



environment & tourism

Department:
Environmental Affairs and Tourism
REPUBLIC OF SOUTH AFRICA



ANNEXURE A

**BRIEFING DOCUMENT FOR THE PORTFOLIO COMMITTEE FOR THE
CONSIDERATION OF THE NATIONAL ENVIRONMENTAL LAWS AMENDMENT BILL B-
66 OF 2008**

TOPIC: INCREASED PENALTIES AND JURISDICTION FOR THE MAGISTRATES COURT

1. PURPOSE

The purpose of this briefing document is to inform the Portfolio Committee on specific aspects of the National Environmental Laws Amendment Bill, B66 of 2008 relating to the proposal to increase the maximum penalties for environmental offences, as well as the proposal for the increased jurisdiction of the magistrates court.

DISCUSSION

2.1 Increased maximum penalties for criminal offences

2.1.1 International comparisons with other countries

The National Environmental Laws Amendment Bill 2008 (NEMLA, 2008) proposes increased maximum penalties for a number of criminal offences in relation to national environmental legislation. The Department of Environmental Affairs and Tourism became involved in a project to compare penalties for environmental contraventions with countries across the globe through the INTERPOL Pollution Crimes Working Group.

In comparison to other countries, such as the United States, New Zealand, Australia, Israel, Austria and the Netherlands, South Africa's penalty clauses provide for terms of imprisonment that compare favourably with other countries, however, our monetary fines are amongst the lowest in all participating countries.

2.1.2 Standardisation of Penalties

NEMLA 2008 proposes a standardisation of penalties across various types of environmental crimes. For the framework National Environmental Management Act, 1998 and accompanying sectoral pieces of legislation – the Biodiversity Act, 2004 (Act No. 10 of 2004), the Protected Areas Act, 2003 (Act No. 57 of 2003), the Air Quality Act, 2004 (Act No. 39 of 2004) (Air Quality Act), the proposal is a maximum penalty of R10 million and/or 10 years imprisonment. For the “older generation” Acts (soon to be repealed by the new Acts), such as Atmospheric Pollution Prevention Act, 1965 (Act No. 45 of 1965) and Environment Conservation Act, 1989 (Act No. 73 of 1989), it is proposed that the maximum penalty is R5 million and/or 10 years - this has been set at a significant level to provide for penalties that will provide a deterrent effect for would - be offenders in the interim period until the new pieces of legislation are brought fully into effect. This standardisation of penalties is necessary to promote a level of consistency across the various pieces of national environmental legislation.

2.1.3 Adjustment of Fines Act

Currently, many of the new pieces of legislation, such as the Air Quality, Biodiversity and Protected Areas Acts refer to “the *legislation regulating maximum fines for criminal offences...*”. This refers to the Adjustment of Fines Act, 1991 (Act No. 101 of 1991) (AFA) that is aimed at escalating fines to a contemporary level, by providing for the maximum fine to be equal to the maximum period of imprisonment x 20 000. For example, the Air Quality Act provides for 10 years maximum imprisonment, plus an unstipulated fine. Applying the AFA, this would amount to:

10 years x 20 000 = a maximum fine of R200 000,

It is submitted that R200 000 is clearly insufficient, taking into account

- the financial gains generated by illegal activities;

- the financial cost of the damage to the environment, and
- the costs of investigation and prosecution of the alleged offence.

2.1.4 Financial gains of Environmental Crime

The proposed maximum penalties of R5 and R10 million; and/or 5 and 10 years may seem like an excessive response to environmental crimes, however, they are aligned to the types of profits that are generated by offenders involved in environmental crime, who very often operate in a syndicated manner amounting to essentially organised crime. It is important to remember that these penalties only represent a maximum term of imprisonment/monetary value; and it is still within the discretion of the judicial officer to impose an appropriate sentence based on the facts of each case.

2.1.4.1 Examples of the profits generated by Environmental Crimes:

2.1.4.1.1 Caviar:

The global legal caviar trade is estimated at \$100 million (R743 million) annually. Despite steep declines in numbers of sturgeon, most of the world's caviar supply is from the Caspian Sea. The average beluga sturgeon caught today weighs about 300 pounds with up to 60 pounds of caviar per fish. Beluga caviar sells for \$100 (R743 million) an ounce, which would be an average retail value of \$90,000 (R668 700) per fish.

Significant quantities of poached caviar are exported, smuggling such caviar out of the five countries bordering the Caspian Sea is a flourishing business. Russia officially exported \$25 million (R185 million) worth of caviar in 1999, while the value of poached caviar exports was estimated at \$250 million (R1.8 billion).

In July, 2000, Maryland-based U.S. Caviar and Caviar Ltd. was fined \$10.4 million (R77.3 million)– the largest fine ever in a wildlife prosecution – for smuggling black market Russian caviar into the United States using forged Russian caviar labels, and for passing caviar from American paddlefish and shovelnose sturgeon as Russian caviar. Company officials admitted selling the contraband caviar to victim airlines, caviar wholesalers, seafood suppliers, and gourmet stores.

2.1.4.1.2 Abalone:

Due to the increase and difficulties in obtaining abalone, the estimated value of abalone has increased to R5 000 per kilogram of dried abalone. This is significant when taking into account that the average quantity of abalone being smuggled internationally via airfreight is on average 1 ton per consignment which equates to R5 000 000 per consignment. The average quantity smuggled via sea freight per consignment is on average 5 to 7 tons, which equates to R25 000 000 to R35 000 000.

The conservative estimate of abalone smuggled out of South Africa per annum was calculated at 939 tons in 2006 by CUSTOMS. This has escalated dramatically due to the ever increasing demand and stricter domestic measures implemented to curb the smuggling, which equates to R4 695 000 000 per annum.

2.1.4.1.3 Rhino horn:

The average per kilogram of rhino horn is also on the increase, documentation found on a suspect that was smuggling rhino horn from South Africa, indicated that the 9.5kg horn was valued at \$128 000 (R951 000), to which they also admitted in court. This equates to an average of \$13 473 per kilogram (R100 104). Taking into consideration that this year alone 26 rhinos were poached in an isolated area, the estimated value is R23 400 000.

2.1.4.1.4 Traditional Asian Medicine:

These medicines contain a variety of endangered species products, the raw products of which is collected from across the world including South Africa, such as rhino horn, elephant ivory and numerous plants etc. The problem needs to be addressed in its totality as value should not only be placed on the actual byproduct but the animal or plant itself. In Africa, black rhino populations have declined by 96% over the past two decades due to poaching for the trade in traditional medicines and dagger handles. Approximately 13,000 rhinoceros are left in the wild and these numbers are far from stable. "...an estimated

100,000 tigers roamed India, Indochina, and other parts of Asia. Today, fewer than 7,000 tigers are left in the wild, and those numbers continue to drop".

2.1.4.1.5 Hazardous waste in Gauteng

Per annum approximately 446 200 tons of recurring and non-recurring waste is generated in the Gauteng province alone (this figure does not include medical waste or waste generated and disposed at own on-site facilities). In addition, hazardous waste from other provinces is transported into Gauteng. The cost for landfilling hazardous waste legally ranges depending on the type of hazardous waste, with the cheapest being in respect of coal ash at R600 per ton. Incineration is significantly more expensive at approximately R10 000 per ton. The cost of legally disposing of hazardous waste generated in Gauteng (excluding medical waste and waste disposed of on-site by industries), taken at the cheapest cost per ton, would therefore amount to approximately R268 million per annum. There are therefore massive sums of money to be made by illegal operators who charge generators of hazardous waste at the rates for legal disposal and then dump these wastes on illegal sites. In addition to making huge profits, the actions of these illegal operators result in significant damage to the environment through soil and ground and surface water pollution as well as posing serious health risks to communities that are located in these areas. The cost of rehabilitating the environment as a result of illegal dumping of hazardous waste can easily escalate into millions, if not billions, of Rands.

2.2 Increased jurisdiction for the magistrate's court

The normal jurisdiction for a magistrate's court is:

District: 3 years and R60 000

Regional: 15 years (life sentence in respect of offences for which Minimum Sentences are prescribed) and R300 000

The NEMLA Bill, 2008 proposes that the magistrate's court be given the necessary jurisdiction to impose the penalties referred to in 2.1.2 above. The reason for this proposal is as follows:

2.2.1 Accessibility

With the significant increase in the number of criminal offences that must be enforced in terms of national environmental legislation by Environmental Management Inspectors (EMIs), the numbers of criminal cases likely to be brought to a criminal court will increase dramatically. In fact, there are already signs of this increase in the short period of approximately two and a half years since the initial designation of the first EMIs.

Referring all environmental crimes falling above the normal jurisdiction of the magistrate's court to the High Court will mean that fewer cases may be heard within a specified period due to the busy roll of High Court judges. One of the principles of NEMA is that *"Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons."* This can only be achieved if there is sufficient access to justice; and it is proposed that this objective would be better served by providing for magistrate's courts to hear appropriate environmental cases, notwithstanding their normal jurisdictional limitations.

2.2.2 Awareness and Experience in the Adjudication of Environmental and Criminal Offences

DEAT has, in collaboration with Justice College, been offering awareness-raising workshops for magistrates in environmental crimes. This has resulted in nine workshops being held around the country; in which more than 230 district and regional court magistrates have been presented to on the nature, scope and legislation applicable to environmental crime. These four day events are now part of the annual standard programme of Justice College; and presenters involve academics, Environmental Management Inspectors, NGOs, overseas experts (from the United Kingdom Environment Agency) as well as senior magistrates.

At these workshops, magistrates cover the full spectrum of green, blue and brown environmental crimes and deal with the relevant legislation, as well as the socio-economic effects of environmental crimes. The topic of sentencing in environmental crimes has been dealt with specifically by experienced magistrates at these events.

Regarding experience and expertise in hearing criminal law matters, the regional court magistrates only have criminal jurisdiction (as opposed to the district court that has both criminal and civil). Regional court magistrates are often from the district courts or from prosecutorial ranks and thus have a wealth of knowledge and experience in the application of the law pertaining to criminal law and procedure. Regional court magistrates conduct the bulk of the trials of the more serious offences, are highly experienced and can hand down sentences of up to 15 years imprisonment per count. It therefore seems to be rather strange to limit them to a fine of R300 000 per count, especially in cases of this nature. In contrast, High Court judges are likely to hear a mixture of civil and criminal matters in the ordinary course of proceedings.

2.2.3 Discretion with the Director of Public Prosecution (DPP)

The provincial/regional head of prosecutions is the DPP's office, under whose authority state advocates and prosecutors prosecute cases on behalf of the state. It is ultimately the discretion of the DPP to refer cases to the appropriate court, in accordance with the specified guidelines; and not the EMI. For example, if the DPP is of the opinion that the case may warrant a penalty of a fine of R10 million and/or 10 years, s/he still has the discretion to refer it to a High Court for hearing, even though a provision exists that expressly provides for the magistrates court to also have the necessary jurisdiction to hear the matter.

2.2.4 Precedent for increased magistrates jurisdiction in other legislation; and in the case of organized crime

There are other pieces of national environmental legislation where the provision for the increased jurisdiction of the magistrate's court has been used successfully. For example, in the Marine Living Resources Act, section 70(3) makes provision for increased penalty jurisdiction for magistrates's courts. A magistrate's court can therefore hand down sentences of up to R5 million rand, the maximum fine provided for in section 58(3) for certain specified offences. A similar provision is to be found in section 99(2) of the Mineral and Petroleum Resources Development Act and section 29(9) of the Environment Conservation Act, which can to a large degree be seen as the predecessor of NEMA, also provides for this. Magistrates courts may also utilize the Prevention of Organised Crime Act (POCA) in the event of criminal matters falling within the ambit of "organized crime". The trend in relation to many Environmental Crimes is "organization" leading to money laundering, criminal gang activities (especially pertaining to Abalone poaching) and racketeering. POCA provides for maximum penalties, such as 30 years imprisonment, R100 million for money laundering and R1 billion for racketeering. Regional Courts have the R100 million / 30 years imprisonment jurisdiction so the regional magistrates have already been exercising increased jurisdiction. Furthermore since December 2007, in terms of the Criminal Law (Sentencing) Amendment Act for certain offences the Regional Courts have been provided with increased jurisdiction in now being able to sentence a person convicted of an offence in Part 1 of Schedule 2 to the Act to life imprisonment.

The trend is therefore to provide increased jurisdiction to the lower courts especially the Regional Courts which for many years have been specialist criminal courts. Of course mitigating and aggravating circumstances would still have to be considered in exercising any increased jurisdiction. The crucial point however is that the Lower Courts are more accessible to deal with increasing Environmental Crimes and in the courses held where Regional and District Court Magistrates attended, the issue of sentencing was debated at length and many believed that the penalty provisions were not severe enough to serve as

a deterrent. Regional Courts and many District Courts deal with criminal matters and sentencing on a daily basis and therefore there is much experience within the ranks of the Magistrate.

Regional and District courts are also available in almost every area in South Africa as opposed to High Courts so they are more accessible. Persons charged with the commission of an environmental crime may also not have legal representation (if they chose to conduct their own defence), the lower courts are better equipped to assist in the adjudication of cases involving such an accused. Of course there may be precedent setting matters that may be referred to the High Courts but the bulk of prosecutions would be in the lower courts. The Department of Justice and Constitutional Development has also indicated enormous trust in the abilities of the Regional Courts to the extent that next year the Regional Courts will be exercising civil and family (divorce) jurisdiction and approximately 50 new posts of Regional Magistrates are to be created. This allows magistrates to impose sentences far beyond their normal jurisdictional limits.

3. RECOMMENDATION

It is recommended that the Portfolio Committee take into account the information provided above when considering the specific aspects of the National Environmental Laws Amendment Bill B66 of 2000 relating to the proposal to increase the maximum penalties for environmental offences, as well as the proposal for the increased jurisdiction of the magistrates court.