

SUSTAINABILITY

Regulations Regarding the Control of the Import or Export of Waste

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On 2 October 2023, the Minister of Forestry, Fisheries and the Environment (“**Minister**”) published the Proposed Amendments to the Regulations Regarding the Control of the Import or Export of Waste under GN 3928 in GG 49390 (“**Amendment Notice**”). The Amendment Notice called for members of the public to submit comments on certain proposed changes to the Regulations Regarding the Control of the Import or Export of Waste, published under GN 22 in GG 42175 of 21 January 2019 (“**Regulations**”).

The Regulations aim, in accordance with the power granted to the Minister in terms of section 69(1)(j) of the National Environmental Management: Waste Act 59 of 2008 (“**Waste Act**”), to establish procedures and control measures for the import, export and transit of waste. The proposed amendments to the Regulations are intended to give effect to South Africa’s obligations under the “*relevant international agreements on transboundary movements of waste*”.[1] In this regard, South Africa is a party to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (“**Basel Convention**”). The Preamble to the Basel Convention recognises, *inter alia*, that –

“States should take necessary measures to ensure that the management of hazardous wastes and other wastes including their transboundary movement and disposal is consistent with the protection of human health and the environment whatever the place of disposal.”[2]

It is further acknowledged that transboundary movements of waste (i) should be permitted only when conducted under conditions that do not endanger human health and the environment, and conform with the provisions of the Basel Convention, and (ii) should be reduced to a minimum, especially in light of the limited capabilities of developing countries to manage waste. Accordingly, the Basel Convention establishes certain standards for the transboundary movement of waste, particularly, a requirement of prior notice of the import of certain forms of waste to the receiving country, and written consent to the import of such waste by that country.[3]

In light of the above, the Regulations, read together with the Amendment Notice, designate the Department of Forestry, Fisheries and the Environment (“**Department**”) as the “*competent authority*”[4] that will consider applications for the “*transboundary movement*”[5] of waste in South Africa. Regulation 4(1) of the Regulations provides that no person may (i) import any waste from a country, (ii) export any waste to a country, (iii) transmit any waste through South Africa, or (iv) re-import waste from a country without obtaining the “*consent*”[6] required for the transboundary movement of waste. Additionally, regulation 4 contains explicit prohibitions on the import of (i) “*general waste*”[7] for landfilling, (ii) “*hazardous waste*”[8] from a developed country, (iii) the infectious portion of medical waste, and (iv) “*mixed waste*”[9] streams.

The Regulations distinguish between applications for the import and export of hazardous and “*non-hazardous waste*”[10]. In this regard, all applications must include –

- a letter of request, either from the Department of the country of export (in the case of imports to South Africa), or the exporter (in the case of exports from South Africa);
- the waste management licence of the receiving waste treatment facility (or equivalent legal documentation in the country of import, in the case of exports from South Africa); and
- a contract between the exporter and importer, alternatively, in the case of imports to South Africa where the importer does not own the receiving waste treatment facility, the contract between the importer and the receiving waste treatment facility.

Additional requirements imposed in respect of hazardous waste include –

- in the case of imports to South Africa, a completed notification form (provided in Annexure 1 to the Regulations) stamped by the competent authority of the export country. The notification form makes provision for the disclosure of, *inter alia*, the quantity of waste, designation and composition of the waste, waste identification code (as per the Basel Convention, provided in Annexure 4 to the Regulations), and disposal/ recovery operations. In the case of exports, such a form is only necessary if required by the country of import;
- applicable insurance or other financial guarantee covering the movement of waste and environmental clean-up in the case of an incident; and
- a material safety data sheet for such hazardous waste.

A significant amendment to the Regulations contemplated in the Amendment Notice is the introduction of a requirement for the submission of a notification form for the import or export of certain categories of non-hazardous plastic waste. Category Y48 of “*wastes requiring special consideration*”^[11] makes an exception for, *inter alia*, certain forms of plastic waste that are “*destined for recycling in an environmentally sound manner and almost free from contamination and other types of wastes*”. Furthermore, in the case of non-hazardous waste, the contract between the exporter and importer that is required to be submitted to the Department must include liability for environmental cleanup in the case of an incident. The proposed additions to the Regulations are pursuant to the amendment of the Basel Convention in 2019 to include plastic waste as a regulated material.

Following the submission of an application as contemplated above, the Department must issue a decision in the form of a consent with conditions, or refusal with reasons. Once a consent has been granted, the provisions of regulation 11 of the Regulations become relevant –

- at least seven days before the shipment of waste reaches the port, the importer or exporter, as the case may be, must submit a movement document to the Department, which document is provided in Annexure 2 to the Regulations;
- in the case of imports to South Africa, the importer must provide the Department with a “*safe disposal certificate*”^[12] from the waste treatment facility within 30 days of reuse, recycling or recovery of the waste; and
- regulations 11(2) and 11(4) make provision for circumstances in which waste is not accepted by the waste treatment facility in the case of imports and exports, respectively.

Noncompliance with the obligations outlined above constitutes an offence in terms of regulation 13 of the Regulations, and a person convicted of such an offence is liable to (i) imprisonment for a period not exceeding 15 years, (ii) an appropriate fine,^[13] or (iii) both a fine and imprisonment.

It should be noted that the Minister has yet to issue a proclamation in the *Government Gazette* to bring the Regulations into force. The import and export of certain forms of waste, accordingly, continues to be regulated under the International Trade Administration 71 of 2002 (“**ITA Act**”) and the relevant regulations promulgated thereunder. Notably, in terms of the Import Control Regulations, published under GN R91 in *GG 35007* of 10 February 2012, no “*waste and scrap of whatever nature*”, with limited exceptions, shall be imported into South Africa except by virtue of an import permit issued in terms of section 6 of the ITA Act. The International Trade Administration Commission presently co-operates with the Department in considering applications for such permits.

The finalisation of the Regulations will constitute an import step in the consolidation and formalisation of the regulatory environment surrounding the import and export of waste and will ensure compliance with South Africa’s obligations under the Basel Convention.

[1] See item 3 of the Schedule to the Amendment Notice, which contemplates an amendment of the purposes clause in regulation 2 of the Regulations.

[2] Preamble to the Basel Convention.

[3] Item 1(c) of Article 4 of the Basel Convention.

[4] Defined at item 2(a) of the Schedule to the Amendment Notice as “*the national department responsible for the environment for the consideration of applications for consent for the transboundary movement of waste in South Africa*”.

[5] Defined at item 2(g) of the Schedule to the Amendment Notice as “*any movement of waste from an area under the national jurisdiction of one state to or through an area under the national jurisdiction of another state or through an area not under the national jurisdiction of any state, provided at least two states are involved in the movement*”.

[6] Defined at item 2(b) of the Schedule to the Amendment Notice as “*written authorisation prior to import, transit or export of waste, issued by the competent authority*”.

[7] Defined in section 1 of the Waste Act as “*waste that does not pose an immediate hazard or threat to health or to the environment*”, including domestic waste, building and demolition waste, business waste, inert waste, or “*any waste classified as non-hazardous waste*” in terms of the regulations made under section 69 of the Waste Act.

- [8] Defined at item 2(d) of the Schedule to the Amendment Notice, read together with the Waste Act, as *“any waste that contains organic or inorganic elements or compounds that may, owing to the inherent physical, chemical or toxicological characteristics of that waste, have a detrimental impact on health and the environment”*, taking into account South Africa’s obligations in terms of international agreements.
- [9] Defined at item 2(e) of the Schedule to the Amendment Notice as *“waste that is unsorted”*.
- [10] Defined at item 2(f) of the Schedule to the Amendment Notice as general waste, as defined in the Waste Act, taking into account South Africa’s obligations in terms of international agreements.
- [11] A list of Category Y48 plastic waste is set out in Annexure 4 of the Amendment Notice.
- [12] Defined in regulation 1 of the Regulations as *“a document which is issued by the waste treatment facility confirming the acceptance and management of the waste”*.
- [13] No indication has to date been provided as to what would constitute an *“appropriate fine”* for purposes of the Regulations.



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