

**ADMINISTRATIVE PENALTIES AS A TOOL FOR RESOLVING SOUTH AFRICA'S
ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT WOES**

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ABSTRACT

South Africa's environmental resources are in serious decline, despite the constitutional environmental right, and multiple environmental protection laws. A predominant reason for this is that the criminal sanction is the default method of environmental enforcement. Even if prosecutors succeed in proving guilt beyond reasonable doubt, the fines imposed are too low to deter environmental violations.

This dissertation proposes the introduction of an administrative penalty system into SA environmental law, as this system has had positive compliance impacts in numerous jurisdictions. Administrative penalties in the Netherlands and United Kingdom (the roots of SA's civil and common law systems, respectively) are evaluated to identify best practices for administrative penalties.

In SA's environmental regime, there is an 'administrative fine' contained in section 24G of the National Environmental Management Act 107 of 1998. This is not a true administrative penalty, nor does it comply with the recommended best practices. Section 24G should either be deleted or substantially improved to meet its obligation of protecting the environment. Given the significant potential of administrative penalties to improve environmental compliance and enforcement, practical suggestions are made regarding their introduction into SA environmental law as a means to halt the current widespread non-compliance with environmental legislation.

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LIST OF ACRONYMS/ABBREVIATIONS

AEL	Atmospheric emission licence
AQA	National Environmental Management: Air Quality Act 39 of 2004
BRE	Better Regulation Executive
C&E	Compliance and enforcement
CA	Competent authority
CER	Centre for Environmental Rights
DEA	Department of Environmental Affairs
DEFRA	Department for Environment Food and Rural Affairs
EA	Environment Agency
EC&E	Environmental compliance and enforcement
ECA	Environment Conservation Act 73 of 1989
EIA	Environmental Impact Assessment
ECSO	Environmental Civil Sanctions (England) Order 2010 No.1157
EMA	Environmental Management Act (Wet Milieubeheer van 13 Juni 1979)
EMI	Environmental Management Inspectorate
EPA	Environment Protection Act 1990 c.25
ETS	Emission Trading System
EU	European Union
FMP	Fixed monetary penalty
GALA	General Administrative Law Act (Algemene Wet Bestuursrecht van 4 Juni 1992)
GHG	Greenhouse gas
IAP	Interested and affected party
IEM	Integrated environmental management

LN	Listing Notice
NEA	Netherlands Emissions Authority
NECER	National Environmental Compliance and Enforcement Report
NEM	National Environmental Management
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMLAB 2	National Environmental Management Laws Second Amendment Bill [B13-2012]
NPA	National Prosecuting Authority
NWA	National Water Act 36 of 1998
ORO	Offence Response Options (Environment Agency Offence Response Options Operational Instruction 1430_10 2013)
PAA	National Environmental Management: Protected Areas Act 57 of 2003
RES	Regulatory Enforcement and Sanctions
RGE	Regulation, Enforcement and Governance
SA	South Africa
SAEO	South Africa Environment Outlook (Department of Environmental Affairs & Tourism South Africa Environment Outlook A report on the state of the environment 2006)
SCA	Supreme Court of Appeal
SEMA	Specific environmental management Act
UK	United Kingdom
UT	Upper Tribunal
VMP	Variable monetary penalty
WML	Waste management licence
WRA	Water Resources Act 1991 c.57

1 CHAPTER 1: INTRODUCTION

*'[T]he condition of the South African environment is deteriorating. Increasing pollution and declining air quality are harming people's health. Natural resources are being exploited in an unsustainable way, threatening the functioning of ecosystems. Water quality and the health of aquatic ecosystems are declining. Land degradation remains a serious problem. Up to 20 species of commercial and recreational marine fish are considered over-exploited and some have collapsed.'*¹

Recent reports reveal that most of South Africa's (SA) terrestrial ecosystems, and over 80 per cent of its river systems, are threatened.² The quality and quantity of water reserves are declining. This has an adverse impact on human health, exacerbated where there is inadequate sanitation. Marine wastewater pollution is escalating. About half of SA's wetlands have been destroyed.³ Alien invasive species are multiplying – aggravating impacts on biodiversity and water availability.⁴ Waste management and access to waste services are poor.⁵ Uncontrolled coastal development poses serious environmental threats.⁶ Air quality is deteriorating, and the population is increasingly being exposed to dangerous ambient pollutant concentrations, with their accompanying serious health risks. The negative impacts of climate change - for the environment, and for human health and well-being – are mounting.⁷

This dire situation persists despite the fact that the state is constitutionally obliged to ensure environmental compliance and enforcement (EC&E). In addition to a constitutional environment right,⁸ there is a surfeit of environmental legislation compelling compliance with

¹ South Africa Environment Outlook (SAEO) 2.

² Outcome 10 Delivery Agreement 2,32.

³ OECD *Environmental Performance Reviews* 29-30,33,35; Outcome 10 2,10-11,14-15; National Water Resource Strategy 2 (GN845 GG36736 of 2013-08-16) ii,7-15,18,25-26,37-42,72,75-79; SAEO 3-4,9,11,28-30,34-39.

⁴ OECD *Performance* 31-32; Outcome 10 2,13; SAEO 10-14,24-27,30-31,35-39; National Biodiversity Strategy and Action Plan 2-3,13-27; National Biodiversity Framework (GN813 GG32474 of 2009-08-03) vii,15-23,37-40,42,50-54; National Biodiversity Assessment 2-17,31-35,47-58,61-62,65-93,98-146.

⁵ OECD *Performance* 34; DEA Strategic Plan 2012-2017 15; Outcome 10 10,12,30; SAEO 34-35,38; National Waste Management Strategy (GN344 GG35306 of 2012-05-04) 15.

⁶ DEA Strategic Plan 2012-2017 16; OECD *Performance* 22-23; SAEO 38.

⁷ OECD *Performance* 23,33; Outcome 10 2,10-11,13,24,29; SAEO 4-7,10,24-25,32-39.

⁸ S.24 of the Constitution of the Republic of South Africa, 1996 guarantees everyone the rights to an environment not harmful to health or well-being, and to have the environment protected, through reasonable

and facilitating enforcement of section 24 - the environment right in the Constitution of the Republic of South Africa, 1996 (Constitution). The National Environmental Management Act 107 of 1998 (NEMA) is the framework legislation for environmental protection.⁹ NEMA and the various specific environmental management Acts (SEMAs),¹⁰ are among the 'reasonable legislative measures' for environmental protection envisaged by the environment right.

The combination of widespread non-compliance with legislation designed to protect the environment, and the poor enforcement of these laws¹¹ mean that constitutional rights are not being realised, and environmental governance is subverted.¹² This is so even though NEMA contains several provisions intended to make the criminal sanction more effective.¹³ Several commentators argue that this poor EC&E is partly because criminal sanctions imposed by criminal courts are the default enforcement measure of SA's environmental authorities.¹⁴ This dissertation advocates the use of an administrative penalty system – with

legislative and other measures that: prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and social development.

- ⁹ Glazewski 'NEMA' in *Environmental Law* 7-6; van der Linde 'NEMA' in *Environmental Management* 197; Du Plessis 'Environmental Compliance' in *Compliance&Enforcement* 379.
- ¹⁰ Environment Conservation Act 73 of 1989 (ECA); National Water Act 36 of 1998 (NWA); National Environmental Management: Protected Areas Act 57 of 2003 (PAA); National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA); National Environmental Management: Air Quality Act 39 of 2004; National Environmental Management: Integrated Coastal Management Act 24 of 2008; National Environmental Management: Waste Act 59 of 2008; and World Heritage Convention Act 49 of 1999.
- ¹¹ 2011-12 National Environmental Compliance and Enforcement Report 2; SAEO 14-15,22,29; Kidd & Retief 'Environmental Assessment' in *Environmental Management* 995; Craigie et al 'Environmental Compliance&Enforcement Institutions' in *Environmental Compliance&Enforcement* 89,95-96; Fourie 2009 (16)2 SAJELP 95,97-102; Kidd 'Criminal Measures' in *Environmental Compliance&Enforcement* 265; Svatikova *Economic Criteria for Criminalization* xiv,39-42,108-109,145; van Zeven 2010(22) *Georgetown Intl Env'tl Law Review* 241-242,244-245,247.
- ¹² Feris 2010 (13)1 *PER* 77; Kotze 'Environmental Governance Perspectives' in *Environmental Compliance&Enforcement* 108-109; Craigie et al 'Dissecting Environmental Compliance&Enforcement' in *Environmental Compliance&Enforcement* 45-47; Paterson&Kotze 'Effective Environmental Compliance&Enforcement' in *Environmental Compliance&Enforcement* 374,376; Müller 'Environmental Governance' in *Environmental Management* 94,96.
- ¹³ Damage from environmental crimes and rehabilitation costs are recoverable from polluters (s.34). Offenders can be ordered to: repay the financial advantage (and investigation and prosecution costs); or remediate. Employers and company directors who fail to take reasonable preventative steps are presumed criminally liable for their employees' or company's environmental crimes. Courts may: withdraw authorisations; disqualify offenders (s.34C); and order forfeiture (s34D). Part of a fine can be paid to anyone whose evidence led to conviction (s.34B). S.34G provides for admission of guilt fines.
- ¹⁴ Fourie 2009 (16)2 SAJELP 95-96,126-127; Bosman & Boyd 2008 *INECE Proceedings* 493-494; Kidd 2002 (9)1 SAJELP 21,50; Faure&Svatikova 2012 (24)2 *JEL* 254,281,285; Watson 2005 (17)1 *ELM* 3,5; Better Regulation Executive (BRE) *Sanctioning post-Hampton* 3,13,22; Macrory *Regulatory Justice* (Macrory Report) 7,14,18; Macrory 2009(11) *ELR* 69-71; Macrory *Consultation Document* 5,12,35,43-44; Macrory *Regulation, Enforcement and Governance* 12-13.

non-criminal fines generally imposed by administrative officials¹⁵ - as a tool to help resolve SA's EC&E woes.

Compliance with laws depends on the risk of being caught and convicted, and on the severity of punishment imposed,¹⁶ all of which are currently minor in SA environmental law. Environmental crime is both under-investigated and under-prosecuted.¹⁷ If an offence is detected and a decision made to prosecute, the prosecutor must prove the violator's guilt beyond reasonable doubt in criminal court.¹⁸ Even if this onerous burden of proof is met and a fine is imposed, it is generally far too low to deter non-compliance - particularly when the benefits of breaking the law are significant.¹⁹

This is supported by statistics in the National Environmental Compliance and Enforcement Reports (NECERs) released annually by the Department of Environmental Affairs (DEA).²⁰ NECERs contain details of C&E action taken by the Environmental Management Inspectorate (EMI) – a network of environmental enforcement officials. The EMI has wide-ranging investigative,²¹ inspection,²² enforcement²³ and administrative powers²⁴ to

¹⁵ Macrory&Woods *Environmental Civil Penalties* 4,6; Hampton *Reducing Administrative Burdens* 40; BRE *Sanctioning post-Hampton* 11,17-18,24-25; Macrory Report 38,41,43,45; Svatikova *Criminalization* 39,85,107,109,145; Faure&Svatikova 2012 (24)2 *JEL* 256,259,282; Kidd 2002 (9)1 *SAJELP* 37,39; *INECE Principles Environmental Compliance&Enforcement* 65; fn.66.

¹⁶ Kidd 'Criminal' in *Environmental Compliance&Enforcement* 241-242; Minzner 2012(53) *WMLR* 860,877; Rechtschaffen 1998(71) *SCLR* 1186-1188; Sherman 2007(23) *JLUEL* 99,105; Babbitt et al 2004(15) *DELPH* 39-40,46; BRE *Sanctioning post-Hampton* 5,14-15; Svatikova *Criminalization* 108-109,181; OECD *Administrative Fines* 9-10; fn.55,156-157,161.

¹⁷ Fourie 2009 (16)2 *SAJELP* 95,98-99; Kidd *Environmental Law* 269-270,272-273; Craigie et al 'Institutions' in *Environmental Compliance&Enforcement* 98; Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 306; Kidd 'Criminal' in *Environmental Compliance&Enforcement* 242-243; Faure&Svatikova 2012 (24)2 *JEL* 258-259,281-282; fn.91-92.

¹⁸ Fourie 2009 (16)2 *SAJELP* 95,120,124; Svatikova *Criminalization* 109; Faure&Svatikova 2012 (24)2 *JEL* 259,282; *INECE Principles* 71-72; Davis 2010 *Acta Juridica* 412,415.

¹⁹ Fourie 2009 (16)2 *SAJELP* 95,97—103,105,127; Babbitt et al 2004(15) *DELPH* 3,44-45,47-48,54,63; Svatikova *Criminalization* xiv,39-42,108-109,145,182; Lynott 2010 (17)1 *IPELJ* 12,14; BRE *Sanctioning post-Hampton* 3 5-6,14-15,21-22; Macrory Report 14-16,20-24,54; van Zeven 2010(22) *Georgetown Intl Env'tl Law Review* 241-242,249; DEFRA *Review of Enforcement* 3,5,14; Watson 2005 (17)1 *ELM* 3-6; Pedersen 2013 76(2) *MLR* 322-324,343; Hampton *Reducing Burdens* 6,9,38-41; Macrory *Consultation* 14-15,17,26,29-32,36-38,41,48,60.

²⁰ 2010-11 *NECER* 10; 2011-12 *NECER* 11,13-14.

²¹ S.31H.

²² S.31K.

²³ S.31J,s31H(5).

²⁴ S.31L,s34G.

monitor and enforce compliance with NEMA and/or the SEMAs.²⁵ Although the EMI has made some progress in improving poor EC&E, issues like: intersecting (and sometimes conflicting) mandates; difficulty ensuring coordination with other government departments; the fact that certain legislation falls outside of the inspectors' mandate; resource constraints; and the vast extent of environmental non-compliance – including by government - undermine its effectiveness.²⁶

For instance, the NECERs indicate that, despite several arrests for environmental offences, conviction rates are low. The 2010-11 NECER²⁷ reveals that the conviction rate was a dismal 9.75 per cent.²⁸ In the following year, it was only 7.59 per cent,²⁹ and the conviction rate reflected in the 2012-13 NECER³⁰ was extremely low – 4.7 per cent.³¹ The 2011-12 NECER also contains what it calls 'highlights of court sentences obtained'. That these are regarded as 'highlights' illustrates how low criminal penalties are.³² In 2012-13, 49 administrative fines were issued in terms of section 24G of NEMA (s24G) with a total value paid of R5 385 215.³³ As evidence that current enforcement efforts are not an effective deterrent, the NECERs demonstrate that many violators are repeat offenders and/or remain in non-compliance, despite enforcement action against them.³⁴

²⁵ S.31B-31D,s31G(1)(a) NEMA; Feris 2006 (9)3 *PER* 54-56,65-66,68; Kidd *Environmental Law* 278; van der Linde 'NEMA' in *Environmental Management* 216-217; Glazewski et al 'Compliance' in *Environmental Law* 26-14,26-29,26-37-26-39; Craigie et al 'Institutions' in *Environmental Compliance&Enforcement* 88-94; Paterson&Kotze 'Compliance&Enforcement' in *Environmental Compliance&Enforcement* 372.

²⁶ Craigie et al 'Institutions' in *Environmental Compliance&Enforcement* 66,90,94-96,101-102; Fourie 2009 (16)2 *SAJELP* 98-99; Kotze 'Perspectives' in *Environmental Compliance&Enforcement* 113; Glazewski et al 'Compliance' in *Environmental Law* 26-30.

²⁷ 10.

²⁸ There were 1988 arrests and 738 criminal dockets registered with the South African Police Service. Of the 234 cases handed to the National Prosecuting Authority (NPA), it declined to prosecute 21. There were 72 convictions, 19 plea bargains and 22 acquittals. To calculate the conviction rate, I divided the number of convictions by the number of criminal dockets.

²⁹ 2011-12 NECER 11. There were 1339 arrests and 1080 criminal dockets registered. 201 cases were handed to the NPA, and it declined to prosecute 20 of these. 82 offenders were convicted, 13 entered into plea bargains, and there were seven acquittals.

³⁰ 9.

³¹ There were 1818 arrests and 1488 registered criminal dockets - of which 268 were handed to the NPA. The NPA declined to prosecute 37 of these. There were eight acquittals, 70 convictions and 14 plea bargains.

³² 13-14. For instance: six months' imprisonment (suspended for three years) was imposed for illegal hunting inside a protected area; and R3000 was imposed for the illegal dumping of medical waste.

³³ 10. There were 58 such fines, with R8 364870 paid in 2010-11 and 86 fines with R17 627233 paid in 2011-12.

³⁴ Non-compliances by the following facilities have annually been recorded in the NECERs since 2009-10: Sasol's Secunda Refinery, Mpumalanga (25,40,36,36); Engen's Refinery, Kwa-Zulu Natal (25,41,37,37); PetroSA Refinery, Western Cape (28,39,35,36); Samancor Middelburg, Mpumalanga (25,41,38,37); Highveld

The deficiencies of the current enforcement measures are not the only problems with SA's C&E efforts. Another serious challenge is C&E's fragmented nature. Environmental authorities from different government spheres have overlapping mandates and can use various environmental measures in different contexts.³⁵ This is compounded by legislative fragmentation. As well as there being national, provincial and local laws all dealing with similar issues, there are also multiple cross-sectoral Acts applicable to activities.³⁶ Inadequate communication and cooperation between different government spheres and departments and within department means that this fragmented structure can result in duplication, conflict, inconsistencies, turf protection, bureaucracy, inaction, excessive governance costs, a lack of accountability and uncoordinated enforcement actions.³⁷

Government's substantial resource constraints – both human and financial – have also seriously hindered C&E endeavours. Many officials lack the required capacity and skills for effective C&E. Staff turnover is also high. The dearth of skills and capacity is most dire in local government.³⁸ This is of particular concern, given that municipalities have been entrusted with several important environmental functions.³⁹

Steel, Mpumalanga (26,42,39,38-39); BHP Billiton Metalloys Meyerton, Gauteng (27,43-44,42,41); Xstrata Wonderkop, North West (28,43,41,40); Mondi Richard's Bay, Kwa-Zulu Natal (26,52-53,58,62).

³⁵ National government has executive authority over 'marine resources', 'mining', and 'fresh water resources'. 'Environment', 'pollution control', 'air pollution', and 'water and sanitation services' (potable water supply systems, domestic waste-water and sewage disposal systems) are areas of concurrent national and provincial legislative competence (ss.44,85,104,125,Sch.4 Constitution). Municipalities have executive authority over 'air pollution' and 'water and sanitation services' (s.156(1),Sch.4,5 Constitution). 'Cleansing', 'refuse removal, refuse dumps and solid waste disposal' are areas of exclusive provincial legislative competence, which municipalities have the right to administer. Local government competence is subject to the other spheres' oversight (ss.104,125,156(1),156(6)(a),155(7),Sch.5 Constitution).

³⁶ For instance, instead of a comprehensive Act addressing pollution in an integrated manner, several laws apply - administered by different authorities.

³⁷ Craigie et al 'Institutions' in *Environmental Compliance&Enforcement* 65-68, 87,96,100-101; Müller Environmental Governance' in *Environmental Management* 68,80,83,92,95; Kotze 'Environmental Governance Perspectives' in *Environmental Compliance&Enforcement* 110-117,124-125; van Zeven 2010(22) *Georgetown Intl Env'tl Law Review* 242.

³⁸ Craigie et al 'Institutions' in *Environmental Compliance&Enforcement* 95-96,101-102; Paterson&Kotze 'Compliance&Enforcement' in *Environmental Compliance&Enforcement* 371-374,376-377,379; Kotze 'Perspectives' in *Environmental Compliance&Enforcement* 116-117,125; Müller Environmental Governance' in *Environmental Management* 91,94,96; Du Plessis&Nel 'Compliance' in *Compliance&Enforcement* 262,274; Du Plessis 'Environmental Compliance' in *Compliance&Enforcement* 383,385,394; Babbit et al 2004(15) *DELPF* 43,45; Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 306-307,334-335; Macrory *Regulation* 13,24; fn.82-83,88.

³⁹ Du Plessis 'Environmental Compliance' in *Compliance&Enforcement* 379-380,384; OECD *Performance* 173; fn.35.

These C&E problems are not unique to SA.⁴⁰ To try to curb the severe decline in the state of the environment, law and policy-makers across the globe have been introducing innovative C&E measures as alternatives to the criminal sanction.⁴¹ Several other jurisdictions⁴² have established administrative penalties, which have, in many cases, had a positive impact on legislative compliance.⁴³ An administrative penalty system is also successfully used in terms of SA's Competition Act 89 of 1998 (Competition Act).⁴⁴

Currently, apart from NEMA's 'administrative fine' paid in terms of s24G for the consideration of an application for retrospective authorisation of an illegally-commenced activity,⁴⁵ SA environmental law does not contain an administrative penalty system. This dissertation seeks to critically explore the merits of and possibilities for promoting the extended use of administrative penalties in SA environmental law to complement existing criminal, administrative and judicial measures; and, generally, as an alternative to the criminal sanction.

Chapter 2 considers C&E theory, and the available tools.⁴⁶ It also addresses the challenges of traditional C&E mechanisms - specifically the criminal sanction - and the

⁴⁰ Fn.11-12,14,17-19,37-38.

⁴¹ Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 296-329,307-313,334-335; Lehmann 'Voluntary' in *Environmental Compliance&Enforcement* 269-272,275,294; Nel&Wessels 2010 (13)5 *PER* 48-49,71; Kidd 2002 (9)1 *SAJELP* 21,26,28-50; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 52-53,55,58; Glazewski et al 'Compliance' in *Environmental Law* 26-46-26-47; Rechtschaffen 1998(71) *SCLR* 1183-1186,1267; van Zeben 2010(22) *Georgetown Intl Env'tl Law Review* 242,245,247-249; Pedersen 2013 76(2) *MLR* 323-324,328-329; Macrory *Consultation* 4-5,13,29,44,60; Du Plessis&Nel 'Compliance' in *Compliance&Enforcement* 261-263,266,270,273-275; Du Plessis 'Environmental Compliance' in *Compliance&Enforcement* 380,383-385,387-389,392-398.

⁴² Including United States, Canada, Finland, Germany, Belgium, Greece, Italy, Spain, Sweden, Portugal, Mexico, Peru, Equatorial Guinea, UK, Netherlands, Australia, Ukraine, Moldova, Armenia, Kyrgyzstan, Russia, Kazakhstan, Georgia, and Belarus.

⁴³ *BRE Sanctioning post-Hampton* 16-19; Fourie 2009 (16)2 *SAJELP* 94-97,103-104,124-126; Kidd 2002 (9)1 *SAJELP* 37-38; *DEFRA Review* 4,6,28,30; *Hampton Reducing Burdens* 38,40-41; *Macrory Consultation* 6-7,18,45-50; *Svatikova Criminalization* 3,20,24,39,85-86,106,110,183,185; *Macrory&Woods Penalties* 4-5,11,19-22,31,38; *Macrory Report* 22,41-42; *Macrory Regulation* 13,15-16; fn.156.

⁴⁴ Fourie 2009 (16)2 *SAJELP* 113-117; Kidd *Environmental Law* 279.

⁴⁵ Fourie 2009 (16)2 *SAJELP* 113; Kidd *Environmental Law* 279; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 237-238. Chap.4 explains why this is not a true administrative penalty.

⁴⁶ Civil measures - like interdicts - require litigation in civil court and fall outside the scope of this dissertation (Kidd *Environmental Law* 279-280; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 57-58; Glazewski et al 'Compliance' in *Environmental Law* 26-11-26-14).

increasing use of administrative penalties. The form and nature of administrative penalties, as well as their advantages and shortcomings, are addressed.

Chapter 3 evaluates the use of administrative penalties in the United Kingdom (UK) and the Netherlands - which are, respectively, the roots of SA's common and civil law legal systems. The purpose of examining the contemporary use of administrative penalties in the two jurisdictions which form the basis of SA's legal system, is to distil a set of best practices for the application of administrative penalties to SA's EC&E efforts.

Chapter 4 critically assesses NEMA's s24G 'administrative fine' - currently the only so-called administrative penalty in SA's environmental law - and the recent amendments thereto⁴⁷ - against the possible lessons identified in Chapter 3. Practical suggestions are made for SA's introduction of a true environmental law administrative penalty system.

To ensure consistency in the analysis, the relevant regimes in both Chapters 3 and 4 are assessed using the following set of themes: the penalty's nature and extent, and the circumstances which must exist before it can be applied; institutional arrangements for its use; the decision-making process - including the burden of proof and the factors for consideration in calculating the penalty; whether the penalty has an upper limit; the destination of the penalty funds; appeal and review procedures; the penalty's impact on criminal offences; and the implications of penalty non-payment.

Chapter 5 concludes by summarising how administrative penalties can potentially improve SA's C&E.

⁴⁷ The National Environmental Management Laws Second Amendment Act 30 of 2013 took effect on 18 December 2013.

2 CHAPTER 2: ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT THEORY

2.1 Compliance and enforcement tools

C&E mechanisms generally fall within two primary categories: 'command-and-control' and 'alternative compliance'⁴⁸ mechanisms.⁴⁹ Administrative penalties are an example of the command-and-control approach, which consists of prescribing legal obligations and compelling compliance using various enforcement mechanisms. Such measures are designed to: compel legislative compliance; and punish and deter non-compliance.⁵⁰ These state-centred measures afford the state some direct control over the regulated community.⁵¹ Examples are criminal, administrative and civil measures.⁵²

Both criminal and administrative measures (in their more traditional forms), are considered below, as are some of their inherent difficulties. Administrative penalties are more innovative than traditional administrative measures. Since they contain both civil and criminal elements, they are regarded as a hybrid sanction.⁵³ This hybridity has the result that, when evaluating how best to formulate administrative penalties, lessons can be learned from the theory of both criminal and administrative sanctions.

⁴⁸ These are often divided into incentive-based and voluntary measures. The former can be market-based (tax benefits, subsidies, deposit-refunds), regulatory or information-based incentives, and generally reward desired conduct. They can also penalise unwanted conduct – means like product taxes, user charges, emission and disposal charges impose costs on those who fail to meet required standards. Voluntary measures include self-regulatory (co-operative agreements and labelling schemes) and co-regulatory measures (environmental management co-operative agreements) for firms to improve environmental performance (Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 58-60; Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 297-306,313-329; Lehmann 'Voluntary' in *Environmental Compliance&Enforcement* 269,272-294; Nel&Wessels 2010 (13)5 *PER* 49-53,59-65; van Zeben 2010(22) *Georgetown Intl Env'tl Law Review* 247-249).

⁴⁹ Kidd *Environmental Law* 268; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 51; Du Plessis 'Environmental Compliance' in *Compliance&Enforcement* 381; Du Plessis&Nel 'Compliance' in *Compliance&Enforcement* 259.

⁵⁰ Kidd 2002 (9)1 *SAJELP* 26-27; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 51-52; Du Plessis 'Environmental Compliance' in *Compliance&Enforcement* 381; van Zeben 2010(22) *Georgetown Intl Env'tl Law Review* 246.

⁵¹ Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 297,306; van Zeben 2010(22) *Georgetown Intl Env'tl Law Review* 245-246; INECE *Principles* 75; OECD *Compliance* 76.

⁵² van Zeben 2010(22) *Georgetown Intl Env'tl Law Review* 246; Kidd *Environmental Law* 269,278; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 52.

⁵³ Macrory&Woods *Penalties* 6,11,19; Minzner 2012(53) *WMLR* 862; Lynott 2010 (17)1 *IPELJ* 12; DEFRA *Review* 6.

When considering C&E measures, it is important to evaluate the justifications for punishment. The retribution theory is that society's condemnation of an offender is reflected by means of the offender's punishment. Punishment is regarded as being justly deserved.⁵⁴ The deterrence theory provides both for individual deterrence: in which punishment discourages one person from repeating the same wrongdoing, and for general deterrence: in which the punishment of one offender serves to deter the general public.⁵⁵

2.1.1 The criminal sanction

Fines and/or imprisonment imposed by the criminal court are the default punishment for breaching environmental legislation.⁵⁶ Historically, criminalising conduct has been used to express condemnation with the most socially objectionable conduct. But more recently, regulatory crimes have been created, several of which are for apparently minor and/or highly technical legislative violations.⁵⁷ Generally, environmental crimes are not regarded as moral wrongs, and do not elicit the kind of indignation that would support the retributive theory's reliance on public condemnation. This is strengthened by the fact that many environmental offences are strict liability offences – offenders are held liable in the absence of fault. Therefore, most criminal sanctions are intended as a deterrent, rather than for retributive purposes.⁵⁸

For the criminal sanction to be effective in this role, there must be a serious likelihood of an offender's apprehension and conviction, and the imposition of a meaningful sanction.⁵⁹ Another integral aspect of deterrence is that C&E action is publicised. In addition to imposing

⁵⁴ Fourie 2009 (16)2 SAJELP 95-96; Svatikova *Criminalization* 25-46; Minzner 2012(53) *WMLR* 856,909,912-913; Glazewski et al *Compliance* in *Environmental Law* 26-15; Kidd 'Criminal' in *Environmental Compliance&Enforcement* 241.

⁵⁵ Glazewski et al *Compliance* in *Environmental Law* 26-15; Minzner 2012(53) *WMLR* 856,860-861; Svatikova *Criminalization* 23-24; OECD *Compliance* 74; Macrory *Consultation* 30; van Zeven&Mulkey 1992 *INECE Proceedings* paras.3.2.1,3.3.2; OECD *Fines* 9; fn.16.

⁵⁶ Fn.14.

⁵⁷ For instance, a failure to provide: access to accounts (s.151(1)(b) NWA); or information for the national waste information system (s.67(1)(m) Waste Act).

⁵⁸ Kidd *Environmental Law* 270,272-276; Fourie 2009 (16)2 SAJELP 98,105,109; Svatikova *Criminalization* ix,1,23,37,40-41,109,175; van Zeven&Mulkey 1992 *INECE Proceedings* paras.3.2.1-3.2.3,3.2.5,5.1,6; OECD *Fines* 9,19; BRE *Sanctioning post-Hampton* 11,13,22,24,26; Macrory Report 7,14,16,18,23,38,47,54; Macrory&Woods *Penalties* 4,6,8,37; Sherman 2007(23) *JLUEL* 88,93-94; Babbitt et al 2004(15) *DELPHI* 2-3,26-29,43,48-50,54-64; DEFRA *Review* 4,14,22,27-28; Macrory *Consultation* 5,14-15,17,19,29,33-35,39,43-44,49-50,54; INECE *Principles* 76,79-80; Macrory *Regulation* 12,15,26-29.

⁵⁹ Fn.16.

meaningful sanctions, an effective penalty regime must send a strong message to ensure that others comply.⁶⁰ This is illustrated by the popular quote of American diplomat and politician Chester Bowles:

*'20 percent of the regulated population will automatically comply with any regulation, 5 percent will attempt to evade it, and the remaining 75 percent will comply as long as they think that the 5 percent will be caught and punished.'*⁶¹

It is also essential that the punishment fit the crime – if the penalty is too lenient, the utility of the criminal sanction as a deterrent is significantly diluted, and the seriousness of environmental law violations are minimised. By contrast, if a penalty seems too severe, this may result in contempt for the law. Over-zealous prosecution – especially of offenders whose non-compliance is inadvertent or the result of strict liability - also deprives criminal sanctions of their stigma.⁶²

Because of the stricter criminal procedure and high standard of proof (guilt must be proved beyond a reasonable doubt),⁶³ the public believes that the information about the offender's guilt is reliable. This can attract negative publicity and a loss of reputation – with a likely loss of business - for corporate offenders. For individuals, stigma has social and economic consequences, as many people avoid interaction with criminal offenders, and a criminal record limits ex-offenders' employment opportunities. This is particularly so for violations which elicit widespread public disapproval. Stigma is an extra cost to the offender, which does not draw on government resources.⁶⁴ Criminal law is also the most coercive form of enforcement – the only one that provides for the offender's incarceration. Imprisonment

⁶⁰ Svatikova *Criminalization* 79,109; Kidd 'Criminal' in *Environmental Compliance&Enforcement* 241-242; van Zeben&Mulkey 1992 *INECE Proceedings* paras.3.2.1,3.3.2; OECD *Fines* 10,25-26,29; INECE *Principles* 79,85; Rechtschaffen 1998(71) *SCLR* 1225-1226; Macrory *Consultation* 8,15,22; Macrory Report 10,35,86,91,97,99,101; fn.412-414.

⁶¹ Bowles *Promises to Keep* 25.

⁶² Fn.16,54-55,57-58,158-159.

⁶³ Fn.18-19.

⁶⁴ Rechtschaffen 1998(71) *SCLR* 1187,1221; Sherman 2007(23) *JLUEL* 89-90,102; Babbitt et al 2004(15) *DELPE* 1,23,26,47; Kidd 'Criminal' in *Environmental Compliance&Enforcement* 241-242; Svatikova *Criminalization* xv-xvi, 4,26,86,88-91,96,98-100,109,140,144,179-181,186; Waite 2007(24) *PELR* 353-354; INECE *Principles* 72,79; Pedersen 2013 76(2) *MLR* 323,327.

incapacitates the offender by removing them from the general population to prevent additional harm.⁶⁵

2.1.2 Administrative measures

Administrative measures are implemented by relevant environmental authorities and not by the courts.⁶⁶ These officials have specialist expertise and experience.⁶⁷ Administrative measures usually aim to stop unlawful conduct, to ensure compliance with the law and authorisation conditions, and/or to compel persons to take corrective actions where their conduct harms the environment.⁶⁸ Because polluters can be directed to remediate environmental damage at their own cost, these measures support the 'polluter pays' principle.⁶⁹ Where administrators do not wish to seek criminal recourse through the judicial system, administrative measures provide a very attractive alternative.⁷⁰

Administrative measures take many forms;⁷¹ can be used in a wide variety of circumstances; and are able to regulate activities in fairly specific ways. More than one measure may be applicable in a particular context; and often, a range must be applied simultaneously. Officials have extensive discretion regarding their use. As a result, administrative measures are potentially more efficient than criminal measures.⁷²

⁶⁵ Svatikova *Criminalization* ix,xiv-xv,2,4,24,26,86-91,98-100,185; van Zeben&Mulkey 1992 *INECE Proceedings* paras.3.2.1,5.1; *INECE Principles* 71-72, 9; Sherman 2007(23) *JLUEL* 89,102; Kidd 'Criminal' in *Environmental Compliance&Enforcement* 241-242.

⁶⁶ Feris 2006 (9)3 *PER* 54-55; Kidd *Environmental Law* 278; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 225,238; *OECD Compliance* 74; fn.15.

⁶⁷ Fourie 2009 (16)2 *SAJELP* 109,118,122,124; Minzner 2012(53) *WMLR* 911,913; Abbot 2009 (11)1 *ELR* 45; Kidd 2002 (9)1 *SAJELP* 37; *INECE Principles* 70, Macrory&Woods *Penalties* 37,39.

⁶⁸ Kidd *Environmental Law* 278-279; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 55; *OECD Compliance* 74; fn.114.

⁶⁹ Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 238; fn.114,445.

⁷⁰ Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 56; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 225-226; Kidd *Environmental Law* 278; Glazewski et al *Compliance* in *Environmental Law* 26-5.

⁷¹ Most prevalent are: directives, abatement notices, compliance notices, and the suspension and withdrawal of environmental authorisations.

⁷² Kidd 2002 (9)1 *SAJELP* 33,38; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 55-56; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 225-226,233,238-239; Lynott 2010 (17)1 *IPELJ* 13,22; *OECD Compliance* 76,80; Macrory Consultation 39,45,48-49; fn.139.

They require proof on the less strict civil standard: a balance of probabilities.⁷³ These measures are less formal, simpler, more flexible,⁷⁴ speedier and cheaper than criminal measures.⁷⁵ Another advantage is that non-compliance with administrative measures is a criminal offence, and the public can compel environmental authorities to implement administrative measures.⁷⁶

2.1.3 Challenges of traditional compliance and enforcement tools

There are numerous problems with the criminal sanction - especially insofar as environmental law is concerned. In addition to its 'inherent weaknesses' (which apply worldwide), there are also 'contingent weaknesses', that apply particularly to SA and other developing countries.⁷⁷

Below, the disadvantages of criminal measures (and administrative measures, where applicable) are evaluated using a series of themes: the body that implements the measure; standard of proof; cost and implementation time; ease of implementation; deterrence impact; proportionality; and prevention of environmental harm.

2.1.3.1 Implementing body

Criminal courts impose criminal penalties after successful prosecution of offenders.⁷⁸ Because of environmental law's inherent complexities and technical nature, specialist prosecutors are

⁷³ Kidd 2002 (9)1 SAJELP 33,37-39; Fourie 2009 (16)2 SAJELP 120-121,124; Svatikova *Criminalization* 20-21,87,95; Faure&Svatikova 2012 (24)2 JEL 253,256,258-259,282; Macrory&Woods *Penalties* 5,9,11; Macrory Report 46-47.

⁷⁴ Kidd 2002 (9)1 SAJELP 33,37-38; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 225,234; Faure&Svatikova 2012 (24)2 JEL 253,255-256,259; Faure 'Balancing of Interests' in *Balancing of Interests* 30; Macrory&Woods *Penalties* 4,11,31; Hampton *Reducing Burdens* 9,40; Macrory *Consultation* 39,45,49.

⁷⁵ Fourie 2009 (16)2 SAJELP 109,124,126; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 235,238-239; Faure&Svatikova 2012 (24)2 JEL 253,258,279,282,284; INECE *Principles* 75; Paddock 2011 *INECE Proceedings* 600; OECD *Compliance* 75-76; Macrory *Consultation* 48,50.

⁷⁶ Glazewski et al *Compliance* in *Environmental Law* 26-4-26-5,26-9; Feris 2006 (9)3 PER 60-61; Kidd 2002 (9)1 SAJELP 34,36; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 232-233,235.

⁷⁷ Kidd 'Criminal' in *Environmental Compliance&Enforcement* 242; Kidd *Environmental Law* 270.

⁷⁸ Fn.14.

often required to argue cases, but there is a lack of such expertise.⁷⁹ A further obstacle is that, generally, judicial officers have not had a lot of exposure to environmental law.⁸⁰

2.1.3.2 Standard of proof

A criminal conviction requires proof beyond reasonable doubt. This is a heavy burden to discharge.⁸¹

2.1.3.3 Cost and implementation time

The time-consuming nature and expense of prosecution are among the criminal sanction's inherent weaknesses. It is extremely resource-intensive (both in terms of financial and human resources) for enforcement agencies to prepare cases for prosecution and ensure that enforcement officials attend court. Prosecutions can take several years. Enforcement resources are limited and the costs can be significant, as extensive investigative powers, including those of experts, are required. It is also costly to imprison offenders.⁸² If too many limited enforcement resources are expended on criminal proceedings, these are not available for other potentially productive means to address environmental harm.⁸³

2.1.3.4 Ease of implementation

Regulatory authorities generally cannot mould these measures to suit specific circumstances, and the regulated community has no incentive to do more than is necessary to comply with

⁷⁹ Rechtschaffen 1998(71) *SCLR* 1201-1202; Kidd *Environmental Law* 270,273; Fourie 2009 (16)2 *SAJELP* 98-99,126; Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 306; van Zeben&Mulkey 1992 *INECE Proceedings* paras.3.3.5.5.1; Watson 2005 (17)1 *ELM* 6; OECD *Performance* 57.

⁸⁰ BRE *Sanctioning post-Hampton* 14,22,26; Fourie 2009 (16)2 *SAJELP* 95,101,109,118,126; Craigie et al 'Institutions' in *Environmental Compliance&Enforcement* 99,101; Faure&Svatikova 2012 (24)2 *JEL* 259,283; Watson 2005 (17)1 *ELM* 5; Macrory *Consultation* 25,32,48; Macrory *Regulation* 28.

⁸¹ Fn.18-19.

⁸² Glazewski et al 'Compliance' in *Environmental Law* 26-15,26-46; Rechtschaffen 1998(71) *SCLR* 1213-1214,1225; Sherman 2007(23) *JLUEL* 93,104; Babbit et al 2004(15) *DELPH* 42-43,45; Svatikova *Criminalization* ix;xiv-xvi,2,40,87,94,98-99,105,108-109,179,181; Kidd *Environmental Law* 270-272; BRE *Sanctioning post-Hampton* 3,5,13,22; Macrory Report 14,16,18,23; Macrory *Consultation* 14-17,29,34-35,44-45,48-49; Davis 2010 *Acta Juridica* 412-413,423; INECE *Principles* 71-72,79; Pedersen 2013 76(2) *MLR* 322,328; Macrory *Regulation* 24,28,30; fn.38.

⁸³ Macrory&Woods *Penalties* 4,19,37-38,42; Paddock 2011 *INECE Proceedings* 601; Svatikova *Criminalization* 41; Watson 2005 (17)1 *ELM* 6; Macrory 2009(11) *ELR* 72; Macrory *Consultation* 5,14.

the law. This means that such measures do not encourage industry to undertake voluntary initiatives or meet stricter environmental standards than legislated.⁸⁴

Environmental crime is under-investigated and under-prosecuted.⁸⁵ Many cases are dismissed – for policy or technical grounds, or because the prosecutor takes the view that it is not in the public interest to prosecute.⁸⁶ Courts have a heavy workload, and SA's criminal justice system is already significantly overburdened with serious criminal cases.⁸⁷ The obstacles presented by the accused's procedural safeguards are another inherent weakness and worsen the time and cost burden.⁸⁸ Contingent weaknesses of criminal law include: ineffective policing;⁸⁹ insufficient public awareness of environmental law and co-operation with the criminal process;⁹⁰ and the challenges of investigation.⁹¹

Since it is difficult to obtain a criminal conviction and an appropriate penalty, authorities are discouraged from prosecuting environmental crimes. This sustains the poor prosecution rate, resulting in a compliance deficit. Officials are, as a result, also denied the opportunity to improve their practical investigative and prosecution skills.⁹²

A possible disadvantage of the discretion given to officials to impose administrative measures is that there is no control over whether the official will do so.⁹³ In order to be effective, implementing officials require appropriate training. Successful implementation

⁸⁴ Macrory&Woods *Penalties* 4,37; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 52; Feris 2006 (9)3 *PER* 53; van Zeven 2010(22) *Georgetown Intl Env'tl Law Review* 246-247,249.

⁸⁵ Fn.17.

⁸⁶ Fn.18.

⁸⁷ Fourie 2009 (16)2 *SAJELP* 95,118,124-126; Svatikova *Criminalization* 40,109; Faure&Svatikova 2012 (24)2 *JEL* 259,283; BRE *Sanctioning post-Hampton* 13.

⁸⁸ Kidd *Environmental Law* 271-272; Paterson&Kotze 'Compliance&Enforcement' in *Environmental Compliance&Enforcement* 375,378; Kidd 'Criminal' in *Environmental Compliance&Enforcement* 243-247.

⁸⁹ Fourie 2009 (16)2 *SAJELP* 99; Kidd *Environmental Law* 272-273.

⁹⁰ Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 55,61; Paterson&Kotze 'Compliance&Enforcement' in *Environmental Compliance&Enforcement* 373,375; Kidd *Environmental Law* 273.

⁹¹ Kidd 'Criminal' in *Environmental Compliance&Enforcement* 243; van Zeven&Mulkey 1992 *INECE Proceedings* para.4.1; fn.17-19,79.

⁹² Fn.17-19.

⁹³ Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 56; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 239; OECD *Compliance* 81; Lynott 2010 (17)1 *IPELJ* 13.

depends on administrative capacity – which is currently quite poor. The political will to make these measures successful is also essential.⁹⁴

2.1.3.5 Deterrence impact

The widespread non-compliance with environmental law makes it clear that the criminal sanction and traditional administrative measures are not an effective deterrent.⁹⁵ Inadequate penalties are another contingent weakness. Where sanctions are imposed for environmental offences, these are, generally, too insignificant to amount to a serious deterrent. This problem is exacerbated by the low detection probability and the large financial benefit that can result from non-compliance with environmental legislation.⁹⁶ This results in perverse incentives for the regulated community to violate the law.⁹⁷

2.1.3.6 Proportionality

Another weakness of criminal law is the reluctance to penalise wrongdoers for actions not regarded as moral wrongs (with priority being given to ‘real crimes’). In relation to regulatory offences, criminal prosecution may, in any event, be disproportionate.⁹⁸

2.1.3.7 Prevention of environmental harm

Command-and-control measures are not aimed at preventing or repairing environmental harm. This harm has already been done by the time the prosecution is instituted: criminal law is reactive. This is contrary to the aim of environmental law: to protect the environment.⁹⁹ Because criminal law is usually plant or medium-specific, it fails to regulate cross-media and cumulative effects on the environment appropriately. Crucial demand-side management

⁹⁴ Winstanley ‘Administrative Measures’ in *Environmental Compliance&Enforcement* 226,239; Paterson&Kotze ‘Compliance&Enforcement’ in *Environmental Compliance&Enforcement* 376; INECE *Principles* 77; fn.38.

⁹⁵ Fn.11-12,17-19,27-34.

⁹⁶ Fn.16-19.

⁹⁷ BRE *Sanctioning post-Hampton* 5; Macrory Report 20,54; Faure&Svatikova 2012 (24)2 *JEL* 284; Hampton *Reducing Burdens* 38-39; Macrory *Consultation* 29-30; OECD *Fines* 10; Paterson&Kotze ‘Compliance&Enforcement’ in *Environmental Compliance&Enforcement* 375.

⁹⁸ Fn.57-58.

⁹⁹ Craigie et al ‘Dissecting’ in *Environmental Compliance&Enforcement* 54-55; Glazewski et al ‘Compliance’ in *Environmental Law* 26-28-26-29,26-46; Paterson&Kotze ‘Compliance&Enforcement’ in *Environmental Compliance&Enforcement* 375-376; Waite 2007(24) *PELR* 354. This has been ameliorated to some extent by NEMA’s accessory sanctions (fn.13).

considerations are neglected, because criminal law focuses on controls relating to supply. Having stricter control over demand and consumption is essential, given the fast-depleting natural resources. Criminal law does not correct market failure so as to take consideration of environmental goods and services like water, soil, air, fauna and flora.¹⁰⁰

In his evaluation of regulatory sanctions for the UK, Richard Macrory determined six 'Penalties Principles' as the source of any sanctioning regime. Sanctions should aim to: change the offender's behaviour; eliminate non-compliance benefits; be responsive, taking into account what is appropriate for the particular offender and the circumstances; be proportionate to the nature of the offence and the harm; include an element of restoration; and deter future non-compliance.¹⁰¹ For the reasons set out above, the criminal sanction largely fails to address these aims in relation to environmental law violations. Although traditional administrative measures have fewer of the deficiencies of criminal measures, a common criticism of these measures is that they lack 'teeth'.¹⁰²

It has been argued that criminal sanctions should be reserved for serious infringements that demand significant punishment – for instance where there is intentional and/or continued wrongdoing, and/or where the conduct of the offender has resulted in serious damage to humans or the environment. Criminal prosecution for environmental offences should be used as a last resort.¹⁰³

Due to the many disadvantages of the command-and-control methods - particularly the criminal sanction - alternative compliance mechanisms¹⁰⁴ are increasingly being used – either as an alternative, or in conjunction with criminal measures.¹⁰⁵ Despite being a

¹⁰⁰ Paterson 'Incentive-based Approach' in *Environmental Compliance&Enforcement* 307; fn.1-7.

¹⁰¹ Macrory *Consultation* 8,19-20; OECD *Fines* 9; Macrory Report 10,27-31,35.

¹⁰² Paterson&Kotze 'Compliance&Enforcement' in *Environmental Compliance&Enforcement* 376.

¹⁰³ Kidd 2002 21-27,50; Kidd *Environmental Law* 269,274-277; Paterson&Kotze 'Compliance&Enforcement' in *Environmental Compliance&Enforcement* 375; Feris 2006 (9)3 *PER* 67-68; INECE *Principles* 71-72,74-75; Sherman 2007(23) *JLUEL* 94-95,104-105; Faure&Svatikova 2012 (24)2 *JEL* 254,258,282,285; Waite 2007(24) *PELR* 354-355; BRE *Sanctioning post-Hampton* 13,18,22-23; Macrory Report 18,38,42,47,98; OECD *Compliance* 74-75,84-85; DEFRA *Review* 4,6,28-29,53; Watson 2005 (17)1 *ELM* 3-4,6; Hampton *Reducing Burdens* 9,39-40; Macrory *Consultation* 7,13-14,16-18,30,35,37-38,43-44,48-49.

¹⁰⁴ Fn.48-49.

¹⁰⁵ Fn.41-44.

command-and-control measure, administrative penalties are able to negate various disadvantages of the more traditional of these measures.

2.2 Administrative penalties

The nature and form of administrative penalties is considered below. Thereafter, the pros and cons of administrative measures are evaluated, using the same themes as in 2.1.3 above.

2.2.1 Nature and form of administrative penalties

Administrative penalties – sometimes called civil penalties¹⁰⁶ - are another type of administrative measure and the focus of this dissertation. In general, these are monetary penalties imposed by the regulator, without the intervention of the courts.¹⁰⁷ However, in some jurisdictions – like the United States (US) – administrative penalties are imposed by an independent tribunal. In this case, the system is still administered by environmental officials.¹⁰⁸

Administrative penalties have been described as a hybrid sanction, as they have both criminal and civil law elements. They resemble criminal law fines because they are financial and punitive in nature, but the process in which they are imposed is civil.¹⁰⁹ Given the lower standard of proof required for administrative penalties – a balance of probabilities¹¹⁰ - and the stigma¹¹¹ and coercive nature¹¹² of criminal prosecution, administrative penalties should be used for environmental law violations that are not egregious enough to warrant criminal prosecution.¹¹³

¹⁰⁶ Some authors use these terms interchangeably; others distinguish civil from administrative penalties, in that the former use the existing civil court structure and rules, and the latter require specialised institutions (Lynott 2010 (17)1 *IPELJ* 12; Fourie 2009 (16)2 *SAJELP* 118; Kidd 2002 (9)1 *SAJELP* 43-46). Others regard the latter as fixed penalties imposed by a regulator without discretion to assess the amount, and civil penalties as discretionary monetary sums imposed under criminal law (Macrory&Woods *Penalties* 11). In this dissertation, 'administrative penalties' refer to monetary penalties imposed under the civil law by regulators.

¹⁰⁷ Fn.15,66.

¹⁰⁸ Fourie 2009 (16)2 *SAJELP* 95,118.

¹⁰⁹ Fn.53.

¹¹⁰ Fn.73.

¹¹¹ Fn.64.

¹¹² Fn.65.

¹¹³ Fn.57-58,103.

Administrative penalties aim to enforce administrative regulation by punishing non-compliance, deterring violations and creating incentives for the regulated community to improve its compliance. They support the 'polluter pays' principle as they aim to: eliminate any monetary advantage from non-compliance with legislation; secure the remediation and recover the costs of environmental damage; and be proportionate to the nature of the offence and the resulting harm.¹¹⁴ Ideally, they should also make restitution to adversely affected communities.¹¹⁵ Administrative penalties should also take into account what is appropriate for the particular issue and the offender.¹¹⁶

These penalties can be structured to provide for both fixed and variable monetary penalties. This provides more flexibility and allows penalties to be more proportionate to the violation.¹¹⁷ Fixed monetary penalties (FMPs) are automatic, non-discretionary, relatively low monetary amounts imposed for technical regulatory or otherwise minor offences that do not result in substantial financial gain or serious environmental consequences. The penalties are 'fixed', because the relevant legislation sets out the circumstances in which a breach has occurred, as well as the penalty amount or the method to calculate it. There is no discretion as to the level of the penalty, but the regulator does have discretion as to the penalty's imposition.¹¹⁸ Although they can more easily avoid the concerns attendant on a regulator's discretion, FMPs cannot accommodate issues of mitigation and aggravation.¹¹⁹

By contrast, a variable monetary penalty (VMP) is for larger amounts, determined at the regulator's discretion, with reference to a published scheme. Legislation may set out a range of factors to consider in determining the penalty; alternatively, detailed guidelines may be developed. A maximum penalty may be specified in legislation, but there is not always an upper limit. Generally, VMPs would be for negligent breaches of environmental legislation; alternatively for 'innocent' breaches resulting in significant financial gain and/or substantial

¹¹⁴ Macrory&Woods *Penalties* 4,11,19,37-39; BRE *Sanctioning post-Hampton* 26; Macrory *Consultation* 8,39,44,50,55; DEFRA *Review* 21-22,29-30,40,42; Macrory Report 22,42,47; OECD *Compliance* 78; OECD *Fines* 3,18; fn.68-69.

¹¹⁵ Hampton *Reducing Burdens* 41; DEFRA *Review* 29,46-48; Macrory Report 22,69-72.

¹¹⁶ DEFRA *Review* 29; Macrory Report 42.

¹¹⁷ Fn.68-69,71-72,74-75,114,116,122,133-138,167-168.

¹¹⁸ BRE *Sanctioning post-Hampton* 11,24; Macrory *Consultation* 18,51,55,59; DEFRA *Review* 28; Macrory Report 43-45,48,100; OECD *Compliance* 78-79; OECD *Fines* 3; Waite 2007(24) *PELR* 354-355.

¹¹⁹ Macrory&Woods *Penalties* 39; DEFRA *Review* 28; Macrory Report 38.

external consequences.¹²⁰ Notice of the possible penalty imposition is provided, as is an opportunity to make representations. Having considered the representations, the regulator can impose a VMP.¹²¹

Administrative penalties are more representative of the level of economic advantage, and the severity of the non-compliance. In determining the penalty, the regulator must consider a publicly available set of criteria, including mitigating and aggravating factors like: the circumstances of the non-compliance; the seriousness of the violation; the regulatory importance of the requirement violated; the offender's degree of fault; vicarious liability for employees' failures and whether the employee was acting within their authority; the level of the offender's cooperation with the enforcement authority; the expected or actual gain from the non-compliance; the violator's history of non-compliance; regulators' previous enforcement actions; the firm's size; the violator's ability to pay the penalty; the duration of the non-compliance; the conduct of the business after the non-compliance came to the regulator's attention; and whether the offence was voluntarily reported in a timely and accurate manner.¹²²

The recipient of an administrative penalty can appeal to an independent tribunal if the imposition and/or the amount of the penalty is disputed. This tribunal should be staffed by members with specialist environmental law expertise.¹²³

¹²⁰ Kidd 2002 (9)1 SAJELP 41; Macrory *Consultation* 59; DEFRA *Review* 28,40; Macrory Report 38,45,52,55,100; OECD *Compliance* 79,87.

¹²¹ Macrory Report 55-56.

¹²² Macrory&Woods *Penalties* 4-5; BRE *Sanctioning post-Hampton* 11,24-25; Macrory *Consultation* 18,45,52-53,55-59; DEFRA *Review* 22-23; Macrory Report 38,45-49; OECD *Fines* 3,6,11-23,28; Fourie 2009 (16)2 SAJELP 95,110,120; OECD *Compliance* 3,87-89.

¹²³ Hampton *Reducing Burdens* 40-41; BRE *Sanctioning post-Hampton* 11,18-19,24; Macrory *Consultation* 7,18,22-23,44,53-55,59; DEFRA *Review* 31, 42,53; Macrory Report 38,41,52-56,93,100; Paddock 2012(42) *ELRNA* 10630; Macrory 2009(11) *ELR* 72-73; Kidd 2002 (9)1 SAJELP 37-39; Fourie 2009 (16)2 SAJELP 95,121-122; Svatikova *Criminalization* 85,282; INECE *Principles* 75,78.

2.2.2 Advantages and disadvantages of administrative penalties

2.2.2.1 Implementing body

A major advantage of an administrative penalty system is that environmental officials¹²⁴ – who are familiar with environmental legislation and the effect of environmental violations – administer the system and impose the fines. They have particular expertise and understand the sanctions expected to result in compliance. These officials are also better acquainted with the technological aspects of the regulated entity, and the offender's personal circumstances. They are therefore well-placed to consider all relevant information when deciding if an administrative penalty is appropriate; and, in the case of a VMP, its extent.¹²⁵

If someone is aggrieved by the imposition of an administrative penalty, they can challenge it in a higher tribunal which has specialised expertise in the subject matter. The appeal tribunal's clearer understanding of the issues is likely to result in fairer outcomes.¹²⁶ Appeals also do not have to compete with other cases in the already overloaded court system.¹²⁷

2.2.2.2 Standard of proof

Another significant benefit of the system is that there is generally no need to prove guilt beyond a reasonable doubt (the criminal standard) before imposing a penalty, but on a balance of probabilities (the civil standard).¹²⁸ As a result, monitoring regulatory requirements like those in environmental authorisations is less demanding than for a criminal case.¹²⁹

2.2.2.3 Cost and implementation time

Administrative penalties are less resource-intensive than criminal proceedings in terms of time, finances and personnel.¹³⁰ However, the enforcement costs of administrative law include the costs of inspection and evidence-collection – which are incurred irrespective of

¹²⁴ Fn.15,66.

¹²⁵ Fn.67.

¹²⁶ Fn.123.

¹²⁷ *Macrory Consultation* 54; *Macrory Report* 54-55; *Fourie* 2009 (16)2 SAJELP 124; fn.87.

¹²⁸ Fn.73.

¹²⁹ *Svatikova Criminalization* 95; *INECE Principles* 71-72; *Macrory Consultation* 30; *Macrory Report* 20.

¹³⁰ Fn.72,74-75.

whether a violation is found. A lack of human, monetary and technical resources for inspections will impact negatively on an administrative penalty system.¹³¹ The flip-side is that a credible and effective enforcement system requires fewer inspections of compliant businesses.¹³²

2.2.2.4 Ease of implementation

Administrative penalties have simpler procedural requirements, are less formal, and are easier to administer and impose than criminal penalties.¹³³ The administrative penalty system also makes it easier to determine the optimal punishment level.¹³⁴

In an administrative penalty system, more complaints are lodged for adjudication or settlement, more environmental violations are pursued, and more fines are imposed. Administrative penalties are flexible – allowing both for a more personalised approach to regulatory non-compliance, and a more proportional response to environmental breaches.¹³⁵ Because the system provides a meaningful, transparent and consistent regulatory response to violations, the regulated community knows where it stands.¹³⁶ As a result, administrative penalties promote fairness. They can remove the economic advantage of non-compliance – like a business's avoided costs of operation and maintenance, as well as the profits from postponed expenditure (like the time, value or money accrued as a result of industries not installing required equipment or infrastructure).¹³⁷ Industries that incur the costs required to

¹³¹ Svatikova *Criminalization* 94-95; Lynott 2010 (17)1 *IPELJ* 13; Macrory *Consultation* 30; Macrory Report 20,98.

¹³² Hampton *Reducing Burdens* 38; Macrory Report 98; fn.129.

¹³³ Fn.71-72,74-75.

¹³⁴ Svatikova *Criminalization* 87,107,109,137,145; OECD *Compliance* 75; Waite 2007(24) *PELR* 355; Lynott 2010 (17)1 *IPELJ* 13; Kidd 2002 (9)1 *SAJELP* 38.

¹³⁵ Fn.117.

¹³⁶ Kidd 2002 (9)1 *SAJELP* 37; Macrory *Consultation* 5,8,15,22,39,45,50,55,58; DEFRA *Review* 8,40,53; Macrory Report 10,33-35,86-89,91,97,99,101; OECD *Fines* 10,25-26,28; Fourie 2009 (16)2 *SAJELP* 125-126; INECE *Principles* 67.

¹³⁷ Macrory&Woods *Penalties* 4,38-39; Minzner 2012(53) *WMLR* 877; Macrory Report 15,20,22,47; Hampton *Reducing Burdens* 40-41; Macrory *Consultation* 19,48, 54-55,57,60; Fourie 2009 (16)2 *SAJELP* 110-111,125; OECD *Fines* 10-17,25..

comply with environmental legislation support the penalisation of those competitors that obtain an unfair advantage from non-compliance.¹³⁸

Enforcement authorities have much greater control over administrative proceedings than criminal prosecutions.¹³⁹ Because violations do not have to be sent to the public prosecutor or argued in court, the burden on state attorneys, police services, public prosecutors and criminal courts is reduced, and environmental cases do not have to compete with other crimes in the criminal justice system.¹⁴⁰

Since administrative penalties do not have the risk, negative publicity, loss of reputation and stigma of criminal prosecution, nor the threat of a criminal record, offenders are also less likely to dispute such penalty than a criminal fine.¹⁴¹ It is also so that criminal prosecution is clearly not the appropriate response for all violations of environmental legislation: certain breaches do not 'deserve' the stigma and adverse publicity of a criminal offence.¹⁴² In any event, because criminal prosecution of environmental law is limited, the stigmatic impacts and loss of reputation associated with a criminal sanction are often theoretical.¹⁴³

Officials' successful use of administrative penalties enhances their reputation, which is likely to increase compliance.¹⁴⁴ Administrative penalties can also provide more funds towards the fiscus.¹⁴⁵ Although administrative penalties cannot 'incapacitate' offenders and remove them from society in the way that imprisonment can, an 'incapacitation' effect is

¹³⁸ Rechtschaffen 1998(71) *SCLR* 1223-1224,1226-1227; Hampton *Reducing Burdens* 38; Macrory *Consultation* 8,39; Fourie 2009 (16)2 *SAJELP* 110,126; Craigie et al 'Dissecting' in *Environmental Compliance&Enforcement* 61.

¹³⁹ INECE *Principles* 75; OECD *Compliance* 76; fn.72.

¹⁴⁰ Fn.15,66,87,127.

¹⁴¹ Fourie 2009 (16)2 *SAJELP* 98,126; Svatikova *Criminalization* 139,145,153,169; Faure&Svatikova 2012 (24)2 *JEL* 258-259,284; INECE *Principles* 75,78; OECD *Compliance* 75,78; OECD *Fines* 12-13,15; Macrory&Woods *Penalties* 4,19,38; Macrory Report 42, 47.

¹⁴² Fn.57-58,103.

¹⁴³ Svatikova *Criminalization* 140; Faure&Svatikova 2012 (24)2 *JEL* 284; fn.17.

¹⁴⁴ Fourie 2009 (16)2 *SAJELP* 125.

¹⁴⁵ Fourie 2009 (16)2 *SAJELP* 124,126; Kidd *Environmental Law* 272; OECD *Fines* 7-8.

available by suspension or withdrawal of licences. This has been held to be the corporate counterpart of imprisonment.¹⁴⁶

A disadvantage of the system is that, because they have similar aims, administrative penalties sometimes have some of the same safeguards for offenders as those in the criminal system. An administrative penalty may be regarded as a 'criminal charge', entitling an offender to the rights in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴⁷ But important procedural differences remain between the two systems.¹⁴⁸ As long as the model applied incorporates safeguards proportional to the nature of the penalty system, the benefits of avoiding the burdensome criminal procedural requirements can be retained. The emphasis is on the true nature of the proceedings and not their form.¹⁴⁹

A further downside of administrative penalties is that court judgements have a greater precedent value than administrative penalty decisions. However, where the imposition of a penalty is resisted, the matter will, in any event, end up in a higher tribunal like a court.¹⁵⁰

In relation to those jurisdictions where there are currently no administrative penalties – such as in SA's environmental legislation – enabling legislation and new policies and procedures would need to be introduced. The need to establish new institutions - or expand existing institutions – is the primary disadvantage to the introduction of an administrative penalty system. New staff will have to be employed and procedural rules drafted.¹⁵¹

2.2.2.5 Deterrence impact

Because administrative authorities usually have an ongoing relationship with offenders, authorities often follow a compliance strategy; negotiating with offenders instead of

¹⁴⁶ Svatikova *Criminalization* 86-87,139,144; Faure&Svatikova 2012 (24)2 *JEL* 283-284; Watson 2005 (17)1 *ELM* 6.

¹⁴⁷ Rome,4.XI.1950.

¹⁴⁸ Svatikova *Criminalization* 3-4,20-21,144,169; Faure&Svatikova 2012 (24)2 *JEL* 254-255,285; Macrory&Woods *Penalties* 31-35.

¹⁴⁹ Macrory&Woods *Penalties* 35,39; Lynott 2010 (17)1 *IPELJ* 10.

¹⁵⁰ van Zeben&Mulkey 1992 *INECE Proceedings* para.3.3.5.

¹⁵¹ Fourie 2009 (16)2 *SAJELP* 118-122; Macrory&Woods *Penalties* 37.

prosecuting them. This is based on the assumption that authorities are more likely to achieve increased compliance if they adopt a conciliatory rather than a coercive approach. This approach is also followed because of the problems inherent in the criminal sanction, and a lack of alternative enforcement mechanisms.¹⁵²

Given the widespread non-compliance with environmental law,¹⁵³ and the fact that many violators are repeat offenders,¹⁵⁴ it appears that negotiation is not a sufficient deterrent. Compliance strategies often persist for long periods, requiring continuous interaction between authorities and offenders. A credible threat of legal sanction is essential for compliance,¹⁵⁵ and administrative penalties provide this.¹⁵⁶ Monetary fines have a strong impact in deterring the contravention of environmental legislation; in that potential violators are dissuaded by administrative penalties issued, and adjust their behaviour to avoid their imposition. This means that administrative penalties play an important role in increased C&E of environmental law.¹⁵⁷

However, if administrative penalties are not set high enough, businesses may easily budget for these fines as part of their operational costs and/or transfer the cost of the fine to their shareholders or the public.¹⁵⁸ And if the penalty is set too high, it will be perceived as unfair, and the offender will spend resources resisting the penalty instead of complying with it. Both clearly defeat the deterrent and punitive goals of administrative penalties.¹⁵⁹

Another shortcoming of any monetary sanction is that it is only effective to the extent of the offender's assets. Administrative penalties are inappropriate where offenders do not

¹⁵² Rechtschaffen 1998(71) *SCLR* 1205-1206; Svatikova *Criminalization* 91-92; Babbit et al 2004(15) *DELPF* 45; Macrory Report 14-15,20; Pedersen 2013 76(2) *MLR* 340; Macrory *Consultation* 15-16,29-30,35,44-45,49,60; DEFRA *Review* 28; INECE *Principles* 75,82; Kidd *Environmental Law* 274-275; fn.14.

¹⁵³ Fn.11.

¹⁵⁴ Fn.34.

¹⁵⁵ Rechtschaffen 1998(71) *SCLR* 1220,1227,1230; BRE *Sanctioning post-Hampton* 7; Macrory Report 20; INECE *Principles* 75,82; Svatikova *Criminalization* 93; fn.16.

¹⁵⁶ Svatikova *Criminalization* 91-93; INECE *Principles* 82; Macrory&Woods *Penalties* 9-10,38; BRE *Sanctioning post-Hampton* 7,15; Macrory Report 16,20; Kidd 2002 (9)1 *SAJELP* 24; Macrory *Consultation* 15.

¹⁵⁷ Fn.43.

¹⁵⁸ BRE *Sanctioning post-Hampton* 22; Sherman 2007(23) *JLUEL* 100-101; Macrory Report 20-21; Pedersen 2013 76(2) *MLR* 324,343; Macrory *Consultation* 60; fn.62.

¹⁵⁹ INECE *Principles* 80, fn.54-58,62.

have the means to pay.¹⁶⁰ The deterrence impact is limited when the benefits of non-compliance are high, substantial harm is caused by the violation, the probability of detection and/or imposing sanctions is low, and/or the offender's assets are negligible compared to the harm. When insolvency is an obstacle, more severe sanctions, like imprisonment, are required for appropriate deterrence.¹⁶¹ The more significant the harm, the more society values deterrence, and is prepared to bear the costs of imprisonment.¹⁶²

It has been proposed that an option to resolve the insolvency problem is to raise the probability of detection and thereby decrease the severity of the sanction required for optimal deterrence. However, it might not be possible to increase the likelihood of detection cheaply enough.¹⁶³ Another option is to arrange for payment in instalments, or to consider alternatives to monetary payment – such as a violator's donation of time and effort for voluntary improvements to environmental quality, or participation in environmental awareness media campaigns.¹⁶⁴ Where the imposition of the fine would result in an extreme financial burden - with results like insolvency or closure of the business - and there is determined to be an important public interest for the firm to remain in business, a decision could be made to impose a smaller fine. This option should only be considered if no alternatives are possible.¹⁶⁵ A reduced penalty should not be imposed in circumstances where the plant is likely to close down in any event, or will probably persist with its non-compliance.¹⁶⁶

2.2.2.6 Proportionality

Monetary fines also address circumstances where criminal prosecution is not a fitting response to a breach of environmental legislation. In other words, the violation does not warrant the moral condemnation and stigma of criminal prosecution - for instance, where there is only negligible harm as a result of the violation, or non-compliance was inadvertent.¹⁶⁷

¹⁶⁰ Watson 2005 (17)1 *ELM* 6; Pedersen 2013 76(2) *MLR* 324; Macrory *Consultation* 27,58; INECE *Principles* 77-78,86; Svatikova *Criminalization* 80,86,100.

¹⁶¹ Babbit et al 2004(15) *DELPF* 42-43,48,59; Svatikova *Criminalization* 86,100-101; Faure&Svatikova 2012 (24)2 *JEL* 258 *DEFRA Review* 23; fn.16.

¹⁶² Svatikova *Criminalization* 86.

¹⁶³ Svatikova *Criminalization* 87.

¹⁶⁴ OECD *Fines* 17,23; INECE *Principles* 86.

¹⁶⁵ OECD *Fines* 17,23.

¹⁶⁶ OECD *Fines* 17.

¹⁶⁷ Fn.117.

VMPs promote proportionality as they are imposed by having regard to relevant factors like the circumstances of the offence, the economic benefit of the violation, and the environmental damage.¹⁶⁸

2.2.2.7 Prevention of environmental harm

In addition to penalising environmental law contraventions, administrative penalties deter violations and incentivise improved compliance. They aim to eliminate the benefits of violations and remediate environmental harm. Like other administrative measures, they are in keeping with the 'polluter pays' principle.¹⁶⁹

Apart from the NEMA's s24G administrative fine,¹⁷⁰ there are no administrative penalties in SA's environmental law. However, there is quite widespread use of such penalties in other jurisdictions.¹⁷¹ Chapter 3 critically evaluates administrative penalties in the Netherlands and the UK.

3 CHAPTER 3: DRAWING LESSONS FROM OTHER JURISDICTIONS REGARDING THE USE OF ADMINISTRATIVE PENALTIES

This chapter evaluates the use of environmental law administrative penalties in two foreign jurisdictions to distil a set of best practices for possible application to SA's environmental regime. The Netherlands and the UK are the roots of SA's civil and common-law legal systems, respectively, and have contemporary experience with administrative penalties. The Constitution provides that a forum interpreting constitutional rights may consider foreign law,¹⁷² and examining these foreign systems provides relevant general lessons for assessing SA's legal system in Chapter 4.

¹⁶⁸ Fn.117.

¹⁶⁹ Fn.43,68-69.

¹⁷⁰ Chap.4.

¹⁷¹ Fn.42-43.

¹⁷² S.39(1)(c).

To set a context for the critical evaluation, a brief introduction to the regimes is provided. Thereafter, the regimes are jointly evaluated using a series of themes, with a view to draw possible lessons for the use of administrative penalties to improve SA's EC&E effort. These themes are: the administrative penalties' nature, trigger and scope; institutional arrangements; decision-making processes; maximum quanta; allocation of their proceeds; appeal and review procedures; their effect on criminal offences; and non-compliance implications.

3.1 Introduction to the regimes

3.1.1 Netherlands

The Constitution¹⁷³ is the framework of Dutch public law (including environmental law).¹⁷⁴ Government must conserve and improve the environment.¹⁷⁵ The General Administrative Law Act (GALA)¹⁷⁶ contains general administrative law provisions¹⁷⁷ and deals with the conduct of administrative authorities,¹⁷⁸ including the Netherlands Emissions Authority (NEA).¹⁷⁹ There is also constitutional provision for specific administrative courts.¹⁸⁰ Most environmental laws are enforced via the Economic Offences Act,¹⁸¹ which, together with the Dutch Penal Code,¹⁸² regulate criminal law enforcement.¹⁸³ The Environmental Management Act (EMA)¹⁸⁴ contains general environmental provisions,¹⁸⁵ and makes provision for the NEA to impose administrative penalties when certain emissions trading provisions are violated.¹⁸⁶

European Union (EU) law is the primary influence of Dutch environmental law. EU directives and regulations apply directly to the Dutch regulatory framework, or are

¹⁷³ Grondwet voor het Koninkrijk der Nederlanden, 1815.

¹⁷⁴ Seerden&Heldeweg 'Public environmental law in the Netherlands' in *Public Environmental Law* 342.

¹⁷⁵ S.21 Grondwet.

¹⁷⁶ Algemene Wet Bestuursrecht, 1992.

¹⁷⁷ S.107 Grondwet.

¹⁷⁸ S.1:1 GALA.

¹⁷⁹ Barkhuysen, Ouden&Schuurmans 2012 *NALL* 9; Koster, Hoge&Buiter 'Environmental Law in the Netherlands' 9.

¹⁸⁰ S.112 Grondwet.

¹⁸¹ Wet Economische Delicten, 1950.

¹⁸² Wetboek van Strafrecht, 1881.

¹⁸³ Svatikova *Criminalization* 125.

¹⁸⁴ Wet Milieubeheer, 1979.

¹⁸⁵ Seerden&Heldeweg 'Environmental law' in *Public Environmental Law* 348.

¹⁸⁶ S.18.16a.

incorporated into national law.¹⁸⁷ Directive 2003/87/EC of the European Parliament and of the Council of the EU¹⁸⁸ (Directive) establishes a scheme for Greenhouse gas (GHG) emission allowance trading within the European Community. The Netherlands is subject to GHG-reduction targets and falls within the EU Emission Trading System (ETS). Emission allowances are auctioned or allocated - with each allowance representing the emission of one carbon dioxide tonne. Allowances can be traded in the online European Registry (NEA manages the Dutch registry section), to enable companies to purchase additional allowances to meet their EU ETS obligations.¹⁸⁹ Participating businesses and airlines that emit GHGs require an emission permit¹⁹⁰ and must annually surrender emission allowances (or other credits) equivalent to their emissions.¹⁹¹

3.1.2 United Kingdom

The legal systems of England, Wales, and Northern Ireland are based on common law principles, and Scottish law is based on civil law principles with common law elements.¹⁹² There is no written constitution - statute law takes precedence.¹⁹³ The Environment Protection Act¹⁹⁴ (EPA) (amended by the Environment Act)¹⁹⁵ is the primary legislation¹⁹⁶ regulating emission control and waste management.¹⁹⁷ The Environment Agency (EA) is responsible for enforcement.¹⁹⁸

Following investigations and reports by Philip Hampton and Macrory into alternative regulatory and enforcement approaches,¹⁹⁹ the Regulatory Enforcement and Sanctions (RES) Act²⁰⁰ came into force in the UK in 2008.²⁰¹ It empowers EA (and others) to impose various civil sanctions - including administrative penalties in the form of both FMPs and VMPs -

¹⁸⁷ Koster, Hoge&Buiter 'Netherlands' 5.

¹⁸⁸ 13 October 2003.

¹⁸⁹ Koster, Hoge&Buiter 'Netherlands' 9-10.

¹⁹⁰ S.16.5 EMA.

¹⁹¹ Koster, Hoge&Buiter 'Netherlands' 10.

¹⁹² Himsworth 'Scotland' in *One Country* 119,124.

¹⁹³ Barnett *Constitutional & Administrative Law* 26; Himsworth 'Scotland' in *One Country* 119-120.

¹⁹⁴ 1990 c.43.

¹⁹⁵ 1995 c.25.

¹⁹⁶ In England, Scotland and Wales.

¹⁹⁷ OECD *Environmental Compliance* 150.

¹⁹⁸ Svatikova *Criminalization* 119. The Scottish Environment Protection Agency enforces the EPA in Scotland.

¹⁹⁹ Fn.101.

²⁰⁰ 2008 c.13.

²⁰¹ S.75.

subject to the introduction of secondary legislation.²⁰² These sanctions were introduced by the Environmental Civil Sanctions (England) Order (ECSO)²⁰³ and the Environmental Civil Sanctions (Miscellaneous Amendments) (England) Regulations.²⁰⁴ To give effect to these, EA published guidance on the use of civil sanctions and enforcement of offences²⁰⁵ by means of the 2011 Enforcement and Sanctions Statement and Enforcement and Sanctions Guidance (Guidance).²⁰⁶ Civil sanction guidance is provided to regulators by the Department for Environment Food and Rural Affairs (DEFRA)²⁰⁷ and the Department of Business Enterprise and Regulatory Reform.²⁰⁸

The RES Act applies to offences in relation to which EA has an enforcement function,²⁰⁹ including illegal water abstraction in terms of the EPA and a failure to furnish information in terms of the Water Resources Act (WRA).²¹⁰

3.2 Lessons to be drawn from the Netherlands and United Kingdom

3.2.1 Nature of penalty

The Dutch administrative fine is defined as a punitive sanction, comprising an unconditional obligation to pay a sum of money.²¹¹

In the UK, FMPs are payments of prescribed monetary penalties.²¹² FMPs are most appropriate for minor offences without direct environmental impacts - where EA's advice has not resulted in the required improvements and a low monetary penalty is more likely to change the offender's conduct.²¹³ VMPs are monetary penalties of amounts EA determines.²¹⁴ VMP are for more serious offences or where there is evidence of negligence or mismanagement.

²⁰² Part 3 RES Act; OECD *Environmental Compliance* 150.

²⁰³ 2010 No.1157.

²⁰⁴ 2010 No.1159. Svatikova *Criminalization* 120.

²⁰⁵ S.63(2)(a),s4(1) RES Act; s11(1)(a) ECSO.

²⁰⁶ The 2013 Offence Response Options (ORO) instruction contains options for offences EA regulates.

²⁰⁷ 2010 Guidance to Regulators in England and Draft Guidance for Wales.

²⁰⁸ 2008 RES Act Guidance.

²⁰⁹ S.38(1).

²¹⁰ 1991 c.57.

²¹¹ S.5.40 GALA.

²¹² S.39(3) RES Act.

²¹³ Guidance 10.

²¹⁴ S.42(3)(a) RES Act.

VMP imposition could change the violator's behaviour, deter others, remove the financial gain of non-compliance, and/or result in a quicker resolution.²¹⁵

It is preferable for an administrative penalty regime to follow the UK system of distinguishing between FMPs and VMPs. This allows more flexibility and proportionality as mitigating and aggravating circumstances can be considered.²¹⁶

3.2.2 Trigger for penalty

The Dutch EMA sets out the offences in relation to which NEA has discretion to impose an administrative penalty,²¹⁷ and those where such fine must be imposed.²¹⁸ Examples of the former are: establishing a facility with GHG installations without NEA's authorisation,²¹⁹ and contravening an emissions trading²²⁰ licence.²²¹ NEA must impose a fine, for example, when an airline fails to surrender annual GHG emission allowances at least equal to the total emissions in that year from aviation activities (in Annex I to the Directive) from 1 January 2012 for which that airline is responsible.²²²

Generally, administrative penalties can only be imposed if the offender is at fault.²²³ However, for non-discretionary fine offences, fault is not required.²²⁴ An administrative penalty cannot be levied if one has previously been imposed on the violator for the same violation.²²⁵

In the UK, several laws provide monetary penalties for offences. The WRA provides that a FMP or VMP may be imposed, *inter alia*, for abstracting water without a licence granted

²¹⁵ Guidance 11; fn.68.

²¹⁶ Fn.117-122,251,278,280-281.

²¹⁷ S.18.16a(1).

²¹⁸ S.18.16a(2).

²¹⁹ S.16.5.

²²⁰ Chap.16.

²²¹ S.18.18.

²²² S.16.39t.

²²³ S.5.41 GALA.

²²⁴ S.18.16a(2) EMA.

²²⁵ S.5.43 GALA.

by EA.²²⁶ A VMP may be imposed for the EPA offence of failing to furnish information in compliance with a written notice from the Secretary of State or a waste regulation authority.²²⁷

Before a FMP or VMP may be imposed, EA must be satisfied beyond reasonable doubt that the offence has been committed.²²⁸ EA should follow the Penalties Principles²²⁹ when considering appropriate action.²³⁰

It is recommended that administrative penalties be available for all environmental violations not serious enough to warrant criminal action.²³¹ Strict liability offences should generally be reserved for FMPs.²³² Contrary to the UK's position, and because a violator does not face criminal prosecution, it is appropriate for the standard of proof for administrative penalties and appeals to be a balance of probabilities.²³³

3.2.3 Scope of application

In the Netherlands, an administrative penalty for an airline's failure to surrender the required emission licence²³⁴ may be levied in addition to an increase in the GHG allowances that airline must annually surrender.²³⁵ If an emissions trading licence is violated, an administrative order under penalty²³⁶ may be imposed as well as an administrative penalty.²³⁷

In the UK, the EA may not serve a notice of intent to impose a FMP where a VMP (or other discretionary requirement) has been imposed on that person for that act or omission. A notice of intent to serve a VMP cannot be served where a FMP has already been imposed, or

²²⁶ S.24(4)(a); Sch.6 RES Act; Sch.5 ECSO; ORO 207 .

²²⁷ S.71(3); Sch.6 RES Act; Sch.5 ECSO; ORO 37.

²²⁸ S.39(2), s42(2) RES Act; Sch.1, s1(2), Sch.2, s1(2) ECSO.

²²⁹ Fn.101.

²³⁰ Guidance 4.

²³¹ Fn.113.

²³² Fn.118-119.

²³³ Fn.73.

²³⁴ S.16.39t EMA.

²³⁵ S.18.16a(4) EMA.

²³⁶ A reparation sanction requiring reparation of the violation and monetary payment if the order is not carried out (s.5.31d GALA).

²³⁷ S.18.16a(3) EMA.

the person has discharged FMP liability by paying the prescribed sum.²³⁸ A VMP may not be imposed on a person on more than one occasion in relation to the same act or omission.²³⁹ Provision to pay a FMP, VMP or non-compliance penalty may include provision for: early payment discounts; payment of interest or other late payment penalties (which cannot exceed the penalty amount); and penalty enforcement.²⁴⁰

Apart from criminal penalties,²⁴¹ a possible lesson to be drawn from these two jurisdictions is that an administrative penalty should be in addition to any other environmental penalty, and should only be imposed once per violation.

3.2.4 Institutional arrangements

In the Netherlands, NEA is an agency affiliated with the Ministry of Infrastructure and Environment.²⁴² It is an autonomous government organisation with independent sanctioning and enforcement powers,²⁴³ responsible for allocating emission rights, issuing emission permits, monitoring compliance and imposing sanctions.²⁴⁴

The EA in the UK is an executive non-departmental body accountable to the Secretary of State for Environment, Food and Rural Affairs, and aims to protect the environment and contribute to sustainable development by implementing UK government policies.²⁴⁵ The EA must have regard to published guidance when exercising its functions.²⁴⁶ This includes: the circumstances in which the penalty is likely to be imposed and when it may not be levied; rights to make representations and objections and appeal rights.²⁴⁷ FMP Guidance includes: the penalty amount; how to discharge liability; and the effect of

²³⁸ S.51(1) RES Act; s.5,Sch.1,s.5(3) ECSO.

²³⁹ S.42(4) RES Act; Sch.2,s.1(3) ECSO.

²⁴⁰ S.52(1) RES Act.

²⁴¹ Addressed at 3.2.9.

²⁴² Koster, Hoge&Buiter 'Netherlands' 9.

²⁴³ Dekkers & Allessie 2005 *INECE Proceedings* 275.

²⁴⁴ Chap.16 EMA; Koster, Hoge&Buiter 'Netherlands' 22.

²⁴⁵ <http://www.environment-agency.gov.uk/aboutus/149356.aspx>.

²⁴⁶ S.63(2)(e) RES Act; s.11(1)(d) ECSO.

²⁴⁷ S.63(3)(a),(b),(e),s.63(4)(a),(b),(d) RES Act; s.11(2)(a),(b),(e),s.11(3)(a),(b),(d) ECSO.

discharge.²⁴⁸ VMP guidance also contains the factors EA considers in determining the penalty.²⁴⁹

Enforcement guidance includes: possible sanctions; action EA may take to enforce the offence; and when EA is likely to take action.²⁵⁰ In deciding on the appropriate response to environmental non-compliance, EA must consider: the outcomes sought; immediate action for environmental protection; and whether additional action is required. If advice has not resulted in the desired result, these public interest factors will be considered to determine the appropriate sanction: intent; foreseeability; environmental effect; nature of offence; financial implications; deterrent effect; and the offender's history, attitude, and personal circumstances.²⁵¹

As is the case in these two jurisdictions, it is preferable for officials with specialist expertise to administer and impose administrative penalties. These officials should be adequately trained to understand when administrative penalties are appropriate, and to exercise appropriate discretion in the evaluation of VMP factors.²⁵²

Transparency, fairness, consistency and accountability are crucial for effective administrative penalties.²⁵³ There should be publicly-available guidance which contains similar information to the UK Guidance. Ideally, the enforcement policy should be drafted in consultation with the regulated community and wider stakeholder groups.²⁵⁴ The public and regulated entities must know what action regulators will take when a violation is discovered.²⁵⁵ The policy must state the circumstances in which different types of enforcement action will be imposed, and how fines will be calculated (including the factors considered in determining the fine).²⁵⁶ It should also contain information like: relevant time limits; the scale of charges;

²⁴⁸ S.63(3)(c),(d) RES Act; s.11(2)(c),(d) ECSO.

²⁴⁹ S.63(4)(c) RES Act; s.11(3)(c) ECSO.

²⁵⁰ S.64(2) RES Act.

²⁵¹ Guidance 13-16.

²⁵² Fn.67.

²⁵³ Fn.136.

²⁵⁴ Macrory Report 97.

²⁵⁵ OECD *Fines* 25.

²⁵⁶ Macrory *Consultation* 8,21-22,55,59; OECD *Fines* 25-26; Macrory Report 10,32-33,35,86-99; OECD *Fines* 25-26 Fourie 2009 (16)2 SAJELP 120; INECE *Principles* 77.

methods of payment; and complaints and appeals mechanisms.²⁵⁷ Enforcement policies should retain some flexibility. To boost confidence in the system, regulators must be able to justify the enforcement action chosen, and any departures from the policy.²⁵⁸ Enforcement policies should be periodically reviewed and improved.²⁵⁹

3.2.5 Decision-making process

The Dutch GALA provides that NEA and the competent supervisor may draw up a report of the violation (including the legislative violation; and, if necessary, the violation date, time and place), to present to the violator by the date of fine notification. If a Code of Criminal Procedure²⁶⁰ investigating officer's report has been prepared, the administrative report is not required.²⁶¹ Where an administrative penalty of more than €340.00 may be imposed, one of these reports is mandatory, as is the violator's opportunity to make submissions.²⁶² In such event, the report-drafter may not impose the fine.²⁶³ For non-discretionary fine offences, the report includes the intention to add the offender's name to the published list of transgressors, and the offender may also make submissions on this.²⁶⁴ The violator may inspect and copy the information on which the fine is based, which, if reasonably required for the offender's defence, should be their language.²⁶⁵

For those violations which require NEA to exercise discretion regarding fine imposition, the legislation gives no guidance. If a report has been drawn up of a violation, NEA decides – within 13 weeks – whether to impose the fine. If the violation is submitted to the prosecutor, this time limit is suspended until NEA regains power to impose an administrative penalty.²⁶⁶ If, after the violator has expressed their views, NEA decides: not to impose a fine; or to submit the violation for prosecution, it advises the violator in writing.²⁶⁷

²⁵⁷ Macrory Report 89.

²⁵⁸ *Macrory Consultation* 8,21; Macrory Report 10,32,35,88,99; OECD *Fines* 26.

²⁵⁹ Macrory Report 89; OECD *Fines* 26.

²⁶⁰ S.152 Wetboek van Strafvordering, 1921.

²⁶¹ S.5:48.

²⁶² S.5:53.

²⁶³ S.10:3(4).

²⁶⁴ S.18.16g(2),s.18.16i EMA.

²⁶⁵ S.5:49 GALA.

²⁶⁶ S.5:51.

²⁶⁷ S.5:50(2).

For discretionary fine offences, the violator may only receive the administrative report with the fine decision. This decision must be based on sound reasons, and, in general, all decisions must contain these reasons and the relevant legislative provisions.²⁶⁸ The decision should also contain the fine amount,²⁶⁹ and the deadline for payment²⁷⁰ (usually six weeks).²⁷¹ For EMA non-discretionary fines, the decision also states that the offender's name will be published,²⁷² and NEA adds the name to the transgressors' list.²⁷³

In the UK, where the EA proposes to impose a FMP, it must serve a notice of intent which includes: the grounds; the penalty amount; that liability can be discharged by paying 50 per cent within 28 days; the right to make representations and objections (within 28 days); and the circumstances in which it may not impose the FMP (including any defences).²⁷⁴ If the EA possesses material undermining its case, it must disclose this.²⁷⁵ A person who made representations timeously may discharge liability as per this notice.²⁷⁶

Before serving a VMP notice, EA may require the provision of reasonable information to establish the offence's financial benefit.²⁷⁷ VMPs have three components: financial benefit (to remove the offence's benefit); deterrent; and deduction (to reduce the penalty by the costs the violator incurred - like complying with a compliance notice). The deterrent component is based on: the financial benefit; the costs to comply with a restoration notice; or the maximum criminal fine a magistrate's court could impose for the offence where there is neither significant benefit or restoration; and then adjusted according to aggravating and mitigating factors. Aggravating factors include: blameworthiness, non-compliance history, foreseeability and risk of environmental harm, and ignoring previous advice. Mitigating factors include: preventative measures, cooperation with EA, self-reporting, immediate voluntary remediation and restoration, and personal circumstances. The offender's attitude could either aggravate or

²⁶⁸ S.3:46-3:47.

²⁶⁹ S.5.52.

²⁷⁰ S.4:86.

²⁷¹ S.4:87.

²⁷² S.18.16k.

²⁷³ S.18.16a(5),s.18.16p.

²⁷⁴ S.40(2)(a)-(c)(i),s40(3) RES Act; Sch.1,s.2-5 ECSO.

²⁷⁵ Guidance 19.

²⁷⁶ Sch.1,s.7 ECSO.

²⁷⁷ Sch.2,s.1(6) ECSO.

mitigate.²⁷⁸ Persons who cannot pay the full penalty amount may provide submissions and evidence for EA's consideration.²⁷⁹

The deterrent and financial benefit components are added together to: challenge the offender's behaviour; deter others; and assure others that offenders have not secured any advantage. From this amount, the costs incurred by the violator are deducted.²⁸⁰ Regulators must exercise their reasonable judgement on the appropriate penalty on the basis of the available evidence.²⁸¹ The VMP amount determined is included in the notice of intent. The procedure for imposing a VMP is similar to the FMP process. The offender can undertake to take action (including a monetary payment) to benefit anyone affected by the offence: EA can accept or reject an undertaking, and consider any accepted undertaking in its decision.²⁸²

As soon as possible after the representations period, the EA decides whether to impose the sanction (with or without modification) or to impose a different sanction.²⁸³ Decisions to proceed with a civil sanction, notwithstanding contrary representations, will be made by a separate reviewing lawyer and manager.²⁸⁴ Where EA decides to impose the FMP, the notice imposing it (the final notice) includes: the penalty amount; the imposition grounds; payment methods; the period of 56 days for payment; any early payment discounts or late payment penalties; appeal rights; and non-payment consequences.²⁸⁵ Following VMP representations, the final amount is included in the final notice.²⁸⁶

Having considered the procedure in these two jurisdictions, it is proposed that, in an administrative penalty system, an offender should receive notification of the intention to impose a monetary penalty, including relevant details of the violation (and other information similar to the UK procedure), and should have a reasonable opportunity to make submissions

²⁷⁸ Guidance 23-33.

²⁷⁹ DEFRA *Review* 20.

²⁸⁰ Guidance 23,33-34

²⁸¹ DEFRA *Review* 19.

²⁸² S.43 RES Act; Sch.2,s.1(1),s.2(3),s.4-6 ECSO.

²⁸³ S.40(2)(c)(ii); s.43(2)(c) RES Act; DEFRA *Review* 23.

²⁸⁴ Guidance 19.

²⁸⁵ S.40(2)(d)-(e),s.40(5) RES Act; Sch.1,s.6 ECSO.

²⁸⁶ Guidance 24.

regarding the factors used to calculate the fine.²⁸⁷ The decision-maker must carefully consider the representations – and, for a VMP, also the relevant mitigating and aggravating circumstances – to decide whether to impose a fine. In making this decision, the regulator must be guided by its policies.²⁸⁸ Generally, more junior staff could impose FMPs, but decisions regarding VMPs should be taken by more senior officials, independently from inspectors, to protect the relationship between field staff and industry and for a more consistent regulatory approach.²⁸⁹ When the offender is notified of the fine imposition, reasons should be provided, and the offender advised of details like: the payment deadline; consequences of non-payment; and the appeal right (and how and where to lodge an appeal).

3.2.6 Maximum penalty quanta

In the Netherlands, maximum administrative penalties are generally determined by statute and the administrative authority imposes a lower fine if the violator demonstrates special circumstances. If the amount is not legislatively determined, the authority sets the fine at an amount commensurate with the violation's gravity and the offender's blameworthiness. If necessary, the authority considers the circumstances of the violation.²⁹⁰

The maximum administrative penalty for discretionary fine offences is €450,000 per violation; or, if the turnover in the preceding financial year exceeded €4.5 million, ten per cent of the undertaking's turnover.²⁹¹ In relation to non-discretionary fine offences, the fine is prescribed in the Directive²⁹² for each tonne of carbon dioxide equivalent by which the annual emissions exceed the GHG emission allowances, emission reduction units or certified emission reductions surrendered.²⁹³ A lower penalty may not be imposed.²⁹⁴ The Directive requires that member states ensure that operators who do not annually surrender sufficient allowances to cover emissions during the preceding year are liable for an excess emissions penalty of €100 for each tonne of carbon dioxide equivalent emitted by that installation for

²⁸⁷ Fn.118-122,251,274-278,280-282.

²⁸⁸ Fn.246-250,254-259.

²⁸⁹ *Macrory Consultation* 58; *Macrory Report* 50.

²⁹⁰ S.5:46 GALA, read with art.1, para.2 of the Penal Code.

²⁹¹ S.18.18e(1). S.18.16e(5) deals with the calculation of the turnover.

²⁹² S.16(3).

²⁹³ *Inter alia*, in terms of s.16.39t EMA.

²⁹⁴ S.18.16(e)(2) EMA.

which the operator has not surrendered allowances. Payment of this penalty does not release the operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.²⁹⁵ This amount is increased annually in accordance with the European consumer price index.²⁹⁶

In the UK, where the relevant offence is: for a FMP, triable summarily (whether or not it is also triable on indictment), and for a VMP, triable summarily only; and, for both, punishable on summary conviction by a fine (whether or not it is also punishable by imprisonment), the penalty amount may not exceed the maximum fine amount.²⁹⁷ The maximum FMP is £100 for an individual or £300 for a body corporate.²⁹⁸ The amount of a VMP must not exceed £250,000.²⁹⁹ Where the VMP would be greater than £250,000, the EA usually prosecutes.³⁰⁰

As in the UK and for EMA non-discretionary fine violations, it is recommended that FMP amounts be determined by statute.³⁰¹ Since administrative penalties are for less egregious violations that do not warrant criminal prosecution,³⁰² maximum VMPs should not exceed the maximum criminal fine that could be imposed. If the fine would exceed this amount, it is recommended that, as in the UK, the regulator prosecute.

3.2.7 Allocation of penalty proceeds

Because Dutch administrative penalties are paid to the authority that imposed the sanction, unless otherwise provided by law,³⁰³ EMA fines are paid to NEA.

²⁹⁵ S.16(3).

²⁹⁶ S.18.16e(2)-(3) EMA.

²⁹⁷ S.39(4),s.42(6) RES Act; Sch.2,s.1 (4)EC SO.

²⁹⁸ Sch.1,s.1(3) EC SO.

²⁹⁹ Sch.2,s.1(5) EC SO.

³⁰⁰ DEFRA *Review* 19.

³⁰¹ Fn.118.

³⁰² Fn.113.

³⁰³ S.5:10(1) GALA.

However, in the UK, where a regulator receives any monetary penalty or interest for late payment, it must be paid into the Consolidated Fund (the government's general bank account), and is not available to regulators.³⁰⁴

Best practice requires that, to prevent any incentive for regulators to increase their revenues improperly by levying inappropriate fines, funds from administrative penalties should not be available – directly or indirectly – to the regulator that imposed the fine.³⁰⁵ This is contrary to the Dutch position, but the same as in the UK.

3.2.8 Appeal and review procedures

In the Netherlands, GALA provides that, if a decision is open to objection (reconsideration by the administrative authority) or administrative appeal (review by a different administrative authority),³⁰⁶ this is stated in the decision, together with details as to time limits (generally six weeks),³⁰⁷ and where the objection or appeal may be lodged³⁰⁸ (objection notices are filed with NEA; administrative appeal notices are filed with appellate authorities; and administrative court appeals are instituted by filing appeal notices with that court).³⁰⁹ Notices describe the challenged decision and the grounds, and, if possible, include the decision.³¹⁰ Generally, an objection precedes an administrative court appeal.³¹¹ In appropriate circumstances, NEA grants an applicant's request to appeal directly to the administrative court.³¹² An objection or appeal does not suspend the challenged decision's operation, unless otherwise provided by law.³¹³

³⁰⁴ S.69 RES Act. Where a regulator only has functions in relation to Wales, Scotland or Northern Ireland, different Funds are used.

³⁰⁵ *Macrory Consultation* 58-59; *Fourie* 2009 (16)2 SAJELP 124; *Macrory Report* 10,33,50; *Macrory Regulation* 15,30.

³⁰⁶ S.1:5.

³⁰⁷ S.6:7-6:8.

³⁰⁸ S.3:45.

³⁰⁹ S.6:4.

³¹⁰ S.6:5.

³¹¹ S.6:13,s.7:1(1)a-c.

³¹² S.7:1a.

³¹³ S.6:16.

Before deciding an objection or administrative appeal, NEA gives interested parties the opportunity to be heard.³¹⁴ At least a week before the hearing, NEA makes all relevant documents available for inspection by interested parties - who may also file additional documents until ten days before the hearing.³¹⁵ Parties are generally heard in each other's presence.³¹⁶ Witnesses and experts may be heard.³¹⁷

Unless the objection hearing is handled wholly or partly by NEA, it is conducted by: someone not involved in preparing the challenged decision, or two or more persons of whom the majority (including the chairman) were not so involved. Unless otherwise provided by law, NEA determines whether the hearing will be public.³¹⁸ An advisory committee – consisting of a chairman (neither a member of nor working under NEA's authority) and at least two members – may decide an objection. NEA may explain its position at the hearing.³¹⁹ The appellate authority or an advisory committee conducts an administrative appeal. The hearing is public, unless, for compelling reasons, the authority decides otherwise, or an interested party so requests.³²⁰ A record of the hearing is kept.³²¹ If, after the hearing, the relevant authority becomes aware of facts with considerable relevance to the decision, this is communicated to interested parties - who have the opportunity to be heard.³²²

The authority deciding an objection generally gives its decision within six weeks from the day after the deadline for filing an objection notice, or within 12 weeks if there is an advisory committee.³²³ The administrative appeal time period is the same if the appellate authority is part of the body whose decision is being appealed. Otherwise, the authority generally decides within 16 weeks from the day after the appeal's expiry date.³²⁴ An advisory committee's recommendation is written and includes the hearing record. If the decision departs from the recommendation, this must be explained and the recommendation

³¹⁴ S.7:2,s.7:16.

³¹⁵ S.7:4(1-3),s.7:18(1-3).

³¹⁶ S.7:6,s.7:20.

³¹⁷ S.7:8,s.7:22.

³¹⁸ S.7:5.

³¹⁹ S.7:13(1),(5).

³²⁰ S.7:19.

³²¹ S.7:7,s.7:21.

³²² S.7:9,s.7:23.

³²³ S.7:10.

³²⁴ S.7:24.

enclosed.³²⁵ Sound reasons for the decision must be provided and reasons stated if no hearing is held. The decision is sent to its addressees and communicated to interested parties as soon as possible. The appeal decision must also be communicated to the authority whose decision was appealed.³²⁶

If the objection is admissible, the challenged decision is reconsidered. If the reconsideration gives cause to do so, the administrative authority revokes the decision and, if necessary, replaces it.³²⁷ The objection decision may be appealed.³²⁸ If the appellate authority finds the appeal well-founded, it annuls and may replace the challenged decision.³²⁹ If the decision on the objection or appeal is appealable, this is stated when the decision is notified, as well as who may lodge an appeal, where and by when.³³⁰

Appeals of EMA administrative penalties are decided by The Hague District Court.³³¹ Cases are first considered by a single-judge panel, but, if deemed unsuitable for a one-judge panel, are referred to a three-judge panel (which may also refer a case to a single judge).³³² Generally, natural persons without legal capacity to appear in judicial proceedings are represented as per civil law rules.³³³ As far as possible, the court must decide the matter finally.³³⁴

A preliminary inquiry takes place. Within four weeks of the administrative authority's receipt of an appeal notice, it sends the case-related documents to court and files a defence.³³⁵ If the court affords the appellant the opportunity to reply, the authority may submit a rejoinder. Other parties may make written submissions.³³⁶ The court may permit the

³²⁵ S.7:13(6-7),s.7:24(2).

³²⁶ S.7:12,s.7:26(1),(3)-(4),s.3:27,s.3:28(2).

³²⁷ S.7:11.

³²⁸ S.7:1(2).

³²⁹ S.7:25.

³³⁰ S.6:23.

³³¹ S.8:7,Sch1,chap.3,s.6.

³³² S.8:10.

³³³ S.8.21(1).

³³⁴ S.8:41a.

³³⁵ S.8:42.

³³⁶ S.8:43.

authority to correct a defect in the challenged decision;³³⁷ and, if so, parties have four weeks for written submissions.³³⁸ The judge advises parties of the further conduct of the matter within four weeks of: the authority indicating it will not repair the defect; the deadline for the defect to be repaired; the representations; or the representations deadline.³³⁹ Until the parties are invited to appear in court, the district court may, in certain circumstances, close the inquiry, and give judgment directing the authority to deal with the appeal notice as an objection notice.³⁴⁰ This judgment may be opposed.³⁴¹

Parties must cooperate in an investigation,³⁴² but appellants are not obliged to testify about the violation.³⁴³ Those summoned must appear, provide requested information,³⁴⁴ and testify when required.³⁴⁵ If persons fail to comply with these obligations, the district court may draw appropriate conclusions.³⁴⁶

After the preliminary enquiry is closed, parties receive at least three weeks' notice to appear in court,³⁴⁷ and may file additional documents until ten days before the hearing.³⁴⁸ Generally, the hearing is public.³⁴⁹ With the parties' consent, the district court may direct that there will be no hearing - the inquiry is then closed.³⁵⁰ The court closes the hearing following examination of the case and the parties' final speeches. Thereafter, the judge: gives oral judgement immediately;³⁵¹ or announces when judgment will be given³⁵² (usually oral judgment can only be deferred by a week and written judgment is given within six weeks).³⁵³ Judgment comprises the decision, its grounds, and states who is entitled to which remedy -

³³⁷ S.8:51a.

³³⁸ S.8:51b.

³³⁹ S.8:51c.

³⁴⁰ S.8:54.

³⁴¹ S.8:55.

³⁴² S.8:30.

³⁴³ S.8:28a.

³⁴⁴ S.8:27(1),s.8:28.

³⁴⁵ S.8:33(1).

³⁴⁶ S.8:31.

³⁴⁷ S.8:56.

³⁴⁸ S.8:58(1).

³⁴⁹ S.8:62.

³⁵⁰ S.8:57.

³⁵¹ S.8:67(1).

³⁵² S.8:63,s8:77(1).

³⁵³ S.8:66,s8:67(1).

before which court and by when.³⁵⁴ If the district court annuls the penalty decision, it decides the fine imposition and directs the extent to which its judgment replaces the annulled decision.³⁵⁵ Where a judgment includes an award of damages, costs or compensation, it is enforceable in terms of the Code of Civil Procedure.³⁵⁶ The judgment may declare that: the district court lacks jurisdiction; the appeal is inadmissible, unfounded or well-founded.³⁵⁷ If the appeal is well-founded, the judgment sets out the violation.³⁵⁸ The court also annuls all of part of the decision, and may order the authority to take a new decision, perform another act, or replace the annulled decision. A non-compliance penalty may also be ordered.³⁵⁹

A district court may reopen an inquiry it considers not to have been complete, and determine its further conduct.³⁶⁰ GALA makes provision for interim judgments,³⁶¹ and provisional relief.³⁶² A court may review a final judgment on the grounds of facts: which occurred before judgment; of which the applicant was not and could not reasonably have been aware prior to judgment; and which might have resulted in a different judgment had the court been aware of them.³⁶³

There is a higher appeal available to the Administrative Jurisdiction Division of the Council of State.³⁶⁴ Generally, this appeal would not suspend the appeal decision's operation.³⁶⁵ The court clerk of the higher appellate court advises the district court clerk of the appeal as soon as possible. The latter provides the former with the court record and judgment within one week, and a report of the hearing (if requested).³⁶⁶ There is provision for a cross-appeal within six weeks of receipt of the grounds of higher appeal. Interested parties may make written submissions within four weeks of these grounds. Generally, inadmissibility or

³⁵⁴ S.8:67,s8:71.

³⁵⁵ S.8:72a.

³⁵⁶ Wetboek van Burgerlijke Rechtsvordering,2002; s.8:75-s.8:76.

³⁵⁷ S.8:70.

³⁵⁸ S.77(2).

³⁵⁹ S.8:72.

³⁶⁰ S.8:68.

³⁶¹ S.8:80a-8:80b.

³⁶² S.8:81-8:87.

³⁶³ S.8:119.

³⁶⁴ S.8:104-105.

³⁶⁵ S.8106(1).

³⁶⁶ S.8:107.

withdrawal of the higher appeal does not affect the cross-appeal's admissibility.³⁶⁷ The higher appellate court can: confirm the district court's decision (adopting or improving it); or partially or completely replace it. If the judgment requires that the authority take a new decision, it may provide that only the higher appellate court can hear an appeal of such decision.³⁶⁸ In certain circumstances, the higher appellate court may refer the case back to the district court.³⁶⁹

In the UK, the person on whom a FMP is imposed may appeal.³⁷⁰ Appeal grounds include that the decision was: unreasonable; based on an error of fact; or wrong in law.³⁷¹ VMP appeal grounds are the same, with an additional ground that the penalty amount is unreasonable.³⁷² Appeals are to a first-tier Tribunal (Tribunal) established in terms of the Tribunals Act,³⁷³ consisting of judges and other members.³⁷⁴ Tribunal Rules³⁷⁵ govern this process³⁷⁶ and the Tribunal may give directions on issues like: document inspections; statements; and the evidence required.³⁷⁷ Parties may be represented.³⁷⁸ An appellant lodges an appeal notice within 28 days of the decision, including: the appeal grounds; the relief sought; a written record of the decision challenged; and any statement of reasons. The Tribunal sends these documents to respondents,³⁷⁹ who respond within 28 days, including any opposition grounds, and the written record and decision reasons (if these were not in the notice).³⁸⁰ Within 14 days, appellants may make written submissions, with supporting documents, in reply.³⁸¹

Appeals are considered at a hearing (unless agreed otherwise and the Tribunal is satisfied that a hearing is not required),³⁸² of which at least 14 days' notice is provided.³⁸³

³⁶⁷ S.8:111-112.

³⁶⁸ S.8:113.

³⁶⁹ S.8:115.

³⁷⁰ S.40(2)(e) RES Act.

³⁷¹ S.40(6) RES Act; Sch.1,s.8 ECSO.

³⁷² S.43(7) RES Act; Sch.2,s.8 ECSO.

³⁷³ Tribunals, Courts and Enforcement Act 2007 c.15.

³⁷⁴ Ss.3-4.

³⁷⁵ The Tribunal Procedure (First-tier Tribunal) (General regulatory Chamber) Rules 2009.

³⁷⁶ S.22 Tribunals Act.

³⁷⁷ Rule 15.

³⁷⁸ Rule 11.

³⁷⁹ Rule 22.

³⁸⁰ Rule 23.

³⁸¹ Rule 24.

³⁸² Rule 32.

Usually, hearings are public³⁸⁴ and each party may: attend any hearing; and send written representations to the Tribunal and other parties before the hearing.³⁸⁵ In certain circumstances, the Tribunal may proceed with the hearing in a party's absence.³⁸⁶ EA must prove the commission of an offence beyond reasonable doubt. In other cases, the Tribunal determines the standard of proof. Notices³⁸⁷ are suspended pending appeal. The Tribunal may: withdraw, confirm or vary the sanction; take such steps as EA could take; or remit the decision whether to confirm the decision (or any related matter) to EA.³⁸⁸ The Tribunal may give a decision orally at a hearing. As soon as practicable, it provides to each party: a decision notice and written reasons; and notification of any appeal right (and how to exercise it).³⁸⁹

A party seeking permission to appeal the Tribunal's decision makes written application to the Tribunal within 28 days of the latest of: receipt of written reasons; notification of amended reasons or the decision's correction following a review; or notification of failure of an application to set it aside. The application sets out the alleged error of law and the result sought.³⁹⁰ The Tribunal must first decide whether to review the decision. If it does not do so (or takes no action following a review), it considers whether to grant appeal permission. A record of its decision must be sent to the parties as soon as practicable. If permission is refused, the record must be accompanied by: reasons for such refusal; and notification of the right and procedure to make an application to the Upper Tribunal (UT) (which consists of judges and other members)³⁹¹ for permission to appeal.³⁹² The Tribunal may also review a decision containing an error of law. Generally, all parties may make review representations. The Tribunal must notify the parties in writing of the review outcome, and of any appeal right.³⁹³

³⁸³ Rule 34.

³⁸⁴ Rule 35.

³⁸⁵ Rule 33(1).

³⁸⁶ Rule 36.

³⁸⁷ Except stop notices.

³⁸⁸ S.54 RES Act; s.10 ECSO.

³⁸⁹ Rule 38.

³⁹⁰ Rule 42.

³⁹¹ S.3(3),s.5.

³⁹² Rule 43.

³⁹³ Rule 44.

The Tribunals Act provides that, with Tribunal or UT permission, a Tribunal decision may be appealed to UT on a legal point.³⁹⁴ If UT sets aside the Tribunal's decision, it must either remit the case to the Tribunal with reconsideration directions, or re-make the decision, by making any decision the Tribunal could make and appropriate factual findings.³⁹⁵ There is also an appeal right to the relevant appellate court on any point of law arising from UT's decision. Permission may be sought from UT (or the appellate court if UT refuses). The appellate court has the same decision-making powers as the UT.³⁹⁶ Both the Tribunal and UT may review their own decisions.³⁹⁷

EA publishes reports specifying the cases in which: civil sanctions have been imposed;³⁹⁸ FMP liability discharged; third party undertakings accepted; and enforcement undertakings concluded.³⁹⁹ To ensure that sanctioning is in line with good practice and applied consistently, EA has centrally-coordinated arrangements to review or monitor individual decisions,⁴⁰⁰ and civil sanctions are monitored and overseen by a director-led national panel.⁴⁰¹ Having consulted appropriate persons, the relevant Minister reviews the operation of provisions conferring power on regulators to impose civil sanctions, particularly considering whether the provision has implemented its objectives efficiently and effectively. The review results are published and provided to Parliament.⁴⁰²

It is recommended that – as is the UK - appeal grounds be contained in legislation.⁴⁰³ The appeal tribunal should be staffed by adjudicators with environmental expertise – ideally, a legal expert, an expert in the particular area, and a member from a relevant stakeholder group.⁴⁰⁴ A notice of appeal, setting out the appeal grounds, should be filed with the appeal tribunal. Generally, an appeal should suspend the decision's operation. At the appeal tribunal,

³⁹⁴ S.11. The Tribunal Procedure (Upper Tribunal) Rules 2008 govern the UT Procedure.

³⁹⁵ S.12.

³⁹⁶ Ss.13-14.

³⁹⁷ Ss.9-10.

³⁹⁸ S.65(2)(a),s.65(3).

³⁹⁹ S.65(2)-(3),s.14(1)-(2).

⁴⁰⁰ DEFRA *Review* 23.

⁴⁰¹ www.environment-agency.gov.uk/business/regulation/116844.aspx.

⁴⁰² S.67.

⁴⁰³ Macrory Report 55-56.

⁴⁰⁴ Fn.123.

the appeal can be a full re-hearing on the merits, or deal only with a particular issue.⁴⁰⁵ As in the UK, appeals should usually be public.

In a FMP appeal, the first step could be an internal review by the regulator to allow the presentation of information that it may not have been aware of before imposing the penalty. Thereafter, the regulator can: uphold its decision; reverse its decision; or impose a lesser sanction. If the appellant remains dissatisfied, an appeal can be brought before the appeal tribunal. Parties can agree that the FMP appeal be determined on the papers only.⁴⁰⁶ A VMP appeal should take the form of an oral hearing.⁴⁰⁷ The appeal tribunal must provide reasons for its decision, and can confirm, set aside, and where appropriate, replace the regulator's decision. Costs can also be awarded. The appeal decision should also indicate that it can be taken on review or appeal to a higher appellate tribunal, as well as the time period for doing so.

An appeal notice containing the appeal grounds should be delivered to the higher appeal tribunal, which, as in the UK, has the same powers as the appeal tribunal. Again, the appeal could be a full re-hearing or limited to a particular disputed aspect regarding the administrative penalty. A record should be kept of all proceedings and both tribunals should have the status of a High Court so that their orders are executable.⁴⁰⁸

There must be good record-keeping on the use of administrative penalties.⁴⁰⁹ Enforcement bodies should measure the environmental advantages of enforcement action, such as steps taken by industry in response.⁴¹⁰ Regulators must follow up enforcement actions to ensure compliance, and subsequent follow-ups should determine the effect of the action on compliance.⁴¹¹

⁴⁰⁵ Macrory Report 55-56.

⁴⁰⁶ Macrory Report 55.

⁴⁰⁷ Macrory Report 56.

⁴⁰⁸ Fourie 2009 (16)2 SAJELP 119. The Constitution makes provision for the establishment, by an Act of Parliament, of courts with a status similar to the High Courts (s166(e)).

⁴⁰⁹ OECD *Fines* 26.

⁴¹⁰ Rechtschaffen 1998(71) *SCLR* 1269-1271.

⁴¹¹ Macrory *Consultation* 8,22; Macrory Report 10,32-33,51,100; OECD *Fines* 25,27; Rechtschaffen 1268-1271.

For administrative penalties to be effective deterrents, environmental agencies should regularly publicise the outcomes of enforcement action – including administrative penalties – and not only the number of actions taken. If outcomes are monitored, officials, the public and the regulated community will know the impact of enforcement action, and whether it must be changed to improve these results.⁴¹² Officials should make public: the number of fines imposed; their monetary value; the violators; the nature of the violations; whether fines have been paid; and if not, what enforcement will be (or has been) taken.⁴¹³ A strong message must be sent to other potential offenders that any non-compliance will be penalised with meaningful fines.⁴¹⁴

3.2.9 Effect of penalty on criminal offence

The Dutch GALA provides that an administrative authority shall not impose an administrative penalty if criminal proceedings have been brought against the violator for the same act, and the hearing has started or a penalty imposed.⁴¹⁵ If the conduct is also a criminal offence and the seriousness of the offence or the circumstances under which it was committed warrant this, NEA presents it for prosecution,⁴¹⁶ together with the administrative report.⁴¹⁷ If an act is one that must be submitted to the prosecutor, NEA may only impose an administrative penalty if the prosecutor has: informed NEA that there will be no prosecution, or failed to respond within 13 weeks.⁴¹⁸ An administrative penalty imposed for conduct which is also a criminal offence is void if the Court⁴¹⁹ orders that the offender be prosecuted.⁴²⁰

In the UK, where a notice of intent to impose a FMP is served: no criminal proceedings for the relevant offence may be instituted for 28 days; and if that person discharges liability or an FMP is imposed, they may not be convicted of the offence.⁴²¹ If a

⁴¹² Macrory *Consultation* 8,21; Macrory Report 10,32,35,87-91,97; Macrory 2009(11) *ELR* 73; OECD *Fines* 25,27,29; Rechtschaffen 1998(71) *SCLR* 1268-1271, fn.60.

⁴¹³ Faure&Svatikova 2012 (24)2 *JEL* 284; Macrory *Consultation* 22; DEFRA *Review* 4,6; Macrory Report 33,86; Macrory 2009(11) *ELR* 73; OECD *Fines* 26; fn.60.

⁴¹⁴ Fn.16,60-61.

⁴¹⁵ S.5:44(1).

⁴¹⁶ S.18.16d EMA.

⁴¹⁷ S.18.16g(3).

⁴¹⁸ S.5.44(3) GALA.

⁴¹⁹ Pursuant to art.12*i* of the Code of Criminal Procedure.

⁴²⁰ S.5.47 GALA.

⁴²¹ S.41 RES Act; Sch.1,s.10 ECSO.

VMP is imposed or a third party undertaking is accepted, that person may generally not be convicted. However, conviction is possible if: a non-monetary discretionary requirement is imposed, or an undertaking⁴²² is accepted; no VMP is imposed; or there is non-compliance with this requirement or undertaking. Criminal proceedings for such offences triable summarily may be instituted up to six months from the date EA notifies the person of their failure to comply.⁴²³

To commence a prosecution, EA must be satisfied that there is a realistic prospect of conviction, as required by the Code for Crown Prosecutors.⁴²⁴ Where, for instance: the offence has caused (or may cause) serious harm to the environment or people; there is overt criminality, gross negligence or reckless behaviour; or non-compliance has been protracted and serious, EA would generally prosecute, having regard to the public interest considerations.⁴²⁵

A possible lesson to be drawn from these jurisdictions is that, if liability for a monetary penalty has been discharged, or a FMP or VMP has been imposed, no criminal proceedings should be instituted for the violation, as criminal and administrative penalties are alternatives to one another. If the conduct is particularly egregious,⁴²⁶ or also amounts to a criminal offence and there is a realistic prospect of conviction, the authority should present it for prosecution. Also, an administrative penalty cannot be imposed if criminal proceedings have been instituted or a criminal penalty imposed for the violation. For the reasons explained in Chapter 4, s24G is different – and both the ‘administrative fine’ and criminal liability apply.

3.2.10 Non-compliance implications

In the Netherlands, GALA provides that a debtor who fails to pay the fine within the prescribed period is in default and liable to statutory interest.⁴²⁷ NEA may recover the sum by compulsory

⁴²² In terms of s.43(5).

⁴²³ S.44 RES Act; Sch.2,s.10 ECSO.

⁴²⁴ Guidance 3. The Code is a public document, issued by the Director of Public Prosecutions, setting out the general decision-making principles prosecutors should follow.

⁴²⁵ Guidance 16.

⁴²⁶ Fn.103.

⁴²⁷ S.4:97-4:99.

payment order.⁴²⁸ This is an enforceable order, served and executed at the debtor's expense,⁴²⁹ which enables the creditor to proceed to execution in terms of the Code of Civil Procedure.⁴³⁰ The demand notice fee, statutory interest and cost of an enforcement order may also be collected.⁴³¹ A right of action for payment of money prescribes five years after the payment period expires.⁴³² If an administrative penalty is imposed on one person twice within four years for the same violation, NEA can withdraw the authorisation for a facility with GHG installations.⁴³³

In the UK, provision to pay a penalty may include: provision for EA to recover it, and any interest or other financial penalty for late payment, as a civil debt; provision for these amounts to be recoverable, on the order of a county court or the High Court, as if payable under a court order.⁴³⁴ The penalty must be paid within 56 days of the final notice; and, following an unsuccessful appeal, a penalty must be paid within 28 days. Failure to pay increases the penalty by 50 per cent.⁴³⁵ Where a FMP or VMP is not paid, the defaulter cannot be prosecuted for the original offence – unpaid penalties are enforced in civil courts.⁴³⁶ The application can be decided by a court officer without a hearing. Once the order is made, EA may proceed to enforcement action – including a warrant of execution to seize money or goods to the amount's value; a charging order on the debtor's property; and a third party debt order (usually to prevent the debtor from withdrawing money from their bank account).⁴³⁷

It is recommended that interest be levied on an unpaid administrative penalty. Decision of the relevant authorities and tribunals should be enforceable as if they were court orders.⁴³⁸

⁴²⁸ S.4:114,5.10(2).

⁴²⁹ S.4:120.

⁴³⁰ S.4:116.

⁴³¹ S.4:119.

⁴³² S.4:104-4:107.

⁴³³ S.18.17 EMA.

⁴³⁴ S.52(2) RES Act; s.6 ECSO.

⁴³⁵ Sch.1,s.9 ECSO.

⁴³⁶ DEFRA *Review* 40.

⁴³⁷ RES Guidance 33-34.

⁴³⁸ Fn.408.

Chapter 4 assesses s24G against the lessons identified in this chapter, and makes practical suggestions for an environmental law administrative penalty system in SA.

4 CHAPTER 4: ADMINISTRATIVE PENALITIES IN SOUTH AFRICA'S ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT REGIME

SA environmental law does not contain a true administrative penalty. The criminal sanction's deficiencies, the many advantages of administrative penalties,⁴³⁹ and the success of administrative penalties in other jurisdictions,⁴⁴⁰ mean that an administrative penalty system holds enormous potential for SA's EC&E. This chapter critically evaluates the s24G 'administrative fine', and the amendments made to it on 18 December 2013 by the National Environmental Management Laws Second Amendment Act 30 of 2013 (Amendment Act).⁴⁴¹ This evaluation is informed by the lessons drawn from the assessment of the administrative penalty schemes in operation in the Netherlands and the UK, undertaken in Chapter 3. Accordingly, it is similarly structured; with the first part providing a brief overview of the relevant regime, and the second part, a critical evaluation based on the themes used in Chapter 3.

4.1 Overview of s24G

NEMA contains National Environmental Management (NEM) principles to guide the implementation of environmental legislation.⁴⁴² The precautionary principle requires a risk-averse approach,⁴⁴³ and the preventive principle is that negative impacts on the environment and environmental rights must be prevented; alternatively, minimised and remedied.⁴⁴⁴ Polluters must pay to remedy, and to prevent or minimise pollution and consequent health effects.⁴⁴⁵

⁴³⁹ Chap.2.

⁴⁴⁰ Fn.42-43.

⁴⁴¹ NEMA's s.34G makes provision for admission of guilt fines for NEMA/SEMA offences. This is also not a true administrative penalty because, if the contravention is disputed, it must be proved beyond reasonable doubt in criminal court (Fourie 2009 (16)2 SAJELP 94-95).

⁴⁴² S.2(1)(e).

⁴⁴³ S.2(4)(a)(vii).

⁴⁴⁴ S.2(4)(a)(viii).

⁴⁴⁵ S.2(4)(p).

Integrated environmental management (IEM) is central to NEMA, and includes evaluating activities' impacts on the environment, socio-economic conditions and cultural heritage, and alternative options to mitigate these.⁴⁴⁶ IEM dictates that environmental authorisations are required for certain activities.⁴⁴⁷ Detailed requirements (including, in some cases, environmental impact assessments (EIAs)) must be followed before authorisation is obtained. Activities' potential environmental consequences, and the option of not implementing the activity, must be assessed and reported on.⁴⁴⁸ The state organ that decides whether to grant authorisation (the competent authority (CA))⁴⁴⁹ also considers feasible and reasonable alternatives to and modifications of the activity to minimise environmental harm.⁴⁵⁰ All parties interested in and affected by the proposed activity (IAPs) require a reasonable opportunity to participate in public procedures regarding its potential environmental consequences.⁴⁵¹

Section 24F (s24F), read with section 49A(1)(a) of NEMA, makes it an offence to commence an activity listed or specified in the EIA Listing Notices, 2010 (LN) without prior authorisation.⁴⁵² However, s24G permits *ex post facto* authorisation of activities that commenced unlawfully.⁴⁵³ S24G provides that anyone who has commenced a listed activity without authorisation can apply to the Minister of Water and Environmental Affairs, the provincial MEC for environmental affairs, or their delegate for a directive. Prior to its amendment, s24G provided that this directive was to compile and submit a report containing: an assessment of the nature, extent, duration and significance of the activity's environmental impacts (including cumulative effects); mitigation measures undertaken or to be undertaken; the public participation process followed (which also addressed all IAP comments); an environmental management programme; and any other information required. As set out below, the amended s24G makes provision for various other directives. The CA determines an

⁴⁴⁶ S.23(2)(b) & (c).

⁴⁴⁷ S.24(2). The activities are set out in EIA Regulations Listing Notices, 2010.

⁴⁴⁸ S.24(4)(b)(i).

⁴⁴⁹ S.1(1).

⁴⁵⁰ S.24O(1)(b)(iv).

⁴⁵¹ S.24(4)(a)(v).

⁴⁵² S.24(2)(a)-(b). There is a maximum fine of R10 million and/or ten years' imprisonment (s.49B(1)). As discussed below, s.24F(1)(b), read with s24(2)(d), prohibits the commencement of certain activities without compliance with applicable norms and standards.

⁴⁵³ Introduced in 2005, s.24G was presumably intended to address unauthorised developments, and uncertainty regarding *ex post facto* rectification (van der Linde 'NEMA' in *Environmental Management* 206; Paschke&Glazewski 2006 9(1) *PER* 126-137,140; Basson 2003(10) *SAJELP* 133-147).

administrative fine – a maximum of R5 million – for the applicant.⁴⁵⁴ After payment of the fine, the Minister or MEC considers the documents provided, and may then: refuse to issue authorisation; issue authorisation subject to conditions; or direct the provision of further information or additional steps before deciding whether to grant authorisation.⁴⁵⁵ Failure to comply with a directive or a condition is an offence, punishable by a maximum fine of R10 million and/or ten years' imprisonment.⁴⁵⁶

When s24G was promulgated, the maximum R1 million fine was one of the highest fines for environmental legislation, and caused some concern among potential violators.⁴⁵⁷ However, s24G has been controversial and frustrating, and its effective application severely hampered by interpretation difficulties.⁴⁵⁸ Effectively, a person contemplating the undertaking of a listed activity can choose either: to follow the prescribed route of seeking authorisation before commencing the activity; or, if the perceived benefits outweigh the perceived costs, or there is some doubt as to whether authorisation will be granted, to undertake the activity and seek s24G authorisation.⁴⁵⁹

Although s24G was not intended as an invitation to commit offences for later correction,⁴⁶⁰ this is what appears to have happened. The widespread abuse of s24G has become the most prevalent environmental offence.⁴⁶¹ The DEA has noted that: 'many people tend to knowingly commence with a listed activity without [authorisation] and later apply for a [s24G authorisation] to rectify the unlawful commencement', and that this poses 'serious dangers to the credibility of the [EIA] process'.⁴⁶² This has been confirmed by research in Gauteng, which revealed that the section 'has seriously undermined the overall compliance and enforcement effort by opening the door to abuse and providing a mechanism which effectively accommodates environmental crime'.⁴⁶³ Many violators simply budget for the

⁴⁵⁴ S.24G(5).

⁴⁵⁵ S.24G(2).

⁴⁵⁶ S.49B(1).

⁴⁵⁷ Fourie 2009 (16)2 SAJELP 113; Winstanley 'Administrative Measures' in *Environmental Compliance&Enforcement* 237-238.

⁴⁵⁸ Van der Linde 'NEMA' in *Environmental Management* 207.

⁴⁵⁹ CER May 2011 1,6,8-9; Paschke&Glazewski 2006 9(1) *PER* 144-145; OECD *Performance* 51.

⁴⁶⁰ *Body Corporate of Dolphin Cove v KwaDukuza Municipality & another* 2012 JOL 28771 (KZD) [41].

⁴⁶¹ OECD *Performance* 39.

⁴⁶² National Environmental Management Laws Second Amendment Bill [B13-2012] explanatory memorandum.

⁴⁶³ September *Critical Analysis s24G* 81.

administrative fine and proceed without authorisation, knowing they can apply for [s24G] 'rectification' if they are discovered.⁴⁶⁴

When a s24G application is made, the violator often presents the CA with a *fait accompli*, at a stage where it is too late to consider alternatives - damage to the environment has been done, and might even be irreversible. In other words, the CA has little basis to refuse the application,⁴⁶⁵ and it is unlikely that an authority or a court would order the demolition of an illegal structure.⁴⁶⁶ This approach renders environmental assessment ineffective.⁴⁶⁷ This is exacerbated because the vast majority – if not all - s24G applications succeed.⁴⁶⁸

The Amendment Act attempts to address some of s24G's significant problems. However, as explained below, it fails to deal with all of the problems with the section.

4.2 Critical evaluation of s24G

S24G triggers some broad constitutional issues, and arguably amounts to an unreasonable, unjustifiable violation of the constitutional right.⁴⁶⁹ The idea that a lawful activity can follow from unlawful administrative action is contrary to the constitutional rule of law,⁴⁷⁰ read with the principle of administrative legality and administrative justice.⁴⁷¹ Retrospective authorisation is inconsistent with NEMA's purpose to promote environmental rights⁴⁷² and with the preventive and precautionary principles; falls foul of the principles that promote IAPs' participation in

⁴⁶⁴ CER May 2011 1,6,8-9, July 2012 4, August 2013 2-3, September 2013 3.

⁴⁶⁵ CER May 2011 2;

Magaliesberg Protection Association v MEC: Department of Agriculture, Conservation, Environment and Rural Development, North West Provincial Government and others 2013 3 All SA 416 (SCA) [56].

⁴⁶⁶ CER August 2013 2;

In *Magaliesberg*, the Supreme Court of Appeal commented, at para 52: 'in considering the remedy of demolition, the image of wrecking equipment, bulldozers, earth moving machines..., with concomitant pollution and potential further harm to the environment cannot be ignored'.

⁴⁶⁷ Paschke&Glazewski 2006 9(1) *PER* 124,134,144-145.

⁴⁶⁸ CER May 2011 2, July 2012 4, August 2013 2.

⁴⁶⁹ S.36 of the Constitution makes provision for rights to be limited if this is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

⁴⁷⁰ S.1.

⁴⁷¹ S.33.

⁴⁷² Paschke&Glazewski 2006 9(1) *PER* 135-136.

environmental decision-making;⁴⁷³ and is incompatible with IEM - principles required by sustainable development⁴⁷⁴ - and international law obligations. Conducting an EIA and obtaining prior authorisation for an activity, are integral to the environmental right,⁴⁷⁵ and there are sufficient legislative tools to regularise unlawful activities without s24G.⁴⁷⁶

However, as the section has not been subject to constitutional scrutiny, the analysis will focus on the lessons to be learned from foreign experience, with a view to improving the current formulation of s24G (although the preference is for s24G to be scrapped entirely), and introducing a true administrative penalty system into SA environmental law

4.2.1 Nature of penalty

Although it is referred to as an 'administrative fine', the s24G fine is not strictly punitive – payment merely triggers the consideration of the application for *ex post facto* approval of an activity.⁴⁷⁷ The Minister or MEC may direct the provision of a report and may require additional information.⁴⁷⁸ Prior to its amendment, s24G provided that, after the CA determined an administrative fine, the Minister or MEC considered the reports and information submitted and decided whether to: direct the person to cease the activity and rehabilitate the environment; or issue an authorisation. The Amendment Act⁴⁷⁹ makes explicit provision for the refusal of the authorisation⁴⁸⁰ and for the provision of further information.⁴⁸¹ The fact that the fine is determined before the authority evaluates the information⁴⁸² militates against it being an administrative penalty of the nature described in Chapter 2.

⁴⁷³ Basson 2003(10) SAJELP 146.

⁴⁷⁴ Paschke&Glazewski 2006 9(1) PER 132; van der Linde 'NEMA' in *Environmental Management* 207; CER August 2013 2-3.

⁴⁷⁵ Van der Linde 'NEMA' in *Environmental Management* 208; OECD *Performance* 51.

⁴⁷⁶ CER July 2012 4, August 2013 3;

A *mandamus* can compel the removal of the illegal activity and restoration of the previous position (*Silvermine Valley Coalition v Sybrand van der Spuy Boerdery and Others* 2002 (1) SA 478 (C) 488D). S28 NEMA requires polluters to take reasonable measures to prevent, or minimise and rectify pollution. The Director-General or provincial department head may direct such measures, or take them herself and recover costs. S31A of ECA is similar. If there is an ECA conviction, the court may order the offender to repair environmental damage from the offence (s29(7)).

⁴⁷⁷ Fourie 2009 (16)2 SAJELP 113.

⁴⁷⁸ S24G(1)(b)(vii)-(viii).

⁴⁷⁹ Except where otherwise indicated, all amendments discussed are in clause 9.

⁴⁸⁰ S.24G(2)(a).

⁴⁸¹ S.24G(1)(b)(viii).

⁴⁸² 2005 NEMA S24G Guideline; Paschke&Glazewski 2006 9(1) PER 142.

True administrative penalties are hybrid in nature.⁴⁸³ They are more proportionate to the type of offence and harm caused, and easier to administer and impose than criminal penalties.⁴⁸⁴ It is recommended that a conventional administrative penalty system be introduced into SA, with FMPs for minor infringements and VMPs for more serious offences or where there is evidence of mismanagement or negligence.⁴⁸⁵ The s24G administrative fine triggers the consideration of an application for *ex post facto* environmental authorisation in the circumstances set out in 4.2.2 below – there is no distinction between FMPs and VMPs as in the UK.

4.2.2 Trigger for penalty

Prior to its amendment, s24G(1) provided that ‘a person who has committed an offence in terms of s24F(2)(a)’ – i.e. commenced a so-called listed⁴⁸⁶ or specified⁴⁸⁷ activity without authorisation - could apply for ‘rectification’ in terms of s24G. Although it was held in *Supersize Investments 11 CC v MEC of Economic Development, Environment and Tourism, Limpopo Provincial Government and another*⁴⁸⁸ that s24G(1) meant that there had to be criminal proceedings against an applicant, this cannot be correct. S24G applied to anyone who had commenced an activity identified in terms of section 24(2)(a) or (b) (which amounted to an offence). It did not indicate that it applied to a person who had been ‘charged and/or convicted of an offence’. The Amendment Act contains the following improved formulation: ‘on application by a person who has commenced with a listed or specified activity without [authorisation] in contravention of s24F(1)’.⁴⁸⁹ However, this should read ‘s24F(1)(a)’ because s24F(1)(b) refers to activities that do not require authorisation, but instead must comply with prescribed norms or standards. Alternatively, if the intention is for s24G also to be applicable to activities that do not comply with prescribed norms and standards, a distinction should be made between s24F(1)(a) and (b) offences.⁴⁹⁰

⁴⁸³ Fn.53.

⁴⁸⁴ 3.2.1; fn.117.

⁴⁸⁵ Fn.212-216.

⁴⁸⁶ S.24(2)(a).

⁴⁸⁷ S.24(2)(b).

⁴⁸⁸ 2013 JOL 30257 (GNP) [13].

⁴⁸⁹ S24G(1)(a).

⁴⁹⁰ CER July 2012 5.

In practice, there is a trend for companies to rely on the emergency defence to criminal liability,⁴⁹¹ and then to make a s24G application. As the section does not provide for separate responses to different fault levels, intentional and repeat offenders are let off too easily, while 'innocent' offenders are prejudiced by s24G's criminal stigma in the context of section 49A(1)(a)'s strict liability.⁴⁹²

It was incorrectly held in *Supersize* that the intention of the legislature was not to force innocent applicants to admit to a crime, in order to fall within the ambit of s24G. In other words, that those who *bona fide* commence an activity without authorisation fall outside the purview of s24G, and can apply for authorisation, with completion of the construction regarded as the 'proposed activity'.⁴⁹³ As set out above, fault is not a requirement of s24F or s24G, and the violator's state of mind is therefore irrelevant.

If s24G remains in SA law, payment of the administrative fine should be limited to negligent violations. The Centre for Environmental Rights (CER) has proposed that anyone who falls within s24F's ambit is required immediately to cease the activity and take reasonable measures to mitigate environmental degradation from the offence. Secondly, it proposed that a s24G applicant would have to show, on a balance of probabilities, that the offence was not committed intentionally. If this onus cannot be discharged, such person would have to rehabilitate all environmental degradation - to the satisfaction of the CA - and would not be permitted to apply for s24G authorisation. An applicant who can show that the offence was not intentional, but cannot show that it was not committed negligently, can apply for s24G authorisation. An 'innocent' violator – who can show that the offence was not committed with intent or negligence – can apply for s24G authorisation, but should not be required to pay the administrative fine.⁴⁹⁴ None of these suggestions – which would prevent the cynical use of s24G to avoid conducting an environmental assessment - was taken on board in the Amendment Act.

⁴⁹¹ Prior to amendment, s24F(3) provided a defence to a s.24F charge if the activity was in response to an emergency so as to protect human life, property or the environment. S49A(2) is stricter, but similar.

⁴⁹² CER May 2011 1-2,6-9, August 2013 2-3.

⁴⁹³ [13]-[14].

⁴⁹⁴ CER May 2011 1-2,6-9.

Insofar as the introduction of a true administrative penalty is concerned, and bearing in mind the lessons from the Netherlands and the UK, the trigger for an administrative fine should be the commission of certain violations of environmental legislation⁴⁹⁵ which are not sufficiently egregious to warrant criminal prosecution.⁴⁹⁶ Generally, intentional offenders should instead be prosecuted, as should those who are repeat offenders and/or who have committed infringements causing serious damage to people or the environment.⁴⁹⁷ It is recommended that strict liability offences generally be reserved for FMPs,⁴⁹⁸ with VMPs for negligent violations. VMPs may also be available for 'innocent' breaches if these have serious consequences, or the offence resulted in significant financial gain.⁴⁹⁹

Contrary to the UK's position, and because a violator does not face criminal position, the standard of proof for administrative penalties and appeals should be a balance of probabilities.⁵⁰⁰ This is the same standard required by the Competition Act.⁵⁰¹

4.2.3 Scope of application

Until its amendment, s24G only applied to activities identified in EIA LNs as requiring authorisation.⁵⁰² The LNs specifically include activities that require an atmospheric emission licence (AEL) in terms of the National Environmental Management: Air Quality Act 39 of 2004 (AQA),⁵⁰³ and specifically exclude activities that require a waste management licence (WML) in terms of the National Environmental Management: Waste Act 59 of 2008 (Waste Act).⁵⁰⁴ Notwithstanding the explicit exclusion of waste management activities from the LN, it was incorrectly held in *Interwaste (Pty) Limited and others v Coetzee and others*⁵⁰⁵ that s24G also applied to the Waste Act.

⁴⁹⁵ Addressed at 4.2.3.

⁴⁹⁶ Fn.113.

⁴⁹⁷ 3.2.9.

⁴⁹⁸ Fn.232.

⁴⁹⁹ Fn.120.

⁵⁰⁰ 3.2.2; fn.233.

⁵⁰¹ S.68.

⁵⁰² S.24(2)(a)-(b).

⁵⁰³ LN.1,activities 2 & 18; LN.2,activities 5 & 26.

⁵⁰⁴ LN.1 activity 28; LN.2,activity 5; LN.3,activities 13(1) & 14(2).

⁵⁰⁵ 2013 JOL 30686 (GSJ) [31].

In addition to the apparent extension to s24F(1)(b), the Amendment Act now expands s24G to apply to the commencement of waste management activities without Waste Act WMLs.⁵⁰⁶ No explanation is given for the singling out of WMLs from all other authorisations – the majority of which are not covered by the LN. This expansion is unwarranted and is likely to lead to expectations and create vested interests which will be difficult to reverse in subsequent amendments.⁵⁰⁷

The Air Quality Amendment Bill, 2013 proposes the introduction of a s24G equivalent into the AQA (section 22A) for circumstances where an activity listed in terms of section 21 of AQA is commenced without an AEL. However, activities requiring an AEL are already contained in the LNs and therefore require NEMA authorisation. Section 22A would mean that two applications are needed: one in terms of s24G for commencing a NEMA-listed activity without authorisation; and one in terms of AQA (generally to the municipality as licensing authority) for commencing an AQA-listed activity without authorisation. This duplication creates the possibility of conflicting decisions by different authorities on related ‘rectification’ applications.⁵⁰⁸

S24G should not have been extended. However, having regard to lessons drawn from C&E theory and the two foreign jurisdictions, a true administrative penalty system should be available at least for those violations of NEMA and SEMAs which are not sufficiently egregious to require criminal sanctions.⁵⁰⁹ As has been done in both the UK and the Netherlands, it is advisable initially to pilot the use of administrative penalties for particular offences.⁵¹⁰

Apart from criminal penalties,⁵¹¹ an administrative penalty should be in addition to any other NEMA/SEMA penalty, and should only be imposed once per violation – as per the

⁵⁰⁶ S.24G(1)(b).

⁵⁰⁷ CER September 2011 2-3, July 2012 4.

⁵⁰⁸ CER September 2013 2-3.

⁵⁰⁹ Fn.113.

⁵¹⁰ Fourie (2009 (16)2 SAJELP 119) proposes that these penalties also be available for violations of the Water Services Act 108 of 1997 and the Marine Living Resources Act 18 of 1998.

⁵¹¹ Addressed at 4.2.9.

Netherlands and the UK. Provision for payment should include provision for: early payment discounts; interest; and penalty enforcement.⁵¹²

4.2.4 Institutional arrangements

The decision-maker on s24G applications and administrative fines is the CA – the Minister or the relevant MEC. A person who has contravened s24F(1)(a) initiates the s24G process – although this is often on instruction from the EMI - by making an application. On application, the Minister or MEC ‘may’ direct, *inter alia*, the compilation of a report and the provision of additional information. Although s24G uses ‘may’, the Minister and MECs apparently take the view that there is no discretion regarding the acceptance of a s24G application. However, some offences are so egregious that they cannot be ‘rectified’ and should never be considered for *ex post facto* authorisation. In these cases, the authority should refuse to process the application.⁵¹³

S24G contains no details as to how or by when a decision regarding an administrative fine is made, nor is there any publicly available guidance in this regard. There is general unease about the lack of transparency in the fine calculation, giving rise to concerns about corruption.⁵¹⁴ As set out in 4.2.5 below, the CER only recently learned of the factors that are considered in determining such fines. The Amendment Act⁵¹⁵ makes provision for regulations to be prepared that relate to the procedure and criteria to be followed in the determination of a s24G administrative fine,⁵¹⁶ and provides that the ‘existing standard operating procedure adopted by the Minister’ for determining s24G fines applies in the interim.⁵¹⁷ Whilst there is no difficulty in setting out the procedure and criteria for s24G fines in regulations, the DEA should make these regulations available for public comment as soon as possible, as it is clear from its implementation that the ‘standard operating procedure’ is wholly inadequate.

⁵¹² 3.2.3.

⁵¹³ CER August 2013 2-3, September 2013 3.

⁵¹⁴ CER May 2011 1,9. Many incidents of corruption in the s24G process have been reported to the EMI (personal communication from Grant Walters (Director Enforcement: Environmental Impact and Pollution, DEA)).

⁵¹⁵ Clause 21.

⁵¹⁶ S.44(1)(a)(aC). This amendment was not necessary, given that NEMA already empowers the Minister to make regulations ‘generally to carry out the purposes and provision of [NEMA]’ (s.44(1)(b)).

⁵¹⁷ S.44(1B).

For the introduction of a true administrative penalty system for SA environmental law, such penalties should be imposed by a specialist environmental authority (as in the UK and the Netherlands), with officials who are properly trained in the use of administrative penalties, including the discretionary evaluation of VMP factors.⁵¹⁸ The EMI – which has environmental expertise, understands the impact of violations, and is familiar with the technical aspects and particular circumstances of offenders – could potentially fulfil this role.⁵¹⁹

As in the UK, for both s24G and a conventional administrative penalty system, and in order for regulated entities and the public to know what action can be expected from a regulator,⁵²⁰ there must be publicly-available guidance on administrative penalties, which is updated,⁵²¹ and into which IAPs have input.⁵²² All decisions should be made with due regard to the decision-maker's policies and this guidance.⁵²³

4.2.5 Decision-making processes

There is no requirement in s24G that a person who has commenced a listed activity illegally must cease the activity, pending the application's determination. Instead, the unlawful activity is apparently generally permitted to continue, while the various reports and studies are underway.⁵²⁴ The explanatory memorandum to the National Environmental Management Laws Second Amendment Bill [B13-2012] (NEMLAB 2) states that the DEA has received numerous complaints that 'applicants proceed with illegal activities on the assumption that their 24G applications will be successful'.

The Amendment Act provides the Minister or MEC with powers to issue directives for several reasons – in addition to the existing s24G powers to direct the compilation of a report and provision of other information.⁵²⁵ One of these is a directive to cease the activity

⁵¹⁸ Fn.252.

⁵¹⁹ Fn.125.

⁵²⁰ Fn.255.

⁵²¹ Fn.246-250,256-259.

⁵²² Fn.254.

⁵²³ 3.2.4.

⁵²⁴ Paschke&Glazewski 2006 9(1) *PER* 143-144.

⁵²⁵ S24G(1)(b).

immediately, pending a decision on the application.⁵²⁶ This is discretionary, unlike the CER's proposal that an applicant be required immediately to stop the unlawful activity and mitigate its impacts.⁵²⁷ The decision-maker could also, for example, direct the applicant to: remedy the activity's adverse environmental impacts; cease, modify or control any act or omission causing pollution or degradation; and/or eliminate and/or contain or prevent the movement of pollution or degradation.

S24G is, effectively, a short-cut procedure for authorisation⁵²⁸ - not only does it permit less stringent environmental assessment and public participation processes than the normal authorisation process, but the public participation process is not clear.⁵²⁹ The preparation of a report is apparently not even a prerequisite to the application's consideration – it is just one of the directives available. An applicant so directed is only required to describe the public participation process, and how IAPs' comments were addressed.⁵³⁰ The Amendment Act attempts to make the environmental assessment aspect more robust by indicating that the report should also: describe the activity's need and desirability;⁵³¹ and assess the manner in which the geographical, physical, biological, social, economic and cultural aspects of the environment may be impacted.⁵³² There is still, however, no provision to consider alternatives to the activity, which is a crucial aspect required by NEMA and the EIA Regulations, 2010.⁵³³

After the application is received, the report compiled and it and other required information made available (and other directives potentially issued), the applicant is required to pay an administrative fine determined by the CA (which cannot exceed R5 million) before the Minister or MEC can consider the documents submitted and decide whether or not to issue authorisation.⁵³⁴ There is no publicly available list of factors to be considered by the decision-maker, nor any specific provision for an applicant to make representations in this

⁵²⁶ S.24G(1)(b)(i).

⁵²⁷ Fn.494.

⁵²⁸ CER August 2013 2.

⁵²⁹ CER May 2011 2.

⁵³⁰ S.24G(1)(b)(vii)(dd).

⁵³¹ S.24G(1)(b)(vii)(aa).

⁵³² S.24G(1)(b)(vii)(bb).

⁵³³ CER May 2011 2.

⁵³⁴ S.24G(4).

regard. In fact, the CA is apparently required to make the decision before the information is considered, and therefore without having regard to its contents. It is consequently not clear what information is taken into account by the decision-maker. As set out above, it is essential that the draft regulations on s24G fines are urgently made available for public comment.

In May 2013, the DEA advised the CER that environmental authorities had developed, for internal use, a calculator to guide the determination of s24G fines, based on the following indices: social benefit that may accrue from the development; socio-economic and biodiversity impact that may result from the development; the development's impact on the sense of place/heritage significance of the environment within which it is situated; and the pollution that has occurred or which may occur if mitigation measures fail. The calculator allows for a standard application of impact scores linked to the activity's potential environmental risk (a more severe impact means a higher impact score). The impact score is determined after a review of, *inter alia*, any additional information requested from the applicant, DEA inspection findings, and any other relevant information. The applicant's compliance history is also taken into account in making a final fine determination.⁵³⁵

As indicated above, the vast majority of s24G applications succeed.⁵³⁶ Prior to its amendment, s24G did not make explicit provision for the application to be refused - it provided two options for the Minister or MEC after determination and payment of the administrative fine, and consideration of the report: direct the applicant to cease the activity and rehabilitate the environment; or issue an authorisation. The amended s24G(2) empowers the authority to: refuse to issue authorisation; issue authorisation (which only takes effect from the date of issue); or direct the applicant to provide more information or take certain steps before a decision is made. The Amendment Act also provides that, as part of this decision, the authority may direct the applicant to rehabilitate the environment; or take other necessary steps,⁵³⁷ and that an applicant's failure to comply with a s24G(1) or (2) directive may be taken into account.⁵³⁸

⁵³⁵ DEA May 2013 3.

⁵³⁶ Fn.468.

⁵³⁷ S.24G(3).

⁵³⁸ S.24G(5).

As ‘administrative action’ (as defined in the Promotion of Administrative Justice Act 3 of 2000 (PAJA)), administrative penalties must be lawful, reasonable and procedurally fair, and anyone whose rights are adversely affected is entitled to written reasons.⁵³⁹ To ensure fair administrative action, and in keeping with the lessons distilled from the UK and the Netherlands, decisions on s24G administrative fines and conventional administrative penalties should only be made after the offender has had an opportunity to make representations regarding the imposition of the penalty and the mitigating and aggravating factors, and these have been carefully considered.⁵⁴⁰

The consideration of mitigating and aggravating factors by the decision-maker allows for the optimal administrative penalty to be determined.⁵⁴¹ Insofar as s24G is concerned, the factors apparently considered in determining the fine are insufficient. Both for s24G and a conventional administrative penalty system, the factors to be evaluated should at least include those used in the UK for determining a VMP.⁵⁴²

Having considered the procedure in the other jurisdictions, when the offender is notified of the fine imposition, it should be in writing, containing reasons and the relevant legislative provisions, and the offender advised of details like: the payment deadline; consequences of non-payment; and the appeal right (and how and where to lodge an appeal).⁵⁴³ FMPs could be imposed by more junior staff members, but senior officials – and not inspectors – should decide VMPs.⁵⁴⁴

4.2.6 Maximum penalty quanta

Before its recent amendment, s24G indicated that the maximum administrative fine was R1 million per offence. It seems, however, that this maximum amount was really – if ever – imposed.⁵⁴⁵ S24G fines were simply too low to amount to a proper disincentive for non-

⁵³⁹ S.33 of the Constitution; Craigie et al ‘Dissecting’ in *Environmental Compliance&Enforcement* 56.

⁵⁴⁰ Fn.246-250,287.

⁵⁴¹ Fn.134.

⁵⁴² CER May 2011 1,8-9, August 2013 3-4, September 2013 3; fn.277-278,280-281.

⁵⁴³ 3.2.5.

⁵⁴⁴ Fn.289.

⁵⁴⁵ Fn.33.

compliance: companies budgeted for the fine and proceeded with their contraventions. If they were discovered, they applied for rectification.⁵⁴⁶ Even if the maximum fine of R1 million were usually imposed, this was a very small amount compared to the benefit of not having to follow the proper authorisation route. The maximum fine was also well below the cost of following EIA process and only one-fifth of the maximum criminal penalty in s24F.⁵⁴⁷

It has been suggested that the s24G fine be linked to a meaningful percentage of the activity's commercial value.⁵⁴⁸ The CER has proposed that, where a juristic person has unlawfully commenced an activity, it should be liable, on conviction, to a fine not exceeding the greater of: ten per cent of the person's annual turnover in SA and its exports during the preceding financial year; or R10 million.⁵⁴⁹

The Amendment Act increased the maximum s24G fine to R5 million.⁵⁵⁰ Whilst an increase is supported, R10 million is more appropriate.⁵⁵¹ When the fine is determined, the CA must consider all relevant factors.⁵⁵² The Amendment Act⁵⁵³ increased the penalty for s24F violations from a maximum fine of R5 million to a maximum fine of R10 million and/or ten years' imprisonment.⁵⁵⁴ The s24G administrative fine is therefore half the fine for s24F offences. The increased s24F fine is more in keeping with the fact that many offenders are corporate entities, and that substantial benefits can accrue to an offender who commences an activity without authorisation. It is also in line with penalties for similar SEMA offences.⁵⁵⁵

Having considered the position in the UK and the Netherlands, it is recommended that, for a true administrative penalty system, the maximum amounts of both FMPs and VMPs should be prescribed in legislation. FMPs should be for fixed amounts, and, since administrative penalties are generally intended for offences which do not warrant criminal

⁵⁴⁶ Fn 459-464.

⁵⁴⁷ CER August 2013 2.

⁵⁴⁸ Paschke&Glazewski 2006 9(1) *PER* 146.

⁵⁴⁹ CER May 2011 6.

⁵⁵⁰ S.24G(4).

⁵⁵¹ CER May 2011 1,8-9, September 2011 3; OECD *Performance* 41.

⁵⁵² Fn.122,251,277-281.

⁵⁵³ Clause 25.

⁵⁵⁴ S.49B(1).

⁵⁵⁵ S.68(1) Waste Act; s.102(1) NEMBA; s.52 AQA, s.89(2) PAA & s.151(2) NWA (for a second or subsequent offence).

prosecution, maximum VMPs should not exceed the maximum criminal fine. As in the UK, if, having evaluated the appropriate fine using the relevant factors, it would be higher than the maximum criminal fine, the violator should instead be prosecuted.⁵⁵⁶

4.2.7 Allocation of penalty proceeds

The fact that the s24G administrative fine is paid to the department implementing it has resulted in a system of perverse incentives, ensuring that the vast majority (if not all) s24G applications succeed.⁵⁵⁷

Funds (from s24G and true administrative penalties) should not be available to the regulator that imposed the fine.⁵⁵⁸ As is the position with Competition Act administrative fines,⁵⁵⁹ these should be paid into the National Revenue Fund,⁵⁶⁰ controlled by National Treasury.⁵⁶¹

4.2.8 Appeal and review procedures

NEMA provides that there is an appeal to the Minister⁵⁶² or MEC⁵⁶³ of any decision by anyone acting under a NEMA or SEMA power delegated by the Minister or MEC, respectively. This means that appeals of both s24G fines and s24G decisions are available when the Minister or MEC delegates these decisions. If the Minister or MEC is the decision-maker, no appeal is available, but the decision can be taken on review to the High Court.

An appeal panel can be appointed to advise the decision-maker.⁵⁶⁴ Importantly, the appeal does not suspend a decision, an authorisation or any of its provisions, or any directive, unless the Minister or MEC directs otherwise.⁵⁶⁵ The EIA Regulations provide that anyone

⁵⁵⁶ 3.2.6.

⁵⁵⁷ OECD *Performance* 51; CER July 2012 4, August 2013 2, September 2013 3; fn.468.

⁵⁵⁸ 3.2.7; fn.305.

⁵⁵⁹ S.59(4).

⁵⁶⁰ S.213 Constitution.

⁵⁶¹ S.11 Public Finance Management Act 1 of 1999.

⁵⁶² S.43(1).

⁵⁶³ S.43(2).

⁵⁶⁴ S.43(5).

⁵⁶⁵ S.43(7).

affected by the decision may submit a notice of intention to appeal to Minister or MEC within 20 calendar days.⁵⁶⁶ If the appellant is not the s24G applicant, it must, within ten days, provide the applicant with the notice and advise where and for what period the appeal submission is available for inspection. If the appellant is the applicant, it must provide each registered IAP with this information.⁵⁶⁷ The appeal must be submitted within 50 days of the decision.⁵⁶⁸ It must be in writing and accompanied by: the appeal grounds; supporting documentation not in the decision-maker's possession; a statement of compliance with the notice of intention to appeal requirements; and any prescribed appeal fee.⁵⁶⁹ Any responding statement must be submitted within 30 days; and delivered to the appellant ten days thereafter. If there is new information in the responding statement, the appellant may submit an answering statement within 30 days, with a copy to the respondent ten days thereafter.⁵⁷⁰ In processing the appeal, the decision-maker must: acknowledge receipt of appeal/statements within ten days; and advise all parties of a suspension directive or an appeal panel's appointment. The decision-maker may also require additional information.⁵⁷¹ Members of an appeal panel must be independent and the Minister or MEC must provide it with written instructions regarding the issues and the deadline for its written recommendations. If the panel introduces new information, each party may, within a period the panel determines, provide additional statements rebutting or supporting such new information.⁵⁷² The decision-maker must make a final decision within 90 days of receipt of all relevant information, including a panel's recommendations.⁵⁷³ The decision may confirm, set aside or vary the decision, or make any other appropriate decision.⁵⁷⁴ All parties must be notified of the decision and its reasons within ten days.⁵⁷⁵

A party aggrieved by: a s24G decision taken or fine imposed by the Minister or MEC; or the internal appeal outcome, can, within 180 days of the decision, apply to review the

⁵⁶⁶ Time periods may be extended on good cause.

⁵⁶⁷ Reg.60.

⁵⁶⁸ Reg.62.

⁵⁶⁹ Reg.61.

⁵⁷⁰ Reg.63.

⁵⁷¹ Reg.64.

⁵⁷² Reg.65.

⁵⁷³ Reg.66(2).

⁵⁷⁴ S.43(6) NEMA.

⁵⁷⁵ Reg.66(3)-(4).

decision in the High Court in terms of PAJA.⁵⁷⁶ Unless there are exceptional circumstances, internal remedies – like a NEMA appeal – must be exhausted before a PAJA review.⁵⁷⁷ Possible review grounds include that: there was procedural unfairness; the decision was made — for a reason not authorised by the empowering provision, because irrelevant considerations were taken into account, in bad faith; or that the decision itself — contravenes a law, or was not rationally connected to: the purpose for which it was taken, or the information before the administrator.⁵⁷⁸ Rule 53 of the Uniform Rules of Court governs review proceedings, which are initiated by the applicant submitting a notice of motion stating the decision for review, supporting by a founding affidavit containing the facts and circumstances upon which applicant relies.⁵⁷⁹ To oppose the relief, the relevant decision-maker may, within 15 days of receipt of the notice (or any amendment) deliver a notice of intention to oppose.⁵⁸⁰ Within the same period, the decision-maker must despatch to the registrar the record of the internal appeal proceedings, together with reasons from the decision-maker, and notify the applicant.⁵⁸¹ The registrar makes the record available and the applicant furnishes the portions necessary for the review to the registrar and other parties.⁵⁸² The applicant may, within ten days of the record's availability, by delivery of a notice and accompanying affidavit, amend or vary the notice of motion and supplement the affidavit.⁵⁸³ Within 30 days thereafter, respondents may deliver answering affidavits.⁵⁸⁴ Rule 6 provides that, if new evidence is raised in the answering affidavit, the applicant may submit a replying affidavit within ten days.⁵⁸⁵ Within five days, the applicant can apply for a hearing date.⁵⁸⁶ Before the matter is argued, the court file must be indexed and paginated and heads of argument exchanged.⁵⁸⁷

A review court can make any just and equitable order, including, *inter alia*: directing the administrator to — give reasons, act in a particular manner; setting aside the administrative action and: remitting the matter for reconsideration, or, in exceptional cases:

⁵⁷⁶ S.7(1) PAJA.

⁵⁷⁷ S.7(2).

⁵⁷⁸ S.6(2).

⁵⁷⁹ Rule 53(1)-(2).

⁵⁸⁰ Rule 53(5)(a).

⁵⁸¹ Rule 53(1)(b).

⁵⁸² Rule 53(3).

⁵⁸³ Rule 53(4).

⁵⁸⁴ Rule 53(5)(b).

⁵⁸⁵ Rule 6(5)(e).

⁵⁸⁶ Rule 6(5)(f).

⁵⁸⁷ For example, 9.8.2 of Practice Directive 02/2013 of the South Gauteng High Court provides that a hearing date can only be allocated if the court file has been indexed and paginated and heads of argument delivered.

substituting the decision or correcting a defect resulting from it; directing the payment of compensation; declaring the parties' rights; granting temporary relief like an interdict; or as to costs.⁵⁸⁸

The High Court's decision can be appealed to the Supreme Court of Appeal (SCA) (the highest appeal court except in constitutional matters)⁵⁸⁹ or to the Constitutional Court (the highest court in constitutional matters).⁵⁹⁰

Having considered C&E theory and the position in the UK and the Netherlands, an appeal tribunal should be constituted of adjudicators with expertise in environmental matters.⁵⁹¹ There is no special tribunal to dispute a s24G administrative fine. An Environment Tribunal could be established as the appeal tribunal for appeals of decision regarding administrative penalties (and potentially other environmental disputes). It might be possible to expand the existing Water Tribunal for this purpose.⁵⁹² An Environment Appeal Tribunal could be established for higher appeals and its decisions should be appealable to the SCA.⁵⁹³ These tribunals should have the status of High Courts and have the power to set aside, replace, or confirm the contested decision. Records must be kept of all proceedings.⁵⁹⁴

It is recommended that, as in the UK, appeal grounds are contained in legislation.⁵⁹⁵ An appeal should, as a general rule – and unlike NEMA appeals – suspend the operation of

⁵⁸⁸ S.8.

⁵⁸⁹ S.168(3) Constitution.

⁵⁹⁰ S.167(2)(a) Constitution. There may also be an appeal from the SCA to the Constitutional Court on a constitutional issue. The latter can also be approached as a court of first instance in certain circumstances (s.167(6) Constitution).

⁵⁹¹ Fn.404.

⁵⁹² Fourie 2009 (16)2 SAJELP 122. From about mid-2012, the Tribunal's operations have been 'held in abeyance' pending legislative amendments – due to concerns that it was not legally constituted. As an interim solution, s.150 of the NWA (which makes provision for the Minister to direct parties to attempt to settle NWA disputes through mediation and negotiation) has been employed (Minister's Written Reply to Parliamentary Question 2280 on 10 September 2012). In *Exxaro Coal (Mpumalanga) (Pty) Ltd v The Minister of Water Affairs* (case 63939/2012, 7 December 2012), the Minister's decision to suspend the Tribunal and introduce mediation was held to be invalid and *ultra vires*. The SCA in *Makhanya NO and another v Goede Wellington Boerdery (Pty) Ltd* 2013 1 All SA 526 (SCA) commented that a mediation panel was not an appropriate body to consider licence applications. On 14 June 2013, the Minister called for nominations for members to reconstitute the Tribunal (GN615 GG36568 of 2013-06-14).

⁵⁹³ This is also the position for appeals of Competition Appeal Court decisions (s.62(4) Competition Act).

⁵⁹⁴ Fn.408.

⁵⁹⁵ Fn.403.

the decision, and should generally be public. It can be a full re-hearing or only deal with a particular issue.⁵⁹⁶ In a FMP appeal, the regulator could initially conduct an internal review at which information is presented that it may not have seen before imposing the fine; following which, the decision can be upheld or reversed, or a lesser sanction imposed. There should be an option to appeal this decision to an appeal tribunal and parties can agree that the appeal will be determined on the papers.⁵⁹⁷ It is recommended, however, that a VMP appeal generally be conducted by an oral hearing.⁵⁹⁸

Detailed record-keeping on administrative penalties is essential.⁵⁹⁹ In relation to publicising s24G fines, the NECERs contain some enforcement action details, but not enough to draw meaningful conclusions. This is compounded by the lack of reliable baseline evidence. In relation to s24G fines, for example, only the number and value of fines are provided.⁶⁰⁰ The value of each individual fine is not known, nor is the violator or the nature of the violation. The NECERs also do not indicate what enforcement action has been taken where s24G fines have not been paid.

4.2.9 Effect of penalty on criminal offence

Until its recent amendment, the heading of s24G was 'rectification of unlawful commencement of activity', but the word 'rectification' was not repeated in s24G; nor is it in the amended s24G. There has been uncertainty regarding the consequences of 'rectification', especially regarding criminal liability for the period between the activity's illegal commencement and rectification, and regarding the admissibility in other proceedings of evidence from a s24G application.⁶⁰¹ The National Prosecuting Authority (NPA) argues that s24G creates a criminal prosecution indemnity, and that prosecuting a violator who follows the s24G process would amount to the offender being punished twice.⁶⁰² It has been argued that, because the Legislature made provision for a criminal sanction (a fine), instead of a mere administrative fee

⁵⁹⁶ Fn.405.

⁵⁹⁷ Fn.406.

⁵⁹⁸ Fn.407.

⁵⁹⁹ 3.2.8.

⁶⁰⁰ Fn.33.

⁶⁰¹ CER August 2013 2,4.

⁶⁰² NPA April 2013 4.

for processing the application, the payment halts s24F's operation.⁶⁰³ The effect of these arguments is that, prior to s24G's amendment, someone who illegally commenced a listed activity, and subsequently obtained *ex post facto* authorisation, was subject only to a maximum R1 million fine (and not imprisonment), rather than the s24F potential fine of R5 million and/or ten years' imprisonment.⁶⁰⁴ This interpretation has the result that payment of the fine indemnifies the offender from prosecution, even if the authority refuses to grant *ex post facto* authorisation and issues a directive to cease the activity. Payment of a fine means that the offender will not acquire a criminal record, and others involved in the offence and directors do not face prosecution.⁶⁰⁵ The NPA's interpretation, coupled with the fact that s24G applications are very seldom – if ever – refused, means that violators have effectively been able to buy themselves out of criminal prosecution.⁶⁰⁶

It was held in *Interwaste* that a s24G rectification application suspends s24F's penal provisions, and, by implication, any unlawfulness of the illegal activity. The court held that s24G provides for a moratorium against further action being taken against the applicant, pending the finalisation of the rectification application.⁶⁰⁷ Another argument in favour of the previous s24G creating a criminal prosecution indemnity, is that, unless it was so intended, there was very little incentive to follow s24G: an offender had to admit the offence, pay an administrative fine and remained liable to prosecution.⁶⁰⁸

However, in the absence of an express contrary provision (of which there was none in s24G), it could not be implied that a successful s24G application created immunity for prosecution for past criminal conduct. There was also no indication in s24G that an authorisation operated retroactively to legitimate the activity. In fact, s24G does not deal with criminal liability – it deals with rectification of the unauthorised development, and the administrative fine is a penalty for seeking *ex post facto* approval; not a substitute for criminal sanctions. The idea of rectification is that something that was irregularly done can be cured. The past unlawfulness is, by the granting of s24G rectification, 'rectified', in that the

⁶⁰³ Van der Linde 'NEMA' in *Environmental Management* 206-207.

⁶⁰⁴ Paschke&Glazewski 2006 9(1) *PER* 145.

⁶⁰⁵ Budlender August 2013 6-7.

⁶⁰⁶ Fn.459-464,465.

⁶⁰⁷ [29].

⁶⁰⁸ Cockrell & Hofmeyr June 2013 11-12.

development that was illegally commenced was no longer unlawful. A substantial advantage of a successful s24G application is that there can be no order to demolish the development. But this rectification is not retrospective: when the listed activity was commenced, that was an offence. The subsequent authorisation does not retrospectively negate this past unlawful conduct or criminal liability:⁶⁰⁹ it merely regularises the activity prospectively.

The NPA's argument about an offender being punished twice for the same offence, is based on the criminal plea of *autrefois convict*. But so-called 'double jeopardy' only applies for criminal convictions and not administrative penalties. Every accused person has the right not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted.⁶¹⁰ In any event, the s24G fine is not punitive.⁶¹¹ As a result, payment of a s24G fine did not amount to a criminal conviction which prevented the offender from being criminally charged for unlawful commencement of the activity.⁶¹²

As set out above, the CER has proposed that an illegal activity be ceased, the damage mitigated, and the offender punished by criminal prosecution and/or an administrative penalty. After completion of the enforcement action, the offender can apply for authorisation. In this process, mitigating factors like: the company's level of disclosure and cooperation with authorities, steps taken in mitigation, and a s24G or criminal fine payment should be considered in determining the administrative and/or criminal penalty.⁶¹³ To avoid self-incrimination, admissions in a s24G application should not be admissible as evidence in a prosecution.

The Amendment Act makes clear that any s24G authorisation granted only takes effect from the date of issue – it is not retrospective.⁶¹⁴ NEMLAB 2's explanatory memorandum states that CAs have experienced a reluctance from the NPA to institute prosecutions once a person has applied for or received a s24G authorisation, and the

⁶⁰⁹ Budlender 7-12.

⁶¹⁰ S.35 Constitution.

⁶¹¹ Fn.477.

⁶¹² Glazewski et al Compliance' in *Environmental Law* 26-17.

⁶¹³ CER May 2011 1,7-9, August 2013 3-4.

⁶¹⁴ S.24G(2)(b).

amendments 'make it clear that criminal prosecution may still be instituted despite the fact that a person has applied for [authorisation] in terms of [s24G]'. The Amendment Act provides that neither the submission nor granting of a s24G application derogates from: the EMI's or the South African Police Service's authority to investigate any transgression; or the NPA's legal authority to institute any criminal prosecution.⁶¹⁵ It also provides that, if after the submission of a s24G application, it comes to the Minister or MEC's attention that the applicant is under criminal investigation for the offence, it may defer a decision to issue an authorisation until the investigation is concluded and: the NPA has decided not to prosecute; the applicant is acquitted or found not guilty after prosecution; or the applicant has been convicted and has exhausted all appeal or review legal proceedings.⁶¹⁶

The payment of a s24G fine should also be included as one of the instances which will not derogate from the authority to investigate transgressions or criminal prosecution. The issue is not whether the NPA has legal authority to institute an application after an application is made or authorisation given – it is whether the application, fine or authorisation confers an indemnity from criminal liability for contravening NEMA. In other words, s24G should provide that neither the submission of the application, nor an authorisation, nor the payment of a s24G fine indemnifies the applicant from criminal liability. To be a proper disincentive for illegal commencement, the discretion for the Minister or MEC to 'defer' the decision to issue an authorisation while a criminal investigation is underway, must be an automatic suspension of the s24G process. Since the decisions made in the criminal prosecution and in the s24G application affect each other, they cannot run concurrently; if the offence justifies criminal prosecution, then this more serious enforcement process must take precedence. This will encourage speedy prosecution by authorities, and plea and settlement agreements with offenders who want access to rectification. In the circumstances, if a s24G applicant is under criminal investigation, the authority must defer a decision to issue an authorisation.⁶¹⁷

Having evaluated the position in the UK and the Netherlands regarding a conventional administrative penalty system, as well as C&E theory, it is recommended that no criminal proceedings be instituted if liability for a monetary penalty has been discharged, or a FMP or

⁶¹⁵ S.24G(6).

⁶¹⁶ S.24G(7).

⁶¹⁷ CER August 2013 4, September 2013 3-4.

VMP imposed. If the violation amounts to a criminal offence and there is a realistic conviction prospect, the offence should be prosecuted. If criminal proceedings have been instituted or a criminal penalty imposed for the offence, an administrative penalty should not be imposed.⁶¹⁸ In other words, criminal and administrative penalties are alternatives to one another. However, because s24G is not a true administrative penalty, it is appropriate that payment of this 'administrative fine' does not indemnify the violator from criminal prosecution.

4.2.10 Non-compliance implications

Before its amendment, s24G(3) provided that the failure to comply with: a directive to cease and rehabilitate; or a s24G authorisation condition, was an offence, for which the offender was liable to a maximum fine of R5 million and/or ten years' imprisonment.⁶¹⁹ The Amendment Act⁶²⁰ provides that the penalty for failing to comply with a directive or with an authorisation condition is a maximum fine of R10 million and/or a maximum imprisonment period of ten years.⁶²¹

Bearing in mind the lessons from the Netherlands and the UK, it is suggested that, for both s24G and the recommended administrative penalty system, interest accrues on unpaid fines. All decisions of regulators, appeal and higher appellate tribunals should be enforceable as if they were High Court orders.⁶²²

It appears from the discussion above that s24G fails to comply with any of the recommendations in Chapter 3. It should either be scrapped, or substantially amended as suggested above.

There are no insurmountable obstacles to the establishment of a true administrative penalty for SA environmental law. The numerous advantages of such system over the criminal

⁶¹⁸ 3.2.9.

⁶¹⁹ In terms of s.24F(4).

⁶²⁰ Clause 25.

⁶²¹ S.49B(1).

⁶²² 3.2.10.

sanction,⁶²³ and its success in other jurisdictions,⁶²⁴ illustrate the potential for administrative penalties to improve SA's EC&E significantly. The EMI, which is already familiar with environmental law and violations could, with additional training, administer the system. The legislation would have to be amended to provide for such penalties, and guidance drafted regarding their implementation. A first step could be for the DEA and Department of Water Affairs to prepare a joint policy paper on the implementation of administrative penalties for water and environmental legislation. New institutions⁶²⁵ would have to be established⁶²⁶ to form the Environment and Environment Appeal Tribunals and presiding officers employed. An administrative penalty system would, however, relieve pressure on the State Attorney.⁶²⁷ Another integral aspect to the success of administrative penalties is that they are supported politically and by industry.⁶²⁸ Given all of the advantages of these penalties - including a more proportionate response to violations⁶²⁹ and improved C&E⁶³⁰ – they are likely to receive this support.

5 CHAPTER 5: CONCLUSION

SA's environmental resources are in serious decline, although there is a constitutional environmental right, and multiple laws aimed at protecting the environment.⁶³¹ As highlighted in Chapter 1, the reasons for this dire state of affairs include the fact that criminal punishment is the default method to enforce environmental laws.⁶³² There would appear to be insufficient investigation and enforcement of environmental offences;⁶³³ and, even if a prosecutor succeeds in discharging the heavy burden of proof required to secure a criminal conviction, the fines imposed are simply too small to be an effective deterrent for the violation of environmental legislation. This is particularly the case when significant advantages – financial

⁶²³ Chap.2.

⁶²⁴ Fn.42-43.

⁶²⁵ It may be possible to expand the Water Tribunal into an Environment Tribunal to hear administrative penalty appeals (fn.592).

⁶²⁶ Fn.151.

⁶²⁷ Fn.140.

⁶²⁸ Fourie 2009 (16)2 SAJELP 119-120; Macrory Report 90; fn.94.

⁶²⁹ Fn.117.

⁶³⁰ Fn.43.

⁶³¹ Fn.1-10.

⁶³² Fn.14.

⁶³³ Fn.17.

and otherwise – result from non-compliance.⁶³⁴ The NECERs reveal that, year after year, several industries remain in non-compliance with the law, and/or commit further offences, despite enforcement action against them.⁶³⁵ It is clear that the current approach is failing to deter violations and to stem pollution and environmental degradation.⁶³⁶

Effective EC&E is essential for environmental protection.⁶³⁷ As a possible means of improving the dismal state of EC&E in SA, this dissertation posits the introduction of an administrative penalty system into SA environmental law – with monetary fines imposed by administrative officials⁶³⁸ – on the basis that this has been successfully used in numerous other jurisdictions, with positive impacts on compliance with environmental law.⁶³⁹ There is currently no such system in environmental legislation – the ‘administrative fine’ in s24G of NEMA only triggers the Minister or MEC’s consideration of an application for *ex post facto* environmental authorisation.⁶⁴⁰

If one considers C&E theory - addressed in Chapter 2 - there are multiple drawbacks of traditional C&E tools, and the criminal sanction in particular. Among other things, prosecution is expensive and time-consuming and requires well-capacitated enforcement authorities,⁶⁴¹ specialist prosecutors and judges who understand the consequences of environmental violations.⁶⁴² SA lacks this capacity.⁶⁴³ It is difficult to prove an offender’s guilt beyond reasonable doubt,⁶⁴⁴ and criminal courts are already significantly overloaded with serious criminal cases.⁶⁴⁵ Violating environmental law is generally not regarded as a moral wrong, and priority is given to ‘real’ crimes.⁶⁴⁶ A compliance deficit results from the fact that it

⁶³⁴ Fn.16-19,27-32.

⁶³⁵ Fn.34.

⁶³⁶ Fn.11-12.

⁶³⁷ Fn.16.

⁶³⁸ Fn.15,66.

⁶³⁹ Fn.42-43.

⁶⁴⁰ Fn.477.

⁶⁴¹ Fn.82-83.

⁶⁴² Fn.79-80.

⁶⁴³ Fn.38,79-80.

⁶⁴⁴ Fn.81.

⁶⁴⁵ Fn.87,127.

⁶⁴⁶ Fn.98.

is difficult to obtain a criminal conviction and an adequate penalty: authorities are discouraged from prosecuting environmental crimes.⁶⁴⁷

In contrast, there are numerous advantages associated with the use of administrative penalties. These penalties provide a more proportionate response to violations than the criminal sanction, as they take account of the financial benefit gained by non-compliance and the seriousness of the breach. They are more proportionate and transparent than criminal fines and, for VMPs, mitigating and aggravating factors are evaluated to determine the appropriate fine.⁶⁴⁸ Officials with specialised expertise impose these penalties,⁶⁴⁹ and the standard of proof – a balance of probabilities – is much easier to discharge.⁶⁵⁰ Administrative penalties are more informal than criminal proceedings, require fewer financial and human resources, and are less time-consuming.⁶⁵¹ Offenders are less likely to dispute these fines, which lack the criminal conviction's stigma and risk (including of a criminal record).⁶⁵² The recipient of an administrative penalty can appeal to an independent tribunal - staffed by members with specialist environmental expertise⁶⁵³ - instead of having to compete with other cases in the overburdened court system.⁶⁵⁴

Building on this theoretical foundation and with a view to distilling a set of lessons for the improved formulation and application of administrative penalties to SA, Chapter 3 evaluated the use of administrative environmental law penalties in the UK and in the Netherlands (respectively the roots of SA's common and civil law legal systems). This evaluation highlighted how these two regimes differ in several respects in relation to: the nature of the penalties; their trigger and scope; institutional arrangements; fine quanta; allocation of fine proceeds; appeal and review procedures; their effect on criminal offences; and implications of non-compliance.

⁶⁴⁷ Fn.92.

⁶⁴⁸ Fn.117.

⁶⁴⁹ Fn.67.

⁶⁵⁰ Fn.73.

⁶⁵¹ Fn.74-75,130.

⁶⁵² Fn.141.

⁶⁵³ Fn.123.

⁶⁵⁴ Fn.645.

Against this context, Chapter 4 evaluated SA's first attempt to introduce administrative penalties within its environmental regime; namely s24G of NEMA. This evaluation highlights that s24G fails to comply with several theoretical conditions and lessons drawn from successful regimes, such as those in operation in the Netherlands and the UK. These inconsistencies include the following: s24G is not an administrative penalty of the type discussed in Chapter 2 - it is paid to trigger the consideration of an application for *ex post facto* environmental authorisation when a person has commenced a listed or waste management activity without authorisation;⁶⁵⁵ no distinction is made between 'innocent', negligent and intentional offenders, and all such offenders can apply for *ex post facto* rectification;⁶⁵⁶ the Minister or MEC is the decision-maker; whereas in a true administrative penalty system, environmental officials administer the system and impose the fines;⁶⁵⁷ there is no publicly-available guidance as to how or by when a decision regarding an administrative fine is made,⁶⁵⁸ nor is there specific provision for an applicant to make representations regarding the fine⁶⁵⁹ - the factors that the DEA apparently considers in calculating s24G fines are insufficient;⁶⁶⁰ the fact that the s24G fine is paid to the implementing department creates the risk of perverse incentives to approve applications;⁶⁶¹ there is no specialist tribunal to challenge s24G administrative fines;⁶⁶² lodging an appeal does not suspend the challenged decision;⁶⁶³ and record-keeping and publicising of s24G fines is insufficient.⁶⁶⁴

As a result, it is proposed that s24G either be scrapped entirely or substantially revised to meet the constitutional dictate of protecting the environment for the benefit of present and future generations.⁶⁶⁵ If domestic policy-makers elect to retain it, several key amendments are proposed, together with the introduction of a true administrative penalty system: s24G should be limited to negligent violations and its application should not have been extended to waste management activities - intentional offenders should be

⁶⁵⁵ Fn.477,489,506.

⁶⁵⁶ Fn.492.

⁶⁵⁷ Fn.15.

⁶⁵⁸ Fn.514.

⁶⁵⁹ 4.2.5.

⁶⁶⁰ Fn.542

⁶⁶¹ Fn.557.

⁶⁶² Fn.592.

⁶⁶³ Fn.565.

⁶⁶⁴ 4.2.8; fn.600.

⁶⁶⁵ S.24 Constitution.

prosecuted;⁶⁶⁶ a true administrative penalty system should be introduced into SA environmental law, for violations of NEMA and the SEMAs that are not serious enough to warrant criminal prosecution.⁶⁶⁷ FMPs should be available for minor infringements and strict liability offences, and VMPs for more serious offences;⁶⁶⁸ because criminal and administrative penalties are generally alternatives to one another, if, having evaluated the appropriate penalty using the relevant factors, it would be higher than the maximum criminal fine, the violator should instead be prosecuted (since s24G is not a true administrative penalty, it is appropriate that a successful s24G application does not preclude possible criminal prosecution);⁶⁶⁹ specialist environmental authorities should impose administrative penalties⁶⁷⁰ if violations have been proved on a balance of probabilities;⁶⁷¹ there should be publicly-available guidance regarding the imposition of s24G fines and administrative penalties – including the mitigating and aggravating factors evaluated - so that regulated entities and members of the public know what action will be taken in response to violations;⁶⁷² the factors to be evaluated should at least include those used in the UK for determining a VMP,⁶⁷³ and regulations regarding the procedure and criteria to determine a s24G fine should be published for comment as soon as possible;⁶⁷⁴ decisions on s24G administrative fines and conventional administrative penalties should only be made after careful consideration of submissions made by an offender regarding the penalty and the mitigating and aggravating factors;⁶⁷⁵ funds from s24G and administrative penalties should be paid to the National Revenue Fund and not to the implementing department;⁶⁷⁶ apart from criminal penalties, an administrative penalty should be in addition to any other NEMA/SEMA penalty, and only be imposed once per violation;⁶⁷⁷ specialist tribunals – with the status of High Courts - should be established to hear appeals of s24G fines and administrative penalties;⁶⁷⁸ appeals should suspend the operation of penalty decisions;⁶⁷⁹ administrative penalties should be enforceable as if they were High

⁶⁶⁶ 3.2.9; fn.494,497.

⁶⁶⁷ Fn.509.

⁶⁶⁸ Fn.485,498-499.

⁶⁶⁹ 4.2.9; fn.497,556.

⁶⁷⁰ Fn.518.

⁶⁷¹ Fn.500.

⁶⁷² Fn.520-523.

⁶⁷³ Fn.542.

⁶⁷⁴ 4.2.4; fn.515-517.

⁶⁷⁵ Fn.540.

⁶⁷⁶ Fn.558-561.

⁶⁷⁷ Fn.512.

⁶⁷⁸ Fn.591-594.

⁶⁷⁹ 4.2.8.

Court orders;⁶⁸⁰ and detailed records must be kept of s24G fines and administrative penalties; including: the value of each fine; the violator; the violation; and what action has been or will be taken if the penalty is not paid.⁶⁸¹

Criminal sanctions are clearly failing to realise the constitutional right to an environment not harmful to health or well-being - there is widespread non-compliance with environmental legislation, and the state of the environment is deteriorating. The successful application of administrative penalties in other jurisdictions illustrates the significant potential of administrative penalties to improve SA's EC&E. For the reasons explained in Chapter 4, s24G is not a particularly useful precedent for the introduction of such penalties. It is recommended that an administrative penalty system – structured with regard to the lessons learned from C&E theory and the use of these penalties in the UK and the Netherlands - be piloted in SA environmental law.

⁶⁸⁰ 4.2.10.

⁶⁸¹ Fn.412-413,599.

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