EEB / BAN Comments on Draft Correspondent's Guidelines No. 12

15 October 2021

Introduction

At the outset it is important to recall that BAN does not agree with some of the European Union's unilateral actions in adopting the landmark Basel Convention plastic waste amendments via the Commission Delegated Regulation (EU) 2020/2174 to which these Guidelines apply. You may recall that we find it legally unacceptable for example for the EU to have conveniently excluded themselves from certain aspects of the Basel Convention amendments. The Basel Convention's restraints on Article 11 agreements are very clear -- they must not include provisions which are less environmentally sound than those provided for by the Convention. This fact is echoed by the fact that the Convention does not allow for reservations by Parties. Article 11 was created to allow non-Parties to enter into trade in wastes with Parties -- it was not created to weaken Basel provisions for some Parties. And yet this is precisely what the EU has done.

Not only does this misguided use of Article 11 provide for less protection for the environment and human health of EU Member States than that afforded the rest of the world, and in so doing give themselves a possible short-term trade advantage, but it creates a precedent by which any two or more countries can decide among themselves to ignore Basel Convention obligations, thus making a mockery of the Convention. Additionally, the effort to provide double standards has unduly complicated the application of the Waste Shipment Regulation (WSR) to the point of regulatory malpractice, as it doubles the number of definitions of plastic waste, creating confusion and therefore many likely instances of non-compliance and loss of person-hours in enforcement and implementation. Note that without those EU-only derogations from Basel, this very guidance document would be considerably shorter and more clear.

Having made strong note of the above, we understand that the Guidance Document and comments on it cannot change the fundamental mistakes now found in the text of the Waste Shipment Regulation. We can hopefully look forward to the adoption of the recast WSR to rectify these mistakes and the subsequent guidance therefore will hopefully be legally correct and clear. For the moment we will confine our comments to the interpretation of the statutory text, however misguided. We will focus them on a few areas where we wish to express concerns or praise for the approaches taken.

1. Y48 and EU48 should not be characterized as "non-hazardous"

Throughout this document the EU has made a mistaken inference that needs immediate correction throughout: the characterization of Annex II wastes as "non-hazardous". The Basel Convention

from the beginning established three categories of waste -- two of which are subject to controls. They established a) hazardous waste, b) non-hazardous wastes, and c) other wastes (wastes requiring special consideration).

The category of Annex II wastes "requiring special consideration" was established during the final negotiations of the Convention precisely because certain parties believed that these Annex II wastes were hazardous and certain parties did not. As a compromise, a third category was created which would not stipulate whether they were hazardous or not. Indeed, most Parties at the time of adoption considered Y46 and Y47-- the other two Annex II entries to be hazardous.

It is unacceptable then, given this history and intent, for the EU to unilaterally claim these entries on Annex II to be non-hazardous. The Basel Convention has never done this and, as Parties to the Convention, the EU Commission and Member States cannot suddenly take it upon themselves to re-write the Convention. By calling them non-hazardous, the EU unilaterally and dramatically changes how they are perceived and considered going forward among themselves and sow confusion among other Basel Parties, with which the EU must communicate and trade in the course of time. This nomenclature therefore needs to be changed as it is not an accurate reflection of the Basel Convention. Whenever Y48 or EU48 is referred to, it should be by its proper distinctive language -- "wastes requiring special consideration," and not by "non-hazardous waste". Non-hazardous plastic waste is B3011.

2. Setting Contamination Levels

Perhaps the most important development of the new Guidelines is the setting of the contamination limits that interpret the language from the Basel Amendments which read either "*almost free from contamination and other types of wastes*" or "*almost exclusively consisting of*".
BAN and other NGOs have noted in earlier submissions to the Commission that the language above is not intended to address the matters of hazardousness characteristics which can be actively hazardous at exceedingly small concentrations. Rather the contamination being discussed herein relates more directly to that which will actually likely be recycled (and not likely disposed of). It relates also to the effect of the contaminants in inhibiting the recycling process, making it less likely for the actual target recyclable plastic to take place efficiently and effectively.

Maintaining strict and low contamination levels is vital as it prevents cost externalization of problematic waste to developing countries and relatively weaker economies. And equally important are the incentives low levels provide for more aggressive and efficient upstream waste management. In almost all instances it is known that source segregation of wastes is most efficient in terms of creating a clean waste stream to be recycled. In order to incentivize such upstream segregation, it is important to maintain very low tolerances for contamination as it is traded.

For these reasons BAN and the environmental community have called for a tolerance level -- as first established by China, and now Hong Kong -- to be set at 0.5%. It is important to note that China, the country that has experienced the most harm from plastic waste trade in the last three decades, ceased the level of 0.5% in favor of zero tolerance for contaminants.
In paragraph 20-21 of the Guidelines, the contaminant level for exports from the EU to and from third countries is set at 2%. We find this to be too high to provide an adequate incentive for upstream diligence in product design, waste collection and management, necessary to ensure true circularity and cost internalization.

A level of 2% will result in massive volumes of extraneous materials (e.g. plastic (non-target), metals, papers, chemicals) being exported "along for the ride" to pollute and diminish proper recycling in the receiving country. If we take the Comtrade data on EU exports for the year 2020 to both non-OECD and OECD countries (about 1,600,000 metric tonnes), we see that 2%

would mean that 32,000 metric tonnes per annum of contaminants -- a very significant amount of pollution by itself that equates to about 17 containers per day would be allowed for export. Even if this year the shipments fall by half due to the new Amendments, the amount of about 16,000 metric tonnes is still a lot of EU contamination that must be dealt with in third countries. And it will be accompanied by the even worse impact of failing to drive more efficient upstream waste management at source for all time to come.

If indeed the 2% level is the only politically achievable level today, then the policy should be one that begins at 2% and ratchets up 0.5% perhaps every two years so that in 2022 it's 2%, in 2024 1.5%, in 2026 1%, and in 2028 0.5%.

The 6% figure applied only for intra-EU trade is likewise unacceptable. For reasons previously stated and highlighted again here, there should in no way be different interpretations for trade within the EU and trade from or to the EU from third countries. In the case of the changes already made to the WSR as noted above, the derogation from the new Amendments by the EU in the current delegated version (EU 2020/2174) of the WSR is unacceptable but beyond the scope of the comments on the Guidelines, as these misguided double-standards have already been adopted.

The *contamination levels* allowed in the EU have yet to be determined however, and this interpretation of the delegated WSR and future guidance for the recast version is fully within the scope of these Guidance comments.

Paragraph 18 is supposed to provide rationale for the notion that the EU can have a higher level of contamination than the rest of the world. And yet the argumentation in paragraph 18 is faulty.

The first bulleted argument provided is that the EU wishes to subject plastic waste to R1 (waste-to-energy incineration) and still retain a non-controlled designation, whereas the Basel Amendments do not allow for that. It is unclear whether the EU also wishes to open up the scope of EU3011 to include D (disposal) listing destinations as well and a quick read of (EU 2020/2174) appears to reflect that this is quite possible. So not only could these plastics with high levels of contamination be directed to landfills and avoid control procedures, but they could also be directed to waste-to-energy incineration (R1) as well. This is tantamount to allowing vast amounts of sequestered carbon to re-enter the atmosphere as burned plastic -- dramatically exacerbating the climate crisis. This is misguided in any event but in terms of an argument to justify higher contamination levels (6% instead of 2%) it is not an argument. Needless to say, in time of climate crisis we should not be combusting anything if we can avoid it, whether it is the target material or so-called contaminants.

The second bulleted argument that *"the EU applies a robust legal framework on waste management and waste is recovered within the EU according to high environmental standards"* is belied by the steady diet of news stories which indicate otherwise. A robust legal framework must include enforcement, and in this regard the legal framework of the EU currently is seriously challenged. Please visit the Plastic Waste Transparency Project News section of the BAN website and scan the large number of scandalous waste trafficking stories involving EU member states, if one needs a reminder.

We know that waste moves towards greatest opportunity to externalize costs -- it moves therefore from richer to poorer economies. It is in relatively weaker economies where costs are less likely to be internalized than in the exporting state via robust regulation and greater societal safety nets to protect human health and the environment. This dynamic is at play within the EU as well as the planet at large. It is no accident that recently we have read the news of internal market waste exports and dumping finding their way more frequently to Poland and Romania.

There, waste management is going to be cheaper and less environmentally sound due to a relatively weaker economy.

And yet it must be said that at the same time, the richer countries of the EU possess comparatively the greatest resources to reduce the levels of contamination at source than most every other country on earth. It is precisely because the EU is relatively wealthy that they can achieve greater levels of source segregation and purity, and move to aggressively level the playing field at a high standard of collection and pre-treatment. The EU should be showing the world what clean recycling should look like, not conveniently lowering the standard from the global requirement. The EU should lead and not use their relative wealth as a reason to drag behind the rest of the world.

Contamination levels for waste movements within the EU should be placed at least at 0.5%, if not now, then within the next eight years ratcheting down from 2% as we have called upon for all contaminant levels.

Finally, we do not see reflected in this document any reference to the contamination levels that might be set by the importing country, which are also definitive when designating waste shipment consent. When the acceptable contamination levels differ between the exporting and importing state, the most stringent level must apply to a shipment. This needs to be so stated in this guidance.

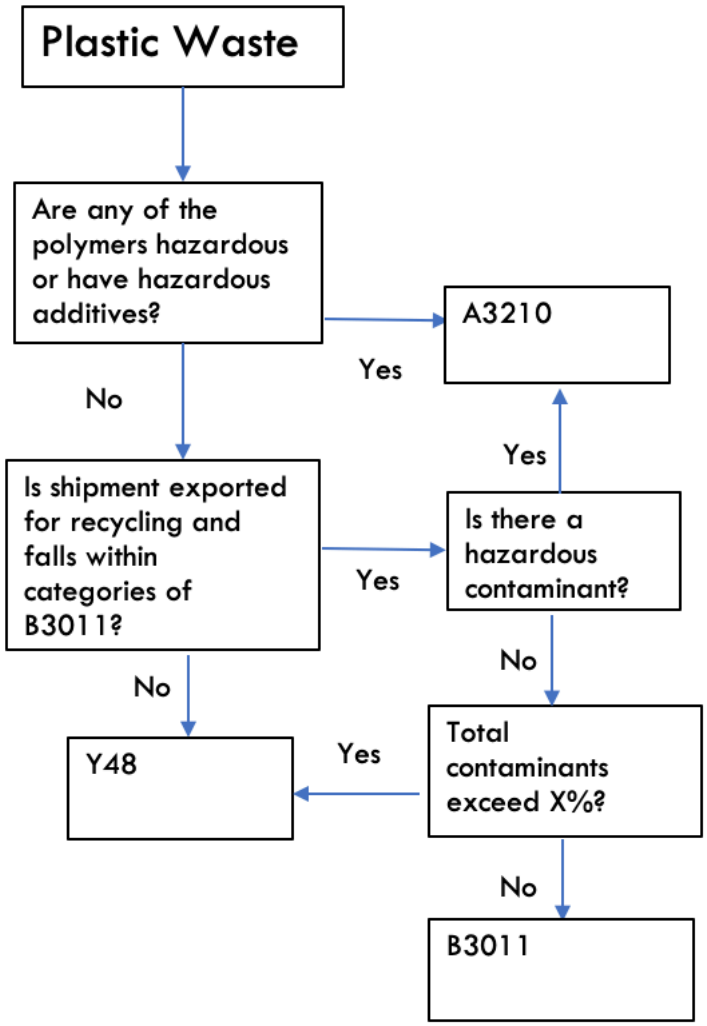
3. What is to be considered a contaminant?

While we appreciate the basic thrust of Paragraph 15 ensuring that the question of contaminants be treated apart from the question of hazardousness, we do not agree that contaminants can never be hazardous. It makes more sense in our view to define contamination as: materials extraneous to the original manufactured plastic polymer isolated in a shipment for recycling, hazardous or not.

These contaminants are non-plastic material or plastic material of a different sort than the isolated polymer to be recycled. In the one case of the allowable mixture (PP, PET, PE combined), then it is all those materials including plastics not part of that special mixture.

Within plastic products there are additives which can be hazardous or not, but they are intentionally marketed together with the polymer to be considered part of the plastic itself, distinguishing themselves from contaminants.

On the following page is a decision tree on how to think about and implement the complicated definition established at Basel in determining the proper classification.



4. How to handle POPs that meet or exceed the Low-POPs level

In paragraph 26 it is written: "*As a common understanding of the Correspondents, it has been agreed that plastic waste containing POPs, such as POP-BDEs, in quantities meeting or exceeding the concentration limits indicated in Annex IV to Regulation (EU) 2019/1021 should be classified under entry Y48 for exports from the EU and imports into the EU, or under entry EU48 for shipments within the EU. However, such waste is to be classified as hazardous if the waste exhibits a hazard characteristic listed in Annex III to the Basel Convention or Annex III to Directive 2008/98/EC.*"

This conclusion ignores the fact that all POPs are hazardous (indeed among the most hazardous of chemicals, warranting an entire Convention dedicated to their eradication). And thus, all POPs waste is hazardous as long as it is present in levels that meet or exceed the Low POP Content Level established by the Stockholm Convention in cooperation with the Basel Convention. For legal confirmation, it is plainly apparent that every POP is included in Annex I of the Basel Convention either by: Y4, Y5, Y10, Y43, Y44, or Y45. Further all of these exhibits at least one of the following hazardous characteristics: H6.1, H11, H12 and H13. There can be no equivocation then that POP wastes exceeding the established thresholds now reflected in EU2019/1021 are hazardous waste under the Basel Convention, so the first sentence in paragraph 26 must be eliminated. The paragraph should be re-written as follows:

"As a common understanding of the Correspondents, all waste containing POPs at concentrations that meet or exceed the concentration limits indicated in Annex IV to Regulation (EU) 2019/1021 should be classified under A3210 as hazardous waste. Such wastes can only be managed in accordance with Article 6 of the Stockholm Convention. As such they will be prohibited for export from the EU to any countries outside of Annex VII to the Convention. The OECD decision will not be relevant as it only applies to trade in recyclables. Imports into the EU by Basel Parties and trade within the EU will be allowed with notification and consent."

5. When plastic waste is but a part of the intended waste shipment

The explanation in paragraph 16 is clear enough to state that wastes that contain plastic which are already described in Basel Annex VIII or IX entries (such as the electronic waste entry) will be considered under those more specific categories. However, those categories were created without thought to the hazardousness and recyclability of the plastics fraction that became part of the considerations at COP14 of Basel when drafting the new Amendments.

For example, what about mixtures of electronic waste that contain plastics which are not destined for recycling? Should they not at least be controlled under the Y48? What if such waste contains PVC? Or a fluorinated compound plastic which is not on the list?

In our view it must be that the most stringently controlled applicable category is the operational one. That is a view driven by the precautionary principle which has been happily brought to bear elsewhere in these guidelines. A new paragraph explaining this is needed in these Guidelines. When in doubt use the most stringently controlled category.

Likewise, we wonder what guidance will be provided about the very common occurrence of plastic waste being included in shipments of paper waste (B3020). We are finding that 5-20% plastic is often found in paper scrap. This plastic fraction is not often recycled and it can be dumped or burned in waste-to-energy operations. Here again, we believe that if the amount of plastic contaminant is above a certain contaminant threshold (e.g. 0.5%) the movement of the paper waste contaminated with plastic must be considered as a movement of the waste category which will provide the most control rigor. In this case, if there are 5% mixed plastics in paper scrap, then Y48 must be used as the waste designation.

Likewise, we believe that the current listing for Tetrapak type of packaging (B3026) should be superseded by Y48 due to the high level of contamination as well as the lack of a requirement for recycling inherent in Tetrapak waste.

Likewise, guidance is needed on Refuse Derived Fuel (RDF) which might contain plastics, including mixed plastics or PVC.

As Y46 (household waste) could contain plastic, both Y46 and Y48 are on Annex II requiring prior-informed-consent at a minimum so in that instance there is little reason to worry about which control procedure is stricter.

6. Guidance Needed on Y13

It would appear that many plastic wastes are included or were always intended to be included in Y13 of Annex I. This listing, "*Wastes from production, formulation, and use of resins, latex, plasticizers, glues/adhesives",* does not mention the world "polymer" used frequently today, but it is very possible that this was meant to be covered by the word "resin". In fact, synthetic resins are important as monomers, to produce polymers. Synthetic resins are more stable and uniform than

natural resins. They are useful in the production of plastics and paints. As resins and plasticizers are often building blocks of marketed plastics and are thus found in plastics as additives or as primary ingredients, the case can be made that wastes derived from the production and use of these resins or plasticizers is encompassed by Y13. Is this not the case? And if not, why? It is very important to know the answer to this question so that we can determine whether plastics has a broad Annex I entry.

7. Paragraph 4 in need of rewording

The construction of paragraph 4 of the document is very confusing as it states:

> "4. The control procedures for plastic wastes depend on whether the shipment of the waste has to be notified or not under the WSR, whether the waste is destined for recovery or disposal, and whether there are additional controls in the country of destination. More information on these procedures is provided in Section 5. If the competent authorities of dispatch and of destination cannot agree on the classification of plastic wastes, the more stringent interpretation in accordance with Article 28(2) WSR is to apply."

The first part of the first sentence says that control procedures depend whether or not a control procedure has been used. The latter part of the sentence mentions but two considerations when in fact there are others.

The last sentence is excellent policy and needs to be retained and hopefully in the recast will be made legally binding. We suggest the following change in this paragraph as indicated below:

> "4. The control procedures for plastic wastes depend on whether the shipment is listed as a waste for special consideration (Y48), a hazardous plastic waste (A3210), or non-hazardous plastic waste (B3011); whether or not it is destined for recovery or disposal, which country it is going to (e.g. Basel Annex VII or not), and whether there are additional national controls required in the country of destination. More information on the procedures to make use of such information is provided in Section 5. If the competent authorities of dispatch and of destination cannot agree on the classification of plastic wastes, the more stringent interpretation in accordance with Article 28(2) WSR is to apply."

8. Inappropriate Exemption: Easily separable usual secondary components of products that become waste, such as caps and labels

In paragraph 23 there is a very surprising and unwelcome exemption from the notion of contamination in the terms of: "easy separable usual secondary components of products that become waste, such as caps and labels." This exception is unacceptable. These are not target to the polymer in question and are unlikely to be recycled but likely to be dumped or burned. If they are easily separable then they should be separated prior to export.

9. The "Precautionary Approach "and burden of proof

In paragraph 31, we are very pleased to see the reference to the precautionary approach when there is doubt as to how to categorize a shipment. Likewise, we are gratified to see the enforcement and inspection provisions that require the exporters to provide the necessary proofs (e.g. of contamination levels) if they wish to have their exports approved.

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