

# HOW CIVIL AND ADMINISTRATIVE PENALTIES CAN CHANGE THE FACE OF ENVIRONMENTAL COMPLIANCE IN SOUTH AFRICA<sup>1</sup>

Melissa Fourie<sup>2</sup>

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## Abstract

At present, the primary way to ensure that a violator of South African environmental legislation pays a punitive monetary penalty is to prosecute the offender beyond reasonable doubt in a criminal court, and to rely on a magistrate to levy an appropriate fine. This not only places an undue burden on an already overburdened criminal justice system, but the resulting low prosecution success rate discourages environmental authorities from pursuing prosecution in the first place.

Having regard to comparative international experience, this paper argues that a civil and administrative penalty system that provides for the adjudication of contraventions and the determination of a monetary penalty (having regard to a range of factors) on a balance of probabilities by either an administrative body, civil courts, or both, is not only a feasible innovation in South African legislation, but will significantly improve environmental compliance.

## 1 Introduction

In December 2005, the United States Environmental Protection Agency (EPA) announced the largest administrative penalty ever imposed for an environmental violation: multinational company DuPont was fined R92.25 million,<sup>3</sup> with an additional R56.25 million to be paid towards environmental research and education projects. DuPont agreed with the EPA to pay these amounts to settle eight violations of toxic substances and hazardous waste legislation, primarily relating to multiple failures to report information to the EPA about a particular synthetic chemical's substantial risk of injury to human health and the environment.<sup>4</sup>

In December 2008, the EPA and the US Justice Department (DoJ) reached an agreement with multinational oil company Exxon Mobil to pay a fine of more than R54 million. Exxon Mobil's misdeed was to violate an agreement with the EPA reached three years before to decrease sulphur emissions at four of its refineries (and as part of which Exxon had already paid a R69.3 million fine at the time). In

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<sup>2</sup> BA LLB (Stell) MSc (LSE). Consultant in environmental law, policy, strategy and implementation. Former Director: Enforcement, Environmental Quality & Protection Branch, Department of Environmental Affairs and Tourism. [mfourie@fastmail.fm](mailto:mfourie@fastmail.fm)

<sup>3</sup> Throughout this paper, exchange rates of US\$1=ZAR9 and GBP1=ZAR12.6 have been used to convert amounts into South African rand for the purpose of appropriate comparison.

<sup>4</sup> [www.epa.gov/compliance/resources/cases/civil/tsca/dupont121405.html](http://www.epa.gov/compliance/resources/cases/civil/tsca/dupont121405.html). E.I. DuPont De Nemours & Company (Docket No. FIFRA-95-H02 (April 30, 1998)).

response, Exxon not only paid the R54 million fine, but also came into compliance with EPA standards for sulphur emissions.<sup>5</sup>

Most recently, in February 2009, the EPA and DoJ reached a settlement with BP Products North America Inc to pay a R108 million fine and spend R54 million on a project to reduce air pollution in Texas City. In addition, BP will spend more than R1.449 billion on pollution controls, enhanced maintenance and monitoring, and improved internal management practices to resolve air quality violations at its Texas City refinery. The settlement related to violations of a 2001 agreement with authorities.<sup>6</sup>

The penalties imposed in the examples cited above – that can only be described as colossal by South African standards - were not fines imposed after lengthy prosecutions in the criminal courts, requiring the EPA to prove the commission of criminal offences beyond reasonable doubt. In the case of DuPont, the administrative penalty was imposed on DuPont based on evidence of wrongdoing proved by the EPA on a balance of probabilities - the standard of proof in civil matters. In the cases of Exxon Mobil and BP, the penalties were civil penalties confirmed by a court at the instance of the EPA and the DoJ. In all three cases, the penalties were imposed by agreement between the violator and authorities.

In South Africa, with two exceptions,<sup>7</sup> environmental legislation does not provide for the imposition of administrative penalties for contraventions, whether or not the contravention constitutes a criminal offence. This means that the only way to obtain a punitive monetary order (cf. orders to remediate environmental damage) against a violator is to prosecute that offender in a criminal court on the basis of evidence that must be so persuasive as to support a conviction beyond reasonable doubt. Should a conviction be achieved, it is then left to a magistrate – who currently receives no standard training in environmental law and the impact of environmental crime – to determine an appropriate fine.

Needless to say, having to prosecute each and every contravention of environmental legislation or permits places a significant burden on the criminal justice system, already overcommitted as a result of, *inter alia*, a high violent crime rate in South Africa. In addition, partly because it is so difficult to procure a conviction and a meaningful sentence for environmental crimes, authorities are discouraged from prosecuting cases in the first place. This, in turn, perpetuates the low prosecution rate for environmental offences and prevents officials from improving the quality of investigations and prosecutions through experience.

In this paper, I will argue that, having regard to both international experience and the domestic example of competition law, an administrative and/or civil penalty system for environmental violations can be an effective and feasible way of addressing these challenges in South Africa.

In broad terms, an administrative and/or civil penalty system would provide for the determination of a monetary penalty (whether by reference to particular penalties in a permit, or by reference to a published formula that takes into account factors like the nature and scope of harm to the environment, benefit incurred by the violator and ability to pay the penalty) by either an administrative tribunal (supported by an appeal court), civil courts, or both.

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<sup>5</sup> [www.usdoj.gov/opa/pr/2008/December/08-enrd-1118.html](http://www.usdoj.gov/opa/pr/2008/December/08-enrd-1118.html) and <http://edition.cnn.com/2008/US/12/18/exxon.mobile.fined/index.html>

<sup>6</sup> [www.epa.gov/compliance/resources/cases/civil/caa/bptexasinfosht09.html](http://www.epa.gov/compliance/resources/cases/civil/caa/bptexasinfosht09.html)

<sup>7</sup> The first exception is the “administration fine” authorised by Section 24G of the National Environmental Management Act, 1998. The second exception is an admission of guilt fine that may be issued by Environmental Management Inspectors (and peace officers) in terms of Section 34G of the National Environmental Management Act, 1998; however, admission of guilt fines are unlike administrative penalties in that, if disputed, the contravention must be proved in a criminal court beyond reasonable doubt.

## 2 Why monetary fines are an effective tool for deterring and reducing environmental violations

Traditionally, environmental contraventions are met with two types of regulatory responses. The first is remedial, i.e. to remediate such damage as has been caused by the violation, and is enforced either administratively (by instruction of the regulator) or civilly (by court order).

The second type of regulatory response is punitive, i.e. to punish the offender for contravening the law. These punitive measures can either take the form of a custodial sentence (or other forms of involuntary service, such as community service)<sup>8</sup> or monetary fines to be paid by the violator. Whereas direct imprisonment and community service can only be imposed as part of a criminal prosecution, fines can either be imposed through a criminal process (i.e. by a criminal court), through an administrative process (i.e. by a regulatory authority) or through a civil judicial process (i.e. by a civil court).

There is a significant and growing body of research on the theory behind the compliance behaviour of individuals and enterprises,<sup>9</sup> and the impact of different enforcement tools on such behaviour. Research conducted in the United States suggests that monetary fines (whether criminal or administrative) play a major role in deterring the regulated community from contravening environmental laws. It does so both by incentivising specific measures toward compliance, as well as by affirming past decisions by complying firms. It also goes a long way towards building the reputation of the authority motivating for and/or issuing the penalty.

A 2005 review by Thornton *et al* of 233 facilities in various industry sectors in the US<sup>10</sup> found the following:

- 89% of respondents remembered at least one instance of a fine against some other company, 64% recalled at least one fine imposed on an individual company official, and 31% remembered a prison sentence. These recollections were frequently inaccurate, and respondents remembered far fewer fines than were actually imposed.
- 71% of respondents could describe at least one particular example of a person or business being penalised for an environmental offence, with a tendency to remember only cases where unusually large financial penalties were imposed, or where someone was sentenced to jail. 97% remembered the infraction that led to the enforcement action, while 83% recalled the penalty given as a result of the enforcement action. At the same time, respondents overwhelmingly underestimated the actual penalties imposed.
- Despite such knowledge not showing a correlation with an increase in the respondents' perceptions of the risk of detection and punishment, 65% of firms reported taking some compliance-related actions in response to learning about cases at other facilities in which severe legal penalties were imposed on a violator of environmental laws: 57% of facilities reviewed their environmental programmes, 35% changed how they kept track of or monitored things, 23% of facilities changed their employee training, and 32% of facilities incurred the expenditure of changing equipment.<sup>11</sup>

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<sup>8</sup> For obvious reasons, most non-monetary punitive measures are only of value in relation to individual offenders, and not corporate entities. Although individual offenders may also include directors and employees of corporate offenders, the reality is that most environmental damage is caused by the economic activity of corporate entities, and that corporate entities generally have deeper pockets than individual offenders.

<sup>9</sup> See a summary of these theories in Craigie, F et al. "Dissecting Environmental Compliance and Enforcement in Kotze L and Paterson A (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (forthcoming) Juta, Cape Town.

<sup>10</sup> Dorothy Thornton, Neil A. Gunningham and Robert A. Kagan. 2005. "General Deterrence and Corporate Environmental Behavior". *Law & Policy*, Vol. 27, No. 2, April 2005.

<sup>11</sup> Note 10 at 276.

Thornton *et al* argue that:

*“... this form of ‘explicit general deterrence’ knowledge usually serves not to enhance the perceived threat of legal punishment, but as reassurance that compliance is not foolish and as a reminder to check on the reliability of existing compliance routines.”<sup>12</sup>*

In a 2007 study of how 267 US chemical plants’ pollutant discharges responded to inspections and fines, nearly 75% of facilities reported that fines were an effective deterrent (87% cited inspections as an additional incentive for compliance). The analysis confirmed that fines and inspections resulted in decreased water pollution emissions.<sup>13</sup>

Monetary fines, in particular (as opposed to other types of enforcement action), appear to have significant positive effects on compliance. An analysis of data from 1988 to 1996 from the US EPA’s permit compliance system for the Clean Water Act (CWA) in 23 regulatory jurisdictions proved empirically that monetary fines produced a 64% reduction in the statewide probability of a violation in the year following a fine being imposed in that jurisdiction (this figure declined to 27% in the second year). The majority of this impact, according to the review authors, must be ascribed to “reputation enhancement by the regulator”. Thus, in response to fines being imposed on a plant for a violation under the CWA, other plants were found to reduce violations almost as dramatically as the fined plant.

In contrast, the review found that non-monetary enforcement actions (formal administrative orders, formal notices of non-compliance, and administrative consent orders) had “statistically insignificant” impacts on compliance.<sup>14</sup>

*“Empirically, large improvements follow even from modest sanctions, as long as they have economic ‘teeth’. Consequently, a substantial improvement in water quality might be achieved from a relatively small additional investment in traditional adversarial enforcement. Given this result, it is perhaps an interesting institutional research question why fines are not imposed with greater regularity.”<sup>15</sup>*

There is little reason to believe that the regulated community in South African industry would respond in a notably different way to enforcement, and to fines in particular. If anything, South African industry, being far less compliant with environmental legislation than its US counterparts, and less familiar with and prepared for significant fines, will be likely to take more drastic action in response to fines.

### **3 The challenges of obtaining meaningful criminal fines for environmental violations**

At the outset, it should be acknowledged that, even where a violation constitutes a criminal offence, criminal prosecution is not always an appropriate enforcement response to a contravention. For example, where the offender reports a contravention immediately upon detection and takes all reasonable measures to mitigate and prevent a recurrence of the violation, an authority may wish to punish the offender without the negative stigma attached to a criminal prosecution. Another example is a violation that has caused no direct harm, such as late filing of required reports. Although this may be a serious violation in terms of

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<sup>12</sup> Note 10 at 262.

<sup>13</sup> R. Glicksman and D. Earnhart, 2007. “The Comparative Effectiveness of Government Interventions on Environmental Performance in the Chemical Industry”, *Stanford Env. Law J.* Forthcoming (2007).

<sup>14</sup> J.P. Shimshack, M.B. Ward. 2005. “Regulator reputation, enforcement, and environmental compliance”. *Journal of Environmental Economics and Management* 50 (2005) at 521.

<sup>15</sup> Note 14, at 538.

potential risk to the environment, it may not be an efficient use of resources to institute a full-blown criminal prosecution to punish the offender.<sup>16</sup> The difficulty is that, in such a situation, there is no alternative, non-criminal punitive measure available to authorities.

Assuming, however, that a particular violation is indeed appropriate for criminal prosecution, environmental authorities have to make a decision on whether to institute a criminal investigation (i.e. collect evidence to a standard acceptable in a criminal court). Although much progress has been made in the design and roll-out of Basic Training for Environmental Management Inspectors (EMIs) that includes training on conducting criminal investigations, the reality is that this training alone remains (and is likely to continue to remain) inadequate to prepare officials for conducting the type of investigations that, in the case of non-environmental crimes, are conducted by South African Police Services (SAPS) officials of detective rank. This problem is compounded in the case of pollution, waste and development crimes, which are generally investigated by EMIs with no other training in criminal investigations than the relevant module in the EMI Basic Training.<sup>17</sup> This fact, in turn, might explain why managers in many environmental authorities (who generally have academic backgrounds that exclude training in criminal enforcement or any enforcement at all) are often reluctant to institute criminal proceedings in pollution, waste and particularly development cases, and provide little or no encouragement to EMIs to pursue this option.<sup>18</sup> All of these factors regularly result in the slow or inadequate investigation of environmental crimes, or, even worse, the abandonment of any enforcement action whatsoever.

In addition, although the Environmental Management Inspectorate has worked to reducing its reliance on the SAPS in its criminal investigations,<sup>19</sup> there are still aspects of criminal investigations that involve the SAPS. Many SAPS officials remain overworked, under-trained and disincentivised to support the investigation of environmental crimes, particularly those that do not constitute organised crime and therefore benefit from the expertise of the SAPS Organised Crime Unit.

The arguments above are borne out by the National Environmental Compliance and Enforcement Report (NECER) for 2007-8, the most recent enforcement results published by the Inspectorate.<sup>20</sup>

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<sup>16</sup> This is supported by the principles contained in the Practice Note entitled “Principles of enforcement of environmental legislation, including criteria for criminal prosecution and the provision of zero tolerance offences” published by DEAT in July 2008.

<sup>17</sup> Those EMIs who are the best criminal investigators tend to be those who were employed by the SAPS prior to joining the Inspectorate or other environment authorities. Generally speaking, for a range of historical institutional reasons, these EMIs tend to be employed by EMI institutions to investigate wildlife and marine crimes rather than pollution, waste and development crimes.

<sup>18</sup> This reluctance may explain the extraordinary provision that crept into Section 31N(2) of the National Environmental Management Act, 1998 (Act 107 of 1998), which gives the Minister or MEC a discretion to report or not report the criminal offence of non-compliance with a compliance notice to the Director of Public Prosecutions.

<sup>19</sup> See, for example, the agreement concluded between DEAT and the SAPS in February 2009 regarding the carrying of criminal dockets by EMIs (Standard Operating Procedure).

<sup>20</sup> Actual enforcement results for the Department of Water Affairs and Forestry are hard to come by. In relation to water resource management, against an indicator of “Non-compliance with legislation or licence conditions addressed” and targets of “Compliance and enforcement strategy finalised and implementation initiated” and “number of cases dealt with and decision taken”, the DWAF 2007-8 Annual Report simply states “39 directives issued by Limpopo, Gauteng, North West, Northern Cape and Eastern Cape Regional Officers, 4 Cases with the Water Tribunal, 37 Court Cases pending”. In relation to forestry management, the DWAF 2007-8 Annual Report to the implementation and communication of an enforcement strategy, as well as “201 transgressions were investigated in the regions resulting in 58 successful litigations; 18 warnings were issued”. It is not clear whether the “court cases” or “litigations” entail criminal or civil proceedings.

Fig. 1: Extract from National Environmental Compliance and Enforcement Report, 2007-8

	2006/7		2007/8	
Criminal dockets under investigation	n/a		1762	
Convictions (per accused)	134		748	
Acquittals (per accused)	n/a		441	
NPA declined to prosecute	n/a		16	

Both the total number of criminal dockets under investigation reported in the NECER, as well as the number of acquittals per total number of dockets (25%), are indicators of, *inter alia*, weaknesses in the investigation of environmental crimes. In 2007-8 the National Prosecuting Authority (NPA) as a whole reported 1,037,538 new cases for that year,<sup>21</sup> even in the unlikely event that all 1,762 environmental crimes dockets under investigation in 2007-8 were prosecuted, that would amount to less than 0.17% of the total number of cases received by the NPA for that year.

Assuming that the criminal docket makes it to completion, the next institutional obstacle lies in the prosecution of that docket. As things stand, all environmental criminal cases must be prosecuted by prosecutors employed by the NPA. Since 2005, the Department of Environmental Affairs and Tourism (DEAT) and other institutional members of the Environmental Management Inspectorate have invested heavily in the training and support of NPA prosecutors.<sup>22</sup> Despite this, the conviction rates for environmental prosecution have remained poor. The NECER results for 2007-8 (and noting the *caveats* in the NECER regarding reporting inaccuracies) indicate only a 42% conviction rate for environmental crimes.<sup>23</sup> In contrast, in 2007-8 the NPA reported a conviction rate of 90.5% in High Court cases, 88% in District Courts, and 73% in Regional Courts, for all criminal cases. The Specialised Commercial Crimes Unit reported a 94.12% conviction rate for this period.<sup>24</sup>

When considering the provincial breakdown of the NECER criminal dockets under investigation, it is particularly noticeable that there is a significant discrepancy between criminal prosecution by institutions primarily responsible for resource and wildlife management and those primarily responsible for development, pollution and waste management. The NECER 2007-8 unfortunately does not indicate how this discrepancy plays out in the number of convictions, but anecdotal evidence seems to indicate that very few of the convictions relate to development, pollution and waste management prosecutions.

Once a conviction has been obtained, it lies in the hands of district and regional magistrates (who adjudicate almost all environmental prosecutions) to impose a meaningful sentence. Other than a few notable exceptions, fines imposed by magistrates in environmental prosecutions tend to be very low,

<sup>21</sup> NPA Annual Report 2007-8 available at [www.npa.gov.za](http://www.npa.gov.za).

<sup>22</sup> For example, DEAT has provided ongoing hands-on support of training courses facilitated by Justice College (the NECER 2007-8 reports that, as at May 2008, 204 prosecutors had attended this training course), published a comprehensive manual for prosecutors on environmental crime, and instituted an annual award of excellence for prosecutors of environmental crime.

<sup>23</sup> Note that this can never be an accurate calculation due to the fact that at least some of the convictions in 2007-8 relate to criminal dockets that pre-date 2007-8. This is a perpetual problem in the reporting of criminal prosecution statistics.

<sup>24</sup> It is likely that one of the primary reasons for the discrepancy between the conviction rates for environmental crimes and other crimes is the absence of dedicated environmental prosecutors, despite ongoing discussions between DEAT and the NPA since 2005; this means that all prosecutors are expected to be able to prosecute environmental crimes, generally accepted to be a specialised field. Note also that the conviction rate in the Environmental Court in Hermanus, which had both a dedicated magistrate and a dedicated prosecutor (now defunct as a result of a decision by the Department of Justice), was in excess of 75% (Snijman, P. 2005. "Assessing the role and success of specialised courts regarding compliance in resource management, using the abalone fishery and the environmental court in Hermanus as a case study" MCS Symposium, SADC-MCS programme 1-3 February 2005, Cape Town.)

particularly in development, pollution and waste management prosecutions.<sup>25</sup> As will appear below, this is a perpetual problem in many jurisdictions across the world. The reasons behind low fines for environmental crimes are complex and many. In South Africa, one such reason is the absence of training in environmental law and the impact of environmental crime in the standard training for district and regional court magistrates.<sup>26</sup> Another is the relatively low maximum penalties for offences in many environmental statutes. A 2006 international comparative review undertaken by the Interpol Working Group on Environmental Crimes, in which South Africa participated, revealed that, while South African environmental legislation provided for comparatively lengthy maximum prison sentences, monetary penalties were very low compared to other countries. This problem should be addressed to a large degree in upcoming amendments to the National Environmental Management Act, 1998, specific environmental management Acts and other environmental statutes that significantly increase penalties.<sup>27</sup>

All things considered, the South African criminal justice system is ill-suited, ill-prepared and ill-resourced to be the sole forum for the levying of fines for environmental contraventions. Not only is criminal environmental enforcement not very successful (particularly in the case of pollution, waste and development contraventions) due to a range of institutional obstacles, but the existence of these obstacles, coupled with the very fact of low conviction rates, disincentivise criminal investigation and prosecution from the outset. Although this paper does not suggest that criminal environmental enforcement is futile – on the contrary, surely an environmental enforcement programme cannot be effective without a criminal component, and the obstacles to successful criminal enforcement must be addressed urgently – it is contended that existing administrative enforcement programmes need to be given the legislative and institutional tools to procure administrative and/or civil fines against violators.

#### **4 Lessons learnt from existing environmental penalty regimes in other countries**

##### **4.1 Trends in comparative international jurisdictions**

Administrative sanctions are part of administrative law in many countries. In relation to environmental violations, countries as diverse in their legal systems as Austria, Belgium, Finland, Germany,<sup>28</sup> Italy, France, the Netherlands, Portugal, Spain, Sweden,<sup>29</sup> Mexico and the US have established systems of administrative non-criminal sanctions. In most of these cases, administrative sanctions are not limited to the environmental sphere; on the contrary, they occur in the wider regulatory regime and include matters like health and safety, anti-trust or competition law, banking and regulated securities trading.

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<sup>25</sup> A statement made in the NECER 2007-8. The highest monetary fine levied in 2007-8 for an environmental crime referred to in the NECER 2007-8 is R300,000 for the illegal possession of rhino horn. No monetary penalties for any criminal conviction under pollution, waste management or development (EIA) legislation are mentioned in NECER 2007-8.

<sup>26</sup> DEAT, assisted by the other EMI institutions, has, since 2006, provided hands-on support to Justice College's workshops for magistrates on environmental crime. The NECER 2007-8 states that, since 2006, approximately 230 magistrates have attended one of the Justice College workshops on environmental crime.

<sup>27</sup> National Environmental Laws Amendment Bill, B66B-2008.

<sup>28</sup> Germany has a well-developed system of administrative offences known as "Ordnungswidrigkeiten", with monetary sanctions quite distinct from criminal sanctions; appeals against such sanctions are made to administrative tribunals (and not criminal courts). As described in Macrory, R. 2008. *Regulation, Enforcement and Governance of Environmental Law*. Cameron May, 2008. At 259. The Hampton Report (note 34 below) states, in relation to the German system: "Fines can be set up to €500,000, and businesses can appeal to a special tribunal if they feel the penalty is undeserved or disproportionate. The system has been described as 'the most coherent and comprehensive system of regulatory enforcement'."

<sup>29</sup> Note 32 at 18-20.

While adopting some of these systems in certain regulatory spheres, the United Kingdom, with its relatively similar legal and justice system to that of South Africa, traditionally concentrated its environmental enforcement efforts on developing an effective criminal enforcement programme. In this process, the Environment Agency of England and Wales has made significant progress in addressing many of the problems identified above in the context of South Africa, and much can be learnt from the achievements of its criminal enforcement programme.<sup>30</sup> In 2004, in 283 prosecutions, its conviction rate was 96%.<sup>31</sup>

The UK system, however, suffered from many of the same complaints described above in relation to criminal enforcement of environmental violations in South Africa, and in many countries all over the world.<sup>32</sup> Although as many as 25,000 fines, formal cautions and prosecutions were brought against enterprises by the Environment Agency in 2003-4, the monetary fines imposed by criminal courts remained very low. The average fine handed down in 2004 varied between R76,512 in magistrates' courts and R407,694 in crown courts.<sup>33</sup>

Partly as a result of these statistics, the UK government commenced an investigation into alternative approaches to enforcement in various areas of government, including by the Environment Agency of England and Wales. In 2005, the UK government published a national review of regulatory inspection and enforcement in all areas of government.<sup>34</sup> On penalties, the Hampton Report concluded that:

- “...the penalty regime at present does not provide effective deterrence. This is because:*
- “the penalties handed down by courts often do not reflect either the severity of offences, or the economic benefit a business has gained from its non-compliance;*
  - regulators’ penalty powers are sometimes slow, and can be ineffective in targeting persistent offenders; and*
  - the structure of some regulators, particularly local authorities, makes effective action on persistent offenders difficult.”<sup>35</sup>*

The Hampton report recommended, firstly, that a comprehensive review of regulators' penalty regimes be undertaken, and that administrative penalties (with a mechanism to ensure that offenders are deprived of the economic benefit of long-term illegal activity) be introduced as an extra tool for all regulators, with the right of appeal to magistrates' courts unless appeals mechanisms to tribunals or similar bodies already exist. Secondly, after two or three years, the effectiveness of appeals to magistrates' courts must be considered, as well as the option of establishing a “Regulatory Tribunal Service” with specialist judges to hear appeals.<sup>36</sup>

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<sup>30</sup> For example, the Environment Agency of England and Wales addressed the problem of the prosecution of specialised environmental crimes by employing its own specialised prosecutors who have equal standing with Crown Prosecution Service prosecutors.

<sup>31</sup> As quoted at p. 39 in Hampton, P. 2005. “Reducing administrative burdens: effective inspection and enforcement”. HM Treasury, March 2005.

<sup>32</sup> Criminal fines for environmental violations were found to “on average relatively low” by a study conducted in the European Union and reported in Faure, M.G. and Heine, G. *Criminal enforcement of environmental law in the European Union*. Kluwer Law International, 2005. At 56.

<sup>33</sup> As quoted at p. 39 in Hampton, P. 2005. “Reducing administrative burdens: effective inspection and enforcement”. HM Treasury, March 2005. Even the Hampton report noted that “[t]he deterrent effect of such fines is likely to be low”.

<sup>34</sup> Hampton, P. 2005. “Reducing administrative burdens: effective inspection and enforcement”. HM Treasury, March 2005. An exchange rate of 1 GBP = ZAR11,454 was used, based on HRM Customs Rates of Exchange for Customs and VAT purposes for January 2004.

<sup>35</sup> Note 34 above at paragraph 2.74 at p. 38.

<sup>36</sup> Note 34 above at p. 41.



In support of its recommendations, the Hampton Report stated the following:

*“Administrative penalties, which are quicker and simpler than court proceedings could reduce the burden of time and worry placed on businesses under threat of prosecution, while allowing regulators to restrict prosecution to the most serious cases, where the stigma of a criminal prosecution is required. Administrative penalties are used widely in other countries, and can also allow regulators to eliminate the economic benefit of illegal activity more easily.”<sup>37</sup>*

A 2006 follow-up report dealing with the issue of sanctions, known as the Macrory Report,<sup>38</sup> concluded that the current sanctioning regime was ineffective, over-reliant on criminal prosecution and lacking in flexibility. Macrory’s recommendations included introducing an alternative system of civil sanctions, or what he calls an “extended sanctioning toolkit” for regulatory offences in order to set up a modern, targeted, fit-for-purpose sanctioning regime.

In the UK, after approval of the recommendations of the Hampton and Macrory reports, most of Macrory's recommendations on penalties (particularly fixed and variable penalty notices) have been taken forward in the Regulatory and Enforcement Sanctions Act, which became law in late July 2008. Assessment of its implementation will hold useful lessons for the implementation of a similar system in South Africa (more about this under paragraph 7 below.)

In its assessment of the likely impact of the Regulatory Enforcement and Sanctions Bill, the UK government argued that the lack of administrative penalties have had the following consequences:

- In instances where there has been no intent of wilfulness in the non-compliance, criminal prosecution may be a “disproportionate response”. However, the regulator has no other sanctions available, so it then either prosecutes (disproportionately) or takes no action (what Macrory called a “compliance deficit”).
- Current regulatory sanctions are not sufficient to deter offenders, because industry does not regard the sentences imposed to be a sufficient deterrent.<sup>39</sup>

#### 4.2 The administrative and civil judicial penalty system in the US

The US environmental regulatory system has its origins in the early 1970s, when the first comprehensive environmental statutes were passed by the US Congress during a political wave of growing environmental awareness. Most major US environmental statutes<sup>40</sup> provide for administrative penalties for a particular contravention, and authorise the enforcement of those administrative penalty provisions by either:

- an administrative process, led by the EPA, involving a hearing presided over by presiding officers (known as “Administrative Law Judges”, or ALJs) before or instead of court action. Most of these statutes require that administrative enforcement action comply with the requirements of the Administrative Procedure Act, 1946 (APA); or
- a civil judicial process, i.e. civil court proceedings led by the Department of Justice.

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<sup>37</sup> Note 34 above at paragraph 2.82 at p. 40.

<sup>38</sup> Macrory, R. Prof. *Regulatory Justice: Making Sanctions Effective*. November 2006.

<sup>39</sup> Department for Business Enterprise and Regulatory Reform, 2008. *Impact Assessment: Regulatory Enforcement and Sanctions Bill*. Revised for the House of Commons, May 2008. At p. 25-26.

<sup>40</sup> Including the Clean Air Act, 1970, the Safe Drinking Water Act, 1974, the Toxic Substances Control Act, 1976, the Resource Conservation and Recovery Act, 1976, the Clean Water Act, 1977 and the Marine Protection Research and Sanctuaries Act, 1972.

Criminal enforcement is reserved for cases where the EPA has evidence of a “knowing, wilful violation of the law”.<sup>41</sup> In these cases, the EPA often initiates parallel criminal and administrative and/or civil judicial proceedings.<sup>42</sup> In interviews, EPA officials explained that the “default” response to a violation is administrative enforcement (whether through EPA or through the court – see below); should there be additional evidence of intent, criminal proceedings will be instituted on top of the administrative proceedings for a fine.

Although the administrative and civil judicial processes are closely linked, they are two distinctive processes with different rules and procedures, and play out in different judicial fora. In addition, whereas the EPA is the *dominis litis* in the administrative process, in civil judicial proceedings that role is played by the DoJ with the support of the EPA.

#### 4.2.1 Administrative penalties

The rules and procedure for the administrative penalty process are set out in detail in the Consolidated Rules of Practice 40 CFR Part 22.<sup>43</sup> The process is set out briefly below.

The administrative penalty process starts with the EPA filing a complaint setting out its *prima facie* case (note that this is all that is required from the EPA at this stage<sup>44</sup>) in support of the alleged violation, and a description of the relief sought. As part of its *prima facie* case, at this stage, the EPA typically includes an inspection report, witness lists for the hearing, chain of custody documentation and financial information. It may also decide to include a proposed penalty amount, or at least details of the factors it will consider for a later penalty determination.<sup>45</sup> It will often also request a corrective action order.

Should it so wish, the alleged violator may then file an answer to the complaint, which effectively takes the form of a plea. Importantly, not denying facts in the complaint, or providing inadequate explanations for the facts in the complaint, may be regarded as an admission. There is also a requirement that denials or explanations must be supported by actual evidence – unsupported assertions are insufficient.<sup>46</sup> It is often at this stage, having seen the evidence the alleged violator intends presenting, that the EPA will propose a particular penalty amount (see the **Calculation of Penalties** below).

At this point, the matter comes before presiding officer who will issue a procedural order setting a timetable for pre-hearing preparation on both sides. This preparation entails an exchange of copies of all exhibits to be used at the hearing, a list of witnesses and a brief summary of the evidence to be given by each witness. Either party can file a motion with the presiding officer to force discovery.<sup>47</sup>

The presiding officer is usually an official known as an Administrative Law Judge (ALJ), unless the EPA’s Consolidated Rules provide for a Regional Judicial Officer appointed by the Regional EPA

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<sup>41</sup> US Environmental Protection Agency Practice Handbook on Administrative Enforcement at EPA. February 2000. At 2.

<sup>42</sup> Interviews with EPA officials in August 2008. These decisions are governed by the EPA’s Parallel Proceedings Policy dated September 2007.

<sup>43</sup> Part 22 of the US Consolidated Federal Regulations, promulgated on April 9, 1980 at 45 Fed. Reg. 24360 – amended on July 23, 1999.

<sup>44</sup> Note 43 supra at 22.24(a).

<sup>45</sup> In practice, this amount is often not determined at this stage, since more information may come to light during pre-hearing proceedings.

<sup>46</sup> Note 41 supra at 11.

<sup>47</sup> Various other motions typical of litigation can also be filed with the ALJ: that one party is in default; for accelerated decision; to dismiss; to strike; to withdraw the complaint; to amend the complaint or answer; to intervene. These motions will not be described here.

Administrator<sup>48</sup> to fulfil that function. The EPA employs approximately five ALJs who form part of a larger federal system of administrative law and adjudication governed by the Administrative Procedure Act<sup>49</sup> - most federal agencies have ALJs who adjudicate disputes over actions taken by federal agencies. These ALJs therefore do not necessarily have any background in environmental law or EPA practice; instead, they are specialists in administrative penalties and enforcement in general. Although employed by agencies like the EPA, their independence is promoted through exempting them from agency efficiency ratings and promotions, and compensation is determined by a different agency.<sup>50</sup>

As is apparent from the foregoing, ALJs take an active role in pre-hearing proceedings; in fact, their performance is assessed by how many cases they finalise in a fixed period, thereby creating a strong incentive for speedy resolution of cases.<sup>51</sup>

A hearing of the matter takes place at the discretion of the presiding officer, who decides whether oral evidence will assist him or her in making a decision, unless the alleged violator specifically requests a hearing in its answer. At the hearing, the presiding officer may allow a wider range of evidence than in normal civil proceedings (including hearsay evidence).<sup>52</sup>

At the hearing, the EPA carries the burden of “persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate”. The standard of proof for this “burden of persuasion” is “a preponderance of the evidence”, translating to the South African concept of “balance of probabilities”.<sup>53</sup>

Parties submit briefs (setting out each side’s conclusions of facts and law) to the presiding officer *after* the hearing (unlike heads of argument that are submitted before a hearing in South African proceedings).<sup>54</sup> Thereafter, the presiding officer will make an initial decision with findings of fact, all material issues of law or discretion with reasons, and a recommended civil penalty assessment and related orders. Payment of the penalty does not affect injunctive relief or criminal sanctions.<sup>55</sup>

Settlement of cases is encouraged by the EPA “if the settlement is consistent with the provisions and objectives of the [authorising statute]”,<sup>56</sup> and more than 95% of administrative actions are resolved at the EPA without further appeal.<sup>57</sup> All settlements are in writing in the form of a consent order that is essentially an admission of liability of the penalty agreed. Consent orders must be confirmed by the Regional Judicial Officer, the Regional Administrator or the Environmental Appeals Board.<sup>58</sup> However, it is important to note that, in practice, complaints are often settled and penalties agreed *before* a formal complaint is filed.

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<sup>48</sup> The EPA’s federal jurisdiction is divided into ten regions, each with its own Regional Administrator.

<sup>49</sup> 1946, 60 Stat. 238.

<sup>50</sup> Interviews with EPA officials and officials from the offices of the Administrative Law Judges and the Environmental Appeals Board in August 2008.

<sup>51</sup> Note 50.

<sup>52</sup> Note 43 at 22.22.

<sup>53</sup> Note 43 at 22.24.

<sup>54</sup> Note 43 at 22.26.

<sup>55</sup> Note 43 at 22.22.27 (a).

<sup>56</sup> Note 43 at 22.18(3)(b).

<sup>57</sup> Libber, J. 1998. “Making The Polluter Pay: EPA’s Experience in Recapturing a Violator’s Economic Benefit from Noncompliance”. Paper presented at INECE Fifth International Conference on Environmental Compliance and Enforcement, November 1998. Conference record at p.465. In interviews in August 2008, EPA officials confirmed this percentage.

<sup>58</sup> Note 43 at 22.18.

Within 30 days after the initial decision, any party may appeal that decision to the Environmental Appeals Board (EAB). If not, the initial decision becomes a final order within 45 days after served upon the parties.<sup>59</sup>

The EAB is made up of judges who, unlike the ALJs, are officials previously employed by the EPA and report to the EPA Administrator (who is a political appointee, an in the US government system effectively the equivalent of South Africa's Minister of Environmental Affairs and Tourism). They sit as one board to hear appeals against judgements of the ALJs, and make decisions by majority vote.

In interviews, EPA officials held mixed views on the approaches of the ALJs. Some ALJs were seen to be competent and sympathetic to the agency's concerns, while others were seen to be more pro-industry. On the other hand, officials (perhaps not unsurprisingly) held consistently high views on the approaches of the EAB judges.

#### 4.2.2 *Civil judicial enforcement*

After becoming aware of an alleged violation, the EPA usually makes a decision fairly early whether to take a complaint to an ALJ for adjudication, or to sue in civil judicial proceedings. In practice, the EPA refers cases directly to the DoJ where it is an important, precedent-setting case or where they anticipate that a court order will be required to enforce payment of the fine levied.<sup>60</sup> (If a violator does not pay an administrative penalty imposed by the EAB, the EPA then has to approach a court for a court order to be able to enforce payment.<sup>61</sup>) The total number of complaints versus the number of cases referred to the DoJ in FY2008 (see below) is evidence of this approach.

In interviews, EPA officials provided a number of reasons for their approach. In certain instances, this decision is affected by legal requirements or caps on the amount of administrative penalties that may be imposed under a specific statute. Another consideration was that, according to officials interviewed, the DoJ tended to accept bigger cases with more egregious environmental harm or potential harm, so as not to unnecessarily take up the court's time within less important matters, which may impair the EPA's reputation with judges. EPA officials also felt that ALJs, and particularly the members of the EAB, were more informed on environmental law and more receptive to punishing technical contraventions of environmental legislation through penalties than civil court judges; they are also seen to be much speedier in their resolution of cases than civil court judges. For the EPA, the ALJs therefore play a crucial role in adjudicating the multitude of smaller contraventions of environmental law, and promote speedier resolution of cases. EPA officials argued that, should they only be able to take complaints to civil court, they would likely take less enforcement action, particularly in smaller cases.

Civil judicial proceedings follow the Federal Rules of Civil Procedure (which would translate to civil procedure under High Court and Magistrates' Court rules in South Africa).

#### 4.3 Calculation of penalties

The calculation of penalties put forward by the EPA is based on:

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<sup>59</sup> Note 43 at 22.27(c). There are also other circumstances in which the initial order does not become a final order.

<sup>60</sup> Interviews with EPA officials in August 2008. Some statutes give the EPA a discretion whether to use administrative or civil judicial enforcement.

<sup>61</sup> Van Zebe, D.J. and Mulkey, M.E. 1992. "Choosing [*sic*] among criminal, civil judicial, and administrative enforcement options: A comparative discussion of united states and netherlands experience". Paper presented at INECE 2<sup>nd</sup> Conference on Environmental Enforcement, September 1992.

- the EPA’s generic Policy on Civil Penalties;<sup>62</sup> and
- the penalty policies published under each of its environmental statutes, taking into account such factors as are listed in the statutes.

The Policy on Civil Penalties sets out a number of objectives penalty assessment, including:

- to deter people from violating the law;
- the fair and equitable treatment of the regulated community; and
- the swift resolution of environmental problems, with two key approaches:
  - providing incentives to settle and institute prompt remedial action; and
  - provide disincentives to delaying compliance.

This Policy also sets out the outline for civil penalty assessment. Step I is the calculation of the Preliminary Deterrence Amount, based on, firstly, the economic benefit component and secondly, the gravity component.

The economic benefit component includes the benefit from delayed costs (e.g. installing pollution abatement equipment two years after it should have been installed), the benefit of avoided costs (e.g. not paying the operation and maintenance expenses on the pollution abatement equipment) and the illegal competitive advantage gained by the violation (e.g. selling prohibited products on the black market). The gravity component includes actual or possible harm, importance to the regulatory scheme and the size of the violator (on the basis that a violation by a bigger company is more serious than the same violation committed by a smaller company).<sup>63</sup>

Step II involves applying adjustment factors to arrive at the “Initial Penalty Target Figure”. These factors are:

- degree of cooperation/non-cooperation (indicated through pre-settlement action);
- degree of willfulness and/or negligence;
- history of non-compliance;
- ability to pay (optional at this stage); and
- other unique factors (including strength of case, competing public policy concerns).

Step III entails making adjustments to Initial Penalty Target Figure after negotiations with the violator has begun, to arrive at the Adjusted Penalty Target Figure. Adjustment factors include:

- ability to pay (to the extent not considered in calculating initial penalty target);
- a reassessment of adjustments used in calculating initial penalty target (the EPA may want to re-examine evidence used as a basis for the penalty in the light of new information);
- a reassessment of the preliminary deterrence amount to reflect continued periods of non-compliance not reflected in the original calculation; and
- alternative payments agreed upon prior to the commencement of litigation.<sup>64</sup>

The EPA has developed a computer model known as the BEN Model<sup>65</sup> to calculate the economic benefit from delayed and avoided compliance expenditures benefit of non-compliance based on generally

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<sup>62</sup> “A Framework for Statute-Specific Approaches to Penalty Assessments: Implementing EPA’s Policies on Civil Penalties”. EPA General Enforcement Policy No. GM-22. 16 February 1984.

<sup>63</sup> Interview with Jonathan Libber of the EPA’s Office of Enforcement and Compliance Assurance, August 2008.

<sup>64</sup> Note 62, Attachment A.

<sup>65</sup> <http://www.epa.gov/compliance/civil/econmodels/>

accepted financial principles, for the purpose of determining the amount of administrative/civil penalties. This model has been controversial and is not used in all states,<sup>66</sup> but it is an attempt to make the assessment of penalties as objective, transparent and consistent as possible. Assessed penalties increased dramatically after introduction of the BEN model.<sup>67</sup>

All administrative and civil penalties paid (which excludes funds awarded or agreed for supplemental environmental projects) go to the US Treasury.

#### 4.4 EPA Enforcement Results in 2008

In FY2008, the EPA filed 2,056 complaints within the administrative penalty system, and obtained 2,084 final administrative penalty orders. In addition, it obtained administrative 1,390 compliance orders. It referred 280 civil judicial enforcement cases to the DoJ, and 164 civil judicial complaints were filed at court; 192 civil judicial enforcement cases were concluded in this year. In the same year, the EPA initiated 319 criminal cases, and charged 176 criminal defendants.

The EPA’s Civil Enforcement Programme obtained more than R1,1 billion<sup>68</sup> in civil penalties through civil judicial and administrative enforcement actions in FY2008. By contrast, in the same period the EPA’s Criminal Enforcement Programme obtained R576 million in fines and restitution orders (just over 52% of the administrative/civil penalties), plus 57 years in custodial sentences.<sup>69</sup>

Figure 2 below shows the breakdown between penalties from administrative cases, penalties from civil judicial cases and fines from criminal cases for FY2008:

*Figure 2: Administrative and civil judicial penalties versus criminal fines, FY 2008<sup>70</sup>*

	<b>FY2008</b>
<b>Administrative penalties</b>	R343,8 million
<b>Civil judicial penalties</b>	R795,6 million
<b>Administrative and civil judicial penalties combined</b>	R1,1394 billion
<b>Criminal fines</b>	R576 million

The EPA also reports on capital expenditure on corrective measures such as pollution control and clean-up, and on capital expenditure on “supplemental environmental projects” (i.e. projects that a defendant/respondent agrees to undertake as part of some civil enforcement case settlements, but is not legally required to perform prior to such undertaking), incurred as a result of enforcement action. The results for FY2008 are set out in Figure 3 below.

*Figure 3: Capital expenditure on environmental improvements, FY 2008*

<sup>66</sup> See, for example, Reitze, A.W. 2001. *Air pollution control law: compliance and enforcement*. Environmental Law Institute, 2001. Libber (note 57 supra) provides some reasons for this lack of take-up in all states.

<sup>67</sup> Libber (note 57 supra) reports that “[f]or the ten years prior to the introduction of the BEN model, the total annual penalty assessments averaged about \$6 million per year. In fiscal year 1985, the first year BEN was available, the total assessed penalties jumped to \$23 million. In fiscal year 1988, the penalties were already at the \$37 million level, and by fiscal year 1994, they exceeded \$100 million. The success of this policy change was probably due to making the recapture of economic benefit a requirement, and giving EPA enforcement professionals a reliable user-friendly tool to measure that benefit.”

<sup>68</sup> Throughout this paper, an exchange rate of R9 to the US\$ was used.

<sup>69</sup> EPA Office of Enforcement and Compliance Assurance. *FY 2008 Enforcement and Compliance Annual Results*. 4 December 2008.

<sup>70</sup> Note 69 above.

	<b>FY2008</b>
<b>Capital expenditure on corrective measures as part of administrative and civil penalties or settlements</b>	R105,3 billion
<b>Capital expenditure on supplemental environmental projects as part of administrative and civil penalties or settlements</b>	R351 million
<b>Judicially mandated projects as part of criminal sentences</b>	R108 million

Another interesting statistic reported by the EPA relates to its voluntary disclosure programme, where companies and facilities can avoid enforcement action by reporting detected violations to the EPA, subject to strict conditions. In FY2008, the EPA received 2,832 voluntary disclosures from companies and facilities.

Data on the overall compliance with environmental legislation in the US is not easy to compile, though anecdotal evidence seems to suggest that compliance is significantly higher than in South Africa. By way of example, Shimshack and Ward's 2005 study of 217 facilities between 1988 and 1996 showed that less than 3% of facilities were in violation.<sup>71</sup> A starkly different picture is drawn by the NECER 2007-8 regarding the results of compliance inspections carried out in 2007-8 at metals processing plants and refineries, stating that "[o]ut of the 11 sites inspected, only one was found to be in substantial compliance with environmental legislation and permits."<sup>72</sup>

## **5 Experience from another South African sector: implementation of the Competition Act, 1998**

The environmental sector has had a brief taste of the benefits that administrative penalties could bring through the implementation of Section 24G of NEMA. This section provides for an "administration fine" to be paid before the competent authority could consider authorising the rectification of the unlawful commencement or continuation of a listed activity. Not all competent authorities have exploited the regulatory potential of this provision, but in the instance of the Gauteng Department of Agriculture, Conservation and Environment, total administration fines of R4,440,330 were issued under Section 24G during the 2006/07 and 2007/08 financial years, with the highest fine at this stage being R500,000 for an illegal commercial development.<sup>73</sup>

Needless to say, the Section 24G administration fine differs from administrative penalties in the sense described in this paper in that it is imposed by the Minister or his or her provincial counterpart, and not by an independent tribunal. It is also not a punitive measure in the conventional sense, as the purpose of paying the administrative fine is merely to trigger the competent authority's consideration of an application for rectification. However, the maximum administration fine of R1 million (at that stage, one of the highest fines of any kind for an environmental legislation) caused some consternation amongst potential violators. The application of the provision indicated the extent of the funds which could be generated by such a provision, and it is noteworthy that most applicants for rectification paid the assessed Section 24G fines without any challenge.<sup>74</sup>

<sup>71</sup> Note 14 supra, at 525.

<sup>72</sup> NECER 2007-8 at 11.

<sup>73</sup> Reported in the NECER 2007-8 (no results were reported for DEAT or the other provincial environment departments in the NECER 2007-8).

<sup>74</sup> Personal communication, Frances Craigie, then Director: Strategic Compliance and Enforcement, GDACE.

The Competition Act, 1998<sup>75</sup> provides a comprehensive and invaluable South African precedent for the type of administrative penalty system proposed in this paper, and creates an institutional structure not dissimilar to that created by the US administrative penalty system described above. Note that the Competition Act regime does not provide for civil judicial penalties.

The Competition Commission effectively plays a similar role to that of the EPA (or the Environmental Management Inspectorate and other environmental enforcement agencies in the system proposed below), and its functions include:

- investigating and evaluating alleged contraventions of prohibited practices<sup>76</sup> under the Competition Act.<sup>77</sup> For this purpose, the Commissioner may appoint inspectors<sup>78</sup> with powers to enter and search premises,<sup>79</sup> and may summon a person to appear and deliver documents to the Commission;<sup>80</sup>
- granting or refusing applications for exemptions from certain prohibitions<sup>81</sup> and authorise, prohibit or refer mergers;<sup>82</sup> and
- negotiating and concluding consent orders;<sup>83</sup>
- referring matters to the Competition Tribunal, and appearing before the Tribunal, as required by the Competition Act.<sup>84</sup>

The Competition Tribunal, on the other hand, plays a similar role to that of the Administrative Law Judges in the US system described above. The Tribunal, which is a “tribunal of record”,<sup>85</sup> has the following functions:

- it adjudicates on any prohibited conduct under the Competition Act, to determine whether prohibited conduct has occurred, and if so, to impose any remedy provided for in the Competition Act;
- it adjudicates on any other matter that may, in terms of the Competition Act, be considered by it, and make any order provided for in the Competition Act. These orders include imposing an administrative penalty in terms of Section 59, and confirming a consent agreement in terms of Section 49D;<sup>86</sup>
- it hears appeals from, or review any decision of, the Competition Commission in terms of the Competition Act, and makes any other ruling or order necessary or incidental to the performance of its functions.<sup>87</sup>

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<sup>75</sup> Act 89 of 1998.

<sup>76</sup> The substantive content of the prohibited practices – designed to prevent excessive concentrations of ownership and control within the national economy, anti-competitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans (as described in the preable to the Act), is not relevant for this paper and will not be described here.

<sup>77</sup> Section 21(1)(c) of the Act.

<sup>78</sup> Section 24 of the Act.

<sup>79</sup> Sections 47 and 48 of the Act.

<sup>80</sup> Section 49A of the Act.

<sup>81</sup> Section 21(1)(d) of the Act.

<sup>82</sup> Section 21(1)(e) of the Act.

<sup>83</sup> Section 21(1)(f) of the Act. A consent order is described in Section 49D of the Act as an agreement between the Competition Commission and the respondent, which must be confirmed by the Competition Tribunal.

<sup>84</sup> Section 21(1)(g) of the Act.

<sup>85</sup> Section 26(1)(c) of the Act.

<sup>86</sup> Section 58 of the Act.

<sup>87</sup> Section 27(1) of the Act.



At the end of 2007-8, the Tribunal had 3 full-time and 7 part-time members.<sup>88</sup>

The Competition Appeal Court (CAC) plays a similar role to that of the Environmental Appeals Board in the US system described above, though importantly, and unlike the EAB, it is a court of record with the power of a High Court. The CAC may:

- review any decision of the Competition Tribunal; or
- consider an appeal arising from the Competition Tribunal in respect of any of its final decisions (excluding a consent order) or any of its interim or interlocutory decisions that may, in terms of the Competition Act, be taken on appeal;
- give any judgement or make any order, including an order to confirm, amend or set aside a decision or order of the Competition Tribunal, or remit a matter to the Competition Tribunal for a further hearing on any appropriate terms.

The Competition Act sets very specific requirements for the appointment, qualifications and experience of the Commissioner, members of the Tribunal (who serve five year terms<sup>89</sup>) and the judges of the CAC.

The Commission itself is not empowered to impose administrative penalties – this is the function of the Tribunal. The Tribunal may impose an administrative penalty in certain specific instances, including for certain prohibited practices and for non-compliance with certain provisions of the Competition Act.<sup>90</sup> The maximum administrative penalty is 10% of the violator’s annual turnover and exports in the preceding financial year,<sup>91</sup> and must be determined considering the following factors:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and
- whether the respondent has previously been found in contravention of the Competition Act.<sup>92</sup>

All decisions and orders of the Commission, the Tribunal and the CAC may be executed as if they were orders of the High Court.<sup>93</sup> Non-compliance with an order of the Tribunal or CAC is a criminal offence.

Complaints about prohibited conduct under the Competition Act may be initiated either by the Commission or by another person, whereafter the Commissioner will institute an investigation into the alleged conduct.<sup>94</sup> Within one year<sup>95</sup> after the complaint has been filed, the Commission must either refer the complaint to the Tribunal or issue a notice of non-referral. This one-year period may be extended by agreement with the complainant, or by the Tribunal itself on application by the Commission. If not referred within that period (or extended period), “the Commission must be regarded as having issued a notice of non-referral on the expiry of the period.”<sup>96</sup>

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<sup>88</sup> Tribunal Annual Report 2007-8, p. 15.

<sup>89</sup> Section 29 of the Act.

<sup>90</sup> Section 59(1) of the Act.

<sup>91</sup> Section 59(2) of the Act.

<sup>92</sup> Section 59(3)(a) to (g) of the Act.

<sup>93</sup> Section 64 of the Act.

<sup>94</sup> Section 49B of the Act.

<sup>95</sup> (Section 50(4)).

<sup>96</sup> Section 50 of the Act.

Once referred, the Tribunal must conduct a hearing into every complaint referred to it. It must conduct its hearings in public “as expeditiously as possible, and in accordance with the principles of natural justice”. However, the Tribunal may order that a matter be heard in chambers if no oral evidence will be led; it can also order that matters may be heard by telephone or videoconference, “if it is the interests of justice and expediency to do so”. The Tribunal “may conduct its hearings informally or in an inquisitorial manner”.<sup>97</sup> In addition to the Commission and the respondent, other parties may also make submissions, particularly the complainant.<sup>98</sup> The Tribunal may subpoena witnesses and documents;<sup>99</sup> witnesses must answer all relevant questions, subject to the normal privileges in criminal cases.<sup>100</sup>

Each party to a hearing before the Tribunal bears its own costs, unless:

- the Tribunal has not made a finding against a respondent, in which case costs may be awarded to the respondent; or
- the Tribunal has made a finding against a respondent, in which case costs may be awarded against the respondent.

Costs may only be awarded for or against a complainant if that complainant has referred the complaint to the Tribunal despite a notice of non-referral issued by the Commission.<sup>101</sup>

At any time before, during or after the investigation, the Commission can agree the terms of a consent order with the respondent, which consent order must be confirmed by the Tribunal.<sup>102</sup>

At any time, the Tribunal may grant interim relief in the form of an interdict, with the standard of proof the same as in any High Court interdict. At all other times (save for criminal proceedings), the standard of proof is on a balance of probabilities.<sup>103</sup>

A person affected by the Tribunal’s decision may appeal against or apply for a review of a decision of the Tribunal to the CAC.<sup>104</sup> The Tribunal and CAC have exclusive jurisdiction over key competition law matters dealt with in the Competition Act, but have no jurisdiction over damages claims arising from a prohibited practice under the Act.<sup>105</sup> In terms of Section 62(4) of the Act, an appeal from a decision of the CAC lies to the Supreme Court of Appeal (SCA), or the Constitutional Court.

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<sup>97</sup> Section 52 of the Act.

<sup>98</sup> Section 53 of the Act.

<sup>99</sup> Section 54 of the Act.

<sup>100</sup> Section 56 of the Act. Failing to appear or failing to answer questions truthfully is a criminal offence under Sections 71 and 72 of the Act.

<sup>101</sup> Section 57 of the Act.

<sup>102</sup> Section 49D of the Act. The Tribunal does not always confirm orders agreed by the Commission – in the case of *Netcare Hospital Group Pty Ltd and Community Hospital Group Pty Ltd*,<sup>102</sup> the Tribunal refused to confirm such an order and indicated that it “...cannot sanction agreements which fall short of the standard of an appropriate penalty even though it believes that parties must be encouraged to negotiate settlements with the Commission. It warned that firms may well construe low penalties as an acceptable cost of doing business if prior implementation impedes proper adjudication. It found the penalty agreed to by the Commission to be inappropriately low, and declined to make the order sought.” (As summarised in the Tribunal’s Annual Report 2007-8, p. 37.)

<sup>103</sup> Section 68 of the Act.

<sup>104</sup> Section 61 of the Act.

<sup>105</sup> Section 62 of the Act.

Both the Commission and the Tribunal have separate sets of procedural rules applicable to proceedings before them.<sup>106</sup>

It is not within the scope of this paper to analyse the impact that the activities of the Commission, the Tribunal and the CAC have had on the compliance of South African businesses with the Competition Act. However, at least one senior competition lawyer recently stated that South African business “has stood up and taken note of the Act”, which he ascribed partly to a strong increase in activity on the part of the competition authorities, resulting in an increase in leniency applications (of which the Commission has been receiving a record number<sup>107</sup>), compliance audits and compliance programmes at corporate level.<sup>108</sup>

## 7 Feasibility of an administrative penalty system for environmental violations in South Africa

The first important issue to determine under this heading is whether an administrative penalty system like the system created by the Competition Act is sufficient, or perhaps the best place to start, instead of or without the addition of a civil judicial penalty system like the civil judicial system in the US (i.e. creating a parallel process of instituting civil proceedings in the High Court for the imposition of a civil penalty by a High Court judge).

Needless to say, the main downside of the administrative penalty system is that it requires the establishment of new institutions, or the expansion of existing institutions like the Water Tribunal established by the National Water Act, 1998<sup>109</sup> (NWA), that can adjudicate complaints of contraventions of affected environmental legislation. New presiding officers will have to be engaged, and such a system will obviously take some time to be implemented effectively. On the other hand, implementing an administrative penalty system obviates the need to involve the office of the State Attorney, which is already overburdened, and ensures that the system administered and managed by officials already familiar with environmental legislation, the impact of environmental violations and the direct incentive to make the system successful. Giving the proposed Tribunal or Tribunals the status of a High Court, like the Competition Tribunal, also means that an order of that Tribunal is executable (one of the reasons put forward by EPA officials for following the civil judicial route at all).

A civil judicial penalty system, on the other hand, does not require the establishment of any new institutions, since it makes use of the existing civil court structure. However, our existing civil courts are already significantly overburdened, which may defeat the primary purpose of establishing a new penalty system, which is to speed up the adjudication of environmental violations. Even worse, the civil judicial system involves a whole set of roleplayers currently largely unfamiliar with environmental legislation, including judges, magistrates, High Court Registrars, civil court clerks and State Attorneys. The time and resources required to prepare all these officials for a civil judicial penalty system for environmental cases may exceed the resources of setting up an administrative tribunal or tribunals.

The remainder of this paper will therefore consider the legal, institutional, financial and political feasibility of developing and implementing an administrative penalty system for environmental violations in South Africa, based broadly on the example of the Competition Act’s penalty regime.

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<sup>106</sup> 1 February 2009. Available from the Tribunal’s website at [www.comptrib.co.za](http://www.comptrib.co.za).

<sup>107</sup> Deputy Commissioner Tembinkosi Bonakele quoted in *Engineering News* on 2 April 2009 in an article entitled “Commission gears up for new law but misgivings persist” at [www.engineeringnews.co.za/article/commission-gears-up-for-new-law-but-misgivings-persist-2009-04-02](http://www.engineeringnews.co.za/article/commission-gears-up-for-new-law-but-misgivings-persist-2009-04-02)

<sup>108</sup> Martin Versfeld, head of competition law at Webber Wentzel, quoted in *Engineering News* on 2 April 2009 in an article entitled “SA business is far more alive to competition law, lawyer avers” at [www.engineeringnews.co.za/article/sa-business-is-far-more-alive-to-competition-law-lawyer-avers-2009-04-02](http://www.engineeringnews.co.za/article/sa-business-is-far-more-alive-to-competition-law-lawyer-avers-2009-04-02)

<sup>109</sup> Act 36 of 1998

Such an administrative penalty system should ideally, in due course, apply to all environmental legislation, including but not limited to NEMA, the specific environmental management Acts (SEMAs), the Marine Living Resources Act<sup>110</sup> (MLRA), the NWA and the Water Services Act (WSA).<sup>111</sup> In addition, complaints must be adjudicated by a Water and Environment Tribunal, with oversight by a Water and Environment Appeal Court. Decisions of the Water and Environment Appeal Court can be appealed to the SCA. Reasons for this proposed institutional structure are set out in more detail below.

## 7.1 Legal implications

It is not possible to discuss each and every possible legal implication of the proposed system in this brief paper, and the section below therefore highlights some of the legal implications of the following issues only: the Constitutional framework for setting up new judicial or quasi-judicial institutions and the identification of national legislation suitable for such a system, the implications of applying a civil standard of proof in relation to administrative penalties, and the determination of maximum administrative penalties.

### 7.1.1 *Constitutional and national legislative framework*

In relation to establishing the additional judicial or quasi-judicial institutions required for such a system, the Constitution makes express provision for the creation of courts “of a status similar to either the High Courts or the Magistrates’ Courts” other than the Constitutional Court, the Supreme Court of Appeal, High Courts and Magistrates Courts, as long as it is established by an Act of Parliament.<sup>112</sup> There therefore appears to be no Constitutional bar to the establishment of Tribunals and an Appeal Court that has the status of a High Court with the “inherent power to protect and regulate [its] own process, and to develop the common law, taking into account the interests of justice”,<sup>113</sup> as long as such the Tribunals and Appeal Court (and the rules applicable to those courts)<sup>114</sup> are created by an Act of Parliament. In any event, there is the convenient precedent of the Competition Tribunal and CAC; these institutions and their respective powers – including the Tribunal’s power to levy administrative penalties – have paved the way – legally and otherwise – for the implementation of a similar system in the environmental and water sectors.

As indicated above, the new administrative penalty system should ideally be made applicable to the widest range of environmental legislation, including NEMA and the SEMAs, the MLRA, the NWA and the WSA. Applying such a system more widely would assist in gaining wider political and industry acceptance of the concept of administrative penalties and build a more consistent understanding of administrative penalties in the regulated community. It would also save significant costs to standardise and share institutions, officebearers, procedures and training. However, even if all these statutes are included, from a regulatory perspective statutory provision should be made for the staggered identification of specific statutes (or provisions thereof) to which administrative penalties are applicable, by publication in the Government Gazette. This will allow for a pilot implementation of such a system in a particular context, such as the National Environmental Management: Air Quality Act.<sup>115</sup>

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<sup>110</sup> Act 18 of 1998.

<sup>111</sup> Act 108 of 1997.

<sup>112</sup> Section 166(e).

<sup>113</sup> Section 173 of the Constitution.

<sup>114</sup> Section 171 of the Constitution.

<sup>115</sup> Note that this act already requires atmospheric emission licences to specify “penalties for non-compliance” (section 43(1)(k)). It is debatable whether this provision is sufficient to authorise the proposed system of administrative/civil penalties.

Following the US example, a general penalty policy as well as statute specific penalty policies it will aid the transparency and consistency of the system. The general penalty policy would provide a method of calculation of penalties for environmental contraventions having regard to list of factors to be taken into account in the determination of an appropriate administrative penalty, such as the gravity of the violation, real or potential harm to the environment, a reasonable estimate of the monetary benefit enjoyed by the violator as a result of the contravention, and the violator's ability to pay the penalty. Statute-specific penalty policies will give guidance to investigators as well as to the regulated community on how the penalty calculation method will be applied to particular contraventions.

Clear policy guidance also needs to be formulated regarding when violations are reported to a Tribunal fall to be dealt with as administrative complaints, when those violations should be criminally prosecuted, and when both an administrative complaint and a criminal prosecution should be pursued in parallel.

### *7.1.2 Civil standard of proof*

A key component of an administrative penalty system is the incorporation of a standard of proof that is lower than that used in criminal proceedings: more specifically, administrative penalties as applied under the Competition Act and administrative penalties as applied under various statutes in the US require only the civil standard of proof, namely a balance of probabilities.

Needless to say (and for good reason, in the case of many common law and statutory offences and particularly where imprisonment may be imposed) the normal standard of proof in criminal cases – beyond reasonable doubt - provides a crucial and Constitutionally entrenched protection from the unjustified infringement of the right to freedom and security of the person through custodial sentences. However, in cases where the payment of a fine (as is proposed in this paper) is the only prejudicial outcome for a person accused of contravening an environmental statute, there is a strong argument that such a standard of proof is unnecessarily onerous, and that an ordinary civil standard of proof is sufficient. In addition, the proposed structure makes adequate provision for a remedy: If a person on whom an administrative penalty is levied by a Tribunal is aggrieved by that decision, it can review the decision or appeal against the decision through application to the Appeal Court. Needless to say, the Competition Act already provides that the civil standard of proof is all that is required for an administrative penalty to be imposed by the Competition Tribunal.

### *7.1.3 Maximum administrative penalties*

The determination of the maximum administrative penalties that may be levied is a topic that requires a more detailed discussion than can be provided in this paper. Considering that a legislative amendment is underway to increase significantly all the maximum criminal fines in NEMA and most of the SEMAs,<sup>116</sup> one possibility is to use the same maximum amounts for administrative penalties.

However, this may be too conservative, particularly having regard to both domestic and international experience and the purpose of implementing a new administrative penalty system. One option is to cap administrative penalties with reference to a fixed percentage of annual turnover, which has proved to be a very effective deterrent in the case of the Competition Act. Another is to use fixed daily penalty rates, as is provided for in many US statutes; for example, the maximum daily penalty for a particular offence can be fixed at R10,000 per day for every day that the violator is in non-compliance. Either way, this is a key opportunity to choose appropriate maximum administrative penalties that are most likely to deter environmental violators.

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<sup>116</sup> Note 27 supra.

## 7.2 Institutional and financial requirements

As it stands, NEMA does not establish any kind of tribunal or other quasi-judicial body that could function as an Environmental Tribunal able to adjudicate complaints of violations of NEMA or the specific environmental management Acts.<sup>117</sup> An entirely new institution would therefore have to be established, with Tribunal members (with prescribed skills and experience<sup>118</sup>) and administrative support.

The NWA, on the other hand, established the Water Tribunal “to hear appeals against certain decisions made by a responsible authority, catchment management agency or water management institution under this Act”,<sup>119</sup> which mandate could conceivably be expanded to include the adjudication of complaints of contraventions of legislation administered by the new Department of Water and Environmental Affairs.

As suggested above, the implementation of an administrative penalty system requires the establishment of at least two, probably three new institutions:

- an expanded Water Tribunal that becomes a Water and Environment Tribunal; and
- an overarching Water and Environment Appeal Court to hear appeals against the decisions of the Tribunal.

Little public information is available on the cost of operating the Water Tribunal, which consists of five part-time members, as this data is not reported separately in the DWAF Annual Report. However, such costs are unlikely to be significant: the DWAF 2007-8 Annual Report only mentions four cases “with the Water Tribunal”, and only two Tribunal decisions were reported for that period.<sup>120</sup>

The Competition Tribunal is funded to a large degree from filing fees for mergers,<sup>121</sup> while the CAC receives its funding from the Department of Trade and Industry.<sup>122</sup> In FY 2007 and 2008, the Tribunal and the CAC had an annual expenditure of R13,119,000 and R15,388,000 respectively.<sup>123</sup>

Comparing these figures to the substantial fines imposed by bodies like the Administrative Law Judges in the US or the Competition Tribunal in South Africa, however, places the matter in a different light. In the case of the EPA, the combined total fines for the last five years is an estimated R405 billion, which exceeded EPA’s total budget over the same period.<sup>124</sup>

In 2007, the Competition Tribunal levied its largest administrative penalty ever when it fined Mittal Steel South Africa nearly R700 million after finding that Mittal Steel had contravened the Competition Act by

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<sup>117</sup> As defined in Section 1 of NEMA.

<sup>118</sup> Section 146(4) of the NWA requires that members of the Water Tribunal “have knowledge in law, engineering, water resource management or related fields of knowledge”. Section 28(2)(b) of the Competition Act requires that Tribunal members “have suitable qualifications and experience in economics, law, commerce, industry or public affairs”.

<sup>119</sup> Preamble to Chapter 15 of the NWA.

<sup>120</sup> <http://www.dwaf.gov.za/WaterTribunal/cases.asp>

<sup>121</sup> Section 42 of the Act as read with Sections 40 and 41. According to the Tribunal’s Annual Report 2007-8, about 51% of its income was derived from filing fees, with almost the entire balance deriving from grants.

<sup>122</sup> Tribunal Annual Report 2007-8, p. 43.

<sup>123</sup> Tribunal Annual Report 2007-8.

<sup>124</sup> EPA OECA Accomplishment Report FY 2008 at 4.

charging an excessive price for its flat steel products to the detriment of consumers.<sup>125</sup> In 2007-8, total administrative penalties levied exceeded R781 million.<sup>126</sup>

As appears from Figure 4 below, the cost of operating the Tribunal is a tiny fraction of income generated for the National Revenue Fund by way of administrative penalties levied.

*Figure 4: Administrative penalties imposed by the Competition Tribunal vs operational expenditure, FY2007 and FY2008*

	<b>2007</b>	<b>2008</b>
Number of fines imposed	6	5
Total fines imposed	R63,790,600	R781,184,870
Tribunal operational expenditure	R13.22 million	R15.56 million
Tribunal operational expenditure as percentage of total fines imposed	20.7%	1.99%

As appears from Figure 4 above, the Tribunal’s operating costs were less than 2% of the administrative penalties levied in that year. Even taking into account the combined operational costs of the Commission and the Tribunal (and disregarding significant income from filing fees and other sources to which the Commission and the Tribunal are entitled under the Competition Act), the cost of running these two institutions constitutes less than 14% of administrative penalties levied in 2007-8.

In addition to ordinary operational costs (including salaries and premises), provision also has to be made for the development and roll-out of new training for EMIs and other enforcement officials who will now be preparing evidence in support of a complaint to be lodged with the Tribunal or Tribunals.

In the UK, in the assessment of the potential impact of the Regulatory Enforcement and Sanctions Bill, it was estimated that implementing a system of civil sanctions for use by a range of regulatory agencies (not only the Environment Agency) would result in a net benefit to regulators and the courts of between R3 billion and R16 billion.<sup>127</sup>

Fines paid in terms of the Competition Act are not used to fund the operations of the Commission, the Tribunal or the CAC. Instead, and as is the case with administrative and civil judicial penalties imposed in the US, fines payable under the Competition Act must be paid into the National Revenue Fund.<sup>128</sup> The primary reason for this is that most national treasuries oppose ring-fenced funds, and prefer a free hand with the allocation of revenue received by the fiscus.<sup>129</sup> It also removes the potential perverse incentive of issuing larger fines to ensure increased funding.

<sup>125</sup> This fine constituted 5.5% of Mittal’s total turnover earned on flat steel in both the local and international market.

<sup>126</sup> Tribunal Annual Report 2007-8, p. 3. This figure may be slightly misleading, since the Tribunal’s decision in the Mittal case is still on appeal to the Competition Appeal Court, and many observers expect at least parts of the decision (including perhaps the penalty itself) to be overturned by the CAC.

<sup>127</sup> An exchange rate of 1GBP = ZAR12,6 was used.

<sup>128</sup> Section 59(4) of the Competition Act. The National Revenue Fund is established by Section 213 of the Constitution.

<sup>129</sup> In February 2009, National Treasury’s Cecil Morden was quoted as saying that, in the context of the proceeds of environmental taxes, the National Treasury would continue to resist calls from environmental group for it to “ earmark” revenues raised from such taxes for environmental programmes. “In general, earmarking taxes is not a very good fiscal-policy objective, because it distorts the allocation of resources,” he explained, while acknowledging that some earmarking might have to be introduced to improve the acceptability of such taxes.” Quoted in an article in *Engineering News* entitled “‘Green jobs’ plan included in SA stimulus framework”, dated 23 February 2009,

### 7.3 Benefits

Firstly, an administrative penalty system should result in more environmental violations being pursued and significantly more fines being imposed. The primary reason for this expected benefit is that an administrative penalty system obviates the need for EMIs and other environmental enforcement officials like those in the DWAF to prove an environmental contravention based on evidence presented at the criminal standard of proof of beyond reasonable doubt. Instead, Inspectors will be able to present evidence of a contravention at the civil standard of proof of a balance of probabilities. A second reason is that all roleplayers in the complaints procedure will be officials who are familiar with environmental legislation and the impact of contraventions. Thirdly, since cases will no longer have to compete with other crimes as they do in the criminal justice system, decisions will be made much more quickly than is currently the case in criminal prosecutions. All of these factors should encourage the lodging of more complaints for adjudication or settlement. In preparation for the implementation of the Regulatory Enforcement and Sanctions Bill, the UK government estimates that there will be a 25% increase in sanctions imposed (noting that, in the UK, criminal conviction rate for environmental crimes is already orders of magnitude higher than in South Africa).

If the experience in the US is anything to go by, a significant proportion of complaints will be settled and the penalty amount agreed without the need for a hearing. The Competition Commission also reports a dramatic increase in administrative penalties levied through consent orders: from R40,425 million in 2005-6, this number has increased to R99,384,870 in 2007-8.<sup>130</sup>

Importantly, the implementation of an administrative penalty system will dramatically reduce current reliance on the stretched resources of the NPA and the courts of the criminal justice system (and to a lesser but still significant degree, the SAPS). In the UK, it was estimated that as many as 60% of cases normally prosecuted would be replaced with administrative sanctions.<sup>131</sup> In the US, the number of criminal cases constituted just over 14% of the number of administrative complaints and civil judicial cases in 2008.<sup>132</sup>

At a broader level, the successful implementation of a well-designed administrative penalty system, with clear empowering legislation and penalty policies, should significantly improve environmental compliance. Research shows that potential violators pay attention to penalties being issued, and most of those individuals and enterprises change their behaviour. In addition, such a system promotes better regulation by providing a meaningful, transparent and consistent regulatory response to non-compliance. The system would ensure a more effective playing field for all industry players, particularly by way of recovering the economic benefit enjoyed by operators who choose not to incur the expense of compliance.

Finally, the system will enhance the reputation of environmental enforcement agencies like the Environmental Management Inspectorate. On the basis of the research described above, such enhanced reputation is likely, in turn, to promote compliance.

### 7.4 Political acceptance

Securing political support for administrative penalties for environmental violations should ideally be backed up by empirical data and comprehensive comparative research. In the UK, the concept of

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available at <http://www.engineeringnews.co.za/print-version/green-jobs-plan-included-in-sa-stimulus-framework-2009-02-23>.

<sup>130</sup> Competition Commission Annual Report for 2007-8, at p. 33.

<sup>131</sup> Note 39.

<sup>132</sup> See paragraph 4.4 above.



administrative penalties “had a rough ride through parliament, particularly by MPs who are pro-business, on the grounds of insufficient safeguards for business against over-zealous regulators.”<sup>133</sup> Therefore any system will like have to incorporate adequate regulatory safeguards to gain political acceptance.

Other government institutions’ approach to administrative penalties for environmental violations will have to be gauged. One can, however, provisionally assume that it will receive *prima facie* support from:

- National Treasury, because of additional revenue to the fiscus;
- the Department of Justice because of reduced demand for the stretched resources in the criminal justice system; and
- the new Department of Water and Environmental Affairs, provincial and local environment departments and parks authorities, if it is likely to increase enforcement success and thereby compliance.

During its prior assessment of the impact of the Regulatory Enforcement and Sanctions Bill, the UK government argued that “[t]he only businesses that will be affected by either the current system of criminal prosecution or the future alternative system of administrative sanctions are those that fail to comply with a regulatory regime. Compliant businesses will be largely unaffected by the proposals.”<sup>134</sup> Along a similar vein, it is submitted that an administrative penalty system for environmental violation is likely to be welcomed by compliant industries for the following reasons:

1. A well-developed administrative penalty system provides a certain outcome to contraventions, allowing industry players to adjust their behaviour accordingly.
2. Traditionally, industry supports the penalisation of industry players who get an unfair advantage from non-compliance over those players who incur the expense of compliance. This has proven to be the case in foreign jurisdictions like the US.
3. While the proposed system increases the prospects of a fine being levied, it reduces the risk of criminal prosecution and a criminal record for industry players, since regulators will have an option other than criminal prosecution available.
4. The speedy resolution of contraventions is likely to be more acceptable to industry, instead of the negative publicity for violators being stretched out for years during a criminal prosecution.

## 8 Conclusion

The criminal enforcement process has too many roleplayers with inadequate training and insufficient incentives for success to justify its status as the sole mechanism for imposing monetary fines for environmental violations. While EMIs and other enforcement officials work against the odds in this system to achieve modest and occasional fines, violators of environmental legislation – particularly non-compliant corporate entities – continue to enjoy substantial illegal financial gains at the expense of their compliant competitors, the environment and the people whose health, wellbeing and natural heritage depend on it.

For the reasons set out in this paper, it appears that the development and implementation of an administrative penalty system that runs parallel to existing criminal enforcement programmes is not only *prima facie* feasible, but could have significant benefits for environmental compliance in South Africa.

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<sup>133</sup> Personal communication from Catherine Wright, then Head: Modern Regulation, Environment Agency of England and Wales, September 2008.

<sup>134</sup> Note 39 at 37.