



NATIONAL ENVIRONMENTAL MANAGEMENT: WASTE MANAGEMENT BILL

SUBMISSION TO PARLIAMENT

BUSINESS UNITY SOUTH AFRICA

INTRODUCTION

Business Unity South Africa (BUSA) is a confederation of chambers of commerce and industry, professional associations, corporate associations and unisectoral organizations. In that role it represents South African business on macro-economic issues that affect it at the national and international levels (Annexure A sets out the member organizations affiliated to BUSA). BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and thereby create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

BUSA welcomes the opportunity to make a submission on this important Bill. BUSA submitted extensive comments on the version of the Bill published for public comment and is pleased to note that many comments have been accommodated in the new version.

BUSA believes that the Bill is an important step towards harmonising the approach to waste management, many aspects of which are dealt with at provincial and municipal level. Currently different municipal areas have different requirements for the same activities specified in the Bill. The requirements for registration in respect of transportation of waste differ from municipality to municipality.

It is not always clear what problems government are targeting for attention through the legislation. Hence, it has not always been possible to present alternative approaches to dealing with a problem.

However, there remain areas of concern that we would like to address in this submission. The submission covers the following key areas of concern:

- Definitions
- Alignment with other legislation and policies

- Role of the private sector
- Transfer of facilities and land
- Implementation of the Bill
- Transitional provisions
- Compliance with international obligations
- Regulatory impact assessment

DEFINITIONS

“ **acceptable exposure**” this definition remains problematic as it implies that a risk based approach is not required and that a single maximum permissible limit can be established without reference to the circumstances.

“**disposal**” Thermal disposal appears to be excluded from the definition. In other words incineration without energy recovery is not disposal. If this is so a number of incineration activities would not be covered by the legislation.

“**general waste**” If general waste is to be defined as non hazardous as seems to be the case then it should refer to the intrinsic nature of the waste as non hazardous, not the potential risk or threat as is the case here. The way the definition is currently worded, the reference to the posing of an “immediate hazard” in fact implies that a waste that poses a long term hazard will also be “general waste” which is surely not the intention.

“**hazardous waste**” the definition is improved from the previous version but remains technically unsound. It is technically inappropriate to refer to “elements of compounds” as if the elements can be separated from the compounds. Chemical compounds are made up of elements. The inherent characteristics of the waste are as a result of its components. A better definition may be the following:

Any waste that as a result of its composition has a detrimental impact on health and the environment.

“waste”

The definition of waste, although it has been constructively amended, is still problematic. For example:

- subsection (b) implies that if the generator cannot use the substance for production, reprocessing or consumption, it would constitute waste, even though the generator may have another use for it (e.g. as a fuel), or the substance may have been given to another person who does have a use for it. It is not clear why this is needed as if the generator has no further use for the material, it would be unwanted etc in any case.
- subsection (d) mere “identification” by the Minister is insufficient, the definition must require that this be done by publication of a notice or regulations in the *Gazette*;

- the proviso at the end of the definition has the effect that a by-product will not be waste even if it is unwanted or discarded by the generator or any other person; should be qualified as “unless unwanted etc”

the word “reduced” must be deleted from the final paragraph of the definition because it is nonsensical to provide that if a waste stream is reduced the remaining waste ceases to be waste (the alternative interpretation that the “reduced” portion ceases to be waste is even more absurd because if waste reduction is successful then the “reduced” portion is never created). It is proposed that the following definition as used by the European Union would have the same effect.

“waste” means any substance or object which the holder discards or intends or is required to discard”

“waste management activity” currently means any activity published by notice in the *Gazette* under section 19, and includes amongst others, the importation and exportation of waste and the generation of waste, including the undertaking of any activity or process that is likely to result in the generation of waste and the reduction, re-use, recycling and recovery of waste.

The control that needs to be exercised in respect of importation and exportation is the transboundary movement of the material not the handling of the waste itself and as such should be regulated in terms of the International Trade Administration Act in terms of a policy developed by the Department of Environmental Affairs and Tourism.

Experience has already shown that control of imports and export control is most successfully carried out if there is a single control mechanism where all relevant roleplayers exercise their constitutionally assigned responsibilities in a co-ordinated manner. The import and export of waste should therefore not be regulated in terms of section 19 but rather in terms of a special section along the following lines:

“Waste” may not be imported or exported except in accordance regulations promulgated in terms of section 69(j).

As far as generation is concerned, the inclusion of this activity for possible regulation in terms of section 19 creates the possibility of production processes themselves being regulated in terms of the Waste Management Act, when it is already controlled by a number of other environmental laws. The inclusion of this activity is also not necessary when read in conjunction with the definition of waste as “unwanted etc “.

ALIGNMENT WITH OTHER LEGISLATION AND POLICIES

BUSA welcomes the provision for consultations with other departments, where overlapping jurisdiction may apply. However, there are a number of cases where such consultation is not sufficient. While the consultation with other departments is supported the Bill still leaves significant room for uncertainty. It is recognized that the Promotion of Administrative Justice Act (Act 3 of 2000) provides for organs of state to provide reasons for their decisions. Stakeholders should not have to invoke

that legislation in order to engage with the Minister on decisions that he/she is empowered to take in terms of this legislation.

Areas of potential duplication or overlapping jurisdiction that need to be addressed include the following;

Section 14

Section 14 provides for a waste to be declared a priority waste and requires consultation with the Ministers of Trade and Industry and Finance, if the declaration under is likely to have a significant impact on the national economy. BUSA welcomes the requirement but believes that the use of the qualifying term “national” may lead to interpretation difficulties. Any economic impact as a result of such a declaration needs to be considered.

Section 25:

Section 25. (1) allows the Minister, an MEC or a municipality to, require any person or category of persons who transports waste for gain to register with the relevant waste management officer in the Department, province or municipality, as the case may be; and to furnish such information as is specified in that notice or as the waste management officer may reasonably require.

Section 25 (5) provides for a person who is in control of a vehicle, or in a position to control the use of a vehicle, that is used to transport waste for the purpose of offloading that waste to be considered to knowingly to have caused that waste to be offloaded at the location where the waste is deposited, unless the contrary is proved.

The transport of hazardous waste, as a dangerous good, is already comprehensively regulated under the National Road Traffic Act and Regulations 225 (Chapter 8) the roles, responsibilities of various role players including consigner, operator, transporter and driver are adequately dealt with therein. Detailed requirements are set out in a number of South African National Standards, which have been incorporated in the regulations.

Another concern here is that the definition of “hazardous waste” is not aligned with the definition of “dangerous goods” as used in the transport legislation, which means that classification of waste may have to be undertaken separately from other material.

The Bill contains no indication that the necessary steps will be taken to avoid duplication.

Section 36

BUSA welcomes the provision in this section that consultation must take place with the Minister of Water Affairs and Forestry in managing contaminated land.

Sections 44 -51

These sections deal with applications for licences and should be read in conjunction with schedules A and B.

During discussions with the Department assurances were given that there would be no duplication of requirements between the EIA regulations and the licensing requirements in terms of this Bill. In order for this to be achieved, the listing of activities requiring a licence should be identical to those in EIA regulations. This is currently not the case. It is therefore proposed that the EIA regulations be amended to ensure that there is no difference between the two lists, once the Bill has been promulgated.

ROLE OF THE PRIVATE SECTOR

The Bill is dominated by a command and control approach and does not provide for a mix of regulatory instruments as provided for in the 1999 National Waste Management Strategy. The only incentive directly provided for is the proposed award.

Most of the recycling initiatives to date have been initiated and maintained by the private sector with minimal intervention by Government. It is not clear that the economic value of waste is being recognised and the traditional contributions of the private sector particularly in the area of waste minimisation and recycling do not appear to be recognised.

In this regard the specific MOUs between the private sector and DEAT that are already in place or are in the process of being negotiated should be accorded the status of industry waste management plans.

Although the Bill is a framework instrument and thus does not provide detailed prescriptions it is already clear that the economic impact of the Bill is likely to be significant. Although BUSA understands that DEAT had undertaken to carry out a cost benefit analysis, as explained below this does not appear to have been done.

There are a number of provisions in the Bill which could have a significant impact on the private sector and while these provisions are not opposed in principle thorough engagement with affected sectors is critical to ensure that there are no unintended consequences.

Section 18. (1) provides for the Minister after consultation with the Minister of Trade and Industry to identify a product or class of products in respect of which extended producer responsibility applies. BUSA welcomes the introduction of the provision for consultation with affected sectors. However there is no provision for reasonableness of the initial decision in the first place. For the Minister to introduce these measures he/ she needs to have reasonable grounds for initiating the process in the first place.

Section 27 (1) requires an owner of privately owned land to which the general public has access, to ensure that sufficient containers or places are provided to contain litter that is discarded by the public and that litter is properly managed on the site.

It is not clear why reference to the municipality providing litter containers has been removed. Municipalities also have an obligation to provide such facilities and this is normally the case.

TRANSFER OF LICENCES AND LAND

Transfer of a remediation site

Section 40(1) provides that no person may transfer contaminated land without informing the person to whom that land is to be transferred that the land is contaminated and, in the case of a remediation site, without notifying the Minister or MEC and complying with any conditions that are specified by the Minister or MEC, as the case may be and that for the purposes of ensuring compliance with this section, the Minister must notify the relevant Registrar of Deeds appointed in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), of any land that has been declared as a remediation site.

The transfer of land is already an increasingly complex matter and it is not clear that the Deeds Office has in fact been consulted on the practicality of this provision. It is proposed that before this provision is enforced agreement be reached with the Deeds office as to the procedure to be followed and that guidance be provided on how it is to be done.

Transfer of waste management licences

Section 52 provides for the transfer of ownership of a waste management licence.

The concept of “ownership of a waste management activity” appears to be a novel one and is likely to create problems. It is proposed that this be amended to “reflect the transfer of the licence by the holder”.

Although the public participation requirement, when licences are to be transferred, is only triggered when the environment or the rights or interests of other parties are likely to be adversely affected, the Minister or MEC must request the applicant to conduct a consultation process that is appropriate in the circumstances. In practice it may be difficult to determine what consultation is appropriate. This may not be easy to determine. Furthermore, any such transfer must, where an integrated licence was issued, comply with the requirements of that other legislation. For example, there may be circumstances where an integrated permit is issued that specific legislation does not make allowance for the transfer of licences. This may place such an applicant in an invidious position as his licence may be partially valid.

Again guidance in the implementation of this provision would be useful.

IMPLEMENTATION OF THE BILL

While the framework nature of the Bill is acknowledged, implementation of the Bill without the necessary technical support in terms of standards and guidelines would be extremely problematic. Experience with the implementation of the EIA regulations has demonstrated the high cost and other unintended consequences if the necessary

technical support is not available.

During engagements with the Department on the draft Bill, Business repeatedly raised concerns about the implementability of the Bill in its current form. The Bill in its current form provides an enabling framework within which a number of detailed regulations will be promulgated. The Waste Management Bill is a Framework Act like the Air Quality Act.

During parliamentary hearings on the Air Quality Bill, Business and other stakeholders raised concerns about implementability of that Bill. At that time assurances were given that the National Air Quality Framework as required in the Bill would cover the technical requirements essential for implementation of the Act. The AQA requires that this framework be published within two years of promulgation. The deadline for publication was thus September 2007.

The National Air Quality Framework has now been published and still does not contain all the technical details required in terms of the Act. This means that two years after promulgation of the Act, Business remains uncertain as to standards that must be met.

BUSA therefore remains concerned that notwithstanding the requirement in the Waste Management Bill that a National Waste Management Strategy covering the numerous technical requirements essential for implementation of the Bill must be produced within two years, the same unsatisfactory situation which now prevails in the case of the Air Quality Act, will also occur with this Bill.

In addition there is no deadline for the prescription of the norms and standards (Section 7(1)) that are essential to the successful implementation of the Bill.

The different sections of the Act, should only become effective when capacity and procedures within the appropriate regulatory authority are functional and the necessary regulations and standards are in place. It is therefore proposed that provision be made in the Bill for phased effective dates dependant on the gazetting of the necessary standards and guidelines.

BUSA therefore requests that the Committee consider requiring that a clear work plan to develop the National Waste Management Strategy be developed and released publicly before the Bill is enacted.

Section 17(1) provides for any person who undertakes an activity involving the reduction, re-use, recycling or recovery of waste to, before undertaking that activity, ensure that the reduction, re-use, recycling or recovery of the waste “uses less natural resources than disposal of such waste”. This requirement currently does not appear to apply to decisions that the Minister may make in exercising his powers in terms of sections 6, 7, 14, 17, 18 and 28. While the underlying principle underpinning this provision is accepted, implementation is not a simple matter and it is proposed that this provision be deleted from the Bill for later inclusion in a well considered regulation.

Sections 29 – 35 deal with the requirement for industry to develop industry waste plans. As with the provision above there is no requirement for the Minister to have reasonable grounds to initiate the process in the first place. The fact that an activity is carried out in more than one province is not seen as reasonable grounds to impose such a requirement on a particular industry section.

Section 28(6) provides for the Minister to require an independent person to prepare the plan. The circumstances under which this additional burden can be imposed should be set out.

Section 28(7) allows industry to submit an industry waste management plan without being required to do so by the Minister. It appears as if in such a case the plan may be subjected to public consultation.

The concern that we had with the peculiar public participation process for the submission of industry waste management plans has not changed. This particularly relates to the requirement that once the plan has been prepared, it does not have to be circulated to that industry for comment before it is approved. This may well give rise to a procedure which breaches the requirements of the Promotion of Administrative Justice Act.

Section 46(1) provides for the licensing authority to require applicants, at own cost, to appoint an independent and suitably qualified person to manage an application.

This requirement should not be implemented until regulations setting out the circumstances under which such requirement would be enforced and what constitutes suitable qualifications.

COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

Any regulation that could affect a product would be required in terms of South Africa's obligations in terms of the World Trade Organisation Agreement on Technical Barriers to Trade to be subjected to regulatory impact assessment to ensure compliance with the principles of that agreement. In this regard regulations to give effect to any product requirements will require more than just consultation with the Minister of Trade and Industry.

REGULATORY IMPACT ASSESSMENT

Section 3 of the Memorandum to the Bill purports to be a regulatory impact assessment. However it is purely an assessment of the financial implications of the Bill for the state. A regulatory impact assessment is not only about cost but should cover at least the following elements:

- The objectives of the legislation,
- The quantifiable risks that the legislation is addressing,
- The options and alternatives to legislation,
- The sectors that will be affected,
- The equity and fairness issues if any,

- The benefits and costs of each option and a comparison of the options, taking into account the following
 - o The distributional impacts, if any, e.g. transfer of income, redistribution of opportunities, etc.
 - o The sectors (society or industry) that will bear the costs and benefits of each option and
 - o The unintended consequences and indirect costs, if any, and how they will be addressed.
 - A recommendation for the preferred option, with a motivation in terms of the impact assessment analysis and in particular with a focus on the costs and benefits of the option.
- The impact assessment should also make provision for:
- o Conformity assessment and compliance requirements;
 - o Enforcement arrangements.

While BUSA appreciates the intention of the Department to undertake a Regulatory Impact Assessment, the Memorandum does not reflect such an assessment as envisaged in the Government's soon to be adopted Regulatory Impact Assessment system.

While BUSA would have preferred a proper assessment to have been carried out and was assured by the Department during consultations that at least a cost benefit analysis would be done, it is recognized that it may not be desirable to delay finalization of the Bill until such time that one is completed. However many of the provisions of the Bill are likely to have significant impacts on Business and it is recommended that any regulations under the Act be subjected to a Regulatory Impact Assessment, as envisaged in the Government's Programme of Action

Business Unity South Africa (BUSA) Members

1. African Minerals and Energy Forum (AMEF)
2. Agri SA
3. AHI
4. Association for the Advancement of Black Accountants of Southern Africa (ABASA)
5. Association of Black Securities and Investment Professionals (ABSIP)
6. Automotive Sector
 - Automobile Manufacturers Employers' Organisation (AMEO)
 - National Association of Automotive Component and Allied Manufacturers (NAACAM)
 - National Association of Automobile Manufacturers of South Africa (NAAMSA)
 - Retail Motor Industry Organisation (RMI)
7. Banking Association
8. Black Business Executive Circle (BBEC)
9. Black Information Technology Forum (BITF)
10. Black Lawyers Association (BLA)
11. Black Management Forum (BMF)
12. Business Leadership South Africa
13. Casino Association of South Africa (CASA)
14. Chambers of Commerce and Industry South Africa (CHAMSA)
15. Chamber of Mines of South Africa (COM)
16. Chemical and Allied Industries' Association (CAIA)
17. Confederation of Associations in the Private Employment Sector (CAPES)
18. Congress of Business and Economics (CBE)
19. Construction Sector
 - Master Builders South Africa (MBSA)
 - South African Federation of Civil Engineering Contractors (SAFCEC)
20. Financial Planning Institute of Southern Africa (FPI)
21. Life Offices Association (LOA)
22. National African Federated Chamber of Commerce and Industry (NAFCOC)
23. NAFCOC Construction (formerly NAFBI)
24. National African Farmers Union of South Africa (NAFU)
25. National Black Business Caucus (NBBC)
26. National Industrial Chamber (NIC)
27. Retailers' Association (RA)
28. Road Freight Employers Association (RFEA)
29. South African Black Technical and Allied Careers Organisation (SABTACO)
30. South African Chamber of Business (SACOB)
31. South African Communications Forum (SACF)
32. South African Institute of Black Property Practitioners (SAIBPP)
33. South African Insurance Association (SAIA)
34. South African Leisure & Tourism Association (SALTA)
35. South African Petroleum Industry Association (SAPIA)
36. Steel and Engineering Industries Federation of South Africa (SEIFSA)
37. United Businesswomen of South Africa (UBSA)