

NGO Response to informal call for comments on the Draft Commission Delegated Regulation to implement recent changes to the Basel Convention

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BAN, GAIA, EIA, EEB, ZWE

We, the organizations of Basel Action Network, Global Alliance for Incinerator Alternatives, Environmental Investigation Agency, European Environment Bureau, and Zero Waste Europe, wish to thank the Commission for allowing us the opportunity to comment on the Delegated Regulation to transpose the Basel COP14 plastic waste amendments found in Decision 14/12 into the Waste Shipment Regulation (WSR) of the European Union. With the exception of one very serious issue, we can agree that the transposition is faithful to the intent and purpose of the Basel Amendments.

The purpose of the amendments can be summarized as newly requiring greater transparency and capacity for legal controls over difficult-to-recycle, environmentally harmful plastic waste streams due to their levels of contamination and mixing, as well as the presence of halogens, or hazardous materials.

Unfortunately, the EU Commission proposal runs contrary to these aims for its own member states -- a fact which is not justified from a legal or environmental standpoint.

The Commission proposes that the EU unilaterally ignore the new efforts to tighten up Basel plastic waste controls by new listings in Annex II (Wastes Requiring Special Consideration and Annex IX non-hazardous waste definitions/listings for plastic wastes. We will take each of these in turn.

In effect, the Commission proposes a dramatic double standard globally. One weaker set of rules for the EU and one stronger one (Basel mandated) for the rest of the world.

I. Failure to transpose the amendment to Annex II of the Basel Convention within the EU/EEA

Derogation from the Basel Convention/failing the Article 11 test

For the very first time, the EU has proposed to not faithfully consider Annex II wastes as applicable to EU/EEA internal control procedures as is currently mandated in the WSR as part of WSR Annex V. Such a refusal to faithfully administer the Basel Convention PIC procedure as well as other Basel obligations for these wastes is a clear derogation from the Basel Convention. And as we shall see, it is a derogation that cannot be remedied by resort to Article 11.

As part of this exercise the EU incorrectly has begun to characterize Annex II wastes as "non-hazardous". The Basel Convention does not consider these wastes as hazardous nor as non-hazardous. They could be or could not be in these categories, but this is not determined.

Rather they are "wastes requiring special consideration" and are called "other" wastes under the Convention.¹ The EU characterization of them as non-hazardous is a derogation from Basel which can only lead to assumptions of lack of harm. The advantage of using Annex II is that it applies controls in a precautionary way, without being forced to engage in the difficult debate as to whether Annex I or III is triggered. The Basel Convention Parties were very careful not to call these non-hazardous and the EU should maintain that important distinction.

Further, as the NGO community's legal experts have argued at the recent OECD discussions on the US efforts to likewise ignore the new Basel listings within the OECD, the specific reference in Article 11 to the Basel defined lists "hazardous and other wastes" which are respectively Annex VIII (Annex I constituent with Annex III characteristic) and Annex II, must be fully transposed for Article 11 to be valid. All Article 11 agreements must encompass these two lists in their totality as they are specifically stipulated in Article 11.1 or such listed wastes would otherwise need to be covered under another agreement or law that provides an Article 11 equivalent level of control to that of the Basel Convention.

If the EU creates a regime that fails to cover some of the hazardous or other wastes (deciding simply to not control them), and does not cover them in another regime or law providing an equivalent level of control, then that is tantamount to a reservation on the part of the EU and the Basel Convention allows no reservations (Article 26.1). If that were possible then any Parties wishing to get together by agreement and ignore controlling certain wastes that they don't agree with, could make a mockery of the Convention and its strict ruling of allowing no reservations. This was never the intent of Article 11 and it cannot be exploited in this way by the EU now.

The EU proposal is surprising as it has argued against the OECD using Article 11 to derogate from these very same new Basel listings. And yet now it appears that the EU intends to do the same within their own ranks. Even if this were a legal transposition of the Basel Convention, we shall explore how this is likewise not justifiable from an environmental transparency standpoint.

Annex II plastic wastes are mismanaged in EU countries

Whilst there is common legislation within the EEA for waste management, it is well known that implementation and enforcement of such legislation is not consistent and adequate across the EU member states. With respect to plastics there has been considerable reporting about wayward exports of problematic plastic wastes even within Europe.

Open burning of plastic waste in countries such as Italy, Latvia and Poland have been in the headlines in recent years and a free trade in difficult-to-recycle plastic waste will only exacerbate the abuses already discovered. Intra-EU plastic waste flows that result in mismanagement harming the environment and human health is already known to be taking place, including in relation to plastic flows from Germany and Italy to Poland and Romania.²

¹ See Basel Article 1.2.

² Journalist Marianne Kerfridern finds German waste including plastic waste dumped in the open environment in Poland: Arte, Décharges illégales hors de contrôle - Vox pop, 6 October 2019; the Organized Crime and Corruption Reporting

The further abuse will surely arise from the fact that such wastes flows are not transparent via a notification procedure and they cannot be scrutinized and questioned from an Environmentally Sound Management (ESM) standpoint. They will flow under a dangerous password of “trust us and don’t verify”.

Let us also consider that due to the construction of the amendment package, Y48 will not be a definitive list of wastes. We really don't know what they can contain due to the fact that Y48 is a listing that captures everything that the Basel Convention neither considers as hazardous, nor as non-hazardous. But the universe of wastes which may fall under the Annex II umbrella (everything else) is unknown. As such, member states are agreeing to accept that uncharacterized wastes will be exempt from notification or consent, nor can they be assessed for their environmentally sound management (ESM) without such notice. Y48 can include:

- plastic waste with so much non-target material (e.g. mud, stones, metals, paper) as to be uneconomical to recycle.
- mixes of halogenated and non-halogenated polymers of different types and qualities which are uneconomical to recycle.
- household waste or municipal solid waste often uncleaned or screened containing plastic
- composite material (e.g. Tetrapak, and sachets) wastes combining plastics with metal foil and/or paper products
- halogenated plastics such as PVC which when incinerated or open-burned produce dioxins/furans.
- computer plastic shred fractions which are known to be mixed with about 5% metals including lead-tin solder circuit board chips.
- uncleaned mixed bag waste

It is precisely these types of wastes which are less likely to be properly and safely recycled or incinerated which will require more government scrutiny -- not less.

Some industry actors have argued that subjecting wastes to notification and consent procedures means subjecting their industry to unacceptable delays and bureaucratic malaise. If that is the case, then this should be solved *not* by dispensing with the proper controls, but streamlining the procedures and requiring member state governments to process the notifications and consents with electronic systems in a timely manner.

There are, however, other industry actors that have, on the contrary, welcomed the Basel Convention Annex II controls as incentives for higher-quality recycling. They recognize that hard-to-recycle and unrecyclable plastics should be designed out because they are a burden on their operations, since they pay to collect and sort materials that have no viable end market, while plastic bags and film damage expensive sorting machinery.³ It is important that the Commission realize that industry voices on the new amendments are far from being in unison.

Project (OCCRP) finds Italian, German waste including plastic waste co-incinerated in cement kilns in Romania, with local cancers on the rise: OCCRP, Cement’s Dirty Business, 7 March 2019.

³ The Ecology Center (2020) "Trying to Recycle That Plastic Bag? The Odds Are Nine to One It’s Not Happening"

This abrogation from the one global treaty that effectively seeks to eliminate externalities and system leakage is a direct assault on a responsible circular economy. Once these types of largely non-recyclable wastes can be freely moved across borders without any transparency or ability of member states to consent to them or properly scrutinize them, due to a failure of the EU to conform to their Basel Convention obligations, we will have incentivized dumping rather than safe recycling. This favors the linear economy resulting in dumping and burning -- not a circular one resulting in the desired minimization of a harmful environmental footprint.

II. Weakening Basel's new non-hazardous plastic waste (B3011) listing

While the Commission proposes to ignore the Basel trade controls for all plastic wastes not defined as hazardous or non-hazardous, a very large universe of wastes, they have made other alterations to weaken the non-hazardous list to ensure that universe is even larger than envisioned by the Basel Convention. This is yet another inappropriate derogation from the Basel Amendments.

While the actions described below maintain the status quo in the EU with respect to internal EU trade, they nevertheless fail to provide for the new levels of control sought by the Parties to the Convention. The Commission has proposed to unilaterally ignore Basel rulings in the following ways:

- Replace the strict and precautionary wording regarding contaminant levels to a weak reliance on "specifications"
- Allowed PVC to be considered as non-hazardous
- Allowed any destination besides Basel Annex IV listing R3 to be considered non-hazardous
- Added PTFE (fluorinated ethylene) to the exempt list without any stakeholder debate

"Prepared to a specification" -- undermining the amendment package

For the proposed language defining what the EU aims to consider non-hazardous waste, they have substituted the language agreed at COP14 of "almost free from contamination" and "*almost exclusively consisting of*" with the words "*prepared to a specification*".

While the amendments outlined in Basel decision 14/12 did refer in two footnotes that in relation to the language described above, stated that international and national specifications may offer a point of reference," that language did not in fact spell out that they should or if even such appropriate specifications exist. Thus, removing the strong language of the Basel text, and instead leaping forward with something posed as a mere possibility in a footnote, is a leap too far. This is particularly true when the issue of how clean is clean is fundamental with respect to the efficacy of the entire amendment package. Given how the EU has not produced the specification that they believe meets the level of rigor indicated by the strict language in the amendment, this becomes impossible to accept as anything other than an effort to effectively undermine the efficacy of the amendment package within the EU. Most alarming is the fact that the EU, will be seen as global leaders

in this regard, and prompt a global resort to meaningless or weak specifications, including the application to EU exports to non-OECD countries.

The significance of contamination

Many countries are exporting waste that is not safely recyclable in its totality to other countries under the pretext of "recycling". This happens in several ways:

- By including polymers not intended or possible to recycle within mixed plastic waste shipments;
- By sending plastic waste shipments that are significantly contaminated with other non-target wastes;
- By sending plastic waste that contains toxic additives making safe recycling uneconomic.

While contamination of a waste that triggers a Basel Annex III hazardous characteristic should legally mean it is a hazardous waste, such reclassification may be challenging to implement and enforce in practice. Who can see at customs level, the contamination? So, it is highly likely that in practice, the contaminated wastes will only be properly managed if they are caught in the Annex II net.

Escaping this last opportunity for proper controls by not taking contamination seriously is precisely the opposite of what has been intended by these amendments. The amendments recognized the importance of contamination in particular, and this is what prompted the use of very strong language -- "**almost free from contamination**" and "**almost exclusively consisting of**" (waste of one type of plastic polymer).

It is very clear that the meaning of these terms describe de minimis levels. That is, levels which have no significance to the concern at hand (environmental harm and harm to the recycling process). The term "prepared to a specification" on the other hand only has meaning if we know what the specification is, who prepared it and for what purpose. Further, as the entire Basel exercise is one of creating a level legislative playing field for global trade, it must be an international specification -- not a carte blanche patchwork which will lead to a competitive race to the bottom. Unfortunately, as we shall see, most specifications in practice are not global in application and are prepared by but one stakeholder group and for but one purpose -- to maximise trade.

Defining the de minimis

Until and unless the Basel Convention grapples with an international standard of what are truly insignificant levels of contamination, it is incumbent on global leaders on environment and the circular economy such as the EU to strive to set a very high bar in this debate. A bar commensurate with the terms agreed: "**almost free from contamination**" and "**almost exclusively consisting of**" There will be plenty of others that will try to drive it down to remove the efficacy of the amendments. But, it is rather shocking to see the EU propose this language -- language which fundamentally pulls the rug out from under the entire agreement, weakening it substantially.

Following the publication of the new Circular Economy Action Plan specifically aiming to “improve the classification and management of hazardous waste so as to maintain clean recycling streams,”⁴ and to prevent leakage of wastes,⁵ and to moreover stand ready to lead the world on this issue,⁶ one would have expected far more in the way of actions to put deeds behind words. Again, what the EU does internally speak loudly as to what the world is likely to require as well. Other countries might find the double standard made manifest by lax EU requirements creates a competitive disadvantage for them, so they too will engage in a race to the bottom in defining contamination -- a race led by the European Union.

On the other hand, China, the global recipient of the lion's share of plastic waste for the last decade and thus a country that has lived the consequences of unfettered waste trade, adapted its National Sword waste import restriction policy as a result. At the beginning of 2018 this policy prohibited all China plastic scrap imports not meeting a purity tolerance of more than 0.5% contaminants. Then, at the end of 2018, China set the tolerance level to zero and barred all entry of plastic scrap. More recently, Indonesia, beset with plastic wastes flowing in either as contaminants of paper scrap, or contaminated with non-target materials, has revised their purity requirements.⁷

In our view it is unacceptable, given the history of the EU and North America externalizing its management costs for dirty and contaminated waste streams to developing countries, to create any example of a level that would turn the clock back and allow a justification for contaminated plastic waste exports in any market.

The European Commission's Joint Research Centre has recognized the lack of consistency in industry plastic waste specifications as a key driver for the dumping of plastic wastes, sometimes with contamination rates as high as 20-30% in Asian countries. The national inconsistency, lack of clarity, and purely voluntary nature of industry specifications is a key cause of the global plastic waste crisis currently. Allowing a standard to vary so dramatically against levels set by countries like China would drive wastes down an unsustainable path of least resistance globally.

The EU must not continue to be found guilty of establishing norms that will encourage utilizing global waste havens rather than seeking to turn waste generation problems into waste minimization solutions at their source.

Industry specifications are not appropriate

Commercial specifications do exist and indeed the US-based Institute of Scrap Recycling Industries (ISRI), an organization that vocally opposed the April 2019 Basel Convention plastic amendments during their negotiation by claiming that its own "specifications" for

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, from the Committee of the Regions, A new Circular Economy Action Plan For a cleaner and more competitive Europe COM/2020/98 final, Pub. L. No. COM(2020) 98 final (2020). p.17. https://eur-lex.europa.eu/resource.html?uri=cellar:9903b325-6388-11ea-b735-01aa75ed71a1.0017.02/DOC_1&format=PDF

⁵ A new Circular Economy Action Plan For a cleaner and more competitive Europe, Section 4.4.

⁶ A new Circular Economy Action Plan For a cleaner and more competitive Europe, Section 7

⁷ New Ministry of Trade Decree No. 92/2019, which is described in public by Indonesian authorities' speeches as newly requiring zero tolerance for contamination.

plastic waste were sufficient to address the problem of global plastic waste dumping without legal restraints.

ISRI specifications are commercial descriptors applied to a wide range of wastes to be traded. They are not created for controlling pollution, they are not prepared with the Basel Convention trade rules in mind, and cannot be mistaken for including any appropriate environmental limit values. Industry specifications are very different from contamination limits, in nature and in intent. One facilitates a healthy environment, the other facilitates trade. The Basel Convention is an environmental treaty not a trade treaty and the Waste Shipment Regulation is environmental legislation to implement it. Indeed, one of the fundamental general obligations of the Basel Convention is to reduce trade in waste -- the very thing ISRI seeks to maximize. Yet it is the former motivation and not the latter which rests with the EU as Parties.

Because the commercial specifications do not aim to fundamentally minimize the transboundary movements of waste, they are un-protective with respect to contamination limits. For example, the ISRI specifications for plastic wastes⁸ vary between 2 and 50% contamination depending on the type of plastic waste, and sometimes do not define limits at all, using words such as "low percentages". Further, ISRI specifications are intended for plastic wastes destined for any form of "processing" which a trader may employ and are not always designed to ensure environmentally sound recycling.

Further, these specifications were not even meant to correspond to the Basel listings. So reading them is like comparing apples and oranges. References to these specifications would likely confuse plastic waste-management businesses and increase the risk that they will commit costly violations of national or EU laws.

Finally, and worst of all, from the standpoint of appropriate democratic process, the ISRI commercial standards were developed, not by nation states in the UN system and quite outside of the Rules of Procedure of the Basel Convention. They were developed solely with the interest of one stakeholder group (Basel observers) -- traders, and are created primarily for use by their dues-paying members.

It is unacceptable for the Basel Convention to negotiate a very important agreement on the basis of one country, one vote, with stakeholder experts providing their advice, and then throw it all away with a commercial private sector "specification" that overrides the globally negotiated outcome based on the opinions of but one non-Party observer association's interest. Why is that viewpoint more valued than that of other stakeholders, or of course, Parties?

Allowing PVC wastes to be considered non-hazardous within the EU

The Basel Convention has made it quite clear, despite some efforts to reverse this on the negotiation floor, that Polyvinyl Chloride (PVC) plastic is to be considered a waste subject to control. How does this very problematic compound suddenly become less hazardous or

⁸ <http://www.scrap2.org/specs/32/>

problematic within the EU? The entire life cycle of PVC is fraught with environmental harm and the end-of-life and recycling aspects of it are of particular concern, when one considers the harmful additives that make up marketed PVC, their propensity to leak/leach out of products and the likelihood of such PVC being combusted either through incineration, and open burning, formal and informal. The last time there was a serious debate about PVC at Basel the result was an impasse with evidence stacking up strongly on the side of hazardousness before the debate was sidelined for an indeterminate time in the future. Since that time far more evidence has come in regarding the harm and fate of PVC additives.

PVC utilizes very significant amounts of lead, cadmium and other heavy metal compounds (e.g. up to 3%) as heat stabilizers. Bear in mind that a 3% lead level would easily trigger and exceed acceptable levels found in most leachate tests such as the TCLP test. These levels already ensure that e-waste is considered hazardous in most countries that define wastes with such tests. Further, as much as 1% of arsenic is often added to PVC as a biocide to prevent bacterial breakdown which is more common when plasticizers are used. Plasticizers which can make up as much as 60% of PVC plastic products are also added. DEHP is one of these, making up as much as 80% of the plasticiser mixtures in PVC. DEHP is a phthalate which is listed in California law as causing cancer and birth defects and other reproductive harm. Further, residual unintentional monomers such as various epoxy groups are extremely toxic. As reported in Commission Regulation No. 10/2011, the vinyl chloride monomers of PVC may pose acute toxicity to the human body and are considered carcinogenic to humans.⁹

The above citations found in but one study, are quickly available indisputable facts. They are not in any way seen to be an exhaustive list of the problems of PVC, but rather as an alarm bell which should be heard by the European Commission. It seems that the whole world is beginning to understand the harm that can stem from PVC disposal and recycling and yet the EU is clinging to old exemptions while ignoring the latest rulings from the Basel Convention to which they are Parties.

PTFE given a “Free Pass” by EU as non-hazardous

PTFE, long associated with Teflon and Goretex brands is closely related to the PFAs class of chemicals now being considered for inclusion in the Stockholm Convention as a Persistent Organic Pollutant (POP). Sodium trifluoroacetate and the similar compound chlorodifluoroacetate can both be generated when PTFE undergoes thermolysis, as well as producing longer chain polyfluoro- and/or polychlorofluoro-(C3-C14) carboxylic acids which may be equally persistent. Some of these products have recently been linked with possible adverse health and environmental impacts and are being phased out of the US market.¹⁰

⁹ An overview of chemical additives present in plastics: Migration, release, fate and environmental impact during their use, disposal and recycling, Hahladakis et al. *Elsevier*, October 2017.

¹⁰ One of many articles. This one in Scientific American entitled “Teflon Parts Could Cause the Environmental Harm.” <https://www.scientificamerican.com/article/teflon-parts-could-cause/>

Perfluorooctanoic acid (PFOA) which is sometimes used in the process of making PTFE/Teflon, while primarily burned-off during this process, has been found to remain present in PTFE.

PFOA persists indefinitely in the environment and its toxicity is subject to much debate. PFOA has been detected in the blood of more than 98% of the general US population in the low and sub-parts per billion range, PFOA has been detected in industrial waste, stain-resistant carpets, carpet cleaning liquids, house dust, microwave popcorn bags, water, food and Teflon cookware. PTFE cookware is considered a minor exposure pathway to PFOA. PFOA is a carcinogen, a liver toxicant, a developmental toxicant, and an immune system toxicant. It also exerts hormonal effects including alteration of thyroid hormone levels.¹¹

Given the above non-exhaustive information on PTFE, why is the EU insistent on exempting this compound that the Basel Convention would in fact control?

Allowing all types of “Disposal” beyond the Basel limitation of mechanical recycling (R3)

During the Basel negotiations, the Parties were adamant about not expanding the plastic waste list exempt from controls (B3011, and be inverse -- entry Y48) beyond processes involving Basel Annex IV R3 destinations. Indeed footnote 5 on the chapeau stipulated that for the purposes of the new listing “recycling” meant only:

“(5) Recycling/reclamation of organic substances that are not used as solvents (R3 in Annex IV, sect. B) or, if needed, temporary storage limited to one instance, provided that it is followed by operation R3 and evidenced by contractual or relevant official documentation.”

But the EU, by removing this stipulation in their listings meant to apply to intra-EU trade, have opened the doors wide to all manner of disposal, even beyond recycling. These can include D1 -- deposit only land (e.g. landfill), D7 -- release into seas/oceans including sea-bed insertion, D10 -- Incineration on land, D12 Incineration at sea, R1-- Uses as a fuel (other than direct incineration) to generate energy, R2 -- Solvent reclamation, etc.

So, all manner of plastic waste (Y48), including mixed, and contaminated, PVC, PTFE can now be directed to EU operations involving the above examples of disposal/recycling, without control procedures, without notification and consent and without the knowledge or approval therefore of member states. Is this what the Commission wants for Europe? Is this what they consider a circular economy?

III. The way forward

We call upon the European Commission to immediately withdraw its legally questionable and altogether inadvisable unilateral self-serving exemption allowing them to ignore the new to Y48 and B3011 listings. We call upon them to step up and apply the Basel Amendments like every other Party. We are talking about the potential for great harm not only to Europe but from a standpoint of global governance on wastes, if the EU ignores

¹¹ Lau C, Anitole K, Hodes C, Lai D, Pfahles-Hutchens A, Seed J (October 2007). "Perfluoroalkyl acids: a review of monitoring and toxicological findings". *Toxicol. Sci.* **99** (2): 366–94. doi:10.1093/toxsci/kfm128. PMID 17519394.

what was proposed at Basel. Further, it sets a dangerous precedent for others that might twist Article 11 of the Basel Convention similarly.

If industry has valid complaints about the process of notification and consent being too burdensome, and we don't doubt their validity of some of these complaints, then we should fix the implementation process and streamline it, not throw out the basic laws necessary to protect human health and the environment. In other words, if it's too difficult to read traffic lights, we should make them more readable, not do away with them -- not unless we want death and destruction on our highways. So too with waste trafficking.

The whole world looks to the EU for environmental leadership and such leadership will not be provided by it creating double standards, by which the global rules of the road apply to everyone else -- but not to them. EU norms on waste trade should be based on what countries, across the globe most impacted and victimised have called for and need, not on what traders would hope for to maximize their profits. Once the EU has set this high bar themselves then they will have the moral standing to lead in negotiating at Basel level an international contamination limit value that can ensure a level global playing field providing high levels of environmental protection and eliminating the use of trade as a mechanism to externalize costs and harm to the vulnerable.

Likewise, we expect the EU not to create double standards anywhere such as they are attempting to do with PVC and PTFE, and failing to limit non-hazardous designations to mechanical recycling only.

We expect that an EU that has laid down the global gauntlet found in the Green Deal challenging the world to do far better in protecting our beleaguered environment will live up to this challenge themselves.

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