatment Council, likewise argued that the language was unworkable and would thus constitute a *de facto* ban on all waste exports, because settling whether a given foreign waste-treatment regime was no less strict than a comparable domestic regime would be impossible.<sup>147</sup> Dr. Frederick A. Bernthal, testifying on behalf of the State Department, objected to this language on the ground that similar language was specifically excised from the final version of the Basel Convention, owing to the absence of consensus on treatment technology.<sup>148</sup>

The objection to the “no less strict” language is not very persuasive for one significant reason. The international agreement provision of WECA, operating in conjunction with the permit and foreign-facility-inspection provisions of WECA, would moot the problem. Assuming that the United States and a potential waste-trading partner contemplated creating a waste-trade agreement, in all probability they would address in the agreement the issue of the comparable strictness of their waste treatment regimes. In negotiating their agreement, they would presumably decide and specify who could dispose of what wastes in which country according to what treatment regime; in fact, WECA would require them to do that. Individual applicants for permits would bear the burden of proving that they intended to export and treat their wastes in conformity with the relevant international agreement. The United States would then have authority under the international agreement to inspect the foreign waste treatment sites, thus ensuring that the permit adhered to the terms of both the international agreement and its specific permit.

Admittedly, all of these activities would require vast allocations of regulatory resources and technical expertise. Yet within the framework of international-agreement and permitting processes, they are not *per se* impossible to accomplish.

The second significant category of objections attacked the international agreement provisions of WECA. Two witnesses objected to these provisions on a variety of grounds.<sup>149</sup> These witnesses asserted that the international agreement provisions would violate the sovereignty of other nations, either by dictating the contents of international waste-trade agreements required under WECA as a pre-condition for waste export

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<sup>146</sup> *Id.* at 3.

<sup>147</sup> *Id.* at 3 (statement of Richard C. Fortuna).

<sup>148</sup> *Id.* at 10 (statement of Dr. Frederick M. Bernthal).

<sup>149</sup> These witnesses were Assistant Secretary Bernthal and Mr. Fortuna of the Hazardous Waste Treatment Council.



permits,<sup>150</sup> or by mandating amendments to existing waste-trade agreements in ways that might be offensive to other nations.<sup>151</sup>

These objections seem unpersuasive for several reasons. First, it seems unlikely that a state would automatically object, simply as a matter of sovereignty, to international agreement provisions that sought to assure safe treatment of U.S. wastes in that recipient state. One can easily envision cases of nations welcoming such provisions, especially if they believe they lack adequate regulatory machinery to control waste-treatment facilities within their borders or because they want to add an additional layer of oversight to whatever machinery they have for regulating waste treatment.

Second, even if a potential state-party to such an agreement objected to such mandatory provisions, it could simply demand reciprocal rights with respect to its exports of waste to U.S. treatment facilities. Thus, to the extent that a state ceded some portion of its sovereignty to the United States, it could demand equal concessions of sovereignty from the United States.

Third, if a state believed that such an agreement offensively trespassed on its sovereignty no matter what terms the parties were willing to reach, that state could simply refuse to sign the agreement and could reject U.S. wastes. WECA would not and could not require other states to accept our wastes.

Finally, both the United States and other states have incentives to carefully and successfully draw such agreements. The United States wants foreign waste-treatment capacity, and contracting States would want the economic benefits associated with selling or leasing their waste-treatment capacity. The United States can offer a range of attractive incentives in support of concluding such an agreement, including helping to strengthen other countries' technical infrastructures for managing wastes.

The third category of objections related to the permit system. Representatives of the State Department<sup>152</sup> and the EPA<sup>153</sup> questioned the necessity of the permit system in their testimony, especially in light of the requirements for international agreements the bill would establish. They asserted that the international agreement provision would provide all of the protection a recipient country might require, and that the permit re-

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<sup>150</sup> Gejdenson Subcomm. Report, *supra* note 6, at 9 (statement of Dr. Frederick M. Bernthal).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 10.

<sup>153</sup> *Id.* at 17 (statement of Mr. Scott Hajost, Acting Associate Administrator for International Activities of the EPA).

quirements consequently were redundant.<sup>154</sup>

These objections seem well-founded, at least superficially. Although the permit provisions of the bill are consistent with the international agreement provisions, they establish additional and extensive requirements that a waste exporter must satisfy before, during, and after obtaining a permit. One can fairly argue that these additional requirements impose so great a burden on waste exporters that they might discourage waste exports or might encourage evasion of the bill's requirements. Further, many of the permit requirements could be incorporated into each international agreement, especially the critical requirement that a waste exporter have the financial resources to satisfy any liabilities that might result from harm from the exported waste.

On the other hand, the permitting provisions would enable several beneficial activities: development by the EPA of a comprehensive case-by-case database on waste-export trends and practices, which would be useful in subsequent review and modification of the bill, if enacted, and other related environmental legislation; public participation in the permit process in the hearing phases and review of permit decisions under the Administrative Procedure Act ("APA"); direct administrative control of a permittee's conduct by modification, suspension, or revocation of a permittee's authorization to export waste, again within the framework of the APA and without resort to state-to-state negotiations over operation of a basic international waste-trade agreement; and extensive front-end assurances that a permittee could handle its financial responsibilities and potential liabilities for damage to a recipient nation's environment or citizens' health. One should remember, however, that administrative permit and permit-supervision processes, especially in conjunction with the APA, can be slow, expensive, inefficient, vulnerable to dilatory abuse by applicants, permittees, and intervenors, and vulnerable to agency "capture" by the regulatees.

On balance, retaining the substantive requirements of the permit process seems useful. The information applicants must submit and the duties they must undertake to earn and retain permits seem essential if the waste trade is to proceed with minimal damage to recipient nations and with maximal incentives for waste minimization. Moreover, because the permit process would be subject to the requirements of the APA, while the international agreement process might be judicially unreviewable, retention of a permitting process would ensure that any actual waste-trade-related conduct remained subject to due-process safeguards

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<sup>154</sup> Id. at 10 (statement of Dr. Frederick M. Bernthal), and 17 (statement of Mr. Scott Hajost).

that could protect applicants, permittees, the public, and other interested stakeholders.

The fourth category of objections relates to the liability provisions of WECA, which would subject permittees to joint and several liability in U.S. courts for any environmental harm in a recipient country resulting from improper management of the permittee's waste exports to the recipient nation. For example, Mr. Hajost, on behalf of the EPA, testified that the provision in effect would establish greater liability for a permittee than its conduct might justify.<sup>155</sup> The provision would, in his view, expose a permittee to unlimited liability for *all* environmental harm or clean-up costs, when its conduct might justify liability for only some portion of the harm.<sup>156</sup> Finally, Mr. Malter criticized WECA for requiring an advance showing by waste generators, exporters, and treatment managers of financial responsibility sufficient to defray all potential liability;<sup>157</sup> no such advance requirement is imposed on domestic generators or waste managers.

This objection seems partly well-founded. If the objective of the statute is to authorize prudent waste trade, then the effect of this provision might be to discourage *any* waste trade, given the risks of liability to which a waste exporter might be exposed. On the other hand, the market can adjust to reflect the costs of regulation of the waste trade, and the risks of liability, through pricing of waste-trade services and liability insurance premiums.

This provision could be redrafted, as witnesses suggested, to enable a permittee to join other liable parties,<sup>158</sup> or by changing the liability provision from joint and several liability for permittees to proportionate liability,<sup>159</sup> in which case a permittee would be assessed damages proportionate to its share of responsibility for the environmental damage.

The last category of objections to the bill relates to its potential effect on existing waste trade and domestic waste-management practices. Several witnesses asserted that the bill could disrupt or prohibit waste exports generally or specifically to Canada,<sup>160</sup> invalidate several north-eastern states' Capacity Assurance Plans by preventing them from in-

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<sup>155</sup> Id. at 15 (statement of Mr. Scott Hajost).

<sup>156</sup> Id.

<sup>157</sup> Id. at 17 (statement Mr. Barry Malter).

<sup>158</sup> Id. at 19.

<sup>159</sup> Id.

<sup>160</sup> See, e.g., *id.* at 2 (statement of Mr. Barry Malter), and 3 (statement of Mr. Richard Fortuna). See also *Luken Subcomm. Report*, *supra* note 50, at 6 (statement of Dr. Donald B. Bright, CEO of Environmental Audit, Inc.).

cluding in their plans access to waste-treatment capacity in Canada,<sup>161</sup> and prohibit domestic waste generators' access to facilities in Canada and elsewhere that satisfy domestic land-disposal-ban requirements.<sup>162</sup> These objections seem in part well-founded, but they are vulnerable to counterarguments.

First, if enacted, this bill would likely unsettle existing waste trade and domestic waste-management practices. That, however, is its purpose.

Further, ambiguity and uncertainty about changes in administrative oversight of the waste trade would doubtless follow enactment of this bill, at least until participants in the waste trade knew conclusively how the provisions of the bill would be applied to them. If enacted, the bill would probably be subject to administrative challenges and litigation by opponents of the law who would seek to shorten its reach and by proponents of tough regulation who would seek expansive interpretations of the statute. Such administrative proceedings and litigation could prolong uncertainty and further disrupt the waste trade. Thus, concluding that WECA could disrupt existing domestic and international patterns of waste management seems reasonable.

The Act also would require renegotiation of existing international waste-trade agreements to conform them to the requirements of the Act. As a result, the terms and conditions of U.S. waste trade with Canada and Mexico would undergo review and revision, with issues raised by the signatory States about what they would and would not agree to in relation to WECA. This, too, could work to unsettle existing waste-trade practices among these countries and affect the Capacity Assurance Plans of states that incorporate Canadian or other nations' capacity in their plans.

On the other hand, WECA would "grandparent" existing international waste-trade agreements for a period of one year. This grace period would allow the signatory States time to negotiate revisions of their waste-trade agreements. The grace period, however, has been criticized by witnesses as too short to permit careful and appropriate revision of the agreements. Whether it would in fact be too short would depend on the priority assigned to the parties to renegotiation of their agreements. Certainly, the Act could provide for an extension of the grace period for renegotiation to assure the signatory States time to revise their agreements.

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<sup>161</sup> See, e.g., *Gejdenson Subcomm. Report*, *supra* note 6, at 6 (statement of Mr. Fortuna) and 13-14 (statement of Mr. Malter).

<sup>162</sup> See, e.g., *id.* at 3-6 (statement of Mr. Fortuna).

One final objection to the bill has been raised by Mr. Malter on behalf of the IEPC. Malter asserted that the fee requirement WECA would establish might constitute a discriminatory, non-tariff trade barrier if viewed in relation to the new free-trade agreement between the United States and Canada.<sup>163</sup> This user-fee-financed regulatory system may or may not be a desirable result, but Mr. Malter argued that the result would be at variance with the spirit and letter of the FTA.

This objection seems well-founded. Generally speaking, a fee on an export permit clearly burdens the export covered by the permit with an additional cost. By imposing such a fee on domestic waste exporters, WECA could reduce the attractiveness of exporting waste to facilities in Canada. Alternatively, the fee requirement might induce U.S. waste exporters to demand lower prices from Canadian waste treatment firms to compensate for the fee. The fee requirement also could induce Canada to legislate a comparable fee requirement on Canadian waste generators or transporters who seek to export waste to the United States. In any event, the amendment could reduce the flow of waste trade between the two countries. If the recipient country imposes no reciprocal fee requirement on its exports and the exporting country offers no compensating benefit to the exporter to offset the cost of the fee, and the fee is a significant amount rather than a nominal amount, then the cost of the permit fee could operate as a non-tariff barrier to export of the material covered by the export license.

WECA clearly contemplates setting the fee schedule at the real cost of administering the waste-trade regulatory program; one thus can reasonably infer that the fee would not be nominal. If the purpose of the U.S.-Canada FTA is to eliminate all barriers to trade between the two countries, and if the fee requirement creates a barrier in the form of an additional significant cost imposed on one species of that trade desired by a state-party to the agreement, then it clearly violates the spirit if not the letter of the FTA.

This problem—if it is a problem—can be solved in at least four different ways. The first and simplest solution would be to ignore the objection and preserve the fee requirement. The second solution would be to delete the fee requirement from the bill. The third solution would be to convince Canada to countenance the fee as a necessary cost of ensuring environmentally-sound regulation and management of our waste trade with that country. The fourth solution would be to persuade Canada to

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<sup>163</sup> Gejdenson Subcomm. Report, *supra* note 6, at 17 (statement of Mr. Malter); Canada-United States Free Trade Agreement, Dec. 22, 1987-Jan. 2, 1988, *reprinted in* 27 I.L.M. 281 (1988) [hereinafter FTA].

impose a compensatory fee structure on exports of waste from Canada to the United States. Each of these solutions has deficiencies.

Preserving the fee requirement exposes WECA, if enacted, to challenge on the ground that the fee requirement is a non-tariff trade barrier. Whatever the ultimate resolution, the challenge would jeopardize the fee program and the waste-export program while the challenge was pending in appropriate administrative and judicial fora. If Congress failed or refused to appropriate funds for the program while the challenge was pending, then one could argue that WECA itself was unenforceable, since the Administrator is directed in the statute to spend no funds for oversight of "permit compliance and administration" in excess of fees received for the program.<sup>164</sup> In either event, any paid fees might be escrowed or suspended pending resolution of this question. Moreover, the program would be altogether jeopardized if the fee was ultimately concluded to be a non-tariff trade barrier in contravention of the FTA.

Eliminating the fee requirement would oblige Congress to appropriate funds to pay for administration of the program, a result which the bill's sponsors clearly sought to avoid by including the fee provision. The sponsors obviously sought to create a user-fee system, an application of the pay-as-you-go principle which seems understandably to have gained legislative favor in recent years as an alternative to financing regulation out of tax revenues.

That Congress would prefer a user-fee-based regulatory system to a tax-based system is understandable. Making a program's regulatees bear the costs of regulation seems pleasingly symmetrical. Furthermore, Congress seems inclined to avoid tax-based regulatory initiatives whenever possible these days because it has heard loudly and clearly from constituents directly and indirectly (via Presidential elections) that its constituents want no tax increases. Throughout recent U.S. history, Congress has struggled with financing activities its constituents want without exposing itself to assaults in election campaigns that its members favor "tax-and-spend" governmental policies.

This issue of regulatory financing is clouded by talk in and out of Congress about the prospect of a peace dividend, which could result from the diminishing threat of a military superpower confrontation. Although talk in and out of Congress involves plans to spend any such peace dividend, as yet no peace dividend exists. Sentiment in Congress and the current administration seems to lean toward spending any peace divi-

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<sup>164</sup> H.R. 2525, 101st Cong., 1st Sess. § 12004(b)(2) (1989).

dend on deficit-reduction, rather than on new or expanded governmental programs.

On the other hand, recent polls of the American public demonstrate strong and growing support for increasing expenditures on environmental protection.<sup>165</sup> If Congress were to establish some sort of general Environmental Trust Fund (analogous to the highway trust fund) and were to support the fund with taxes on environmentally hazardous activities (in a manner analogous to the CERCLA trust fund) it might be able to replace the fee requirement with a portion of the trust fund's receipts. This suggestion, however, involves a long and complex dance, and ought to proceed, as discussed below, in the context of an overall review and assessment of where the United States is and wants to go, in environmental terms.

The third solution—convincing Canada to countenance the fee—may be feasible. However, determining whether this is feasible is impossible until the option is proposed to the Canadian government. This solution, moreover, would require negotiating a mutually satisfactory result through the instrumentalities in each country responsible for administering the FTA and any new international waste-trade agreement. This also could easily be a long, slow, and complex process.

The final solution—convincing Canada to establish a comparable fee for its waste exports to the United States—also may be feasible, but two obstacles exist. First, the establishment of a Canadian fee could start a round of such fee-setting in a variety of trade areas, thus frustrating the purpose of the FTA. Second, Canada may not want or need to regulate its waste trade on a user-fee-based system, in which case the entire proposal fails for want of reciprocity.

Thus, one could conclude that the fee provisions, however sensible and politically acceptable they might be domestically, may create a real problem in meshing this bill, if enacted, with the FTA between the United States and Canada. One should note that this provision might create the same kind of problem with respect to free-trade agreements the United States might have or contemplate with other nations who might participate in a one-way or two-way waste trade with the United States.

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<sup>165</sup> Ruckelshaus, *Toward a Sustainable World*, SCI. AM., Sept. 1989, at 169 (citing polls showing that increasingly large majorities of the public [approximately 65% in 1986, and approximately 80% in June 1989] agree with this statement: "Protecting the environment is so important that requirements and standards cannot be too high, and continuing environmental improvements must be made regardless of cost.").

## VI. PROPOSED AMENDMENTS TO WECA

Given the number and variety of objections to this proposed bill, one should not be surprised that the witnesses came to the proceedings armed with a number of suggested amendments of the bill. By far, the larger number of suggestions would delete provisions of the bill. Beginning with amendments that would toughen the bill, I will present them and offer comments on them, to the extent that I have not already considered the issues and amendments in discussing objections to the bill.

Greenpeace, in testimony to the Luken Subcommittee, proposed four amendments to the bill:<sup>166</sup> banning all waste exports to non-OECD countries; requiring that management in the recipient country of wastes imported from the United States be *more* environmentally benign than would be the case if the wastes were managed within the United States; authorizing only the export of wastes whose production could not have been prevented by source reduction by the waste-generator; and allowing citizens of recipient countries to participate directly in the permitting process. It is unclear why Greenpeace did not propose these four amendments to the Gejdenson Subcommittee, to which the organization proposed a total ban on all waste exports.

The purpose and consequences of each of these amendments seem very clear. The first three would reduce the number of available recipients of U.S. waste exports, establish a higher standard for foreign management of U.S. wastes than for domestic management, and reduce the variety of wastes that might qualify for an export license. In net effect these three amendments would reduce administrative discretion in selecting waste-trading partners and raise the burden of proof of the permit applicant or permittee for establishing that its proposed waste exports qualified for a permit. The fourth amendment would explicitly give standing to a class of individual foreign intervenors in the permitting process.

The proposed ban on waste trade with non-OECD countries seems consistent with two related premises: that developed countries are competent to trade in their comparative advantages in waste management and that less-developed countries are unable to protect themselves from the risks of the waste trade. This amendment would specifically serve the fundamental purpose of the bill and seems a sensible limit on administrative discretion to establish waste-trade agreements with other States. The

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<sup>166</sup> See *Luken Subcomm. Report*, *supra* note 50, at 6-7 (statement of James Vallette, International Waste Trade Project Coordinator, Greenpeace).



absence of any specific limit on administrative discretion in the current bill seems to warrant such an amendment.

The amendment to require more benign waste management in a recipient country would replace the "no less strict" standard with a higher standard for justifying any international agreement and any specific waste-export permit. This proposed amendment would alter substantially the purpose of the bill, which now aims only to ensure at least equally careful treatment of waste in a recipient country. Despite the political feasibility of changing and toughening the objective of the bill, this seems to be a desirable result. In effect it would prohibit waste exports if the treatment in the United States or the recipient country would be identical or merely comparable; presumably, the only other justification for that kind of export would be the comparative cost of treatment in the United States and the recipient country. On the other hand, given that waste-treatment regulation in the United States and other countries is continuously becoming stricter, I question whether the amendment is necessary or even sensible.

The proposed amendment to give standing to individuals of recipient countries seems unnecessary. The bill already requires, as a precondition for issuing a permit, notice and opportunity for comment and an informal hearing, if triggered by written notice of opposition to the proposed permit. The bill also requires a hearing on any proposed revocation of a permit. None of the provisions relating to hearings before or after issuance of a permit limit who may participate. It seems unlikely that judicial scrutiny of these provisions would produce a conclusion that foreign citizens could not intervene, especially when read in conjunction with the requirement that the Administrator solicit "public" comments before promulgating any regulations under this bill or issuing any permits.

One witness proposed that WECA be amended to tie the bill to strict waste-source-reduction requirements to be included in the Resource Conservation and Recovery Act ("RCRA") reauthorization legislation.<sup>167</sup> Presumably this tying could be accomplished by some form of incorporation of RCRA by reference in WECA and vice versa. This seems a sensible suggestion, simply because it would promote the integration of existing and proposed environmental legislation—a desirable result discussed in more detail below.

Another witness proposed that WECA be amended to grant to the Administrator of the EPA authority to halt an export or further exports

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<sup>167</sup> See *id.* at 6 (statement of Alex Hittle, International Coordinator, Environmental Policy Institute/Friends of the Earth/Oceanic Society).

to a recipient country if the Administrator had reason to believe that waste exports would not be handled by the recipient in conformity with the terms of the international agreement between the recipient and the United States.<sup>168</sup> This seems to be a sensible amendment. As drafted, the only remedies under WECA if waste exports are handled improperly in a recipient country are review and revision, or suspension of the international agreement, or a permit review process. The first remedy seems overly powerful, especially if the violation can be corrected without resort to the international agreement. The second remedy might be inappropriate where the permittee had itself complied with all terms of its permit. Thus, this proposed amendment would plug an apparent gap in WECA by giving the Administrator an intermediate remedy that might be most useful in cases where neither the international agreement nor the permit requires revision, suspension, or revocation.

Another witness suggested that WECA be amended to require the exporting country to take back any improperly manifested, identified, or shipped waste.<sup>169</sup> The idea behind this amendment seems logical. This could be enforced through the permitting process, which would ensure APA-based due-process for the permittee.

The remaining proposed amendments would in general narrow or alter the reach of WECA. They fall into several broad categories and may be discussed in groups.

Perhaps the most significant set of proposed amendments affect, again, the core "no less strict than" language relating to recipient countries' treatment of waste imports from the United States. One witness proposed elimination of the language outright.<sup>170</sup> Another witness proposed replacing the language with "equally effective treatment" language.<sup>171</sup> A third witness proposed replacement of the "no less strict" language with additional language in the international-agreement provisions.<sup>172</sup> This amendment would set out several specific additional requirements for the terms of such agreements: assurance of treatment comparable to that the waste would receive in the United States; detailed pre-notice to a recipient regarding proposed waste shipments; written consent of the recipient country to a shipment; specification of the liability responsibilities all parties to the agreement and any persons affected by it; and a U.S. veto power over proposed shipments.

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<sup>168</sup> See *Gejdenson Subcomm. Report*, *supra* note 6, at 14 (statement of Scott Hajost, EPA Acting Associate Administrator for International Activities).

<sup>169</sup> See *Luken Subcomm. Report*, *supra* note 50, at 10 (statement of Donald B. Bright).

<sup>170</sup> *Id.* at 8 (statement of Dr. Bright).

<sup>171</sup> *Gejdenson Subcomm. Report*, *supra* note 6, at 8 (statement of Mr. Fortuna).

<sup>172</sup> *Id.* at 14-15 (statement of Mr. Malter).

At the outset, one should note that these amendments would excise or alter significantly the underlying standard of treatment required under the bill. Deletion of that language without substituting other terms could be read to eliminate any standard, thus allowing an exporter to ship waste without assurances that the exports would be treated even as strictly as required in the United States—a result contrary to the purpose of the statute. Shifting the standard from “no less strict” treatment to “equally effective” treatment could be read to permit shipments of wastes to recipients who might manage the wastes approximately as well as, but no better than, they might be managed in the United States; this would eliminate an implicit signal in WECA as drafted to find, where available, even more benign treatment methods than are available in the United States. Proposed amendments that would require, *inter alia*, only “comparable” treatment of the wastes in the recipient could be read to permit recipient waste treatment approximately as effective as U.S. treatment or even less effective than U.S. treatment, so long as it fell within some zone of “comparability.” The other proposed amendments would simply shift some of the requirements of the permitting process to the international-agreement process.

The proposals to change the “no less strict” standard seem designed to and likely would weaken the bill. Although these proposals rightly recognize that different methods of waste management can be equally effective, they take that proposition a step further than WECA currently seems designed to go. WECA seems designed to establish a minimum-treatment threshold, below which permittees cannot go. These proposals seem designed to either emaciate this provision or create a zone of comparability with some flexibility—contrary to the intent underlying this bill.

In any event, changes in the standard seem unnecessary, given that application of the standard can be settled specifically in international-agreement negotiations and permit proceedings. The application of the standard on a case-by-case basis is a factual question, and conflicts could be resolved through those mechanisms.

The other proposed amendments that would replace the standard with enhanced controls on the content of the international agreements seem unwarranted as substitutes for the standard. Most if not all of those matters would in any event probably be taken up in international-agreement negotiations and settled by State-parties as they see fit.

A second category of proposed amendments addressed the international-agreement provisions. As noted above, one witness suggested amending these provisions to require additional specific provisions be-

yond those the bill now contemplates.<sup>173</sup> Another witness suggested a separate set of requirements for these agreements relating to liner systems for land-disposal of wastes, pretreatment standards, equivalency of U.S. and recipient-country definitions of treatment methods and standards, and prohibitions on sham recycling arrangements.<sup>174</sup> Two witnesses suggested grandparenting in existing international agreements.<sup>175</sup> One witness suggested extending the timetable for modifying international agreements to bring them into compliance with WECA.<sup>176</sup>

These amendments seem superfluous, especially those related to grandparenting in existing agreements, which the bill already contemplates. Given the bill's basic requirement that treatment be no less strict than would be required under the SWDA for management of the waste in the United States and the terms that must appear in international agreements to satisfy the provisions of WECA, it seems unnecessary to preempt further the discretion of the United States and other states that might negotiate such agreements. Moreover, since the statute specifically prohibits judicial review of a decision of the United States *not* to enter into an international agreement,<sup>177</sup> it impliedly authorizes review of decisions to establish such agreements, according to the principle. Thus, the terms of such agreements may be judicially scrutinized to determine whether they respect both the spirit and letter of WECA and SWDA.

Parenthetically, two ambiguities appear in the existing bill: it does not explicitly state whether the decision to enter into an international agreement is judicially reviewable; and it does not provide for extensions of the timetable for revision of existing agreements. The bill should clarify these matters, preferably by guaranteeing reviewability of the decision to reach an agreement and of the terms of any agreement, and by allowing a maximum of a one-year extension for modifying existing agreements, which should be sufficient to ensure satisfactory conclusion of such agreements.

The most numerous group of amendments addressed the permit process. These proposals ranged from eliminating the process outright to modifying it in various ways.

Four witnesses, including three from the administration, suggested eliminating the permit process altogether.<sup>178</sup> They asserted that the in-

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<sup>173</sup> *Id.* at 16-17 (statement of Mr. Malter).

<sup>174</sup> See *id.* at 9 (statement of Richard Fortuna).

<sup>175</sup> See *id.* at 17 (statement of Mr. Malter), and 8 (statement of Mr. Fortuna).

<sup>176</sup> See *Luken Subcomm. Report, supra* note 50, at 6-8 (statement of Donald Bright).

<sup>177</sup> H.R. 2525, 101st Cong., 1st Sess. § 12002(b)(3) (1989).

<sup>178</sup> See *Gejdenson Subcomm. Report, supra* note 6, at 10-11 (statement of Dr. Bernthal), 17 (statement of Mr. Hajost), and 16 (statement of Mr. Malter). See also *Luken Subcomm. Report, supra*

ternational-agreement provisions sufficed to ensure careful management in recipient countries of U.S. wastes and/or that the permit process would unduly retard or disrupt legitimate waste trade. One witness alternatively suggested that the permit process be reduced to a registration/licensing/certification program, in conjunction with strengthening the international-agreement provisions as discussed above.<sup>179</sup>

These changes seem unwarranted, given the potential benefits of a permit process discussed above. The permit process establishes a case-by-case approach to specific waste-export proposals independent of any basic international agreement. The data required of applicants and permittees under the permit program also allows development of a database for justifying future regulatory initiatives and regulating actual practices without resort to proceedings to review, revise, or suspend a basic international agreement. The permit process also establishes due-process safeguards for applicants, permittees, and other stakeholders, subject, of course, to the possibility of abuse of administrative process by applicants, permittees, or intervenors. For these reasons, the permit process seems a necessary and flexible complement to the international-agreement provisions.

Several witnesses proposed more specific amendments to the permitting provisions. One witness suggested four amendments: deleting the notice of violation language as a precondition for commencing a permit-revocation proceeding; requiring the Administrator to thoroughly analyze allegations before altering a permittee's status; limiting the Administrator's review of a permittee's conduct to documents on file with the EPA; and deleting the mandate to ensure that the waste generator made an effort to eliminate or minimize the waste proposed for export.<sup>180</sup>

None of these amendments seems warranted. Deleting the notice requirement would apparently deprive the permittee of a fundamental due-process safeguard: notice before alteration of the permittee's status. Requiring the Administrator to "thoroughly analyze allegations" before altering a permittee's status is, impliedly, a duty of the Administrator under the APA: the Administrator would have to establish either that substantial evidence justified altering the permittee's status or that the decision to alter the permittee's status was neither arbitrary nor capricious. Limiting the Administrator's review to documents on file would deprive intervenors of the opportunity to present oral testimony about

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note 50, at 8 (statement of Mr. William A. Nitze, Jr., Deputy Assistant Secretary of State for Environment, Health, and Natural Resources).

<sup>179</sup> See *Gejdenson Subcomm. Report*, *supra* note 6, at 16-17 (statement of Mr. Malter).

<sup>180</sup> See *Luken Subcomm. Report*, *supra* note 50, at 9-11 (statement of Dr. Bright).

the permittee's conduct, and deleting the waste-minimization mandate would run contrary to the whole trend in regulation of solid-waste generation and management.

Another witness recommended deleting the permit requirement that the applicant demonstrate proof of solvency adequate to satisfy all potential clean-up and other liabilities to third parties.<sup>181</sup> This proposal raises a legitimate issue related to several proposals to amend the CERCLA language in the bill: should the statute require a permittee to demonstrate solvency before the fact to handle all liabilities or just those for which it is proximately responsible? Also, that specific provision does not specify which State's law would be used to determine the exporter's liability.

The provision actually does not reach as far as its critics suggest, but it does have these problematic features. However, it seems that these ambiguities could be resolved by including choice-of-law and liability-limitation provisions in international agreements.

The last group of proposed amendments related to the Superfund (CERCLA) liability section of the bill, which authorizes suits by foreign governments for environmental injury or clean-up costs in the recipient country that would be cognizable under CERCLA if those injuries or costs occurred in the United States. Several witnesses proposed amendments to this section.

One witness suggested deleting all references to CERCLA.<sup>182</sup> Two witnesses suggested limiting the CERCLA liability of U.S. defendants to several liability.<sup>183</sup> One witness also suggested an amendment that would allow U.S. firms to join other defendants and would condition any foreign government's right of action under WECA on the right of U.S. firms'/defendants' right to obtain jurisdiction over other parties responsible for the environmental injury or clean-up costs.<sup>184</sup>

The deletion of any reference to CERCLA seems unwarranted. The CERCLA provision establishes a powerful deterrent to environmentally imprudent conduct in the recipient country. Moreover, a body of case law already exists that enables courts to apply it to disputes arising under it. Applying this case law to foreign environmental harm should not be any more difficult than its application to U.S. environmental harm.

The suggested amendments regarding joint versus several liability

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<sup>181</sup> Gejdenson Subcomm. Report, *supra* note 6, at 17-18 (statement of Mr. Malter).

<sup>182</sup> See *Luken Subcomm. Report*, *supra* note 50, at app. 14 (statement of Dr. Bright) (marked-up revised copy of bill).

<sup>183</sup> See *Gejdenson Subcomm. Report*, *supra* note 6, at 18-19 (statement of Mr. Malter), and 15 (statement of Mr. Hajost).

<sup>184</sup> *Id.* at 15 (statement of Mr. Hajost).

and conditioning a right of action on gaining jurisdiction over other responsible parties present more difficult questions. On one hand, imposing liability on a defendant for conduct beyond the degree of the defendant's culpability certainly seems inequitable. However, CERCLA operates in that fashion in the United States, primarily in order to ensure that *someone* assumes liability for CERCLA-type injury.

On the other hand, it seems perfectly equitable to ensure that defendants in an action in U.S. courts can obtain jurisdiction over other culpable parties. And it seems inequitable to permit a foreign government to sue a U.S. defendant without conditioning that right on legal action by the recipient country's government against recipient-country defendants, either in U.S. courts or in recipient-country courts. One can argue that although a U.S. court could gain personal jurisdiction over foreign defendants under the "minimum contacts" doctrine, actual jurisdiction could be an entirely different problem, especially if the foreign defendant has no attachable assets within the jurisdiction of the U.S. courts that could be used to satisfy a judgment.

Amending the international-agreement provisions of the bill to require an additional undertaking in international agreements seems sensible. Such a provision either could oblige a foreign government to take legal action against its own firms that might be responsible for some part of the injury or could guarantee that the foreign state would execute any judgment in a U.S. court against its own country's culpable actors.

These remarks summarize the witnesses' comments on and suggested amendments to the legislation. The next section will present my comments on the bill's value, the legislative process as it bears on this issue, and the Reagan administration's legacy to international environmental protection.

## VII. AN OVERVIEW OF THE ACT'S UTILITY, THE LEGISLATIVE PROCESS AND THE REAGAN ERA LEGACY TO INTERNATIONAL ENVIRONMENTAL PROTECTION

I agree with all of the witnesses that the United States should strengthen its regulation of the waste trade which it controls. If a trend to increase export wastes exists, or even a possibility that wastes might be exported to countries ill-equipped to deal with wastes, then more regulation of this trade seems necessary, either to minimize environmental harm that might result from the trade or to cure harm that the trade actually causes. Current regulatory machinery seems inadequate to prevent abuses in the waste trade for at least two reasons: there is no regula-

tion whatsoever of purportedly non-hazardous waste; and the EPA has no authority to prohibit an export of hazardous waste.

These two deficiencies alone make it all but impossible to determine where U.S. waste is going, in what quantities, and with what environmental consequences. Our government also altogether lacks authority to prevent ill-advised shipments of waste to vulnerable or incompetent recipients. Moreover, it seems morally dubious to permit our waste exports to be managed in recipient countries according to practices that we would prohibit here, either because such practices are hazardous, or because a margin of safety or source reduction is necessary.

Generally, the bill as drafted does a commendable job of attempting to ensure careful management of our waste exports overseas, subject to some of the suggestions for revision discussed above. By requiring both international agreements and waste-trade permits, the bill seems effectively to anticipate most relevant international legal problems and due-process issues affecting regulation of the waste trade. The bill can be improved in some respects, but as drafted the bill seems basically to accomplish its stated purposes.

By requiring an agreement with a waste-trade recipient-State, the bill anticipates and probably avoids intruding on the sovereignty of other States. Waste-trade agreements are not fundamentally different from other kinds of international trade agreements. Such agreements have been and can be drafted to protect the sovereignty of the signatories. If the negotiators can settle on mutually satisfactory terms, then the parties can trade in their wastes. If they cannot arrive at mutually satisfactory terms, then they cannot so trade.

By also requiring permits for waste exports, the bill theoretically assures that each proposed shipment is scrutinized to determine whether the permittee, the recipient nation, and all other relevant parties are competent to manage the wastes or sufficiently solvent to pay for any harm the exports cause. The permit system also promotes the development of a valuable database on the waste trade, and it does so while providing extensive due-process guarantees for applicants, permittees, and intervenors.

Of course, the fundamental problem with any regulatory statute is obtaining compliance with it. This seems an especially poignant problem in efforts to regulate the international waste trade. An enormous border surrounds this country, with innumerable points of entry and exit, and any waste exporter who wanted to avoid complying with the requirements of WECA could probably do so with little difficulty, simply by masking a waste shipment or by taking it out of the country by surrepti-



tious means, as the Inspector General mentioned in his audit.<sup>185</sup> Evasion seems especially likely in the case of the international waste trade, the international arm of domestic waste management, which itself has been riddled with incompetence and negligence, and is infested with organized crime elements, for whom laws and regulations are irrelevant. One can only hope that the penalties for violation of the bill would serve as a deterrent to most misconduct, but that is problematic.

A separate problem associated with this bill is the enormous amount of labor that will be required to administer it. No matter how worthy its objectives, the bill will probably consume a vast amount of regulatory energy in constructing international agreements and in running the permit program.

This problem—of the *will* to regulate, as it were—seems especially critical in light of EPA's management to date of the waste-export program. Viewed charitably, EPA's performance has been deficient; one can only hope that Congress and the current administration will see fit to provide EPA with the personnel and other resources it would need to administer the Act. The Bush administration seems at least superficially more committed to environmental protection than its predecessor, which showed no interest in regulating environmental protection to any publicly satisfactory extent until overwhelmed by political pressure—reflected in the ritualized public exorcisms of James Watt, Ann Gorsuch, and Rita Lavelle, among others, during the first Reagan term—to improve its performance.

A few comments on the legislative process related to this bill seem to be an appropriate segue to the Reagan-era legacy to international environmental protection. From discussions with several of the people involved in drafting or tending to the bill, I learned that the drafters felt obliged to set out detailed requirements in the bill for international agreements and permits. Until the Reagan administration, such regulatory details customarily have been delegated to the discretion of the executive branch, either for negotiation of international agreements or for rule-making for permitting processes. The drafters apparently included these details in this bill for no other reason than distrust of the administration, or more specifically, the holdovers in the EPA and OMB from the previous administration.

Their distrust results from their negative perceptions of how the Reagan administration dealt with environmental issues specifically and with regulatory issues generally. That administration, in the views of

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<sup>185</sup> IG Audit, *supra* note 15, at 29.

this bill's drafters, generally gave not much more than lip service to environmental protection and resource conservation because it apparently regarded those activities as fuzzy-minded impediments to full-throttle economic development. As a result, the drafters feared that holdovers from that administration could sabotage the bill by producing toothless international agreements or by juggling cost-benefit analysis of regulations so that they imposed no meaningful burdens on permittees. Consequently, the drafters felt obliged to legislate in detail, in contrast to earlier legislation in the environmental area, which reserved substantial discretion for the executive branch to flesh out the specific regulatory processes for enforcing environment-protection and resource-conservation laws.

Whether the drafters have properly assessed the record of the Reagan administration is a matter for debate. What is clear is that relations between the executive and legislative branches deteriorated significantly during the Reagan administration, and Congress now seems determined to protect its legislation from administrative sabotage, whether real or imagined.

Significantly, no witness raised two additional objections to the bill, which I call the "too little/too soon" objections. To put the "too little" point concisely, one must consider whether an omnibus foreign environmental policy statute is needed to complement NEPA and to accomplish this bill's purposes on a broader scale. The "too soon" objection addresses whether the current Congressional practice of piecemeal review and amendment of numerous environmental laws is really the best process for building an effective system for regulating our domestic and international environment-protection and resource-conservation practices.

At this time, no comprehensive policy shapes the environmental ramifications of our public and private conduct abroad. Several statutes have international health or environmental ramifications, such the Pure Food and Drug Act and the Federal Insecticide, Fungicide, and Rodenticide Act, but they regulate business activities in different and sometimes inconsistent ways. Now is the time to put all U.S. conduct with an environmentally significant foreign impact under the scrutiny of a unified administrative lens and sort out what the United States wants to do internationally and how to accomplish it.

Given that twenty years of federal environmental legislation have been added since NEPA, and many additional laws that predate NEPA also have environmental ramifications, now is also the time for a national debate and discussion of what the United States has done in this legal domain, how it has been done, and whether all of this activity has accom-

plished its stated purposes. For twenty years or more, depending on whether one counts forward from NEPA or from earlier legislation, the United States has been enacting environmental laws and establishing enforcement machinery for those laws, without the kind of overall review proposed here. As a nation, the United States has expended no significant effort in settling whether its environmental legal machinery accomplishes its goals, maximizing desired effects and minimizing inefficiency. I believe and have asserted elsewhere<sup>186</sup> that a comprehensive review and integration of existing U.S. foreign and domestic environmental legislation, and administrative apparatus for enforcing those laws, is long overdue.

This kind of review seems especially relevant as the condition of the environment increasingly becomes an international issue. Leading officials of the current administration lately have agreed with environmental-protection proponents that even domestic environmental management can have international ramifications, and the President seems to accord increasing importance to environmental policy.<sup>187</sup> Yet, to date, neither Congress nor the current administration or its immediate predecessors have proposed thoroughly to assess the quality, efficacy, or interaction of our environment-protection and resource-conservation laws and enforcement systems, in terms of their domestic and international ramifications. Instead, Congress and the administrations continue to approach the problem of domestic and international environmental protection on an ad hoc basis.

Given the nature and composition of the U.S. society and of our political system, and the natural and social resources historically available, an ad hoc governmental approach to environmental problems is consistent with the way the United States has approached and attempted to solve other perceived social problems by legislation and regulation. The public and its law- and policy-making agents confront numerous issues competing for a limited attention span and other resources, coupled with pluralized, numerous (perhaps innumerable) interest groups in this country, who settle at different points on the compass on any given issue, and who also have different kinds and amounts of resources available to promote their agenda. In light of these social characteristics, the result is relatively short-term, ad hoc legislation and regulation, at least in the environmental arena. The United States has not focused on the long

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<sup>186</sup> See Neff, *Not in Their Backyards, Either: A Proposal for a Foreign Environmental Practices Act*, 17 *ECOLOGY L.Q.* (1990).

<sup>187</sup> See, e.g., Shabecoff, *Bush Would Agree To Elevate EPA*, *N.Y. Times*, Jan. 22, 1990, at A1, col. 1 (President Bush's endorsement of a proposal to elevate the EPA to a cabinet-level department).

view of its environmentally significant legislative activity and that seems especially imprudent as the United States tries to chart its course toward enhanced environmental protection.

I do not intend to suggest that WECA might not cure a real problem, assuming it is vigorously enforced by regulators and respected by regulatees. The factual premises for this bill appear to justify legislative remediation, if for no other reason than that almost everyone who has commented on this bill seems to agree that the current rules governing the waste-trade game are inadequate to assure environmentally prudent waste trade. At the very least, the part of WECA that would require international agreements as a condition precedent for any exports of domestic solid waste appears necessary, and even the administration proposes to include such a provision in its waste-trade regulatory bill.<sup>188</sup>

Yet if this bill and other environmental initiatives—past, present, or proposed—are fully to attain their domestic and international objectives, then regulatory processes certainly would benefit from an assessment of how well the United States has met its objectives to date and how the United States can most efficiently meet its objectives for environmental protection via our regulatory processes.

### VIII. CONCLUSION

This Article has reviewed proposed legislation that would more stringently regulate the international waste trade. The bill seems generally well-drafted and responsive to what appears to be an environmental problem of growing significance. However, the bill exemplifies the *ad hoc* approach of the United States to environmental issues. To the extent that this *ad hoc* approach further defers governmental attention to the overall domestic and international efficacy of the matrix of environment-protection and resource-conservation laws, it may disserve long-term national interest in efficient and prudent environmental regulatory machinery.

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<sup>188</sup> See *Gejdenson Subcomm. Report*, *supra* note 6, at 263-64 (statements of Mr. Hajost and Mr. Bernthal).