BACKGROUND DOCUMENT

RESOURCE CONSERVATION AND RECOVERY ACT
SUBTITLE C - HAZARDOUS WASTE MANAGEMENT;
EXPORTS OF HAZARDOUS WASTE

Amendments to 40 CFR Parts 260, 261, 262, 263, and 271

Final Regulations

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF SOLID WASTE

August 5, 1986

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INTRODUCTION

This document summarizes and responds to comments received by EPA on the proposed rule for the Export of Hazardous Waste (51 FR 8744 (March 13, 1986)). It includes comments addressing specific issues raised by the Agency in the preamble to the proposed rule as well as other comments on issues found to be of concern to the commenters. The background and summary of the final rule appear below.

On February 26, 1980, EPA promulgated regulations under the Resource Conservation and Recovery Act of 1976 (RCRA) governing exports of hazardous waste (45 FR 12732, 12743-12744, codified at 40 CFR Parts 262 and 263). These regulations place certain requirements on generators and transporters regarding exports of hazardous waste in light of the special circumstances involved in international shipments. Since RCRA did not expressly address exports of hazardous waste, these provisions were promulgated primarily under RCRA §3002 (Standards Applicable to Generators of Hazardous Waste) and §3003 (Standards Applicable to Transporters of Hazardous Waste) and are limited in scope.

On November 8, 1984, the President signed into law a set of comprehensive amendments to RCRA, entitled the Hazardous and Solid Waste Amendments of 1984 (HSWA). Among other things, they add a new §3017 to RCRA specifically addressing hazardous waste exports.

Generally, subsection (a) of §3017 provides that, beginning 24 months after enactment of HSWA, the export of hazardous waste is prohibited unless the person exporting such waste: (1) provides notification to the Administrator; (2) the government of the receiving country has consented to accept the waste; (3) a copy of the receiving country's written consent is attached to the manifest that accompanies each waste shipment; and, (4) the shipment conforms to the terms of such consent. In lieu of meeting the above requirements, a person may export hazardous waste if the United States and the government of the receiving country have entered into an international agreement establishing notice, export, and enforcement procedures for the transportation, treatment, storage, and disposal of hazardous waste and if the shipment conforms to the terms of agreement.

Subsection (c) of §3017 sets forth the requirement to notify the Administrator before the shipment leaves the United States and specifies the information to be included in such notification. Subsections (d) and (e) establish procedures for obtaining the receiving country's consent to accept the waste. Subsection (f) addresses the effect of an international agreement on the requirements of §3017. Subsection (b) requires the Administrator to promulgate regulations necessary to implement §3017. Subsection (h) authorizes the Administrator to establish other standards for the export of hazardous waste under §§3002 and 3003 of RCRA. Finally, Congress also amended §3008 of RCRA to provide criminal penalties for knowingly exporting hazardous waste without the consent of the receiving country or in violation of an existing international agreement between the United States and the receiving country.

Subsection 3017(g) of HSWA contains one additional requirement with which exporters must comply immediately: any person exporting hazardous waste must file with the Administrator, no later than March 1 of each year, a report summarizing the types, quantities, frequency, and ultimate destination of all hazardous waste exported during the previous year. EPA codified this statutory requirement in its export regulations (50 FR 28702, 28746 (July 15, 1985)).

On March 13, 1986, EPA proposed to amend its hazardous waste export regulations to implement §3017 and thereby improve its current program governing exports (51 FR 8744). These specific amendments were placed in a revised Subpart E of 40 CFR Part 262. Because Subpart E currently includes special requirements governing imports of hazardous waste and the disposition of waste pesticides by farmers, these provisions were proposed to be moved to new Subparts F and G respectively with no substantive changes. Amendments were also proposed to 40 CFR Parts 260 regarding confidentiality, Part 263 pertaining to transporters of hazardous waste, and Part 271 with respect to State authorization.

ALPHABETICAL LIST OF COMMENTERS

COMMENTER ABBREVIATION	COMMENTER FULL NAME	DOCKET NUMBER
AAR	Association of American Railroads	013
ARCO	ARCO Chemical Company	030
ARCO Alaska	ARCO Alaska, Inc.	020
AT&T	AT&T, Nassau Metals	014
Acme	Acme United Corporation	005
Alto-Tronics	Alto-Tronics Corporation	003
Anchor	Anchor Fasteners	007
Australia	Australia Department of Arts, Heritage and Environment	036
Border Steel	Border Steel	039
CA Legislator	Assembly California Legislature (Assemblyman Steve Peace)	033
CMA	Chemical Manufacturers Association	024
Cadence	Freedman, Levy, Kroll & Simonds (Cadence Chemical Resources, Inc.)	019
Chevron	Chevron Corporation	021
Co. San Diego	County of San Diego	L0001
Dow Corning	Dow Corning U.S.A.	016
Duncan	Duncan Galvanizing Corp.	004
EC	European Community-Brussels (Department of State)	029
Environment Canada.	Environment Canada (Canadian Embassy)	018
Envirosure	Envirosure	001
Giordano	Giordano Waste Material Company	002
ICWM	Institute of Chemical Waste Management	022
Inst. of Scrap Iron	Institute of Scrap Iron and Steel, Inc.	032
JM	Johnson Matthey Inc.	026
Lake Carriers	Lake Carriers' Association	015
MCA	Mabbet, Capaccio & Associates, Inc.	011
MN Pollution Control	Minnesota Pollution Control Agency	028
Merchant Shipping	American Institute of Merchant Shipping	031
NARI	National Association of Recycling Industries, Inc.	023
NRDC	National Resources Defense Council, Inc.	038
Natl. Wildlife	National Wildlife Federation (Amended)	025A
OHM	O. H. Materials Co.	010
Onsgard	Henry Onsgard	017
Pennwalt	Pennwalt Corporation	012
Resources Conservation	Resources Conservation Co.	037
Stoel	Stoel, Rives, Boley, Fraser & Wyse	035
Tricil	Tricil Limited	008
Uniroyal	Uniroyal Chemical	009
Waterbury	Waterbury Buckle Company	006

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1. DEFINITION OF "RECEIVING COUNTRY"

A. "Receiving Country" Should Include all Transit Countries

Natl. Wildlife: The commenter recommended that EPA define "receiving country" as all transit countries and the country ultimately receiving the waste.

The commenter noted that it appears that even if a waste is to be treated and stored at a "transit" country for substantial periods of time, unless that country will be the "ultimate destination" of the waste, consent need not be obtained prior to shipment.

The commenter objected to the proposal in that it, in the commenter's opinion, does not carry out the mandate of §3017. The commenter also believed that EPA's definition of "transit country" establishes bad policy. The commenter asserted that EPA justifies not including transit countries in the definition of "receiving country" because §3017(c)(6) requires that the notification to EPA to contain "the name and address of the ultimate treatment, storage, or disposal facility" (51 FR 8746). The commenter questioned EPA's claim that there is Congressional intent to minimize regulatory burdens on exporters and on EPA which provides justification for its decision.

Rather than focusing on the "ultimate" TSDF in requiring notification, as EPA has proposed, the commenter believed that Congress focused on the actual acts of treatment, storage, and disposal. See RCRA §§3017(c)(5) and (6). Thus, when an exported waste will be treated, stored, or disposed of in a foreign nation, the statute requires that the nation in which such treatment, storage or disposal will take place be notified and give its consent.

Two strong public policy reasons argue against the proposal to require only the ultimate receiving country's consent. First, the approach would allow even very long-term "storage" and "treatment" in a country without its consent. This is an invitation to unscrupulous exporters and foreign intermediate "treatment" or "storage" facilities to evade the export consent requirement with sham long-term treatment and storage. In addition, by "laundering" the waste through one or more intermediate countries, unscrupulous exporters or intermediaries might effectively evade the notice and consent requirements.

In addition, the commenter claimed, as stated above, that the proposal is bad foreign policy. While the transit countries must be notified under the proposal, EPA's exclusion of transit countries from the definition of "receiving country" apparently has the effect of completely stripping the United States of the authority to prohibit the export of the waste to transit countries. This means that even if a sham treatment or storage

facility was suspected in a transit country, and the transit country asked EPA or the State Department to prohibit the export, EPA would be helpless to stop the export, assuming that the "ultimate" destination of the waste had given its consent to receiving the shipment.

The commenter recommended that EPA define "receiving country" as all transit countries and the country ultimately receiving the waste. The commenter stated that under EPA's proposal, it is not clear which country is the "receiving country" if a hazardous waste is treated and rendered non-hazardous, and then transported to a third country for ultimate disposal. In recognition of the realities of international commerce, the existing regulatory provision exempting from the definition of storage transporters who hold waste for less than ten days at a site (40 CFR 265.1(c)(12)) could be used to allow such short-term storage during transit. Notification of the transit country, however, still should be required in such instances.

NRDC: The commenter noted that although RCRA does not define the term "receiving country," the statute also does not appear to confine the term to only one receiving country. The Senate Report, for instance, refers at one point to "each receiving country" when describing the international agreement with "the receiving country" authorized by §3017 (f). (S. Rept. No.

98-284, 98th Cong., 1st Sess. 48 (1983)). Senator Mitchell, sponsor of the export notification provision contained in the Senate bill (S.757) described the requirement for consent of the "receiving country" using the singular and plural interchangeably:

> The section (§3017) is based on the belief that foreign nations which receive U.S. hazardous wastes should give their consent before the shipments occur. At the present time, only an annual notice is provided to receiving countries prior to the initial shipment. This notice does not give the receiving nation any indication of the quantity of the waste proposed for export, or of the frequency of shipments. (Cong. Rec. §9152 (July 25, 1984).)

Thus, it appears that the term "receiving country" refers to all countries that receive and handle the waste shipment following export from the U.S.

Other portions of legislative history were cited by this commenter in support of its position. This commenter also urged that the risks associated with transportation can be as substantial as those in which long-term storage occurs and claimed that its position was consistent with certain international agreements.

RESPONSE: EPA's response to these comments is contained in the preamble to the final rule. In addition, EPA notes that where a waste is treated and rendered non-hazardous in one country, then disposed of in another, there does not appear to be an export of hazardous waste to the last country.

B. "Receiving Country" Should Include Only the Country of Ultimate Destination

Cadence: EPA indicated that it could have defined "receiving country" to include not only a country where the waste will ultimately be treated, disposed, or recycled, but also countries through which waste may be shipped (51 FR 8746). The commenter concurred with EPA's initial reasoning that this would not reflect Congressional intent, and encouraged EPA to adhere to its proposal in this regard.

Alto-Tronics: The commenter felt that "receiving country" should be the country of "ultimate" destination. In the opinion of the commenter, the entire focus of current regulations shows that the primary concern is where the waste ends up, not the route it travels.

RESPONSE: EPA's response to these comments is contained in the preamble to the final rule.

2. NATURE OF THE INDUSTRY

A. Broadening the Definition of "Exporter"

CA Legislator: This commenter preferred the alternative definition of "exporter," i.e., "any person who intends to export a hazardous waste." The inclusion of all parties involved in the export -- the generator, transporter, and/or any export broker -- is necessary to establish responsibility during the export process. Investigations in California established that generators were misled by export brokers and transporters who alleged that hazardous waste was being properly disposed of in Mexico at licensed facilities. The truth revealed that hazardous waste was shipped to dump sites that were unlicensed under Mexican law located on farmland in Tecate, Mexico.

Natl. Wildlife: The commenter requested that EPA adopt the alternative -- apparently tentatively rejected in the pre-proposal stage -- of defining "exporter" as any person who intends to export a hazardous waste, including all persons meeting the definition of generator, as well as transporters, brokers and other intermediaries.

The commenter noted that this wholesale exemption of "non-generators" by EPA runs contrary to the statute and Congress' expressed desires. In addition, EPA's exemption of brokers, transporters, and others engaged in waste export from §3017 runs contrary to past EPA RCRA policy. If each of these parties is liable for violations, each will have the incentive to ensure that the waste is properly manifested and to ensure compliance with the other export requirements.

RESPONSE: EPA agrees in part with these commenters and has modified the final rule as discussed in the preamble to the final rule. In addition, EPA notes that Congress left to EPA the authority to define who "intends" to export a hazardous waste and to allocate responsibilities among parties involved to ensure that exports do not take place in the absence of notification and consent, to ensure that the consent accompanies the hazardous waste and that the shipment conforms thereto. In fact, the statute itself is unclear on who must take on various responsibilities. The statutory language indicates that "no person" shall export unless certain requirements are met. It is "such person" that must provide notification whereas no particular person is specified as being required to ensure that the consent accompanies the waste. These may be two separate parties, a generator and a transporter, engaged in very different activities. It is questionable whether Congress

intended each of these parties to be responsible for separate and distinct activities undertaken by the other.

In view of Congressional intent to accomplish the purposes of section 3017 with the minimum burdens on U.S. generators and EPA, Congress could not have intended that several persons provide notification for the same shipment. This would represent needless duplication. In addition, it is doubtful that Congress intended to place burdens on transporters transporting hazardous wastes for export where similar requirements are not imposed domestically. For example, it is doubtful that Congress intended to require a transporter to test a waste to verify that it is the waste consented to where transporters are not required domestically under RCRA to test a waste to ensure that it is consistent with the manifest. Nor is the means EPA has chosen to supplement section 3017 contrary to past RCRA policy. The situation here is different from that where several persons meet the definition of generator since in that situation, no one party stood out as the predominant party. In the instant case, it is the person initiating the manifest designating a foreign TSD and any broker involved which appear to stand out as the predominant party as opposed to a mere transporter. Moreover, as a general matter, EPA has divided up the responsibilities of generators and transporters under RCRA.

B. Manifest Preparation and Definition of "Exporter"

Tricil: The commenter stated that the definition of "exporter" as the person who is required to prepare a manifest would be clearer if defined as the person or company required to originate a manifest. "Prepare" may be interpreted as the physical act of filling out the manifest form not necessarily directly involving an individual with decision making authority. The commenter supported the proposal that the "exporter" should be defined as the person or company required to originate (i.e., be responsible for the content of) a manifest.

ICWM: The commenter supported the concept that the "exporter" should be the generator of the hazardous waste shipment, but felt that the proposed rule could be confusing as written. The rule defines "exporter" as the person required to prepare a manifest. One could make an erroneous interpretation of this statement and conclude that "the person preparing a manifest" is actually that person completing the document. Such a person may not be part of the decision making process for hazardous waste management within a company. The commenter suggested that the definition be amended to read "... a person or company required by law to originate a manifest (e.g., the person or company responsible for the content of the manifest). Within the United

States, this definition is well understood and consistent with the RCRA regulations on generator responsibility.

RESPONSE: EPA has addressed these comments in the preamble to the final rule.

C. Transporter Responsibilities

Merchant Shipping: The commenter stated that the export requirements for transporters proposed in Part 263 are acceptable to vessel operators insofar as the manifest and attendant documents are the responsibility of the generator to complete. A transporter cannot be held liable for the accuracy of the documents.

RESPONSE: As discussed in the preamble to the final rule, transporters who merely transport hazardous waste for export and do not also take on the role of a broker nor are required to initiate the manifest for such waste pursuant to 40 CFR §263.10(c) are subject to the requirements of Part 263 regarding the transportation of hazardous waste for export. Thus, essentially, a transporter may not accept a hazardous waste for export unless it is accompanied by an Acknowledgement of Consent. The transporter must also ensure that: (1) such

consent accompanies the waste, (2) must provide a copy of the manifest to the customs official at the point the waste leaves the United States, (3) return a copy of the manifest to the generator indicating the date the waste left the United States, and (4) deliver the waste to the designated facility or, if it cannot be so delivered, contact the generator and revise the manifest accordingly. A transporter is not required, for example, to test a waste to ensure that waste accepted is consistent with the consent or to provide notification to EPA. The final regulation, however, does impose on transporters a requirement not to accept a shipment of hazardous waste for exports if they know it does not conform to the EPA Acknowledgment of Consent. Regarding liabilities, transporters are a type of "exporter" and are subject to criminal actions under §3008 for knowingly transporting a hazardous waste without the consent of the receiving country as well as appropriate civil actions for violations of applicable regulatory requirements.

D. Other Comments

ARCO Alaska: The commenter currently transports quantities of hazardous waste from Alaska to Chicago by way of Canada. The firm stated that, because the U.S. cannot be considered a foreign receiving country, Canada cannot be considered a transit country. The

commenter stated that, for this reason, it should not be subject to any special notification requirements to Canada as a transit country under the proposed rule.

RESPONSE: EPA did not intend by defining "transit country" in the proposal as the country through which a hazardous waste passes en route to a receiving country to exclude transit countries such as Canada in the example noted by the commenter. This phrase was used simply to denote short-term storage that might occur en route. Accordingly, notification to Canada would be required under the scenario presented but not consent, since mere transportation is involved. There is simply no reason to treat this type of "transit" country differently from any other type and this is a proper exercise of EPA's authority under Section 3017(h).

MN Pollution Control: The commenter disagreed with the statement in the preamble that "there may be limits to an exporter's knowledge of the ultimate destination of the waste." The commenter added that since an exporter is required to complete a manifest, he should be required to know how the waste is being managed when it leaves this country.

RESPONSE: Following the statement quoted above, the preamble to the proposed rule stated that "if the exporter does not know and cannot reasonably ascertain the country of ultimate destination, the receiving country would be the last country to which the waste will be sent that is known to the exporter." EPA agrees that since an exporter is required to prepare a manifest, he should know where the waste is going. An exporter will know at least where he plans to send the waste and how it will be managed and must provide this information. The preamble explanation in the proposal was simply included to indicate that EPA was not proposing to require an exporter to provide information about further activities by a foreign consignee, over which the exporter has no control. A foreign consignee may decide on its own initiative to further export portions of a hazardous waste. Such action is beyond the scope of the United States' responsibilities under §3017. Even though EPA has changed the definition of receiving country in the final rule, an equivalent "knowledge" interpretation is retained.

Cadence: In discussing the definition of "exporter" in its proposal EPA often spoke in terms of "the generator." The commenter understood that EPA meant, in the context of the commenter's recycling process, the recycler who arranges for the shipment of the processed hazardous waste fuels -- and not each of the hundreds (or perhaps thousands) of industrial and manufacturing generators who initially send waste to the recycler.

Because of the obviously disruptive effects on recycling if all such "initial" generators were considered "exporters" under the proposed rule, the commenter said it would appreciate EPA clarifying this point explicitly in its final rule, or at least the preamble.

RESPONSE: As EPA determined in an earlier rulemaking, generators of hazardous wastes that are destined to be used as or incorporated into a hazardous waste fuel must comply with the Part 262 generator standards, including the manifest requirements of Subpart B (see 50 FR 49204 (November 29, 1985)). The manifests that these generators originate, however, will not generally specify a foreign treatment, storage, or disposal facility unless the generator markets directly to a foreign burner or ships to a foreign producer of hazardous waste fuels. If a generator ships its wastes to a domestic producer of hazardous waste fuels, the manifest will specify that domestic producer as the "designated facility." As a result, the generator will not qualify as a "primary exporter" (i.e., a person who is required to originate the manifest for a shipment of hazardous waste to a foreign treatment, storage, or disposal facility).

If a fuel producer subsequently markets the fuel to a foreign burner, the producer will be required to originate a manifest specifying the foreign burner as the designated facility (see 50 FR 49204). In this way, the fuel producer,

rather than the "initial" generator, will qualify as the "primary exporter" subject to notification and approval requirements under Subpart E.

Tricil: The commenter stated that the export industry should not be perceived as different from the domestic industry and each should be subject to the same rigorous rules. Exporting companies should not be subject to exceedingly more stringent rules that would impair their ability to compete in the marketplace as long as the service being offered is protective of the environment and acceptable to the receiving country.

The commenter acknowledged that notification and manifesting of any waste that is to cross an international border is necessary so that the receiving country is aware of the activity. However, the commenter added that if the receiving country is to be notified about receipt of a given waste, the U.S. should regulate that waste and subject it to the manifest requirement within its own jurisdiction.

Environment Canada: The commenter said that it seemed reasonable to require that 40 CFR requirements apply equally to exports and domestic shipments of hazardous waste.

RESPONSE: Under EPA's definition of "exporter," the regulations governing exports are applicable to exports of hazardous waste initiated by persons required to originate a manifest under 40 CFR Part 262, Subpart B or equivalent provisions in any authorized State program. Thus, exports of any hazardous wastes that are exempt from these manifest requirements (except spent industrial ethyl alcohol exported for recycling) are not subject to the export requirements. EPA's rationale for this decision is set forth in the preamble to the final rule.

Natl. Wildlife: The commenter urged that the definition of exporter not be tied to the manifesting requirements; thus, even those exports that are exempt from manifesting requirements must be liable for compliance with export requirements. This would include all exports of any hazardous waste for which manifests are not required, including certain wastes that are recycled. Congress was clear in requiring that export by "any person" of "any hazardous waste identified or listed" under RCRA must comply. The commenter cited Congressional intent to assure vigorous and meaningful enforcement of the export provision and urged EPA not to attempt to second guess or subvert Congressional intent on this issue.

RESPONSE: EPA's response to this comment is contained in the preamble to the final rule.

3. EXEMPTIONS OF WASTES/RECYCLING AND WASTE SAMPLES

A. Used, Reused, Reclaimed, and Recycled Wastes

i. Comments Favoring the Proposal that Wastes Exempt from Manifest Requirements Should Also be Exempt from Subpart E

AT&T: The commenter recommended that wastes that are presently exempted from manifesting requirements also should be exempted from Subpart E export requirements. This exemption would be particularly important for certain reused or recycled wastes. Some foreign countries seem to be prolific users of secondary materials in place of, or as a supplement to, virgin raw materials. However, the economics of providing secondary materials to foreign users are often marginal due, in part, to high transportation costs. Therefore, additional administrative costs created by regulatory requirements could make recycling or reuse of secondary materials uneconomical.

Inst. of Scrap Iron: The commenter opposed application of the export regulations to secondary materials that are not regulated when recycled in the United States. The commenter noted that, if finalized as proposed, the export regulations would not affect any

domestically exempted materials and did not see any legal basis for export regulations more stringent then domestic regulations.

The commenter asserted that, if the exemption is not maintained, scrap metal producers, who often deal on the spot market, will be hurt by the 60-day advance notification requirement. The commenter claimed further that the 24-month coverage of notification would do little to alleviate this problem.

RESPONSE: EPA acknowledges the commenters' support for the Agency's proposal to exempt from the Subpart E export requirements wastes that are presently exempt from manifest requirements. The final rule continues this exemption except with respect to spent industrial ethyl alcohol for the reasons set forth in the preamble to the final rule. In addition, EPA notes that it agrees with the point made by the Institute of Scrap Iron that Congress intended general parity between domestic wastes and exported wastes. Moreover, EPA agrees with this commenter's further point that Congress intended to close a potential loophole whereby domestic requirements for hazardous waste management could be circumvented by exporting the material and that where there are essentially no requirements to be circumvented through exporting a material, §3017 should be inapplicable.

ii. The Requirements for Recycled Wastes Should be Reduced or Eliminated

NARI: The commenter read the notice of proposed rulemaking to state that recycled metals which are already exempt from the manifest requirements of 40 CFR Part 262, Subpart B should be exempt from EPA's proposed export regulations under Section 3017 (see 51 FR Vol. 49, pp 747, 48). This commenter agreed that EPA's conclusion is totally sound and completely in accord with the governing statutes as enacted by Congress. However, this commenter asserted that EPA should fashion a broader exemption to cover all recycling of all metal bearing materials, e.g., recyclable materials used for precious metal recovery. In lieu thereof, exporters should provide EPA with a certification or other assurance that the waste would be recycled.

The commenter was of the opinion that it is clear, that section 3017 was not aimed at regulating or interfering with the export of recycled metals or metal bearing materials from the United States to foreign nations solely for purposes of beneficial recycling and reuse. Nowhere in section 3017 is there any reference to exports for purposes of recycling or "resource recovery." And, nowhere in the statute is there any indication that Congress intended to require exporters to obtain "written consent" from each foreign nation to which they export recycled metals or metal bearing materials before export transactions can proceed.

The commenter believed that both §3017 itself and its legislative history make it abundantly clear that HSWA was enacted to regulate exports in cases where hazardous waste is shipped from the United States so it can be dumped or stored in a foreign nation, possibly without that nation's knowledge or consent. Nothing in the statute itself or its legislative history suggests that Congress intended to regulate, prevent, or impede exports of recyclable metals, or to make it impossible, difficult, or more costly for customers in foreign nations to continue to obtain those valuable recyclable commodities from the United States. In this instance, therefore, the commenter submitted that EPA should apply the law as Congress intended it: dangerous hazardous wastes exported solely for disposal, storage, or waste treatment should be regulated as proposed, but metal-bearing materials exported exclusively for prompt, environmentally-sound recycling should be exempt from regulation.

The commenter stated that it would be absolutely devastating for EPA unnecessarily to superimpose its new hazardous waste regulations on any of the recycling industry's metal exports under §3017 for the following reasons, among others:

1. Prices paid for recycled metals in international trade are volatile. They simply cannot be suspended for export transactions that must await foreign nations' written consent procedures.

2. Once recycled metals are labeled "hazardous waste" for export purposes, many foreign governments may well prohibit their importation, or impose importation charges on their entry that will simply destroy long-standing import-export relationships. This will occur almost automatically, albeit the metals are imported for beneficial recycling and reuse, not disposal, storage or waste treatment.

3. Recycled metals exported from the United States must compete in foreign markets with recycled metals exported by foreign nations to the same foreign markets. If EPA requires that U.S. recycled metal exports be stigmatized as "hazardous waste," then the U.S. goods enter the market with a stigma not applied to the competing goods from other nations. Indubitably, this will have numerous adverse impacts, the most important of which will be the prices foreign buyers will agree to pay for stigmatized U.S. metals and those sold by other nations.

Chevron: The commenter said that hazardous waste that is used, reused, recycled, or reclaimed should be exempt from the proposed notification and consent procedures. The time needed to notify and get consent of the importing country will clearly

impede exports of these kinds of materials and, in some cases, may preclude export due to schedule commitments.

In addition, the commenter feared that the stigma attached to "hazardous waste" may cause some facilities to turn away otherwise valuable material. Loss of a recycling outlet means that the material will have to be disposed of in a landfill. This is counter to the RCRA goals of promoting recycling activities and reducing the landfilling of hazardous wastes.

CMA: The commenter believed that hazardous waste that is beneficially used, reused, recycled, or reclaimed should be exempt from the proposed notification, consent, and manifest procedures. EPA's Redefinition of Solid Waste (50 FR 614 (January 4, 1985)) and recently promulgated Hazardous Waste Fuel regulations (50 FR 49164 (November 29, 1985)) have greatly expanded the universe of materials subject to regulation as hazardous waste. Some of these wastes, namely those that are beneficially used, reused, recycled, or reclaimed, should not be subject to the lengthy notification, consent, and manifest procedures. The commenter believed the stigma and perhaps undue alarm in the foreign country of a foreign facility importing hazardous waste may result in the discontinuance of legitimate recycling activities, or at best depress the price of the material to a point where continued U.S. export no longer becomes a viable option. This commenter suggested that, in lieu

of §3017 requirements, exporters should provide EPA with a biennial certified report covering these exports.

ARCO: The commenter requested exemptions from consent and notification procedures for materials that are exported for beneficial use, recycling, or reclamation. Since the proposed rulemaking did not include a specific exemption for hazardous waste that is beneficially used, reused, recycled, or reclaimed, legitimate shipments of by-product hydrocarbons used for fuel or fuel blends that are exported to overseas industrial facilities would be subject to the lengthy notification, consent, and manifest procedures. The commenter feared that the stigma, and perhaps undue alarm in the foreign country, that a facility is receiving imported hazardous waste, may result in the discontinuance of legitimate recycle activities, or at best depress the price of the material to a point where continued export is no longer a viable option.

Cadence: The commenter suggested that if EPA makes its system more burdensome by requiring a copy of the manifest at the border, broadening the definition of receiving country to include all countries through which the waste passes or by creating a notification form, it should consider a system of regulation that distinguishes between traditional waste management practices and the type of regularized, consistent patterns of

beneficial recycling that the commenter and others may engage in. Whatever merit there may be to imposing more stringent requirements on traditional waste disposal practices, there is no merit to adding unnecessary burdens on the beneficial recycling of hazardous waste fuels. To discourage such practices would be environmentally counterproductive.

Border Steel: In the preamble discussion of the definition of "exporter," EPA proposed to exempt from Subpart E all generators not currently required to prepare a manifest. The commenter supported the proposed exemption, but also questioned its narrowness. According to the commenter, any waste managed for beneficial recycling or recovery is likely to be handled in a secure manner because the recycler/reclaimer has an economic incentive to ensure that losses are minimized. Requiring manifesting, recordkeeping, prior consent, and notification would place undue paperwork burdens upon generators attempting to follow the spirit of RCRA.

The commenter emphasized that wastes destined for recycling serve as the reclaimer's "raw materials." Since raw materials are generally not regulated under RCRA, the commenter could not understand why recyclable materials should be regulated under the Act.

RESPONSE: EPA has responded generally to these comments in the preamble to the final rule. Most claims made regarding why materials for recycling should not be regulated have been addressed in discussing the regulation of such materials domestically. See 50 FR 614 (January 4, 1985); 50 FR 49164 (November 29, 1985); see also 50 FR 1701 (January 11, 1985); 48 FR 14473 (April 4, 1983). As EPA has explained in the preamble to the final rule, §3017 requirements are applicable to those wastes manifested domestically (plus spent industrial ethyl alcohol exported for recycling).

Regarding Cadence's comment, EPA believes that the additional export requirement in the final rule (requiring a manifest to be dropped off at the border) is not overly burdensome and believes it necessary for enforcement purposes. EPA sees no reason, therefore, why it should not also apply to hazardous wastes for recycling which are subject to the other export requirements.

EPA also does not believe that some alternative verification submitted to EPA to the effect that these materials will be or were recycled is adequate since this provides no advance notice to a foreign country. Had Congress wished to exempt such activities from §3017, EPA believes that it would have done so explicitly in view of EPA's then-existing definition of "treatment" and in view of Congressional awareness

of the issue of the regulation of recycling as evidenced by its enactment of amended §3001(d)(2).

EPA notes that there is no explicit legislative history indicating that Congress intended to exempt all materials exported for recycling from §3017. At most, Congress indicated that it was not placing an outright ban on exports because there were certain legitimate reasons for exporting including recycling; not that §3017 mechanisms did not apply. In this respect, Representative Mikulski stated:

> This amendment does not mandate an outright ban on such shipments. I recognize the fact that there are several legitimate reasons for exporting hazardous wastes, such as for scientific testing, reprocessing and recycling. My amendment is not aimed at these shipments.
>
> The focus of my amendment is those wastes which are exported to avoid the stringent and more expensive requirements which govern the disposal of hazardous wastes in this country. 129 Cong. Rec. H 8163 (daily ed. October 6, 1983).

The "focus" of §3017 was to ensure that illegitimate or improper disposal, treatment (including regulated recycling or storage) activities are prohibited. The notification and

consent requirements allow action to be taken to prohibit these activities. Where legitimate recycling activities are involved, consent would be appropriate. The intent of §3017 was to provide a means to catch improper activities and allow appropriate ones to proceed. This mechanism is therefore important to ensure that appropriate activities, including recycling, will be undertaken where EPA has determined that materials for recycling should be manifested domestically. Thus, a mechanism for ensuring appropriate actions are involved is available both for wastes handled domestically as well as those exported. In fact, in EPA's view, the statement quoted above indicates that Congress did not intend to exempt all hazardous wastes for recycling from §3017. Moreover, were EPA to exempt all wastes from recycling, a large loophole would be created encouraging sham recycling activities in order to avoid notification and consent.

CMA: The commenter stated that, although it is appropriate that hazardous waste materials legitimately recycled or reused should be exempt from EPA's notification procedures, any total exemption might be viewed as a wholesale bypassing of the regulatory program. The commenter, therefore, proposed that exporters provide EPA with a biannual certified report covering such exported waste volumes, the receiving country, and the recycling, reuse, or reclamation end use that is actually employed. This report information, with appropriate enforcement

provisions, would provide EPA with a tool to adequately control these materials.

RESPONSE: For the reasons discussed in the previous response and in the preamble to the final rule, EPA does not believe that recycled waste should be treated differently when exported than when managed domestically. EPA disagrees with the commenters that a biennial report would be an adequate substitute for the notification requirements in the final rule. The final rule provides a receiving country with an early opportunity to consent or object to the exported hazardous waste. This is not possible under the system proposed by the commenter.

iii. Hazardous Secondary Materials Exported for Recycling Should be Subject to Subpart E, Even if They are Not Subject to Manifest Requirements

Co. San Diego: The commenter felt that the legal definition of a substance as a waste or a reusable or recyclable material is the most pressing issue in the regulation of exports. By considering a waste to be in one of these categories, a U.S. generator can export the material, without notification or manifesting, to a Mexican facility where, because of the laxness of the regulations and their enforcement, it may be put to an inappropriate use.

The commenter added that the hazardous waste management philosophy in this country has been clearly set: full treatment of wastes wherever possible, strict regulation of the air emissions from all facilities and no further land disposal. These practices, which have been deemed to be sound hazardous waste management concepts, should apply regardless of international boundaries. Allowing hazardous wastes to be exported without a complete understanding of their final disposition is a disservice to the receiving country.

RESPONSE: Most wastes exported for recycling will be subject to §3017 and therefore regulated. A relatively small number, however, will not. As noted previously, EPA does not believe that Congress intended for secondary materials that are exempt from the domestic hazardous waste manifest requirement to be subject to the full set of requirements under §3017. Nevertheless, the Agency is concerned about the possibility that hazardous waste exporters might try to circumvent Subtitle C regulations by falsely claiming that the exported materials will be handled in a manner taking them outside the scope of "solid waste" or inside the scope of one of the recycling exemptions under 40 CFR §261.6. EPA is aware of evidence that certain hazardous wastes that have been exported ostensibly for recycling have in fact undergone improper disposal. For example, a 41-count indictment charging conspiracy, mail fraud, and utilization of false statements was returned on April 17, 1986, by a federal grand

jury sitting in the Southern District of California against four officers and owners of two corporations that were allegedly, among other things, claiming to be recycling waste when in fact they knew it was being illegally disposed of in Mexico.

Two safeguards designed to protect against such false claims by hazardous waste exporters exist. First the burden of proof is upon the exporter of hazardous secondary materials to show that such materials are destined to be recycled in a manner bringing them outside the scope of "solid waste" (50 FR 642 and 40 CFR §261.2(f)). Although there is no formal recordkeeping requirement under §261.2(f), exporters "must keep whatever records or other means of substantiating their claims that they are not managing a solid waste because of the way the material is to be recycled" (50 FR 642-643). This might include, for example, a description of the foreign recycling facility, evidence that the recycling facility is licensed or otherwise qualified by the foreign jurisdiction, and a copy of the contract indicating the terms of the transaction. (See also United States v. Hayes International Corp., _____ F.2d _____, No. 84-7796 (11th Cir. Apr. 21, 1986). The court held that in prosecution under §3008(d)(1) of RCRA, for knowing transportation of waste to an unpermitted facility, where the defendant claimed that it believed hazardous waste was being recycled, the defendant must be able to demonstrate its "good faith belief.")

Secondly, with the implementation of these regulations, the United States will also be able to criminally prosecute persons exporting hazardous waste who engage in sham recycling activities (see §3008(d)(6)). The basis for such actions would be, for example, the lack of consent by the receiving country because it either received no notification of intent to export or gave a "consent" based upon the fraudulent misrepresentation in the notification that the hazardous waste would be recycled in a particular manner when, in fact, it was to be handled in another manner (e.g., land disposal).

EPA notes that this commenter suggested no changes in the proposed regulations which would resolve its concerns. To the extent this commenter is suggesting that EPA actually regulate treatment, storage, and disposal in a foreign country, this commenter is completely overlooking concepts of extra-territoriality and the sovereignty of foreign nations. Perhaps the best way to deal with some of this commenter's concerns would be through a bilateral agreement.

iv. Comments Concerning Individual Wastes

Giordano: The commenter expressed concern for the U.S. recycled battery lead market and inquired into how the proposed regulations would affect it. In particular, the commenter

questioned whether the proposed regulations would change the requirements for handling and exporting the recycled material and warned that any impediment to such exportation could severely harm the environment.

RESPONSE: EPA wishes to assure the commenter that the final rule will not directly affect spent lead-acid batteries destined for reclamation. Such batteries are currently exempt from manifesting requirements under Part 262, Subpart B. As a result, they will also be exempt from the export rules of Subpart E.

JM: This commenter stated that the solutions that it deals with that may be corrosive are rarely exported. Other raw materials may be classified as hazardous wastes because they contain soluable silver, other soluable metals, or because listed solvents were used in the manufacturing process that generated the spent catalysts. However, in the commenter's case, the listed solvents are pyrometallurgically destroyed before export. These materials present no hazard to the receiving country; they are exported for refining of the precious metals, not for waste processing or disposal; they are falsely represented as containing listed solvents; and the receiving countries do not view these materials as waste.

RESPONSE: These export regulations apply to all hazardous wastes subject to manifest requirements in accordance with 40 CFR Part 262, Subpart B, or equivalent State provisions for the reasons set forth in the preamble to the final rule. In addition, EPA notes that if the commenter believes the shipments in question merit an exemption from the requirements, he or she may file a delisting form in accordance with 40 CFR §260.22 in order to have the disputed material deleted from the listing of hazardous wastes.

JM: The commenter requested that precious metals materials destined for reclamation be exempt from these export notification/approval rules, since they fall outside of the universe of materials intended to be regulated by Congress.

RESPONSE: EPA has long recognized that precious metal-containing hazardous wastes are entitled to special consideration because their high intrinsic value acts as a partial safeguard against improper management. Nevertheless, precious metal-containing hazardous wastes may pose a threat to human health and the environment under certain circumstances. Consequently, in the preamble to the January 4, 1985 Redefinition of Solid Waste, the Agency concluded that, while a partial exemption for precious-metal containing wastes may be warranted, an exemption

from the manifest requirements of Subpart B is not (50 FR 648 and 40 CFR §266.70(b)(2)). EPA believes for similar reasons that an exemption from the Subpart E export rules is not justified for precious metal-containing wastes. The final rule, therefore, requires exporters of such wastes to comply with the full notification and approval regulations. As EPA explained in the preamble to the final rule, notification and consent serve similar functions for exports as the manifest serves for domestic shipments and therefore manifested wastes are subject to §3017.

B. Waste Samples

ARCO: The commenter believed that, without an exemption analogous to the exemption for the shipment of waste samples in 40 CFR 261.4(d), EPA's proposal will impose an unintended burden on domestic companies that have foreign affiliates and licensees. The commenter noted that with the multinational nature of the basic chemical industry, technology is often licensed in foreign countries. New facilities, employing U.S. technology, are often constructed at plants with existing waste treatment units. Samples of residual streams, often characteristic hazardous waste, are supplied to the foreign entity from U.S. manufacturing units for evaluation of treatment options. Shipment of these samples would require notification and consent of the receiving country under the proposed EPA rules, since no

"de minimis" exemption is provided. The commenter believed that this is well beyond the Congressional intent of §3017.

The commenter added that it is quite common for licensees of the commenter's technology to periodically ship samples of process waste, which may be characteristic hazardous waste under EPA rules, to the United States for analysis. The commenter believed that it is impractical to require manifests for these small quantities of material, since analysis, not disposal, is the intent of the shipment.

Resources Conservation: Currently, and under the rules as proposed, persons not required to prepare a manifest under 40 CFR 262 Subpart B are not subject to the Subpart E export requirements. The commenter believed that this approach should be continued, and that in addition, exemptions currently available under "Samples," found at 40 CFR 261.4(d), should be expressly incorporated into the proposed rule.

The commenter stated that requiring compliance with the Subpart E notification and approval requirements for shipment of samples destined for laboratory testing activities would be unnecessarily burdensome, and would offer little benefit, as there is essentially no risk of significant harm to the environment from such activities. The exemption is already conditioned on compliance with certain specific safeguards.

Continuing the exemption for such activities will save the regulated community significant costs without sacrificing environmental protection, and will save EPA resources for addressing areas obviously needing additional regulatory attention.

RESPONSE: Existing §261.4(d) conditionally exempts from Subtitle C requirements any sample of solid waste that is collected "for the sole purpose of testing to determine its characteristic or composition." Because such samples are not subject to the manifest requirements of Part 262, Subpart B, they are exempt from the Subpart E hazardous waste export requirements. EPA believes the regulations are clear on this matter and that this result is already "expressed."

CMA: The commenter requested that the exemption for waste samples established under 40 CFR 261.4(d) be broadened to include samples that are exported for the purpose of determining (1) whether the foreign facility will accept the waste stream, (2) the treatment, storage, or disposal measures the foreign facility will use, and (3) the price the foreign facility will charge for such treatment, storage, or disposal. In support, the commenter noted possible consequences and difficulties if such an exemption is not granted.

RESPONSE: The Agency believes that this comment has merit, not only in the context of exports, but also for the management of samples domestically. However, the Agency believes that creating such an exemption would require further analysis for both exports and domestic shipments, and if deemed appropriate, proposal for public comment. The Agency questions what the appropriate conditions for such an exemption would be; for example, would some quantity limitation be desirable or some type of limit on the types of waste to be covered by the exemption. EPA will consider the commenter's request for possible further regulatory action. However, the Agency is not at this time expanding the scope of the §261.4(d) sample exemption due to the unanswered questions involved. Therefore, unless and until future regulatory action is taken, exports of hazardous waste samples beyond the scope of §261.4(d) must comply with the requirements of Subpart E. Alternatively, foreign waste management facilities may contract with laboratories in the United States to do any of the necessary analysis.

4. SEPARATE NOTIFICATION FOR EACH SHIPMENT

A. Comments in Favor of Separate Notification for Each Shipment

NRDC: The commenter recommended that EPA require notice for each individual shipment. Renotification, which, by definition, takes place while the prior notice is still "in effect" is, in the opinion of the commenter, a far less effective mechanism for encouraging full disclosure; moreover, the receiving country's ability to stop a shipment is greatly diminished since it must largely rely on the exporter to inform it about changes in a waste shipment occurring after initial consent has been given.

CA Legislator: The commenter expressed the view that separate notification for each shipment would be the ideal.

RESPONSE: EPA disagrees with these commenters. Separate notification for each shipment would overburden both the industry and the Agency, as well as foreign governments. Thus, EPA will not require separate notification for each shipment. EPA believes that requirements governing renotification, as discussed under Issue 22, will provide sufficient and timely information to

receiving and transit countries in the event that conditions on which the original consent was based are changed materially.

B. Comments Opposing Separate Notification for Each Shipment

CMA: The commenter supported EPA's proposal at §262.53 to allow a single notification covering shipments occurring over a maximum period of 24 months. Notification for each and every shipment of a hazardous waste to the same treatment, storage and disposal facility will result in unnecessary paper and lead to inefficient utilization of Agency and industry resources.

JM: The commenter agreed with the Agency that separate notification for each shipment is neither necessary nor advisable. They would create a paperwork nightmare and would undoubtedly result in delays in export of materials which would have substantial financial impact.

Chevron: The commenter agreed with EPA that separate notification should not be required for each shipment of the same waste.

Lake Carriers: The commenter preferred the blanket notification good for 24 months with no separate notification of each shipment.

Acme: The commenter strongly opposed notification for each shipment.

Natl. Wildlife: The commenter felt that it was indisputable, given the language of §3017(c)(3), that a single notification may cover more than one shipment, and that a separate piece of paper is not required for each shipment.

RESPONSE: EPA agrees with these commenters that Congress did not intend notification for each shipment, and that such notification would create burdens on both the industry and the Agency, as well as foreign countries. As a result, EPA is retaining the rule as proposed and separate notification for each shipment is not required in the final rule. EPA notes that a single notification may cover a 12-month period only. For discussion of EPA's decision to adopt a 12 rather than 24-month coverage period, see Issue 5, Notification Period.

5. NOTIFICATION PERIOD (24 vs. 12 MONTHS)

A. Twenty-four-month Notification Period Preferred

Acme: The commenter urged EPA to retain a 24-month notification period, and said that there is no benefit from restricting the period to 12 months. Because its waste generation system is predictable, the commenter claimed it is able to fulfill the notification requirements for shipment number, date, and quantity.

Lake Carriers: The commenter supported EPA's preference for a 24-month time period instead of a 12-month time period.

Chevron: The commenter felt that the notification should be valid for at least 24 months.

CMA: The commenter supported EPA's proposal to allow a single notification covering shipments occurring over a maximum period of 24 months. Receivers of waste can be made aware of the waste that will be received and the likely volume by a single notification covering projected shipments over a two-year

period. This will provide the receiving country with the information it needs to determine whether facilities within its borders are prepared to manage the waste.

Cadence: The commenter opposed any shortening of EPA's 24-month proposal period, but believed there should be no renotification whatsoever. If EPA nevertheless requires renotification, the two-year period proposed is fully adequate and should not be shortened.

RESPONSE: EPA has determined that a 12-month period is preferable for the reasons discussed in the preamble to the final rule.

B. Twelve-month Notification Period Preferred

Tricil: The commenter favored notification to cover a 12-month period rather than the suggested 24 months, particularly where multiple shipments are involved and dates of shipment are difficult to specify. A 12-month notification period would reduce the number of renotifications required due to changes in predicted volume and other causes.

ICWM: The commenter objected to the proposal that a single notification could cover a maximum of 24 months when multiple shipments are involved. The commenter instead suggested a 12-month notification period for multiple shipments. This time period (12 months) would reduce the number of renotifications required by an exporter, and would allow greater control by the receiving country over expected volumes and frequency of shipments crossing the border. The commenter believed that a 12-month requirement would not impose undue burdens on the exporter.

Environment Canada: The commenter favored notification covering a 12-month period rather than 24 months. Given the commenter's experience and several comments from Canadian industry, it would improve the accuracy, particularly of the estimated number and quantity of shipments identified in a notification.

NRDC: The commenter urged that if EPA did not intend to require separate notifications for each shipment, then the notification period should be shortened from 24 months to a period not exceeding 12 months.

Natl. Wildlife: The commenter believed that no more than one year of exports should be allowed to be covered by one notification.

The commenter stated several reasons for this belief. First, the one year period corresponds with the §3017(g) annual reporting requirement, and would allow those reports to reflect accurate and up-to-date information. Second, in many countries, governments and administrators tend to change rapidly, and records may be lost or misplaced, or policy changes may be made. Third, the amount and detail of information on the effects of hazardous waste on human health and the environment is always increasing. The commenter felt that annual reviews of consent would allow reassessment of such new data.

RESPONSE: EPA generally agrees with these comments and, therefore, the final rule establishes a 12-month notification period for the reasons set forth in the preamble to the final rule.

C. Other Comments

CA Legislator: The commenter stated that a 12-month rather than a 24-month EPA notification period would be more acceptable for reasons of projected export accuracy and monitoring. The commenter, however, explained that neither a 12 nor 24-month notification requirement allows for accurate accounts of the incidence or quantity of waste being exported.

RESPONSE: EPA notes that, for the reasons specified in the preamble to the final rule, it has selected a 12-month notification period. In addition, the copies of the manifest provided at the border and in the annual report will provide an accurate accounting, to the extent feasible, of the timing of shipments and quantity of waste being exported.

6. ADDITIONAL NOTIFICATION INFORMATION

Tricil: The commenter did not feel that any additional information should be required to meet Congressional intent.

JM: The commenter saw no need for the notification to include additional information in order to be considered "complete" and ready for transmission to the Department of State.

RESPONSE: EPA agrees with the commenter that no additional notification information is required to adhere to Congressional intent.

Natl. Wildlife: The commenter stated that notification to a potential hazardous waste receiving country should include more than simply the information proposed by EPA and expressly required by §3017. EPA should use its residual regulatory authority, preserved by §3017(h), to require that the receiving country be informed, in readable layman's terms and in synopsis fashion, why the waste to be exported was listed or found to have hazardous characteristics, and to require a layman's summary discussion of applicable restrictions under U.S. law to the treatment, storage and disposal of the wastes. This

notification also should be accompanied by an offer from EPA to advise the receiving country regarding the risks posed by the waste and the proper waste management techniques. Absent such requirements, notification of less sophisticated non-industrialized nations likely will be less effective in soliciting knowing and intelligent consent.

RESPONSE: EPA disagrees with the commenter. EPA believes that the final regulation will effectively solicit informed responses from receiving countries. Subsection 262.53(a)(2)(ii) requires that the exporter notification, provided to the receiving country, include a description of the hazardous waste and the EPA hazardous waste number (from 40 CFR 261, Subparts C and D), U.S. DOT proper shipping name, hazard class and ID number (UN/NA) for each hazardous waste as identified in 49 CFR 171-177. Subsection 262.53(d) requires primary exporters to furnish EPA with any additional information that a receiving country may request in order to respond to notification. Therefore, additional information will be made available to any receiving country upon request. These requirements will ensure intelligent consent from receiving countries.

EPA has limited resources and is unable to provide, for every notice, an explanation, on why the exported waste is listed as having (or is found to have) hazardous characteristics, "in layman's terms and in synopsis fashion."

Similarly, inclusion of a layman's summary of applicable restrictions with every notice would overburden the regulatory ability of the Agency.

7. USE OF FORM OR CABLE FOR DOCUMENTING CONSENT

Cadence: EPA explained that it has tentatively rejected developing a "standard form" in place of the cable setting forth the receiving country's consent, but solicited comments on whether such a form should be developed (51 FR 8750). In light of the additional delay inherent with such a form (cited by EPA) and the uselessness such a new form would have, the commenter supported EPA's current proposal in this regard.

RESPONSE: The Agency agrees with the commenter and continues to believe that the amount of time required to prepare the form may add a few days to the process of notification. The Agency therefore does not intend to develop such a form.

8. TREATMENT OF TRANSIT COUNTRY

A. Definition of "Transit Country"

Stoel: The commenter felt that the definition of "transit country" is too broad to work well with established practices in the shipping industry. With respect to shipments by ocean-going vessels, a transporter's ship may dock at various ports on its way to the receiving country and may also pass through territorial waters of many countries. Under the definition of "transit country," each country into whose ports or territorial waters the transporter's ship enters would be a transit country. Entrance into such ports or territorial waters of foreign countries is outside the control or knowledge of the exporter. Furthermore, an exporter may use different transporters with different routes from one shipment to the next. An exporter giving notice of relatively small shipments over an extended period cannot predict with any certainty the exact route to be taken by its transporters. Under the proposed rule, many exporters would be left with no alternative but to provide EPA with notice specific to every shipment, each notice requiring 60 days' lead time. The additional expense and inconvenience of the delays associated with such notice may outweigh the benefit to transit countries of knowing a particular hazardous waste is passing through its port or

territorial waters, especially when hazardous material is regularly passed through those ports and territorial waters without any special advance notification. Therefore, the definition of "transit country" should be revised to exclude territorial waters and ocean ports. Alternatively, the notice requirement should allow the exporter to describe a range of alternative routes and potential transit countries.

RESPONSE: EPA did not intend to encompass territorial seas through which a ship carrying hazardous waste passes or the mere docking at ports en route to a receiving country where the waste is either not off-loaded or does not enter the customs territory of that country. This appears to be consistent with the term "transit country" under both the February 1985 OECD Council Decision and Recommendation on the Transfrontier Shipment of Hazardous Waste and the new March 1986 Draft Council Decision and Recommendation on the exports of hazardous wastes. In both of these documents, transit country is defined as "any country ... across which a transfrontier movement ... takes place or is envisaged" [emphasis added]. This language does not appear to encompass territorial seas or mere port stops since the country is not being traversed. This is distinguishable from ports of entry for land transportation when the country will be traversed.

In addition, with respect to territorial seas, this interpretation is consistent with U.S. policy generally regarding innocent passage through territorial seas. See Statement by the President on Ocean Policy, March 10, 1983; 1982 U.N. Convention on the Law of the Sea.

EPA also is concerned, based on established practices in the shipping industry, that a requirement for advance notification by an exporter of all ports at which a ship may dock (for example, for refueling or to pick up additional cargo which was not preplanned) would be impossible or extremely difficult to foresee and could significantly interfere with transportation by vessels. Alternatively, if advance notification for all possible ports at which a vessel may stop were required, exporters may list many ports in many different countries to be safe. As a result, numerous notifications would be necessary which not only could significantly increase the burden on EPA and the Department of State, but could result in notification to foreign countries where the ship may not even be likely to stop and/or will not stop. This seems unnecessary. Lastly, we are concerned that an advance notification requirement might limit a ship's ability to make an emergency stop at a port. If advance notification was required, a ship making an unforeseen emergency port stop would potentially be subject to enforcement penalties. Accordingly, EPA interprets the phrase "through which a hazardous waste passes" in its definition of "transit country" not to include territorial seas

or ports at which a vessel stops where the hazardous waste is either not off-loaded or does not enter the customs territory of that country.

ARCO Alaska: The commenter supported EPA's proposed definition of "receiving country" as being limited to the foreign country of ultimate destination of the hazardous waste. Along these lines, the commenter agreed with the EPA definition of "transit country" and the proposal that only notification (not consent) be made to transit countries. The commenter believed this was consistent with Congressional intent to prevent hazardous waste "dumping" on unsuspecting foreign countries. Requiring the consent of both receiving and transit countries would impose a regulatory burden on U.S. generators as well as overtax the administrative role of the EPA in handling the various forms in a timely manner.

RESPONSE: EPA agrees with the commenter that the consent of transit countries is not consistent with the intent of Congress, and will therefore not be required under the export requirements. However, EPA has decided to alter its definition of "receiving country" which impacts on the reach of the term "transit country." See the preamble to the final rule for EPA's discussion of this issue.

B. Notification and/or Consent of Transit Country

Environment Canada: The commenter agreed that EPA should forward transit country responses to the exporter. The commenter added that it was not clear what action EPA would take or request that the exporter take should a transit country provide written objection to a proposed shipment.

In keeping with the OECD principle, the commenter suggested that the following statement be included: "The shipment cannot proceed if an objection has been received from any transit country and no appropriate alternative route can be found by the exporter."

NRDC: The commenter recommended that EPA require the prior consent of transit countries in the final rule. Because under the current proposal EPA would inform exporters of any objections to a shipment raised by notified transit countries, and expects exporters to act to reroute their shipments, requiring prior consent would impose no further burden on exporters. To the contrary, it would provide them with certainty prior to export as to whether they can expect their wastes to be turned away at the border of a transit country, and would enable them to reroute wastes ahead of time through a different transit country. The commenter therefore suggested

that a correct and appropriately broad reading of §3017 would require EPA to include transit countries within the scope of the requirement for both notice and prior consent. However, even if the Agency were to adopt a contrary position with respect to the definition of "receiving country," the commenter urged EPA to exercise its authority to require prior consent by transit countries pursuant to §3017(h). At the very least, EPA should require exporters to provide documentation along with the notification form that demonstrates consent to the shipment by all transit countries through which the waste shipment will move. Absent such documentation, a notification would not be considered "complete," and the shipment could not therefore occur.

RESPONSE: EPA does not agree with the commenters that the exporter needs to obtain prior consent from the transit country.

Consistent with a decision of the OECD Council, EPA's rules provide notification of the same information regarding waste shipments to the transit country as to the receiving country (except with respect to confidential business information). EPA believes that the notification provides sufficient information to a transit country for it to take actions it deems appropriate, including banning the transport of the waste shipment through its jurisdiction.

As discussed in the preamble to the final rule, consent of a transit country is not required. If the transit country objects to the entry of the waste, EPA will advise the exporter to reroute the shipment. Exporters should keep in mind, moreover, that the transit country may take action to prohibit the entry of the waste into that country. EPA believes that its treatment of transit countries is appropriate for the reasons set forth in the preamble to the final rule. In addition, EPA notes that it would not be appropriate to require exporters to provide documentation that demonstrates the consent of transit countries were consent required. This activity should proceed via diplomatic channels and not by private individuals.

Alto-Tronics: The commenter concurred with the proposal, including EPA notification to transit countries. However, the commenter thought it might be advisable to include a provision requiring that exporters seek knowledge of and insure compliance with transport regulations of such transit countries, allowing, however, that such a provision should take into account that the exporter may not always have full control of the actual route taken by the transporter.

RESPONSE: EPA acknowledges the commenter's concurrence with the proposal, including the notification to transit countries.

In response to the commenter's suggestion that a provision should be included to require that exporters seek knowledge of and comply with transport regulations of transit countries, EPA notes that transportation of hazardous wastes in a foreign country would be subject to such country's laws. If the transit country is concerned that the transportation does not meet its own transportation requirements, the country may take actions to stop the transport of the waste shipment through its jurisdiction or enforcement action for noncompliance with its transport laws. In view of the above, EPA does not believe it necessary to include a provision to this effect in its regulations. It is, therefore, in the best interest of the exporter to have knowledge of the transit countries' transport regulations since he would be responsible for complying with them.

Tricil: The commenter was pleased to see the reference to OECD principles in the preamble to the rule. This helps put the transboundary issue in perspective as a truly international issue and not just a European or North American concern. The commenter believed that waste should receive the best treatment possible no matter what its country of origin is or where the technology is located. Mechanisms need to be in place to allow and promote that opportunity. The commenter supported notification of transit countries with the caution that this requirement may have a significant impact on government agencies

that have to process the notices. For example there may be as many as 20 - 30 shipments per day of waste from New York City traveling through Ontario to Michigan.

RESPONSE: EPA acknowledges the support of the commenter and notes that the U.S. and Canada are currently developing an international agreement, as provided for under §3017(f), that will cover transboundary movement of hazardous waste. In addition, the Agency intends to work with the affected government agencies to keep them apprised of the rulemaking process and implementation schedule so that they may adjust their workload projections to accommodate any additional burdens.

9. MONITORING THROUGH U.S. CUSTOMS

A. Comments Supporting Monitoring through U.S. Customs

Natl. Wildlife: The commenter urged EPA to reconsider its tentative decision not to require an additional copy of the manifest to remain with Customs at the border. This provision would allow EPA to crosscheck compliance with the agreed-upon terms of export. EPA will not know with any degree of certainty whether the rules are being violated, or whether the manifests and shipments presented to Customs comply with the terms of the written consent, if this requirement is not adopted.

CA Legislator: The commenter strongly urged that the EPA reconsider its decision not to require an additional copy of the manifest which the transporters would give to a U.S. Customs official at the border. The commenter failed to see how the EPA, in view of recent events in California, can maintain that no evidence exists that some exporters are in violation of current notification requirements under §262.50.

Onsgard: The commenter stated that a copy of the manifest and the Acknowledgment of Consent should be left with the U.S. Customs.

In this way, EPA and U.S. Customs could work together to enforce the requirements of HSWA.

RESPONSE: EPA acknowledges the support for monitoring through U.S. Customs and agrees with the commenters that the involvement of U.S. Customs in monitoring the export of hazardous waste is an important tool for ensuring compliance. Therefore, for the reasons provided in the preamble to the final rule, the requirement that a manifest be left off at the border has been included in the final regulation.

B. Comments Opposing Monitoring Through U.S. Customs

ICWM: The commenter supported the concept that a copy of acceptance of the waste by the receiving company should accompany the transport of hazardous wastes. However, the commenter questioned the need to involve the U.S. Customs in the regulatory program. EPA is suggesting that a copy of the manifest and consent for receipt be left with the U.S. Customs officials at the border. This is unnecessary and only increases extra paper burdens on Customs officials as well as on transporters and exporters. As long as the transporter can show a proper manifest with the appropriate consent agreement, the

commenter did not believe that it is necessary to leave a copy of these materials with the Customs official.

Cadence: The commenter agreed with EPA's original reasoning for not requiring a "border monitoring system" in addition to all its other enforcement tools (51 FR 8751). This would require additional paperwork and costs while providing for no additional health and environmental protection.

Tricil: The commenter did not believe that an additional monitoring system is necessary or of any benefit. This is redundant in cases where large numbers of regular shipments take place and would place significant additional paper burden on Customs officials while providing minimal additional benefit.

RESPONSE: EPA has, after consideration, determined that submission of the manifest at the border should be required for the reasons set forth in the preamble to the final rule.

Lake Carriers: The commenter opposed a monitoring system involving U.S. Customs assistance. Currently, the commenter's member vessels are not required to prepare manifests on their fueling or

transfer of used oil, and the commenter did not advocate initiating such a process.

RESPONSE: First, this commenter is specifically concerned about used oil as an operational waste generated on board a vessel destined for a foreign country. Used oil is not a listed hazardous waste. Accordingly, unless it is a characteristic hazardous waste, it would not be subject to the export requirements which are applicable only to exports of hazardous waste. EPA notes that it has proposed to list used oil as a hazardous waste but has not yet issued a final rule on this subject.

Second, even assuming these wastes are characteristic hazardous wastes, used oil burned for energy recovery is exempt from the manifest requirement and therefore would not be subject to the export rule. See 40 CFR §261.6(a)(2)(3), 50 FR 49203 (November 29, 1985). Finally, assuming these wastes are hazardous and will not be burned for energy recovery, EPA does not believe ship operational waste generated en route to a foreign country is an "export" within the meaning of §3017. An export commonly involves the movement of cargo from one country to another for the purpose of taking that cargo to the other country. These wastes are not cargo but are wastes incidental to transportation. Moreover, the purpose of the trip is not to carry these wastes from the United States to a foreign country. In this respect, EPA notes that §3017 requires notification by

an exporter "before such waste is scheduled to leave the United States." This requirement appears to contemplate that a waste exists before leaving the United States. Since these wastes, however, are generated after leaving port or the customs territory of the United States, there is little, if any, "waste" being shipped from the United States. Second, it would be extremely difficult, if not impossible, to meet the notification requirement to estimate the quantity of such waste since they are generated on board during the voyage which may vary in length, and the types and amounts of generator and engine lubricant, which may be used en route. EPA also notes that its conclusion regarding whether an export is involved under these circumstances is consistent with both the February 1984 Decision and Recommendation of the OECD Council and the new March 1986 Draft Decision and Recommendation of the Waste Management Policy Group of the OECD in the transboundary shipment of hazardous waste. Both of these documents exempt hazardous wastes arising from the normal operation of ships.

EPA also notes that MARPOL, the Act to Prevent Pollution from Ships, and Coast Guard regulations may provide some protection from significant environmental harm from the discharge of oily wastes into the waters. For discussion of a similar question, see the responses to comments by the American Institute of Merchant Shipping.

10. ANNUAL REPORTS

Environment Canada: The commenter agreed that the annual report would be a useful tool for control of exports of hazardous waste.

Envirosure: The commenter pointed out that the requirements for annual reporting are already in place within New York State, and it would probably mean very little extra effort to break out of that report a small portion for exported wastes when that information is already known. Recordkeeping is already in place as well and thus is of no great consequence.

RESPONSE: EPA acknowledges the support of these two commenters on this issue.

Tricil: The commenter felt that the annual reporting of international shipments could be provided separately from other required reports. The commenter questioned whether or not EPA could obtain this information from computerized notice records more easily than from annual reports from exporters.

RESPONSE: The annual report is a statutory requirement under §3017. EPA cannot accept notice records as a substitute since, for example, notifications may overestimate quantities exported since renotification is not required if the quantity of waste actually exported is less than that indicated in the original notification. Thus, the annual report will contain more specific information. It will also show exactly what was exported and how rather than what was intended to be exported.

JM: The commenter recommended that EPA develop an annual report form for use in reporting exports of hazardous wastes, and that the form be distributed no later than January 31 of each year to all exporters who submitted Notifications of Intent to Export covering the preceding calendar year. This will serve as a reminder to those who may believe they are covered only by State reporting requirements, and will provide a standardized format to ease compliance for the regulated community and compilation/ interpretation of data by EPA.

RESPONSE: EPA is not issuing an annual report form at this time for the reasons set forth in the preamble to the final rule.

MN Pollution Control: The commenter stated that the exporter should be required to submit the annual report to the exporting State.

RESPONSE: EPA requires exporters to submit an annual report to the Administrator according to §262.56 because of EPA's involvement in the implementation of the export requirements. Authorized States may also establish regulations requiring the submission of the annual report to the State.

NRDC: The proposed rule stated that exporters will no longer be subject to the biennial reporting requirements of §3002. These requirements include new subsections (a)(6)(C) and (D) which require waste generators to report on their efforts to reduce the volume and toxicity of waste generated and on changes in the volume and toxicity of wastes achieved by comparison with previous years. All waste generators are subject to this reporting requirement. Consequently, to the extent that exporters are generators of hazardous wastes, EPA must require that they report biennially on their waste minimization activities.

RESPONSE: This requirement has been added as explained in the preamble to the final rule.

Lake Carriers: The commenter stated that it will be administratively more burdensome for industry to submit three reports (two annual and a biennial) instead of one biennial report. In this age of

computerized data processing, the commenter suggested that it would be an elementary task to extract required data from a biennial report and send that which is required to EPA Regional Administrators and/or Congress.

The commenter stated that, according to the preamble of the proposed rule, eliminating export information from the biennial report would not place a greater workload on generators since most generators retain separate records on domestic and exported shipments and, thus, are in a position to file separate reports on those activities. The commenter objected that this line of reasoning neglects the fact that its members submit no reports presently so they are keeping no such records.

RESPONSE: See response to the comment above.

EPA notes, however, that where hazardous wastes subject to the report provisions are involved and the annual report is therefore applicable, it is administratively less burdensome for EPA to receive a separate report on exports rather than extract such information from biennial reports every other year.

11. APPLICATION OF DEFINITION OF SMALL QUANTITY GENERATORS ("SQGs")

Lake Carriers: On the subject of small quantity generators, the commenter noted that some of its member vessels will be large quantity generators but will export a small quantity of hazardous waste depending on where their travels take them and how extensively they utilize one of the three Canadian fueling piers. The commenter saw no compelling reasons to regulate exports more stringently than domestic transfers and, thus, would opt for no application of Part 262 or the export requirements.

RESPONSE: See the response to the preceding Lake Carriers comment on page 65.

However, EPA notes that generally where a hazardous waste subject to the export requirements is concerned, generators of 100 kg/m of hazardous waste or more are required to accompany all off-site shipments of hazardous waste with a complete, multi-copy Uniform Hazardous Waste Manifest, under 40 CFR Part 262, Subpart B. This requirement applies regardless of the size of the individual shipments. EPA does not believe that subjecting these same shipments to the hazardous waste export rules would in any way discriminate against foreign shipments. Under the final rule, the regulatory status of both foreign and

domestic shipments will be determined, not according to the size of the individual shipments, but according to the generation rate of the hazardous waste generators. A generator who produces 100 kg/m or more, but exports a smaller quantity will have to comply with Subpart E for the exported material.

12. SQGs SUBJECT TO REGULATIONS

A. Favor Exemption for all SQGs of Less Than 1000 kg/m

Merchant Shipping: As a potential transporter, the commenter felt that while the notification, consent, and reporting requirements appear reasonable for shippers of large quantities of hazardous waste, they are overly burdensome for generators of less than 1000 kg per month of hazardous wastes who may occasionally wish to export their wastes as part of a routine business practice. Presently, a consignee is required to meet applicable regulations of approvals, handling, and reporting in the receiving country. Since a foreign government can easily apply and monitor its own regulations, the commenter feels that generators/shippers of less than 1000 kg per month of hazardous wastes should be excluded from the export requirements of Part 262. Since the consignee is regulated and monitored by his own government, there is no need to regulate such shipment at the point of origin.

RESPONSE: This comment has been addressed in the preamble to the final rule. The export rule applies to small quantity generators generating 100-1000 kg/m of hazardous waste.

B. Favor Compliance for all SQGs of Less Than 1000 kg/m

Natl. Wildlife: The commenter agreed with the proposed rule's requirements for manifesting by all small quantity generators. The commenter claimed that Congress decided that any hazardous waste listed or identified that is to be exported must be subject to acceptance by the receiving countries, and that this is a decision that EPA should not, and is not free to, second guess.

RESPONSE: This comment has been addressed in the preamble to the final rule.

13. STATES' ROLE

Natl. Wildlife: The commenter agreed with the proposed rule's provisions and discussion in the preamble to the proposed rule that States generally should not be engaged in international discussions through the Department of State.

RESPONSE: EPA acknowledges the support of the commenter.

Tricil: The amount of paper that is produced to meet requirements of this rule dictates that the federal agency encourage the States to defer matters of international shipments to the central agency, thus reducing duplication. However, data specific to States such as manifest information and reports should be sent to the States by EPA, generator or exporter.

RESPONSE: Consistent with existing procedures, under the final rule States could not assume the authority to receive notification of intent to export. In addition, States would not be authorized to transmit such information to foreign countries through the Department of State or to transmit Acknowledgement of Consent to the exporter. In EPA's view, foreign policy interests and exporters' interests in expeditious processing are better served

by EPA's retaining these functions. This will provide the Department of State with a single point of contact in administering the export program and will better allow for uniformity and expeditious transmission of information between the United States and foreign countries. With the exception of these functions, States must include requirements equivalent to those promulgated in the final rule. In addition, States may adopt requirements that also require generators or exporters to send copies of manifest information and reports to the State to keep the State aware of these activities.

14. UNIVERSE OF HAZARDOUS WASTE

A. Comments Supporting Exclusive Use of Federal Universe

Inst. of Scrap Iron: The commenter stated that to the extent that EPA decides to impose the export regulations on otherwise unregulated secondary materials, the Agency should include in the universe of affected hazardous wastes only those wastes which are listed or identified under 40 CFR Part 261. EPA should abandon its proposal to include in that universe such additional wastes as may be identified or listed by the State from which the material is exported. As EPA concedes, under this approach notification would be required for wastes exported from some States but not others (49 FR 8754). Not only would the resulting inconsistencies and disparities be confusing to foreign countries, but they would create unfair burdens on persons exporting from certain States.

Moreover, EPA's adoption of State definitions of hazardous waste to regulate exports probably would be unconstitutional. Under Article I, Section 8 of the Constitution, Congress has the exclusive power "to regulate commerce with foreign nations." The vesting of the Commerce Power in the federal government precludes any State attempt to regulate subjects requiring a uniform system of national regulation. Cooley v. Board Wardens

of Philadelphia (53. U.S. 299 (1851)). It is clear that no State could independently require an export license for hazardous waste (or any other product). Yet EPA's proposal would enable States to do indirectly what they cannot do directly. As such, the proposal amounts to an unconstitutional delegation to the States of the federal power to regulate foreign commerce.

RESPONSE: EPA is basing implementation on the State authorized program plus HSWA wastes as discussed in the preamble to the final rule. This will not include wastes identified or listed beyond those federally listed or identified plus HSWA wastes which will satisfy this commenter's concerns.

Acme: The commenter strongly urged the Agency to adopt only the federal universe of hazardous wastes, including any additional federally amended (e.g., HSWA) hazardous wastes.

The commenter did not believe that there is any additional or increased burden on exporters to distinguish between the Federal and State universe of hazardous wastes. In actuality, the commenter believed generators routinely make this distinction since it will affect the manner in which manifests are completed, biennial reports are completed, and State generated Superfund taxes are collected.

To require, where a State has obtained authorization, that the State universe of hazardous wastes be used for purposes of export requirements, would create unnecessary confusion and burden to the generator. First, these wastes would need to be declared in the annual report, which is proposed as being submitted to EPA. There would be considerable burden for EPA to distinguish between each authorized and non-authorized state and respective universes of hazardous wastes. Secondly, because of differences in authorized states for imposing more stringent requirements than the Federal, state regulated (but federally non-regulated) wastes may not be restricted to ninety-day, on-site storage. The ability to predict frequency and quantity of shipments may be considerably less than with federally regulated hazardous wastes. Finally, the commenter agreed with the EPA comment that this may cause undue confusion with the receiving and transit countries as well.

In summary, the commenter encouraged EPA to restrict hazardous waste for the purpose of export requirements to those which are federally regulated.

RESPONSE: This issue is discussed in the preamble to the final rule. Although EPA is basing implementation on the State authorized universe, that universe does not include wastes identified or listed that are broader in scope than the federal universe.

Accordingly, this commenter's concerns would appear to be satisfied by using the State authorized universe.

B. Comments Supporting Inclusion of State Universes

ICWM: The commenter believed that if the originating State or Provincial regulations classify a waste as hazardous, the receiving country must be notified, whether or not that receiving country also considers the waste in question to be hazardous. Any other interpretation will lead to confusion and opportunities for evasion of the law. It is far better to manifest all wastes considered hazardous at the point of origination, thus assuring that proper management and disposal occurs.

Tricil: All wastes deemed hazardous by EPA or any States or Province should be notifiable to ensure that documentation can be completed and filed with appropriate authorities.

Natl. Wildlife: The commenter stated that a principal purpose of §3017 is to warn foreign governments in advance that wastes meriting special handling will be entering their country. The commenter also noted that the regulation of wastes as hazardous by authorized States indicates that these materials warrant special

handling, and that the failure to manage these wastes accordingly may threaten human health and the environment. EPA cannot expect foreign governments to discern or appreciate the variations in regulation among authorized States. Allowing a waste regulated in the U.S. as hazardous to be dumped in a foreign nation without notice or consent will not advance U.S. foreign policy interests, nor will it protect the environment and citizens of foreign States as Congress intended in enacting §3017.

RESPONSE: As noted in the preamble to the final rule, implementation will be based on the State authorized program which does not include wastes listed or identified by a State beyond those listed or identified by EPA plus HSWA wastes. This universe was chosen for the reasons set forth in the preamble to the final rule. In addition, it would be confusing to foreign nations to be subject to widespread disparities in treatment of the same wastes.

15. CONFIDENTIALITY

CA Legislator: The commenter supported EPA's position that claims of confidentiality by generators regarding hazardous waste export information be severely restricted. The availability of such information to elected officials is vital and should not be abridged. Without access to the records of exporters of hazardous waste, regulators on both sides of the border could not track adequately the flow of hazardous materials.

NRDC: The commenter noted that because EPA has improperly excluded transit countries from the definition of "receiving country," these countries will not receive so-called confidential information. To the extent that confidential treatment is afforded to the export notification, this will impair the ability of transit countries to assess risks to the environment and to public health, and hence will decrease the likelihood of their being able to stop shipments that could result in serious harm.

The stated reason for this discrepancy is EPA's belief that §§3007 and 3017 are in conflict. The Agency contends that §3007 "could be read as prohibiting all disclosure of any confidential business information contained in a notice of intent to export." However, the Agency notes that "this reading would

contradict §3017," which requires the information specified in the notification to go to receiving countries.

The commenter did not perceive the "conflict" identified by EPA between §§3017 and 3007. Section 3007 generally gives access to "any person" to any data obtained by EPA that is not held to be confidential. EPA's regulation render non-confidential any data required by statute to be released. As stated above, the statute, in §3017, expressly requires disclosure of the notification to the "receiving country." Consequently, the commenter could see no reason why any of the data required to be included in the notification should be held confidential with respect to any receiving country, including transit countries.

With respect to the public, the commenter also urged the Agency to provide access to all export notification data. Although §3017 does not explicitly require such disclosure, the legislative history of §3017 unmistakably reveals Congressional intent to provide the public with full access to information in order to assure needed public oversight.

Natl. Wildlife: The commenter agreed with EPA's confidential business information proposal in §260.2(b) discussed in the preamble to the proposed rule, except that the commenter failed to

understand how EPA can justify excluding transit countries from receiving such information.

RESPONSE: EPA agrees with the commenters that the availability of export information should not be abridged. EPA does not believe that notification information generally is entitled to treatment as confidential business information. It has been EPA's experience that existing notifications, which consist of identification of the exporter, waste and consignee, have not been claimed by exporters to be confidential. Moreover, it is doubtful that such claims will be made due to the requirement that such claims be resolved prior to finding a notification complete for transmission to transit <u>and</u> receiving countries. Thus, such claims could significantly delay shipment since a shipment cannot take place in the absence of consent.

Regarding transit countries, EPA believes that reading §§3007(b) and 3017 together precludes disclosure to parties other than receiving countries and the Department of State. EPA believes its interpretation of receiving country is the correct one and that no specific requirement to disclose information to other parties is apparent on the face of §3017. Moreover, the commenter has overlooked the fact that the legislative history it cites is qualified by the statement "as in other provisions of Subtitle C," which supports EPA's position that §3007 applies to the availability of information to the public. EPA notes

that a transit country that is not satisfied with the information it received from the notification may, on its own, require such information prior to allowing the shipment to enter its border. Moreover, even if confidentiality is claimed, it generally will allow protection to simply withhold one element of the notification such as the name of the exporter. The remaining information would allow the transit country to alert its border guards to stop entry of such waste should the exporter ship such waste contrary to the transit country's wishes.

16. TRANSPORT BY RAIL

AAR: The commenter objected that the proposed manifest system, which is predicated on face-to-face contact between a transfer and a transferee, is not compatible with railroad operations. The regulation would require that the Acknowledgment of Consent be attached to shipping papers. The paperless exchange of rail cars, now being developed, would not allow for the exchange of these consent documents.

There is no reason to require an exchange of paper between railroads. There is no problem with the current system that requires that manifests be sent to the next non-rail transporter or the last rail transporter in the U.S. for shipments exported by rail. The Acknowledgement of Consent could be attached to the manifest.

The commenter suggests, therefore, that EPA's proposed export regulations for hazardous waste be modified for the rail industry. The regulations should provide that when export shipments of hazardous waste are tendered to a railroad, the Acknowledgement of Consent must be attached to the manifest for forwarding to the next non-rail transporter or, if a shipment is being exported by rail, to the last railroad that will be transporting the shipment in the United States.

RESPONSE: This comment has been addressed in the preamble to the final rule.

17. DEFINITION OF "CONSIGNEE"

Stoel: The commenter believed that the term "consignee" required additional clarification. In the case of hazardous waste that is exported for treatment, storage or disposal (such as recycling), the initial treatment, storage or disposal facility (TSDF) that receives the waste may transfer certain portions of the waste to a second TSDF (e.g., for recycling). Exporters of hazardous waste have no control over such secondary transfers of the hazardous waste and may be unable to identify, especially prospectively, such secondary TSDFs. Thus, the exporter may not be able to give notice of the "ultimate" TSDF as would be required by the proposed rule. To reconcile this problem, the commenter proposed substituting the term "receiving treatment, storage or disposal facility" for the term "ultimate treatment, storage or disposal facility" in the definition of "consignee."

RESPONSE: EPA chose to define "consignee" as the "ultimate treatment, storage or disposal facility" because that is the language employed by Congress in defining notification requirements in §3017(c). The term "ultimate" was used by EPA to distinguish temporary storage in the course of transportation from longer-term treatment, storage, or disposal. However, EPA acknowledges that further management of an exported waste may occur after it is sent to a foreign TSDF, which is beyond the

control of the exporter. EPA did not intend to require an exporter to specify actions that occur in a foreign country unknown to him or beyond the scope of his control. Therefore, EPA interprets the term "ultimate TSDF" to mean the final destination of the waste in a receiving country known to the exporter. This interpretation does not result in a change to the definition of "consignee" but rather is a clarification of EPA's original intent.

Environment Canada: The word "recycling" is recommended as an addition to the definition of "consignee." The commenter maintained that it was clearly the intent to include recycling facilities under the proposed export rules. The commenter explained that the apparent reliance on the word "treatment" to include recycling could be viewed as being ambiguous.

RESPONSE: EPA does not believe that the commenter's suggested change is necessary because the §260.10 definition of "treatment" clearly covers recycling.

18. EFFECTIVE DATE

Natl. Wildlife: The commenter agreed with EPA's position that the effective date override provision of RCRA §3010(b) should prevail (i.e., EPA may shorten the general 180-day effective date specified at §3017), and that a 30-day effective date is adequate.

Acme: The commenter is required by regulation to provide for off-site shipment of hazardous wastes within 90 days of generation and accumulation, resulting in a very predictable schedule of shipments every 90 days. The increased burden of applying for notification 60 days prior to each shipment, coupled with the uncertainty and lack of obligation for the receiving country to respond to the notification, could result in further complication of the documentation and management of wastes.

If consent was not received prior to the 90-day on-site storage limit, then temporary storage would have to be provided at another facility. The commenter believed that, as generator of the wastes, it is better experienced to provide additional storage than a temporary site. The additional handling, transportation, and documentation provides greater opportunity for mixups with the waste management system.

With the exception of the Notification of Intent to Export the commenter had no objection to the implementation and effective date. However, the commenter noted that the Notification of Intent must be submitted at least 60 days prior to the initial shipment of wastes. It is conceivable that within a week of the effective date, a generator will have reached its 90-day, on-site storage limit, but will not have received the EPA Acknowledgement of Consent. The commenter proposed that either the effective date be 90 days from the date of publication, or that a two-tiered effective date system be established to allow for proper filing of notifications and receipt of acknowledgments.

Dow Corning: The commenter believed that the final rule applicable to the export of hazardous waste should not be effective until 90 days after publication to allow exporters time to prepare notification and EPA enough time to process the notifications prior to the effective date and prevent any interruptions in exporting hazardous waste that the current proposal would cause.

The proposed rule states that the applicable standards for the export of hazardous waste will become effective 30 days after publication of the final rule. The proposal also required that a waste exporter notify EPA 60 days prior to exporting the wastes. Therefore, there would be 30 days in which wastes could

not be exported which could cause serious problems in production areas.

JM: The commenter asserted that in implementing any new regulation, a period of uncertainty, confusion and concomitant delay invariably occurs during a phase-in period. Combine this normal occurrence with the number of agencies involved in this regulation (EPA, Department of State and U.S. Customs) and the unprecedented involvement of foreign government environmental protection agencies over whom the U.S. and its laws have no control, and the anticipated length of time needed for all parties involved to become comfortable with the rule, multiplies many times. How, then, can EPA justify an effective date of 30 days after promulgation? At the minimum, exporters should be given six months from the date of promulgation before they must cease exporting hazardous wastes for which they have yet to obtain an Acknowledgment of Consent from the receiving country.

The commenter objected to the imposition of any regulation that interferes with a normal business practice in effect prior to promulgation of new regulations. Those persons presently exporting hazardous wastes to a specific facility in a foreign country should be "grandfathered" under the regulations. They should be required to submit a timely Notification of Intent to Export, and to attach the Acknowledgment of Consent to the manifest once received, but no exports should be held up unless

and until the receiving country objects in writing to the existing practices, especially since neither EPA nor the Department of State has the power to order a response from the receiving country's government. This seems the only equitable way to implement such an open-ended law.

Cadence: The commenter noted that §3017(b) says that under the proposed rule the new regulations "shall become effective 180 days after promulgation." The commenter pointed out that §3010(b) authorizes EPA to shorten the general 180-day period. However, the commenter believed that because §3017(b), which does not authorize EPA to shorten the period, is part of §3017, §3017(b) should control over §3010(b) with respect to §3017 regulations.

The commenter believed that EPA has overlooked a significant problem which could cause great disruption. This problem arises when an exporter has already begun performing -- in accordance with EPA's currently-effective export regulations -- under a continuous contract before the final §3017 regulations are issued. Once the new final regulations are issued, the exporter will have to suspend further exports after the 30th day unless and until all new forms are filed and consents are granted.

Knowing the way governmental agencies work (even with the best of intentions) the commenter seriously questioned whether even a 60-day turnaround will often be accomplished in the real world.

The commenter stated that even if EPA believes that newly contracted exporting activities should be subject to the 30-day effective period, it should make an exception for activities ongoing under currently-effective export regulations and provide a longer lead-time for the transition. Otherwise, beneficial recycling practices might have to be suspended for a few months.

RESPONSE: These comments have generally been responded to in the preamble to the final rule. As noted in that preamble, EPA is changing the effective date to November 8, 1986 and will begin accepting notifications immediately. Thus, since publication should occur approximately 90 days prior to November 8, 1986, approximately 90 days will be provided to notify and obtain consent for any shipments to occur on or soon after November 8, 1986. Thus, approximately 30 days are provided to prepare the notification and 60 days for the transmission of notice, obtaining consent and transmission back to the exporter. EPA believes that this is adequate time to obtain consent by November 8, 1986. Moreover, the statute requires implementation by November 8, 1986 which should take precedence over the time between promulgation and effectuation. Therefore, EPA cannot

grandfather ongoing shipments beyond November 8, 1986 or provide a later effective date.

MCA: The commenter feared that the proposed rule may succeed in closing U.S. borders to licensed hazardous waste shipments for an interim period while foreign governments react to the rulemaking within their own legislatures. The commenter inquired whether EPA had addressed the problem of where these wastes may be disposed in the interim.

Tricil: The commenter acknowledged that this rule is in many ways the formalization and extension of an existing process being carried on between Canada and the U.S. for at least five years. Therefore implementation on November 8 should be readily achievable. However, the commenter suggested that a six month grace period before enforcement actions are to be taken for inadvertent violations would be appropriate.

RESPONSE: EPA agrees that implementation on November 8, 1986 is readily achievable. However, EPA has enforcement discretion which will be exercised as appropriate on a case-by-case basis. As stated in the preamble to the proposed rule, EPA will process all notifications and written consents as expeditiously as possible.

Hazardous waste exporters have been on notice since November 8, 1984 that EPA was promulgating export regulations. Hence, it is the exporters' responsibility to plan for the implementation of the regulations (including planning for contingency waste management plans if consent is denied or delayed by the receiving country).

19. 60-DAY ADVANCE TIME

A. Comments Supporting the 60-Day Advance Time

ICWM: The commenter supported the need for a 60-day advance time. The commenter felt that this time period should be sufficient to obtain written consent from the country receiving the hazardous waste.

Tricil: The commenter agreed that 60 days are needed to allow written consent to be received.

EC: The commenter accepted the time frame for processing notifications.

RESPONSE: EPA acknowledges support for the suggestion incorporated in the rule language that exporters allow a 60-day advance time for the processing of notification and consent and believes that it is the most appropriate time frame.

B. Comments Requesting a 30-Day Advance Time

OHM: The commenter agreed with EPA that foreign governments have the right to be notified of all hazardous waste transactions. However, the commenter felt that a total of 30 days notice is an adequate time for dissenting governments to protest such shipments. Additionally, the proposed revisions would cause unnecessary and costly delays in disposing of wastes generated at emergency and remedial environmental clean up sites.

RESPONSE: As discussed in the preamble to the proposed rule, EPA anticipates that a 60-day advance time will allow a total of 30 days transmission time for notification and consent and 30 days for the receiving country to provide its response to the exporter. This commenter can submit notification at a later date but will assume the risks of delay in shipment. This requirement should not cause substantial delays in emergency and remedial cleanups since an alternative domestic disposal site can be used.

Uniroyal: The commenter stated that the 60-day notification period required prior to exportation is too long, and that 30 days should be sufficient. To keep in compliance with the 90-day storage requirements of U.S. regulations, the commenter thought

that a "fast track" system should be established to allow expedient EPA approvals on hazardous waste exports.

RESPONSE: EPA does not believe that 30 days would provide adequate time for EPA, the Department of State, and the receiving country to process the notification and transmit the receiving country's consent or objection to the exporter. The 60-day advance time should provide adequate time for the process. In fact, the amount of time for EPA and State Department actions is minimal and is already considered "fast track." However, the 60-day advance time is included in the rule as a suggestion and not a requirement (§262.53(a)). Exporters may allow as much or as little time for obtaining written consent as they feel is appropriate and necessary, however, they may be assuming the risks of delay in shipment if notification is not provided sufficiently in advance of the expected day of shipment.

C. Comments Supporting an Advance Time of More Than 60 Days

Cadence: The commenter noted that EPA has explicitly recognized that even in the best of circumstances it would take 60 days to process an approval from the time of notification (50 FR 8748). As the procedures outlined at 50 FR 8749 show, there are an astounding number of things that have to happen during

this time. The commenter questioned whether even a 60-day turnaround will often be accomplished in the real world.

RESPONSE: EPA has decided to retain the 60-day advance time as the recommended submittal time, and believes that this period should provide adequate time for EPA, the Department of State, and the receiving country to process the notification and transmit the receiving country's consent or objection to the exporter. Exporters may however, submit their notifications earlier than the suggested 60 days if they so desire.

D. Other Comments

Stoel: The commenter believed that the proposed rule is devoid of any time constraints in which EPA must respond to an international shipment notice. Consistent with §3017(d), the regulations should require EPA to provide notice to the receiving country within 30 days of its receipt of an international shipment notice from an exporter. Furthermore, the proposed rule should make some provision for cases in which the receiving country does not respond to EPA's notice within a reasonable period. The commenter suggested that for purposes of the proposed rule, a receiving country should be deemed to have

given its consent to the receipt of hazardous waste if it does not respond to EPA's notice within 30 days.

RESPONSE: As stated in §3017(d), within 30 days of the Administrator's receipt of a complete notification, the Secretary of State shall forward a copy of the notification to the government of the receiving country. Thus, EPA must provide the information to the Department of State in sufficient time to enable it to meet this statutory time frame. Because the exchange of information among EPA, the Department of State, receiving countries, and transit countries is administrative in nature and imposes no requirements on the public, EPA did not propose specific procedures to implement these statutory requirements. These statutory deadlines nevertheless are applicable.

EPA disagrees with the commenter's recommendation that failure by a receiving country to respond to a notification should be considered consent because EPA cannot require a receiving country to respond within a specific number of days. Since an export is prohibited in the absence of written consent, EPA does not have the authority to assume consent if there is no response within a specific time period. EPA reminds exporters that the 60-day advance is only EPA's best estimate of the time transmission of information will take. A receiving country may take longer to respond than estimated. Accordingly, regardless of when a notice is submitted (even if submitted 60 or more days in advance), the shipment cannot take place until consent has

been obtained. Exporters are therefore encouraged to submit notifications at the earliest possible date.

EPA intends to work closely with the Department of State to expedite the processing of notifications and intends to encourage receiving countries to expeditiously provide their written response to the U.S. Embassy.

Australia: The commenter noted that the procedures and time frame proposed for processing are satisfactory, with one qualification: later in 1986 the Australian Parliament will have before it a chemicals notification and assessment bill which proposes a 90-day notification period for new chemicals to be imported into Australia. This would raise a minor difficulty if a hazardous waste which is also a new chemical were consigned to the country. However, the commenter stated that this occurrence would be rare.

RESPONSE: Exporters of such materials would simply have to submit two notifications or one notification at an earlier date to serve both purposes. Nothing prohibits notification at an earlier date. Exporters would, of course, have to comply with Australian law. If believed necessary, this could also be addressed in an international agreement.

Border Steel: Under §262.53, EPA proposed doubling the notification period from 30 days to 60 days. The commenter stated that its own current negotiations have taken 60 days and, even though it properly notified the Administrator under the current regulations, the commenter foresees another 30 days before negotiations are finalized and the first shipment is made to Mexico. Adding the extra time on EPA's part will simply add time to what already is a protracted negotiation period. Though EPA believes it is helping the exporter by proposing to allow each notification to cover a 24-month period, the commenter can see a situation whereby such negotiations could last up to eight months and, thus, full-time negotiation with a recycler in Mexico would be necessary just to keep shipping material on a month-to-month basis.

RESPONSE: The final rule provides that the Notification of Intent to Export may cover export activities for a 12-month period rather than the 24-month period. EPA is cognizant of the time-consuming nature of some negotiations and it will make every effort to expedite its handling of the notifications and written consents.

JM: The commenter requested that this rulemaking include specific regulations regarding procedures for the processing of Notification of Intent to Export notices and receiving country responses. Since delays may have economic and legal impacts,

exporters also need to be assured that they will receive fair and equitable treatment by EPA and Department of State officials in the timeliness of the processing of their notifications and responses. As things now stand, there is no deadline for EPA to transmit the exporter's notification to the Department of State, and the Department of State is given up to 30 days to transmit the notification to the receiving country's government. The commenter strongly urged that EPA incorporate the time frame outlined at 49 FR 8749 of the preamble (i.e., that EPA notify the Department of State within five days of receipt of the exporter's notification; Department of State notify the receiving country within ten days of receipt; Department of State notify EPA of the receiving country's response within ten days of receipt; and EPA notify the exporter of such response within five days of receipt) into the regulations. This would go a long way toward preventing preferential treatment of "favored" exporters and toward minimizing the concerns of exporters that their exports may be held up by bureaucratic delays.

RESPONSE: The statutory provisions of §§3017 (d) and (e) require the Department of the State to transmit notification of the intended export to the receiving country within 30 days of receipt of EPA of a complete notification from the exporter. EPA must then notify the exporter of the receiving country's consent or objection within 30 days of its receipt by the Department of

State. Thus, EPA's transmission of the notification to the Department of State is included under the statutorily mandated 30-day period.

As stated in the preamble to the proposed rule, EPA anticipates notifying the Department of State within 5 days of receipt of the notification from the exporter. The Department of State anticipates notifying the receiving country within 10 days of receipt of the information from EPA. They also anticipate transmitting the receiving country's consent or objection to EPA within 10 days of its receipt. EPA then anticipates notifying the exporter within another 5 days. This total of 30 days leaves another 30 days out of the 60-day advance time for the receiving country to provide its consent or objection.

The commenter expresses a concern that some exporters might receive preferential treatment in the processing of notifications and consents by EPA. However, EPA and the U.S. Department of State intend to process notifications and consents as expeditiously as possible, and EPA assures the commenter that this process will proceed in a fair and equitable way. EPA does not believe it appropriate to impose specific time frames on each act subject to each 30-day time frame because flexibility may be necessary (so long as these acts occur within the specific statutory time frames).

20. EXCEPTION REPORTS

Tricil: The commenter expressed support for the requirement for exception reports for returned shipments. This is required of domestic shipments and should be required of transboundary shipments as well.

ICWM: The commenter strongly supported the proposal for exception reports as notification of undelivered shipments, noting that this is a requirement for any domestic transport within the RCRA program. Without exception reports, it would be very difficult to enforce export regulations effectively.

RESPONSE: EPA acknowledges the support of these commenters. Exception reporting is an important tracking and enforcement tool in the regulation of exports of hazardous waste. It provides EPA with notification that a waste shipment has been initiated but did not leave the United States, or left the U.S. but was not received by the consignee. Thus, EPA can determine whether the waste remains within the U.S. or has reached the foreign country, but not the consignee. EPA is retaining §262.55 in the final regulation. These functions cannot completely be met by delivering a copy of the manifest to the U.S. customs official at the border.

The rule also requires generators of between 100 and 1000 kg/m to file exception reports for exports even though not required domestically. Exception reports for these generators where exports are concerned are necessary due to the lack of jurisdiction over the foreign facility (which means it is substantially more difficult to verify receipt).

21. ACKNOWLEDGMENT OF CONSENT

A. Comments Opposing Cable Transmission of Acknowledgment of Consent

Natl. Wildlife: The commenter stated that the plain language of the statute requires that the actual consent accompany the waste and the legislative history indicates the importance of this requirement. The commenter suggested that EPA effectively proposes to delete the requirement that a copy of the receiving country's written consent must accompany the manifest for each shipment. EPA would simply require that a cable from the U.S. Embassy to EPA (acknowledging the receiving country's written consent to the export of waste) accompany the manifest.

The commenter believed that Congress had good reasons for requiring the actual written consent to accompany the manifest even if the language of the statute would allow EPA's interpretation. First, human error in translation or during the cable transmittal process is always possible; it is even more likely if highly technical details are to be transmitted and translated by generalist State Department staff not trained in the finer points of hazardous waste management. If such an error occurs, the exporter would undoubtedly argue that he or she is exempted from any requirements not transmitted in the Embassy cable. In addition, numerous conditions on the consent

may be imposed by the receiving country. These conditions may defy summary, and simply cannot be allowed to be deleted from the written conditions of consent to be attached to the manifest.

While the commenter supported a requirement that the State Department translate the written consent into English, especially for the benefit of EPA and Customs, the ultimate responsibility for compliance with the written consent or objection, and any qualifications or limitations therein, must rest squarely on the exporter. No opportunity should be made available for arguments that the State Department made an error that eliminates the exporter's liability for compliance with the written consent's terms and limitations.

JM: To preclude any misrepresentation of inadvertent deletion of key information by agency intermediaries, the commenter recommended that EPA provide the exporter with an exact copy or literal translation of the receiving country's response. To alleviate U.S. Customs concerns, a copy of the Notification of Intent to Export could be made available upon request.

The commenter questioned the need for preparation of a cable by EPA for the Department of State to telegraph to the U.S. Embassy in the receiving country. The commenter suggested that use of a telecopy or telefax machine to transmit a copy of the exporter's Notification is more appropriate because it would

cut down on processing time by EPA, thus preventing the possibility of backlogs of Notification forms awaiting drafting into cables; it would ensure that the receiving country had timely access to the exporter's entire submission; and sending the actual notification that has been checked by EPA for completeness ensures that the receiving country will obtain all the data the exporter found relevant for inclusion. Where telecopy or telefax machines are not available, in the interest of timeliness, cables may be appropriate. An exact copy of the exporter's notification should also be provided, however.

RESPONSE: These comments have generally been responded to in the preamble to the final rule. In addition, EPA notes that it will notify foreign countries of the information EPA deems necessary, or the foreign country requests, to assist it in making decisions. Regarding use of a telefax or telecopy as the means of transmission, EPA notes that not all embassies are set up for this type of transmission. The cable system is the uniform and commonly acceptable diplomatic means of transmission and therefore will be implemented more easily and expeditiously.

Natl. Wildlife: The commenter disagreed with EPA's reasoning regarding the use of the cable to substitute for the written consent because the latter might take too long to reach the exporter. It will not require 30 days for the Secretary of State to transmit a received letter of consent or objection to EPA, and for EPA to

send it on to the exporter. These are simple, ministerial acts requiring no detailed analysis or decision making. If EPA is concerned that diplomatic pouch mail is too slow to allow 30-day turnaround of the written consent, EPA should simply state that the 30-day clock begins to run from the day the letter is received by the Secretary of State in Washington (as the statute says), rather than the date of receipt by the U.S. Embassy in the receiving country.

RESPONSE: This comment has been responded to in the preamble to the final rule.

B. Comments Supporting Cable Transmission of Acknowledgment of Consent

Tricil: The commenter supported the proposal which provided for cable notices through the Embassies and Department of State channels as confirmation of consent. The commenter stated that providing a copy of the cable confirming acceptance would work well. Requiring the transporter to have a copy of this with each load will assist the conscientious operator who must at times compete with some who are less conscientious.

ICWM: The commenter acknowledged the difficulty of the movement of letters across international borders and therefore supported the proposal to provide telex notices through Embassies and other diplomatic channels.

RESPONSE: EPA acknowledges the support and will retain the proposed transmission procedures.

C. Other Comments

EC: The commenter stated that the transmission procedures for notification proposed by EPA differed from those specified in EC directives. The commenter considered this an important difference and expressed hope that this will be considered in the final regulation.

The commenter cited the international agreement provision (§262.58) and stated that this may be the best solution if EPA retains its proposed notification procedures.

RESPONSE: The U.S. is not a member of the EC and EPA is therefore free to establish its own notification procedures. EPA is mandated by statute to work through the Department of State and,

given the Agency's experience with the present notification system, will continue to work on a government-to-government basis, using the Department of State's facilities and personnel. This will expedite the transmission of notices and give EPA a contact in the receiving country if there are problems with the proposed export. The transmission procedures chosen were chosen to best accomplish the purposes of §3017.

22. RENOTIFICATION

Cadence: The commenter stated that renotification should not be required, at least for the type of practice the commenter engages in (consistent regular and uniform reports of hazardous waste fuels for recycling). So long as a single notification provides a complete and accurate picture of the waste exportation practices that will occur (and recognizing that practices deviating from the notification could be violations under RCRA), the commenter could discern no health or environmental reason to require periodic renotification for unchanged conditions. In this regard, the commenter noted that in a separate section of the proposed regulation, EPA is requiring annual reports by exporters in any event (51 FR 8759.) This annual reporting should give EPA as much information as any renotification, and to require both types of paperwork would be duplicative and burdensome.

The commenter accordingly urged EPA to provide that no renotification be required so long as the terms of the initial notification still fully and accurately reflect the notifier's practices. Nothing in the statute requires any such renotification, and the commenter did not believe health, environmental protection, or common sense requires one.

The commenter stated, moreover, that §3010 of RCRA requires no renotification for domestic waste management activities and EPA has never deemed it appropriate to impose such a burdensome requirement.

Chevron: For recycling activities, the commenter suggested that the notification should not have an automatic cut-off period. Renotification is required whenever information in the original notification changes. This provides EPA with a means of maintaining the accuracy of the notification information without imposing the additional burden of renotification every 24 months. The notification should be made flexible enough to encompass small variations in shipping procedures or routes without requiring renotification.

The commenter suggested that because consent of transit countries is not required, renotification and consent of the receiving country should not be required when the only changes are in the points of entry to and departure from the transit countries. A simple notification to the transit countries should suffice in this case. Flexibility would also be greatly improved by allowing all alternate routes, modes of transportation, and container types under consideration to be listed in the original notification.

The commenter recognized that notification is not required for each shipment; however, the notification is so detailed that time-consuming renotification may be occurring quite regularly.

JM: It is unclear from the proposal exactly what sort of changes from the original Notification of Intent to Export would trigger the need for renotification/reapproval. The commenter assumed that EPA and Congress are interested in substantial changes only, such as:

- significant increases in total quantities of wastes exported (≥ 50%)
- change in types of wastes exported
- change in consignee(s)
- change in disposition of waste in the receiving country (e.g., from incineration to land disposal)

but that the following changes would not trigger a need for renotification, since they would not be likely to affect a country's decision to accept or reject a waste:

- decreases in quantities exported
- changes in the dates of shipments
- changes in the type of container(s) used

- changes in the number of shipments, providing the changes did not result in a significant increase in total quantity of waste exported to any one country.

The commenter requested that EPA address this issue in the final rule -- either in the preamble, or within the Definitions section, 40 CFR §262.51.

RESPONSE: EPA's rationale for requiring exporters to submit notifications every 12 months is discussed in the preamble. In response to the comment that EPA does not require notifications under §3010 to be resubmitted on a periodic basis, EPA points out that the two notifications serve different purposes. In the case of the notification under §3010, there is no approval process involved. However, changes to that notification would require renotification. In the case of notifications of intent to export,the receiving country reviews the notification and either consents or objects to the terms of the notification. It is very important, therefore, that the content of that notification provide up-to-date information so that the receiving country can make an informed decision relative to accepting or rejecting a waste.

23. DUPLICATIVE AND UNNECESSARY REQUIREMENTS

Waterbury: The commenter believed that the exporting regulations are unnecessary in that they add additional reporting and paperwork to a process that is more than adequate for shipments to Canada. The commenter explained that the consignee and the exporter each deliver copies of the manifests to the foreign country and to the State from which the waste is exported, have a variety of paperwork travel with the shipment, notify Canada, and have the consignee confirm delivery. Therefore, in the case of Canada, which has procedures similar to the United States', such additional controls are not warranted.

Uniroyal: The commenter stated that additional U.S. regulations on exports to countries that already have their own set of regulations governing the importation of hazardous waste is duplicative and unnecessary. Uniroyal felt that the prime example is in the exportation of hazardous waste to Canada.

Pennwalt: The commenter stated that with respect to the Acknowledgment of Consent, it seemed unnecessary to add another document to the already burdensome paperwork for each shipment. The commenter believed that there was adequate information provided to Canada to keep it advised of material entering its

borders. The commenter stressed that the proposed rules were unnecessary with respect to Canada since shipments were routine and frequent.

Envirosure: The commenter suggested that the U.S.-Canadian transactions be exempted from the exportation proposal as set forth, or alternatively, that portions of the requirements relative to contacting on a shipment-by-shipment approval be waived for U.S.-Canadian transactions. A one-time, once-a-year approval for shipments in general would seem to be beneficial in light of the fact that that is the current practice at this time and seems to be working very nicely.

Involving the State Department personnel with Canadian transactions will only add an additional layer of non-knowledgeable bureaucracy to an area where there is already direct contact between federal and State Agencies and Canadian Ministries. Canadian manifesting regulations are so similar to those in the United States that the proposals for continued approval, based upon volume changes on a shipment by shipment basis, or changes in the agreed to volume, are really unnecessary. Manifest documentation already provides a full trail for waste tracking, and facilities reports give an exact volume report rather than a pre-shipment estimate.

RESPONSE: As provided for in §3017(f), EPA may develop a bilateral agreement with a foreign country to establish notice, export, and enforcement procedures for the transportation, treatment, storage and disposal of hazardous waste.

HSWA provides that where such an agreement exists, only the requirements of subsections (a)(2) and (g) of §3017 apply. Subsection (a)(2) provides that no person shall export a hazardous waste from the United States to a receiving country where an international agreement has been entered into unless the shipment conforms with the terms of the agreement. Subsection (g) requires annual reporting. The annual report must summarize the types, quantities, frequency, and ultimate destination of all hazardous waste exported during the previous year.

The reporting, manifesting, and notification requirements established in the final rule may be amended by a bilateral agreement entered into between the United States and a foreign country, but until that time when the agreement is finalized EPA must enforce all such requirements. The rule promulgated is intended to apply generically in the absence of an international agreement and essentially follows statutory generic requirements. We are currently negotiating an agreement with Canada which may alleviate these commenters' concerns.

24. ALTERNATE CONSIGNEE

Environment Canada: The commenter suggested that the words "and any alternate consignee", should be eliminated from the initial notification requirements of §262.53(a)(2)(vii) and from the special manifest requirements of §§262.54(b) and (g). To ensure proper control, the notification should identify only the designated consignee. The selection of an alternate consignee would then be subject to the renotification requirements as a substantive change from the original notification. If the original notification allows for any alternate consignee it is possible that the two consignees could be in different foreign countries. As such, EPA would have to receive a written consent from each foreign county before an Acknowledgement of Consent could be forwarded to an exporter.

RESPONSE: If the consignee and alternate consignee named in the notification were in different countries, EPA intends that written consent would have to be obtained from both countries. Thus, because the exporter must include both in the notification, a renotification would not be necessary if the wastes were routed to the alternate consignee. EPA believes that allowing designation of an alternate consignee is important in case of unforeseen circumstances preventing shipment to the designated consignee. Canada may always condition consent on

delivery to a particular consignee or this can be dealt with in an international agreement.

MN Pollution Control: The commenter said that the requirements should address an alternative consignee and itinerary should something unforeseen occur that would preclude the hazardous waste from reaching its original destination, such as a train accident or weather-related problem. The alternative description would allow the waste to be transported without having to bring it back into the United States and arrange for shipment a second time.

RESPONSE: Subsection 262.52(a)(2)(vii) allows the exporter to include in the notification the name and site address of any alternate consignee. Therefore, if it becomes necessary to send the wastes to the alternate consignee, consent would already be obtained from the receiving country, and return and reshipment would not be necessary. Exporters can always include an alternate itinerary in the notification as well since additional information can always be included.

25. CONTENT OF NOTIFICATION

A. Requirement to Provide Estimated Frequency and Total Quantity of Shipments

Pennwalt: The commenter said that the requirement to estimate number and total quantity was meaningless. In order to avoid the necessity of renotifying if estimates are exceeded, the normal reaction, the commenter explained, was to estimate comfortably high. Since the Ontario MOE registration forms give an estimate of waste generation rate for each waste material, the Canadian Provinces have a grasp of the volumes they are receiving.

Envirosure: The commenter believed that the volume reporting criteria is based on a naive assumption on EPA's part that waste generation is basically pre-planned and exact. In practice, the realities of the situation would dictate that generators contact waste disposal facilities on a day-to-day basis based on need at the specific time and not generally on a pre-planned arrangement such as would be required under the proposal. Because of the close proximity of Canada and the United States, this is an ongoing situation and not one that might be envisioned on an extensive transshipment of material where pre-planning might be appropriate. If the proposal were to be incorporated for United

States-Canadian transactions, it would simply mean that every waste stream that would be requested for approval would be extremely inflated as to the estimated volumes. The ability on EPA's part to try to get a handle on the realistic volumes would therefore be defeated.

RESPONSE: In determining what types of changes should trigger the need for renotification and consent, EPA considered which items are most likely to be highly variable, and more importantly, which items would be likely to affect the receiving country's consent. Concerning the required estimate of the total quantity of waste being exported, EPA believes that any increase in the quantity of exported waste requires renotification. However, decreases in the quantity exported would most likely not affect the receiving country's consent. Therefore, EPA is not requiring renotification for quantity decreases. EPA realizes that exporters may therefore estimate high but this is acceptable so long as the receiving country consents. Annual reports and manifests will provide EPA with more specific information on the amounts exported. EPA notes that an estimate of quantity is also statutorily required.

EPA has deleted the requirement to provide the specific dates of shipments and instead is using the statutory language which allows more flexibility. EPA also notes that an international agreement with Canada which is in the initial

stages of development could address many of the concerns of Envirosure.

Tricil: Most of the detail required by the proposed rule is workable with the exception of the request for the date of each shipment, which is not feasible to provide even within the 60-day notice period. The frequency of shipment can be provided (e.g., once per month, quarterly, weekly, etc.) The commenter felt this will meet the intent of the legislators.

ICWM: The commenter believed that the Agency should eliminate the requirement to stipulate the dates of expected shipments. It is not always feasible to know even 60 days in advance of a shipment the exact date when waste will be transported. However, it is feasible for the exporter to note the number of shipments that can be expected in a given period (e.g., once a month or weekly). The commenter felt that by requiring a notation of the expected frequency rather than an exact date the intent of the legislation would be met.

Stoel: The commenter felt that the specificity required by §262.53(a)(2)(ii) goes beyond the requirements of RCRA §3017. In many instances, it may be extremely difficult for an exporter to predict the estimated number of shipments or the approximate

dates for those shipments. For example, a manufacturer may not be able to predict 60 days in advance its output of manufacturing process wastes, the generation of which fluctuates depending upon many unpredictable factors. Therefore, the commenter suggested that this subsection be replaced by the exact language of RCRA §3017(c)(3), which provides for a greater degree of flexibility.

Border Steel: The commenter noted that EPA requests that a schedule be made of the number of shipments to be made, the date of each shipment, and the amount of waste in each shipment. Making projections like this is a very tricky business and such projections are often incorrect. However, the only provision recognizing this in the proposed regulation is one requiring the exporter to start over again in the notification process and to discontinue shipment until any change is authorized and consented to by the receiving country.

RESPONSE: Clearly, the date of arrival of a shipment and the number of shipments is susceptible to change due to unforeseeable circumstances. Although the notification described in the proposed rule only required the approximate date and number of shipments, no guidance was provided on how much deviation from the approximate date was allowable without the need for renotification. To avoid the uncertainty inherent in the proposed language and in view of the concerns expressed by

commenters, EPA has chosen instead to adopt the statutory language, requiring that "the estimated frequency or rate at which such waste is to be exported and the period of time over which such waste is to be exported" be included in the notification. EPA believes this change clearly meets Congressional intent while providing more flexibility to exporters. EPA does not feel, however, that required inclusion of the estimated total quantity of wastes being exported as required in §262.53(a)(2)(iii) will place an unnecessary burden on exporters. EPA suggests that exporters specify the high end of the possible range of waste quantity. EPA notes that neither its proposed or final rule requested the amount of each shipment -- the rule requires estimated total quantity for the period covered by the notification.

B. Other Comments

Environment Canada: The commenter stated that if a receiving country is to be adequately informed, then the information supplied in a notification must be in accordance with the requirements of the receiving country. This would assist the receiving country in making an informed decision to consent or object on the basis of the information supplied in a notification.

The commenter suggested the following changes in notification as expressed in the proposed rule:

Section 262.53(a)(2)(i): "...identified in 40 CFR Parts 171-77; <u>and applicable description and identification numbers in the receiving country.</u>"

Section 262.53(a)(2)(iii): "Manifest Form (8700-22): <u>and the receiving country's manifest</u>."

RESPONSE: EPA believes that a bilateral agreement between Canada and the U.S. could ensure that notification was in accordance with the requirements of the receiving country. EPA does not feel that the suggested additions to the language of the regulation should be included as a generic matter. Some countries may not have identification numbers and manifests. However, it is always the right of the receiving country to request additional information before responding to the notification.

JM: The commenter urged the Agency to develop a form for companies to use for Notification of Intent to Export. This should speed the process of obtaining consent from the receiving country. By standardizing the format, ease and speed of

comprehension are increased and the likelihood of companies submitting "incomplete" notifications is decreased. In addition to the information requirements outlined in §262.53(a), the form should contain a space for additional comments or explanations and a box to check off if attachments are included with the form. This commenter also supplied a suggested form.

Natl. Wildlife: The commenter urged that EPA use a standard form for notifying receiving countries. This would assure that all relevant information is uniformly and adequately transmitted, and should not require excessive amounts of time to be completed.

RESPONSE: EPA feels that the notification requirements are sufficiently straightforward and that use of a standardized form is unnecessary. In addition, under the final regulation, nothing precludes the exporter from including additional comments or explanations with the notification.

EC: The commenter noted that EC directives require, in addition to the information named in the proposed regulations, identification of the carrier transporting waste, information on third party insurance, contractual agreement between holder and consignee, specification of process by which waste was generated, and identification of waste producer if different from exporter. The commenter also stated that any member state

"competent authority" may require further supplemental information or documentation.

RESPONSE: EPA acknowledges that it is the receiving country's prerogative to withhold its consent or rejection of shipments until receipt of additional information from the exporter. At present, EPA believes that as a generic matter the notification information required is adequate to achieve the purposes of §3017.

26. MISCELLANEOUS

A. International Agreements

Alto-Tronics: The commenter suggested inclusion of a provision for consent which may cover numerous shipments within a specified time period (e.g., one year) where the receiving country has such provisions.

RESPONSE: For the reasons provided in the preamble to the final rule, EPA has determined that a notification period may cover up to a 12-month period. Therefore, consent may cover several shipments within a specific time period. Receiving countries may determine other coverage periods in the context of an international agreement.

CA Legislator: The commenter strongly urged EPA to require the manifest to include verification from SEDUE (in the case of Mexico) that the Mexican consignee is a legitimate and licensed operation, under the laws of the Mexican government, to handle the hazardous waste.

RESPONSE: The foreign country will be informed of the foreign consignee. Therefore, if it wishes to ensure that the consignee is legitimate, it may do so. If it does not and still wishes to accept the waste, EPA should not generally interfere with the sovereignty of such nation. Of course, to the extent that there may be significant impacts on U.S. environment due to common borders, the issue becomes more complex. For these types of situations, an international agreement specifying such particularities as this commenter suggested may be appropriate. EPA will also consider for possible future rulemaking whether such a certification can and should be required generally where impacts of U.S. concerns are involved.

Tricil: The commenter favored an international agreement with Canada that could streamline the process of complying with the intent of the rule.

RESPONSE: The U.S. is currently negotiating such an agreement with Canada.

Duncan: The commenter deals with Stablex, Inc., a hazardous waste disposal firm doing business in Canada. The commenter stated that, given the number of forms that must now accompany each shipment, additional paperwork would not improve

accountability. Additional documentation should be required only in those cases where the receiving entity does not have specific authority to operate from the host country. In the case of Stablex, this authority has been granted.

RESPONSE: EPA does not believe that the additional paperwork requirements are too burdensome. Besides the existing requirements for waste shipments, the only additional paperwork is essentially the written consent, some additional notification information, and an additional manifest copy. Moreover, consent and notification are statutorily required in the absence of an international agreement. EPA notes that such an agreement with Canada is in its initial stages of negotiation.

Environment Canada: The commenter suggested that the application of any special requirements for exports should also reflect the need to recognize the applicable special requirements for such wastes in the receiving country. The commenter proposed that the definition of exporter include the following wording:

> "... in accordance with 40 CFR Part 262, Subpart B, or <u>equivalent State provision, or the</u> applicable legislation of <u>the transit, and receiving countries involved where the waste is</u>

considered as being hazardous wastes, which specifies...".

RESPONSE: Although EPA supports such an approach in principal, it believes that if a foreign receiving country wants to expand the universe of waste for which it receives notification, this can best be accomplished through an international agreement between the country and the United States under §3017(f). Moreover, it is questionable whether §3017 provides authority for EPA to regulate any materials for export that are not "hazardous wastes" under RCRA.

Australia: The commenter noted that in the near future Australia will probably adopt a national classification system for hazardous wastes based essentially on the draft OECD "agreed list" approach (see ENV/WMP/86.3), whereby each waste is described in relation to a number of criteria. In this respect the description of hazardous waste proposed in the regulations would not necessarily include the following information that will be used in Australia: the physical state of the waste; the generic waste type; other significant constituents of the waste; and the origin of the waste.

However, the commenter believed that the information that will be provided under the proposed U.S. regulations will, for

all practical purposes in Australia, be quite adequate. If an OECD-wide system of control of transfrontier movement is instituted, it seems that the waste description and other aspects of the proposed regulations would need to be amended to accord with an OECD system.

RESPONSE: If an OECD-wide system of control of transfrontier movements is instituted to which the U.S. is a signatory, EPA will review its legal authority to determine whether it can change its regulations to conform to such a system.

NRDC: The commenter noted that EPA has not proposed at this time to promulgate regulatory requirements for international agreements between the United States and other countries pursuant to §3017(f). Where such agreements exist, their terms may replace the majority of the requirements set forth in §3017.

The commenter noted that the U.S. is currently negotiating an international agreement with Canada pursuant to §3017. Since the Agency has not proposed the criteria for this agreement for public review and comment, the commenter requested that EPA publish the draft agreement itself in the Federal Register. Because this agreement would be the first of its kind and thus will set an important precedent under §3017(f), the commenter felt that it is particularly important that EPA subject its

draft agreement to public scrutiny prior to reaching a final agreement with Canada. Public comments submitted on the draft agreement would not only guide EPA in finalizing the agreement but would also aid the Agency in shaping future international agreements on hazardous waste exports.

RESPONSE: EPA will consider the appropriateness of publishing a draft agreement for public comment or promoting other means for public input once the framework for an agreement has been agreed to. However, EPA notes that such an agreement may essentially be a formalization of the conditions of consent and as such is not subject to rulemaking procedures. EPA also notes that such an agreement may be within the foreign affairs exception to the Administrative Procedure Act.

Envirosure: The commenter stated that the concerns expressed in the proposed rule are not germane to the situation as it exists in the Northeast market between the U.S. and Canada. Including Canada in these regulations on exportation of wastes is contrary to free trade with Canada.

The time frames that EPA delineates in the proposal would unduly influence the ability of Canadian and United States firms to respond quickly to spills and other environmental situations requiring prompt action.

RESPONSE: These generic regulations are governed by statutory requirements for notification and consent. The time frames are considered necessary to transmit notification and consent generally. To the extent these are inappropriate for a particular country, §3017(f) allows for international agreements deviating from certain statutory requirements. We are currently in the initial stages of developing an agreement with Canada. In addition, it is likely that there are alternatives to exportation for dealing with emergencies. And, to the extent export is involved, EPA will make every effort to further expedite transmission in emergency situations.

OHM: The commenter specializes in emergency and remedial hazardous waste cleanup in the U.S. and Canada, and was concerned that the proposed revisions might cause unnecessary and costly delays in disposing of wastes from sites undergoing cleanup. The commenter stated that it is in the interest of EPA and industry to expedite shipments of hazardous waste from uncontrolled sites to licensed TSDFs.

RESPONSE: See preceding response to OHM comment in Issue 19.

B. Point of Entry or Departure

Lake Carriers: The commenter claimed that it is incorrect to classify its operations within the general "export industry" because its vessels are not in the business of exporting. On the order of 300-400 gallons of used oil per month per vessel are transferred ashore as an expedience from roughly 70 percent of the commenter's member vessels. The commenter noted that the proposed amendment in §262.54(c) includes a requirement for the exporter to identify the point of departure from the United States. The commenter's member vessels ply the waters of the eight Great Lakes States, and the used oil product being generated would likely be generated on the waters of several of those States and in the waters of Canada. However, the product is unlike other exports in that it does not come from a facility in a State. Thus, it is recommended that this requirement not be applicable to vessels due to their transitory nature.

The proposed §262.54(e) refers to "the exporter's State." This term would need some clarification for shipping interests. A vessel off-loading used oil in Canada would have last traveled through the waters of Michigan, but it may well not have called at a Michigan port. It is recommended that the exporter's State be defined as the State from which the vessel receives its dispatch orders.

RESPONSE: Where hazardous wastes subject to the export rule are involved, the manifest should be obtained from the same State the vessel would have obtained its manifest if it were carrying the waste to a domestic facility by vessel.

CMA: The transporter, not the generator, should provide information on departure points and transit countries. Proposed §262.53 requires that the generator provide in the initial notification all points of entry to and departure from each foreign country through which the hazardous waste will pass and also requires the generator to designate the transit countries. These are extremely difficult requirements for the generator to meet, since the transporter has significant discretion in routing the material. This is particularly true with respect to rail and truck movements from inland U.S. points to Canada and with respect to shipments to interior points in Europe. The transporter, based on its train, truck or ocean vessel schedules and bookings, may elect to route through numerous alternative gateways. U.S. generators/shippers may often not know of and have virtually no control over the gateways and transit countries that may be selected by the transporter. Therefore, notification of the specific gateways and transit countries should be a transporter requirement.

RESPONSE: The Agency recognizes that the primary exporter may not have prior knowledge of the precise routes that the transporter may use. However, the primary exporter, in consultation with the transporter or intermediary arranging for the shipment, should be able to include such information in the notification. In addition, a variety of alternative routes can be included in the notification. EPA notes that the port of entry to a receiving country is a statutory requirement which would appear to be as likely to change or not change as the ports of departure from and entry to transit countries. EPA also notes that designation of gateways and transit countries are important to enable a transit country to track the shipment or stop its entry. Similarly, gateways are important to receiving countries in order to track the shipment.

Stoel: The commenter believed that the term "point of departure from the United States" requires definition. In many cases, an exporter may deliver a shipment of hazardous waste to a transporter at one port only to later find that the shipment was unloaded and reloaded at some other port still within the United States. Even where such unloading and reloading does not occur, the exporter may have no knowledge or control over what ports the transporter may enter in the United States before delivering the shipment of hazardous waste to the receiving country. The commenter felt that a practical approach to this problem would be to define the point of departure as a point where the

exporter delivers the hazardous waste to a transporter for exportation to the receiving country.

RESPONSE: EPA's new regulations require the exporter to identify on the manifest the point of departure from the United States (§262.54(iv)). This is no different from existing regulations at 40 CFR 262.50(b)(3)(ii). The exporter, in consultation with the transporter, should have sufficient information on hand to determine the last U.S. port from which the shipment will leave for export.

C. Hazardous Waste Imports

CMA: The commenter thought the proposed new Subpart F, Imports of Hazardous Waste, should also contain a "treatment evaluation" exemption for samples of hazardous waste shipped into the United States.

It is quite common for licensees of U.S. technology periodically to ship samples of waste to the U.S. for comprehensive analysis regarding treatment, storage, and disposal measures. The commenter believed that it is impractical to require manifests for these "de minimum" quantities of material.

The commenter recommended that the Subpart F rules contain an exemption for samples imported into the U.S. for evaluation of treatment, storage, and disposal measures. Protection of human health and the environment is ensured since the analytical laboratory becomes the "generator" when a decision to dispose of any remaining sample occurs.

ARCO: The commenter added that it is quite common for foreign licensees of the commenter's technology to periodically ship samples of process waste, which may be characteristic hazardous waste under EPA rules, to the United States for analysis. The commenter believed that it is impractical to require manifests for small quantities of these imports, since analysis, not disposal, is the intent of the shipment.

RESPONSE: This comment is similar to the commenter's comment relating to the export of samples. The Agency believes that this comment also has merit. However, the Agency believes that creating such an exemption would require further analysis, and if deemed appropriate, a proposal for public comment. As with exports of samples, the Agency questions what the appropriate conditions for such an exemption would be; for example, would some quantity limitation be desirable or some type of limit on the types of waste to be covered by the exemption. EPA will consider the commenter's request for possible further regulatory action.

However, the Agency is not at this time expanding the scope of the §261.4(d) sample exemption. Therefore, unless and until future regulatory action is taken, imports of hazardous waste samples beyond the scope of §261.4(d) must comply with the requirements of Subpart F.

D. Other Comments

Lake Carriers: The commenter objected that the proposed amendments in §§262.55(a) and (b) do not recognize the situation wherein vessels are simultaneously generator, transporter, and exporter. It is recommended that §§262.55(a) and (b) not have application where transporter and exporter are one and the same.

RESPONSE: See the response to the commenter's comment in Issue 9.

EPA notes, however, that where a hazardous waste subject to the export requirements is involved and the transporter and exporter are one and the same, it would appear that §262.55(a) would automatically not apply since the "exporter" as the transporter would automatically have a copy of the manifest stating the date of departure from the U.S. and therefore exception reporting would not be necessary. EPA sees no reason, however, why §262.55(b) would not be triggered in some instances since the foreign TSD is involved and an exception report is required where confirmation of delivery is not received.

MN Pollution Control: The commenter urged that the government of the receiving country be required to certify to EPA that the receiving facility is substantially equivalent to a permitted TSDF, or at the very least, uses the "best available technology protective of human health and the environment." It is not in the best interest of all concerned to allow export of hazardous waste out of the country and not assure proper management when it reaches its destination. A copy of the manifest should be required for confirmation of the shipment or, at a minimum, a written confirmation including the waste description, waste code number, quantity, and date received.

RESPONSE: EPA is concerned that to require such a certification would substantially interfere with the sovereignty of a foreign nation. Moreover, notification allows a foreign country to ascertain the legitimacy of a TSDF if that is of concern to the foreign country. However, EPA will consider, for possible future rulemaking, whether it has the authority to ban a shipment even when consent is received because of EPA's view of the adequacy of the foreign TSDF especially to the extent U.S. interests may be affected.

EPA rules require that the exporter require a confirmation of delivery.

MCA: The commenter anticipated that the proposed rule will serve to further eliminate disposal sites used by clients in the metal finishing/electronics industries that had been adequately and safely handling hazardous waste materials. The current situation within the U.S. for the disposal of hazardous waste should not be allowed to continue because it only increases the cost of finished products to all consumers.

RESPONSE: EPA is not aware of any reason why the export regulations for hazardous waste would eliminate disposal sites that are operating in accordance with applicable laws and regulations.

The commenter's concern relative to the need to cite cost - effective facilities domestically, since to do otherwise imposes additional cost on the public, is outside the scope of this rulemaking.

Tricil: The commenter recommended that there be no specific regulations for internal implementation procedures, because the more flexible administrative procedures can be in this already highly regulated area the better.

RESPONSE: EPA acknowledges and agrees with the commenter's recommendation that there be no specific regulations for internal implementation procedures for the transmission of notification, consent and objection. EPA is not proposing any specific regulations regarding implementation procedures for the exchange of information among EPA, the Department of State, receiving countries and transit countries because these actions are administrative in nature and impose no requirements on the public. However, the statutory time frames will govern these activities.

Merchant Shipping: The commenter stated that in reading the proposed rule, it is unclear whether the EPA intended to cover U.S.-flag vessels with the proposed export requirements if they are discharging a solid waste generated on board the vessel in compliance with the regulations set forth in MARPOL 73/78. The discharge may be in a foreign port under another nation's laws or at sea in compliance with U.S. law and Coast Guard regulations. The commenter did not understand how a waste generated on board a U.S.-flag vessel during a coastwise voyage and discharged at sea or to a U.S. shore side facility can be covered by an "export regulation." Similarly, the commenter failed to understand how a waste generated on board a vessel on a foreign voyage and discharged at sea or in a foreign port can be covered by a "export regulation." The commenter therefore maintained that no ship board generated wastes can be covered by an export

regulation. However, this does not mean that the discharges of such wastes are unregulated. These wastes are already regulated by an adequate body of law and regulation that prevents pollution from ships and controls the discharge of waste from ships. The commenter therefore requested EPA to exempt vessels discharging wastes in accordance with MARPOL 73/78 and Coast Guard regulations from the proposed export requirements in Part 262 or to clarify that coverage is not intended.

RESPONSE: This commenter is concerned about oily wastes generated on board a vessel en route to a foreign country. One type appears to be operational wastes generated on board and the other appears to be wastes generated in product or raw material storage tanks or transportation vessels. These wastes as described are not a listed hazardous waste. Nor was sufficient information provided indicating whether these wastes meet the definition of a hazardous waste through demonstrating a characteristic of ignitability, corrosivity, reactivity, or EP toxic. If they do not, they would not be a hazardous waste and therefore would not be subject to the export rule on that basis alone. Second, even assuming the wastes generated in a product or raw material storage tank or transport vessel are hazardous wastes, such wastes are not subject to the manifesting requirement domestically while being so generated. (40 CFR §261.4(c).) Accordingly, they would not be subject to the export requirements since the generator is not required to

prepare a manifest to accompany such waste. Third, for both these types of wastes, assuming they are hazardous, EPA does not believe that an "export" within the meaning of §3017 is involved. Commonly, an export is viewed as transporting a cargo from the United States for the purpose of taking that cargo to another country for sale, trade, disposal, etc. The ship's destination is a particular country for the purpose of taking its cargo to that country. These types of wastes are incidental to transporting cargo to a foreign country. They are not the cargo driving the shipment.

Since Congress did not define what constitutes an "export," EPA has the authority to determine the reach of that term. In this respect, EPA also notes that the statute requires notification before a hazardous waste is scheduled to leave the United States. This appears to contemplate the existence of a hazardous waste before the waste leaves the United States. Yet much of this waste, if not all, will not even be generated until the ship leaves the port or customs territory of the United States. Accordingly, EPA does not consider vessel operational wastes discharged abroad or wastes generated in raw material or product transport vehicles discharged abroad to involve an export of hazardous waste within the meaning of §3017. For further discussion of a similar question, see the responses to the comments by Lake Carriers.

With regard to such wastes generated on a coastwise voyage and discharged at sea or to a U.S. shore facility, these would also not come within the meaning of "export" within §3017 since no foreign country is involved.

JM: The commenter urged EPA to issue an Exporter's Hazardous Waste Manifest form, incorporating the additional requirements in 40 CFR 262.54, and containing sufficient copies to meet State and federal distribution needs. This manifest should be obtainable from EPA rather than frcm the generator's state. Setting up a federal system for this particular application is preferable because: it will assure that the correct information and certification are included on the manifest; it will simplify enforcement by U.S. Customs by standardizing the format used; and it could provide specific instructions for distribution of manifest copies, exception reporting requirements, and need to attach a copy of the EPA Acknowledgment of Consent.

RESPONSE: EPA does not believe that a separate manifest form for exporters is necessary. Only two additional items are required on the manifest as a result of today's rule. Item 16 requires a statement that the shipment conforms to the terms of the EPA Acknowledgment of Consent and in special handling instructions, the point of departure from the U.S. must be provided. Other differences in manifest information for exports are minor and

generally flow logically from those required domestically. EPA does not believe that exporters will have difficulty in complying with these differences in using the existing form. Moreover, EPA does not believe that the relative amount of waste exported merits expenditure of resources for a separate form.

JM: The commenter claimed that although this regulation may not be classified as "major" and, therefore, subject to a Regulatory Impact Analysis, its impact on precious metal refiners and hazardous waste generators will be significant if delays in exports occur while these affected parties are awaiting consent from a receiving country's government. As a precious metals refiner, the commenter's profits are directly linked to the time it takes to refine the precious metal bearing material and produce a saleable end product. Metal values may be given to customers before their material is actually refined; in such cases, the metal provided to the customer is "borrowed" by the commenter, and interest charges must be paid on the loan. Metal finance charges are expected to average 8% in 1986. Based upon 1985 data, the commenter estimated that it would lose $14,000/month for each shipment that is delayed, and that a 90-day delay would cost $252,000.

The commenter expressed concern that generators of hazardous waste who are not also treatment, storage or disposal facilities may store hazardous wastes on-site for only 90 days.

If receipt of consent from a foreign government is delayed beyond the anticipated 60-day period, a generator could quickly find himself in the position of being in violation of generator standards, through no fault of his own.

RESPONSE: While EPA recognizes that some companies may experience economic dislocation if there are significant delays in processing notifications and consents, the Agency believes that judicious planning on the part of these companies could eliminate or lessen the impact of such delays, if any. As stated in the preamble to the proposed rule, EPA will process all notifications and written consents as expeditiously as possible. Exporters may submit notifications to EPA earlier than the suggested 60 days if they so desire. In the event that a generator must store wastes for over 90 days he must obtain a permit to do so.

Co. San Diego: The commenter found the verification procedures to be inadequate to properly regulate shipments of hazardous waste into Mexico. The commenter noted that the high cost of disposal in the U.S. has led to increased illegal dumping. The commenter was concerned that because the Mexican government cannot expend the necessary resources to control foreign businesses, Mexico's citizens are placed at risk. The commenter also stated that Mexican law prohibits the transportation of hazardous waste by U.S. haulers, thereby requiring a U.S. driver to pass his load

to a Mexican driver. This severely strains the "cradle-to-grave" chain of custody by either jeopardizing the U.S. driver's ability to track the material or providing him with a convenient excuse for the disappearance of loads.

The commenter felt that the proposed regulations apparently overlook this problem, requiring only that the U.S. generator of the waste file an exception report if signed copies of the manifest are not received from the transporter and foreign consignee within a specified period of time.

Taken in the context of the entire body of proposed regulations, the commenter found it difficult to not also conclude that EPA is interested in strictly adhering to the "cradle-to-grave" philosophy only within the boundaries of the United States. The commenter added that strict adherence to this regulatory philosophy was deemed necessary in order to protect the public health and safety, an issue which truly knows no borders.

The commenter also expressed disappointment with the EPA's handling of the proposed export regulations. Not only will they be of little value in resolving what appears to be an escalating problem with respect to Mexico, but the implementation schedule allows no flexibility for public hearings and appears to allow no time for revisions based on received comments. Further, the commenter added that the form of the regulations seems to

indicate that they have been drafted with an eye toward countries with a rather sophisticated regulatory program.

RESPONSE: EPA disagrees with the commenter's contention that it is less concerned about the safe transport and disposal of hazardous waste beyond the U.S. borders than within the United States. The Agency believes that the requirements regarding exception reports and monitoring through U.S. Customs provide effective enforcement tools for exports of hazardous waste to foreign countries. At the same time, these requirements respect the sovereignty of a foreign nation over its environment and citizens. In addition, it is questionable whether EPA has any authority to impose controls on the handling of waste generally in a foreign country.

EPA notes that the preamble to the final rule discusses various tools for enforcing and monitoring hazardous waste exports. For example, EPA has determined that it is necessary to require submission of the manifest at the border. Thus, §262.54(h) of the rule requires the exporter to provide the transporter with an additional copy of the manifest which the exporting transporter must give to a U.S. Customs official when the shipment passes through the point of departure from the United States as required by §263.20(g)(4). U.S. Customs Service will collect these copies and forward them to EPA on a regular basis. Section 263.20(g)(4) requires the transporter to

deliver a copy of the manifest to the Customs official at the point of departure. This is a new tracking device intended to assisted EPA in monitoring and spot-checking exports of hazardous waste. Provision of this information to EPA will allow the Agency to monitor closely the generator's compliance with the EPA Acknowledgement of Consent, coordinate enforcement actions with foreign countries, establish trends and patterns for enforcement and program development, and respond to Congressional inquiries.

In addition, the required exception reports (§262.55) provide EPA with information that the waste has not left the United States, reached the foreign consignee, or was returned to the U.S. after rejection (when consent had been provided).

The problems associated with shipments to Mexico may need to be resolved through other mechanisms; for example, an international agreement with Mexico or a stronger enforcement program at the border. EPA also notes that this commenter did not suggest any regulatory provisions for resolving its concerns.

Regarding the schedule for implementation, the statute requires compliance by November 8, 1986. Therefore, implementing regulations are necessary by that date. These are generic regulations. Case specific needs can be specified in international agreements.

NRDC: The commenter stated that EPA should seek the authority to stop a hazardous waste export in certain instances, even where the receiving country has consented to a shipment. EPA must have authority to prohibit or delay a shipment in extraordinary circumstances in which there is (1) evidence of a risk to the environment of the U.S. or the global commons or (2) some other unusual circumstance that could raise serious concerns in the receiving country, thereby causing adverse foreign policy consequences.

RESPONSE: EPA believes there is a question as to whether EPA has the authority to prohibit shipment under §3017 where consent has been obtained. If EPA determines it does not have the authority currently and such authority is deemed necessary, it will consider seeking such authority.

Natl. Wildlife: The commenter suggested that the actual written consents of the receiving countries should be kept.

RESPONSE: As stated in the preamble to the proposed rule, the original written communication from the receiving country would be sent to the State Department and then forwarded to EPA for retention. A copy will also be forwarded to the exporter. As far as recordkeeping is concerned, EPA is requiring that the EPA Acknowledgement of Consent be retained and not the actual

consent document since the Acknowledgement of Consent is the operative document under the regulations.

Border Steel: EPA proposes to "... notify receiving countries of intended shipments ..." as required by §3017 of RCRA. However, as part of the notification, EPA proposes to advise the receiving country "... that United States law prohibits the export of hazardous waste unless the [government of] the receiving country consents to accept the waste." This seemed to the commenter to be begging the issue. Telling a country that it can dictate United States national policy by simply withholding consent could provide an overbalance of power on the part of potential receiving countries. Potential receiving countries with cash flow problems or in debtor status could use this "club" to sweeten their coffers or eliminate their debt, and unscrupulous officials of foreign governments could use the same club to line their own pockets.

RESPONSE: Congress, in amending RCRA to include §3017, established that prior written consent by the receiving country must be obtained for hazardous waste exports. In doing so, Congress went on to stipulate procedures for requesting consent of the receiving country. In particular, §3017(d)(2) requires that the Secretary of State, acting on behalf of the Administrator, "advise the government [of the receiving country] that United

States law prohibits the export of hazardous waste unless the receiving country consents to accept the hazardous waste." EPA therefore asserts that its proposed procedures in this respect go no further than fulfilling the statutory requirements.

JM: The commenter urged EPA and the Department of State to provide the foreign government with an actual copy of the exporter's notification (or literal translation of the same, where appropriate) as soon as possible. The additional information that may be contained in the exporter's notification could affect either how quickly or whether consent is given by the receiving country.

In order to assist in expediting foreign country processing of notification and consent, the exporter should be provided with the name, address and telephone number of the foreign government agency to whom the notification had been given, as well as the department and/or individual(s) within that agency responsible for reviewing the notification. Since delays in shipping will have adverse economic impact on exporters, they should be given every opportunity to minimize their losses.

RESPONSE: EPA and the Department of State plan to telegraphically transmit the notification to the receiving country for the reasons stated in the preamble to the final rule. EPA will

include information in this notification beyond that required as deemed important or necessary. It is assumed that the receiving country will contact EPA or the exporter if it requires additional information. Since this process is a matter of foreign policy, EPA believes that communications with the foreign government should be handled by EPA and the Department of State and not by the exporter. Accordingly, the name and agency of the foreign government receiving the notification is not being provided.

Stoel: The commenter felt that to provide for consistency between the international shipment notice and the Uniform Hazardous Waste Manifest Form, the designation of container type in the international shipment notice should be made according to the instructions to the Uniform Hazardous Waste Manifest Form.

RESPONSE: EPA agrees and is requiring the exporter to designate the container type in the international shipment notice according to the instructions to the Uniform Hazardous Waste Manifest Form.

Environment Canada: The commenter suggested that the special manifest requirements of §262.54(a) be amended as follows:

"...the exporter must enter the name, site address and ID number of the consignee."

RESPONSE: EPA does not know whether all consignees in foreign countries have ID numbers, although some do, as in the case of Canada. The receiving country, through a bilateral agreement with the U.S., could require exporters to provide this information. EPA believes that the information required is therefore appropriate as a generic matter.

Environment Canada: The intent of the export requirements is to ensure that the receiving countries have both adequate information and adequate time to make reasonable, informed decisions to consent or not to the receipt of a given hazardous waste. As such, it would seem reasonable to require that 40 CFR requirements should apply equally to exports as to domestic shipments of hazardous waste. However, the application of any special requirements for exports should also reflect the need to recognize the applicable special requirements for such wastes in the receiving country.

The onus to be familiar with a receiving country's requirements, be they similar but described in a different manner, more stringent, or in addition to any of those applicable under 40 CFR, should be on the exporter wishing to deal with a foreign facility.

This suggestion is embodied in the OECD principles to which the background of the proposed rule makes several references and particularly the OECD definition of "hazardous wastes" which states "means any waste . . . considered as hazardous or legally defined as hazardous in the country where it is situated or through or to which it is conveyed . . ."

In addition, "Subpart F - Imports of Hazardous Waste" clearly recognizes the above mentioned OECD principle and requires that exports from a foreign country to the U.S. comply with the requirements of the receiving destination (i.e., "consignment state").

RESPONSE: EPA agrees with the commenter in that it is the exporter's responsibility to become familiar with the requirements of the receiving country. However, EPA believes that the receiving country should and usually does apply its domestic laws to activities by U.S. citizens while in such country. Moreover, if advance information on such shipment is insufficient or inconsistent with such requirements, the receiving country may withhold its consent. Regarding the applicability of §3017 to wastes not considered hazardous wastes in the U.S., EPA believes it is questionable whether it has authority to impose §3017 requirements on such wastes as a generic matter and would be looking into this question. Under §3017, this may be the proper subject of an international agreement, however.

Anchor: The commenter felt that the proposed changes and additions to 40 CFR Parts 260, 262, 263, and 271 are manageable and consistent with efficient recordkeeping. They should not impose any additional burden or workload.

ARCO Alaska: The commenter expressed support for EPA's proposal to require advance notification and consent from receiving countries prior to hazardous waste being exported from the United States for disposal. In the interest of sound foreign policy, the United States should ensure that receiving nations are apprised of and agree to accept hazardous waste destined for disposal within their borders. Without such a system, there would be a major loophole that could permit the export of hazardous waste to third world countries in order to avoid the hazardous waste controls in place in the United States.

CMA: The commenter expressed support for EPA's proposal requiring advance written notification, written consent of the receiving country prior to shipment, and manifest requirements as they pertain to hazardous waste exported from the United States for disposal. Such requirements are important to ensure the proper management of hazardous waste. The basic framework proposed by EPA will ensure that the receiving country is fully cognizant of disposal activities being conducted within its borders.

RESPONSE: The Agency acknowledges these commenters' expressions of support.