BUSINESS UNITY SOUTH AFRICA

SUBMISSION BY BUSINESS UNITY SOUTH AFRICA ON THE NATIONAL ENVIRONMENTAL MANAGEMENT LAWS AMENDMENT BILL 2015

19 April 2018

BACKGROUND

BUSA is a confederation of business organisations including chambers of commerce and industry, professional associations, corporate associations and unisectoral organisations. It represents South African business on macro-economic and high-level issues that affect it at the national and international levels. BUSA's function is to ensure that business plays a constructive role in the country's economic growth, development and transformation and to create an environment in which businesses of all sizes and in all sectors can thrive, expand and be competitive.

As a principal representative of business in South Africa, BUSA represents the views of its members in a number of national structures and bodies, both statutory and non-statutory. BUSA also represents businesses' interests in the National Economic Development and Labour Council (NEDLAC).

INTRODUCTION

BUSA welcomes the opportunity to comment on these amendments to a range of environmental laws. The attempts to address concerns raised by BUSA and its affiliates are appreciated. However, there are a number of areas where the amendments are in fact retrogressive. This is particularly concerning in an economic environment, which has a large number of companies in Business Rescue or heading in that direction.

The fact that a socio-economic impact assessment was undertaken on this Bill is welcome. The fact that the result of the assessment was made public is even more

welcome. However, it is clear from the report that the results of the assessment do not reflect the reality experienced by business.

This may be because the assessment was undertaken at too high a level to really assess impact. The Bill amends eight different laws, some of which continue to present significant challenges in implementation and in some cases significant costs. There is no indication in the assessment as to how the changes will in fact address the concerns on implementation raised by Business over a number of years.

For example, the SEIAS report reflects a bias against business in that it is only seen as the cost bearer. The intention of many of the amendments was in fact supposed to address the challenges being experienced by industry and to reduce the cost. The intention of providing clarity on interpretation and implementation has not been achieved and in some cases, amendments have exacerbated the current situation.

It is also noted with concern that the report reflects mining and manufacturing to have supported the proposed amendments. This is not correct.

The comments presented below demonstrate the areas in which the stated intention of the Bill has not been met. These comments are intended to complement the detailed comments submitted by BUSA members.

AMENDMENT OF ACT 107 OF 1998 AND AMENDMENTS

The amendments are generally intended to give effect to the “one environmental system” for mining and the challenges presented by the inclusion of mining residues and deposits by the inclusion of these materials in the Waste Act.

While a number of the amendments are an improvement, the current situation facing the mining industry in respect of environmental legislation remains extremely challenging. See detailed submission from the mining industry.

Amendment of section 28

It is noted with concern that powers to issue a directive in terms of section 28 have now been extended to municipalities, which means that a municipality will essentially be granted the same powers in terms of this section as national and provincial government. This could result in the same contravention of the duty of care being addressed by more than one regulator.

In addition, if the national and provincial competence is to be extended in this regard, the capacity to properly carry out these powers must be thoroughly investigated. If this change were to be adopted, which is not supported, as a minimum, this power must be restricted to municipal officials who are also designated as appropriately graded environmental management inspectors and who are required, prior to issuing such a notice to consult with the provincial and national departments.

BUSA does not support the extension of these powers to municipalities, particularly since the proposed extension does not, on the basis of the information available to BUSA, meet the legal prerequisites for doing so in terms of either the Constitution or the Local Government: Municipal Systems Act, 2000.

It is also BUSA's view that where municipalities are empowered to issue directives, it is possible that there would be unforeseen consequences, particularly in relation to exhausting internal remedies and the potential for conflicting decisions, since the Local Government: Municipal Systems Act, 2000 provides for appeals in respect of decisions made by municipal officials.

It goes without saying that the references to municipalities in this context which appear throughout the Bill must be removed.

Amendment of section 43 of the Act

Inclusion of the phrase 'other administrative enforcement notice issued in terms of this Act' is poor drafting and undermines the rule of law principle. The rule of law requires that

administrative action by state officials be based on clear and unambiguous powers contained in a law of general application. In NEMA, these take the form of directives, any 'other administrative enforcement notices' will not have the requisite legal backing and will be ultra vires. It is therefore problematic to include a 'catch-all phrase' in the enforcement mechanism as it is an attempt to provide legal recognition to notices that do not have the requisite legal backing in the first place.

Amendment of section 1, Act 10 of 2004

Certain categories of fish and wildlife have recently been listed as 'invasive species' in terms of the NEMBA and this amendment now places an obligation to eradicate these species as part of the 'control measures' required to be implemented. In aquaculture for example, economically important species such as trout have been declared as invasive. Trout farming is a highly regulated activity and practitioners are subject to strict standards with regards to a number of elements including water quality and measures to prevent possible escape of live specimens or propagating material. In this sense 'control' measures are taken to prevent farmed fish from escaping man-made tanks and entering into natural watercourses. The change in definitions however now oblige practitioners to eradicate listed species as a control measure. In other words, they are required by law to destroy their entire stock as a 'control' measure. These amendments fundamentally blur the distinctions between rational control measures and the destruction of all listed species, irrespective of their beneficial use and value to humans as well as the circumstances under which they are kept.

An eco-centric approach which disregards the social and economic consequences is not in line with the fundamental premise of NEMA which seeks to balance environmental, social and economic considerations. Detailed submissions from the industries affected can be obtained.

AMENDMENT OF ACT 59 OF 2008 AND ACT 26 OF 2014

The relocation of the definitions from Schedule 3 of Act 26 to the body of the Act is a welcome amendment. However, it is not clear why some of the definitions themselves have been amended.

Amendment of Section 1 of Act 59 0f 2008 as amended by section 38 of Act 14 of 2013 and section 1 of Act 26 of 2014.

(d) The proposed amendment to the definition of general waste in fact reverses the improvement that was achieved in the last amendment to address practical challenges that were experienced by waste generators that officials were not accepting that once a waste had been subjected to the prescribed classification process and found to be non-hazardous that it should be managed as general waste.

The definition in Act 26 with the proposed amendment is presented below for convenience

‘‘general waste’’ means waste that does not pose an immediate hazard or threat to health or to the environment, and includes—

(a) domestic waste;
(b) building and demolition waste;
(c) business waste;
(d) inert waste; or
~~(e) any waste classified as non-hazardous waste in terms of the regulations made under section 69,~~

~~and includes non-hazardous substances, materials objects within business, domestic, inert, building and demolition wastes as outlined below:”~~

The deletion of (e) above is considered a retrogressive step and is not supported. There has never been any discussion around this being deleted and the failure to delete it reinstates the original challenge that the amendment in Act 26 was intended to eliminate. No response was received to BUSA’s opposition to this proposal in the original version of the Bill.

It is recommended that this amendment not be implemented.

The deletion of the rest of the text is an improvement as the requirements are already incorporated into the definitions of the specific wastes.

(g) The proposed amendment to the definition of “recovery” reverses the amendment made in Act 26. Again, no response was received on BUSA’s comment on this and it seems a retrogressive step, given that it is understood that the Department wishes to promote beneficial use of waste.

(j) (i) the whole point of this provision is that once a re-use, recovery or recycling process has been approved, the waste subjected to such process ceases to be waste. It appears as if the intention here is to regulate after the material has ceased to be waste, which contradicts the intention.

All this does is to return to the original situation, where the very activities which are considered beneficial are hampered by the requirement to obtain a license. The requirement that recovery etc. must take place within the timeframes contained in the approval presents challenges because once approval has been obtained it should become an ongoing process, so a timeframe could result in a need to be continuously applying for a license, which is clearly ridiculous. The addition of the requirement in respect of conditions is also not understood as the situation could arise where conditions may have to be met after the recycling has taken place. Examples of this have already been experienced by companies.

(l) to be read with amendment of section 74 of the Act. This is not supported.

42 Amendment of section 74 of the Act

The exclusion of any possibility of exemption from the requirement to obtain a license is not understood. In the discussions on the challenges of implementation of the Waste Amendment Act, it was explained that the provision for exemption was in fact available

to address specific challenges. It is requested that consideration be given to re-instating the current provision, which would bring this act in line with other environmental legislation in respect of exemptions.

47. Schedule 3

Title of schedule is: “Sources of waste”. It is clear from the text of the definition that in the first instance a determination of whether a material is waste or not is derived from the definition. The list of sources is intended to support implementation of that

The terms “waste resulting from” and “waste from” are therefore superfluous and should be deleted.

A better heading would be “potential sources of waste”.

There are a number of cases where the subsections of the list are not sources of waste but actually the material itself. This must be corrected for consistency in approach. Significant challenge in the implementation of this Act continue to be experienced, it is therefore imperative that these amendments in fact improve clarity not further confuse the issue.

Where these cases have been identified they are listed below:

1(d): This is material not a source.

6, 7 and 8 refer to the use of certain materials as being a source of waste. This approach is used by the European Union but is applied in a completely different manner to what is contemplated in this Act. The inclusion of the term “use” essentially contradicts the definition of waste as use implies that the material has not been rejected, discarded or disposed of. It therefore cannot be waste and be used at the same time. This reflects the need to reconsider the use of a list at all, and in particular a list that in the context of the current definition of waste makes limited sense.

6(d) This is a specific waste as opposed to a potential source of waste as is understood to be the intention of the heading. It can also not be a subset of a process which what 6(c) refers to.

(e) This is a by-product of wastewater treatment and is therefore covered 19.

13: all of the subsections of this section are in fact describing wastes not sources

14: the subsection is describing wastes not sources

15: Both the heading and the subsection refer to potential wastes not sources

16: Both the heading and the subsections refer to potential wastes not sources. (c): unused products are not necessarily waste. (e) gases in pressure containers may not be waste and are not the same as discarded chemicals. In addition, chemicals are covered under sections 6 and 7 of the list so there is no need to list them again and risk the confusion that this creates.

(f) batteries and accumulators are not per se waste

(i) oxidising substances are not necessarily waste and are covered in sections 6 or 7

(j) such wastes are dealt with under the water act and should not be listed here.

17: These are materials not processes

18: Heading and subsections refer to waste not the source

19: These are all waste management activities which are subject to licensing requirements which would include any waste generated by them. The inclusion of them here adds no value at all and should be reconsidered.

20: heading and subsections refer to material not source.

Generally, the inclusion of a list such as this is not only unhelpful it also exacerbates the already significant challenges in interpretation presented by this Act. BUSA therefore recommends that it be deleted. If the Department insists on proceeding with a list it needs to be amended to address the challenges presented above and it is recommended that consideration be given to the inclusion of text along the following lines in case further implementation problems arise. This amendment has taken at least three years to achieve.

“The Minister may amend Schedule 3 by Notice in the Gazette. “

Amendment of Section 4 of the Act

Supported

Amendment of sections 34A and 34C

These amendments remove the Waste Management Bureau from reporting to the Director General to a body outside the Department which reports directly to the Minister. The increased independence of this body is a concern to BUSA, particularly given the lack of clarity on the functions and powers of the entity. In addition, the legislation contemplated in 13 B of the Act has still not been promulgated so the sources of funding remain unclear. In addition, section 13 B of the Act appears to provide for earmarked taxation which as far as BUSA is aware is not supported by National Treasury. Although section 34D refers to funds from waste management charges, BUSA is not aware of such charges being prescribed. All of the activities listed except where rendered by a municipality are carried out by the private sector with not funding from the state. The objects and functions of the Bureau in many respects appear to include regulatory functions which should be carried out by the Department. The functions of the Bureau therefore need to be much more clearly set out.

Substitution of 34F. 34G, 34H, 34I, 34J, 34K and 34L

These new sections deal mainly with the establishment and procedures of the proposed Board. BUSA does not support the establishment of a new independent entity particularly not before the recommendations on the review of state owned entities have been implemented. It is noted that funding is expected to come from amongst others income derived by the Bureau from the performance of its duties and exercise of its powers. It is unclear how these duties and powers differ from the powers and duties of the department in terms of this Act. The approach raises the concern that industry may be obliged to use the services of this entity to ensure a flow of income instead of being allowed to fulfil its obligations under the Act on its own.

There is no doubt that the proposals in respect of the entity will result in additional costs.

Insertion of 34M. 34N, 34O, 34P, 34Q, 34R, 34S, 34T, 34U, 34V, 34W, 34X, 34Y and 34Z

These provisions deal with the members of the board and of staff and should not be necessary if the functions were carried out inside the Department.

Amendment of section 37

Preparation of a remediation plan results in a cost for the site owner. Business does not support the amendment which seeks to combine the submission of a site assessment plan and remediation plan.

BUSA prefers the original approach where a remediation plan has to be specifically required once the site assessment report has been considered by Government and as contemplated in section Government has decided that one of the possible actions, of which remediation is only one, must be carried out. This would ensure that a remediation plan is not prepared unless absolutely required and provides an opportunity for the decision to be reviewed before costs are incurred.

It is not clear why the requirement to submit a site assessment report and remediation plan are required in subsection (b) (ii) when the amendment of subsection (a) already requires these submissions.
Same comment for subsection (2)(a).

Amendment of section 38

Same comment as above. Revised approach leads to a risk of remediation plans having to be submitted when they are not required. A remediation plan is intended to respond to a remediation order not be prepared before the remediation order has been issued,

Amendment of section 41

Amendment supported.

CONCLUSIONS

BUSA trusts that the Committee will find these comments will be taken into account on the deliberations on these amendments.