Paragraph-by-Paragraph Analysis of SB 20 Export Language

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Updated December 4, 2003

Summary

SB 20 does not prohibit the export of hazardous electronic waste. Even worse, it is drafted in such a way that it actually allows the State of California to sanction such exports and to possibly even reward waste brokers for them, by allowing them access to the recovery fee imposed by the bill on consumers. The bill unfortunately does this by virtue of three gaping loopholes.

The first loophole is due to an ambiguity in the text that appears to require export obligations only on those participating in the program and wanting access to the fee generated funds. Thus, those wishing to conduct business-as-usual and not become part of the program might very well be able to continue to do so.

The second loophole, exempts almost all export criteria as long as it can be claimed that the wastes in question will be recycled into new electronic components in the foreign destinations. All wastes can be said to be available via the commodity markets for recycling back into electronic components and it is well known that the vibrant electronics industry in Asia will make this return to recycling products a likelihood. This loophole is said to be a mistake by the authors which they would like to correct but there are no guarantees that it will be.

Finally, were the above loopholes closed, there would still remain one devastating loophole and ugly precedent wherein the SB 20 provides that the State of California impose technology-based criteria generated by rich, developed countries for waste management guidelines, for those same developed countries, on developing countries. The referenced guidelines have been designed for use only within developed countries of the Organization of Economic Cooperation and Development (OECD), and are not, by their own admission, to be used to justify export to developing countries. These guidelines do not attempt to address the serious environmental justice and equity issues that are even more important than technological criteria for ensuring health, safety and justice for developing countries. This approach also flies in the face of the international community’s decisions made in the Basel Convention which insist that no toxic waste for any reason should be exported from developed to developing countries.

For the noted reasons, elaborated further below, in addition the failure of the bill in other respect (e.g. lack of producer responsibility provisions) BAN believes that this bill is worse than no bill at all and should not be enacted into law.
Paragraph-by-paragraph analysis

What follows is a paragraph-by-paragraph assessment of the efficacy of SB 20 language with regard to export.

Article 6 – Financial Provisions

...(4)(d) The board may not provide any payment for covered electronic devices unless the materials will be handled in compliance with all statutes and regulations regarding the export of hazardous wastes. No payment may be made for covered electronic devices exported to any country where the export import of hazardous waste is prohibited.

The statement above appears to be redundant to the language of 42476 (e), except that 42476 (e) prefaces the setting forth of specific criteria for exporters in section 42476.5. However, given that Section 42476.5, and indeed all of this language is part of the Article 6 "Financial Provisions" it logically follows that the restrictions it provides apply solely to recipients of payments from the Integrated Waste Management Fund ("IWMF"). An argument could be made that the reference to “any persons” in 42476.5 might serve as a stand-alone restriction on export for all citizens of the state, it is likely that this section will be interpreted to mean that the export measures only apply to those persons accessing the fund and the only remedy the state has is to refuse such payment. Regardless, as a practical matter, an effort to enforce the restrictions on non-recipients of funds would likely be futile.

The first sentence in the above paragraph is currently meaningless as there are no statutes and regulations operating in the United States regarding the export of hazardous wastes. BAN believes that an OECD Council Decision/Recommendation of 1986 should be operable and currently require “prior informed consent”, that is, all exporters must notify and receive consent prior to foreign export, however the EPA continues to claim that they don’t believe this is applicable. However it is possible that the EPA will propose new export restrictions on CRTs as part of their CRT rule next year. Presently though, the wording can only refer to the provisions found elsewhere in this article.

The second sentence is more to the point in that it states that it will not allow payment of funds to anyone that wishes to export to a country that has banned the importation of such wastes. China for example has banned the importation of electronic waste. However should somebody want to skirt this little problem and still receive the funds they can simply redirect the waste to a third location (e.g. another state or country), or they can try to just ignore the fee and send the waste directly to China in defiance of the Chinese import ban as many exporters presently do.

(e) The board may not provide any payment for covered electronic waste unless the materials are handled in compliance with all statutes and regulations regarding the export of hazardous wastes, including, but not limited to, Section 42476.5.
The statement above appears to be redundant but it prefaces the laying out of California export criteria in 42476.5. It also appears to want to cover in 42476.5, only those persons that will receive payment, not everyone in the state.

42476.5. Except as provided in Section 42476.6, any person who intends to export covered electronic waste to a foreign destination shall comply with all of the following at least 60 days prior to export:

First, there is the introduction of a gaping, massive loophole found in (42476.6) that makes this entire section, containing export criteria/statutes to be moot as any waste that can be said to be destined for further use in electronic components (e.g. gold, lead, steel, plastics etc.) is exempt. As Asia has a very vibrant electronics manufacturing industry, albeit not always environmentally sound, it can almost certainly be claimed that any electronic waste material will be recovered back into the electronics industry (see more on this below). Hopefully this loophole will be corrected at the earliest opportunity.

Here the reference to “any person” might seem to imply that anybody regardless of whether they get paid or not by the collection/recovery fee would need to follow this criterion. However, as this is under the chapeau of 42476 (e), which refers to those wishing to access payment, it is dubious that the bill intends to apply these criteria to all persons in the state. For that reason and due to the fact that there is no reference made to enforcement of this measure, it is likely that this section will be interpreted to apply only to those seeking recovery fees under the program and the punishment for non-compliance is denial of access to the fund.

If this section (a-e) was not so fraught with loopholes, that is, it applied to all covered electronic wastes, including those that might get recycled into electronic components, or applied to those not wishing to receive payment, then parts of it could have been useful to create a paper trail for exporters that could be checked up on.

(a) Notify the department of the destination, contents, and volume of covered electronic waste to be exported.

This, without the gaping exceptions, could have been useful information. required import and operating licenses shall be forwarded to the department. Such transparency is essential but is unfortunately circumvented too easily in SB 20. Even if the above noted loopholes are closed, it is very easy to avoid the reporting requirements by shipping to an out of state broker and allowing them to conduct the export.

(b) Demonstrate that the importation of covered electronic waste is not prohibited by any applicable law or regulation of the country of destination and that any import is
conducted in accordance with all applicable laws. As part of this demonstration, required import and operating licenses shall be forwarded to the department.

This would have been the most useful element of all, as it would have precluded export to China. It also would have made it very difficult for any Basel non-OECD country to accept USA waste as there is a general prohibition in the Basel Convention against a non-Party (USA) trading with a Basel Party (almost all other countries of the world) unless a multilateral or bilateral agreement is in effect that is consistent with the Basel Convention. The USA possesses an export agreement with OECD states but not for non-OECD states. However, once again this criteria will not apply if there is recycling back to the electronics industry, or one wishes to ignore the possibility of receiving the recovery fee provided by the bill, or finally if one wishes to transship via third states or countries.

(b) Demonstrate that the exportation of covered electronic waste is conducted only in accordance with applicable international law.

This is not currently useful as according to the United States there is no applicable international law on exports of electronic wastes that apply to the US.

(c) Demonstrate that the management of the exported covered electronic waste will be handled within the country of destination in accordance with applicable rules, standards, and requirements adopted by the Organization for Economic Co-operation and Development for the environmentally sound management of electronic waste.

This is actually the most dangerous element of the bill as it attempts to apply extraterritorially, a set of technological criteria for environmentally sound management advanced by the OECD group of 30 most industrialized countries for downstream management of electronic waste and does so in violation of Basel Convention decisions and the principle of environmental justice. The OECD group has to date been very careful to ensure that these criteria are only meant to apply to the OECD and not used to justify export to non-OECD countries. Many OECD countries (e.g. all of 15 European Union states as well as Norway and Switzerland) have agreed that such export should be forbidden, regardless of technologies employed downstream. Now California has leaped into the fray and done what the OECD themselves were loathe to do – impose their standards to justify export to developing countries based on criteria that they (the developing countries) played no part in negotiating.

Further, the fundamental flaws of the OECD ESM approach is that these guidelines are:

a) devoid of environmental justice criteria, and
b) contain no linkage with upstream design issues.
The environmental justice omissions that in many cases are impossible to expect in developing countries include but are not limited to:

- Requirement of resources and ability for infrastructure to maintain and enforce technological standards
- Requirement of good enforcement of environmental or health standards
- Knowledge of environmental health and toxicity issues among workers and public
- Right-to-know legislation
- Ability to sue for damages
- Appropriate downstream hazardous waste management facilities
- Liability law
- Trade unions to train and protect workers’ interests
- Existence of occupational clinics and assistance, and medical expertise on occupational disease
- Right to protest and gain enforcement action
- Freedom from serious corruption problems with authorities

Additionally, the OECD technology based approach to ESM, is flawed as it fails to provide linkage between design issues that impact downstream impacts in a cause-and-effect relationship. That is, many of the downstream risks can only be addressed adequately by changing upstream design that prevents risk, rather than downstream efforts to mitigate imposed risk. An example of this is the fact that all smelting is going to be a hazardous problem as long as halogens are present in the waste stream due to their propensity to create dioxins and furans. However the OECD fails to mention that this design change is part of ESM management needs, despite the fact that smelting is a necessary means to recover metals and the industry can thus hardly avoid smelting and thus dioxin problems. They can however avoid adding halogens to the products and thus the waste stream but of course focus only on downstream issues ignores this fact.

Due to the text of this paragraph, it is very likely that the consumers of California, rather than taking responsibility for their own CRT waste, will, due to the powerful economic pull toward low-wage countries, end up funding the dumping of many of California’s CRTs on a facility that is claimed to be technologically acceptable in a country that has not banned their import such as the Philippines. The workers and communities there will therefore asked to bear the toxic burden of Californian’s waste. Meanwhile, industry will be provided with no incentive to clean up their act by producing less toxic products.

\(d\) Demonstrate that the covered electronic waste is being exported for the purpose of reuse or recycling.

This criterion is rather useless as this is always possible to state, regardless of the final outcome. As nothing can ever be recycled 100%, one can even state the CRTs can be exported for the recycling of the copper yokes and the leaded glass
can be simply dumped as a recycling residue. Further, all of the horrors witnessed in Guiyu, China were clearly a result of recycling.

42476.6. Section 42476.5 does not apply to a component part to a covered electronic device that is exported to an authorized collector or recycler and that is reused or recycled into a new electronic component.

This is a most disgraceful and unfortunate stamp of export approval to California waste brokers that along with the limitation to program participants, adds insult to the injury of the other loopholes. It bears noting however that this language is deemed by Senator Sher to be a drafting mistake and a letter has been sent to be entered into the official journal of the State of California to have this mistake rectified in the next session. Unfortunately there is no guarantee that this correction will occur despite the good intent.

If the language is not corrected, because the paragraph includes the word “recycled” as well as re-use, virtually all waste can be easily claimed as being readied for being used after recycling in a new electronic component. This can include all of the horrific operations BAN witnessed in Guiyu, China. The caveat that the material must go to an authorized collector or recycler is no comfort as the criteria for demonstrating this via permits etc. has been erased with this paragraph and it is very easy to claim that the receiving facility in a developing country is authorized. Usually the receiver is a waste brokerage firm that can claim authorization and there exists no requirement to demonstrate this via submitted permits or state consent.

The worse thing about this paragraph is that it will perversely allow a program participant to collect the recycling fee imposed by the state on manufacturers, then turn around and sell, just as they have been doing, the electronic waste to an offshore Asian broker and in this way get paid at the front-end (ultimately by the well-meaning consumer) and, at the back end by the Asian broker and thereby continue export business as usual, but this time with the sanction and added profit provided by law. All the while they can ignore any of the reporting requirements found in 42476.5.

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