A CRITICAL ANALYSIS OF THE APPLICATION OF S24G PROVISIONS OF THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NEMA)

THE GAUTENG PROVINCE EXPERIENCE

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DECLARATION

I, the undersigned, hereby declare that the work contained in this thesis/dissertation/mini-dissertation is my own original work and that I have not submitted it previously in its entirety of in part to any other university.

Signature:

Date:

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Abstract

Together with an internationally praised Constitution, South Africa can pride itself in having one of the best sets of environmental laws in the world, and since EIAs have become mandatory for projects that negatively affect the environment, our track record with respect to environmental protection has substantially improved from the Apartheid days.

But as the integrated and proactive approach to environmental management has seemingly been established, a new provision was introduced: Section 24G of NEMA ("Rectification of unlawful commencement of activity"), allowing for retrospective authorisation of unlawful activities (i.e. activities identified in terms of S24 of NEMA).

This provision is somewhat of a legislative 'anomaly' and has raised some concerns as to its consistency with the other provisions of NEMA and its alignment with some Constitutional and administrative justice principles. (van der Linde, 2009, and Paschke and Glazewski, 2006)

Aside from the purely legal issues, S24G raises significant concerns from an environmental management perspective. In particular S24G has the potential to considerably undermine the very purpose of environmental assessment, the principles of Integrated Environmental Management and sustainable development, and ultimately, the fundamental right to environmental protection. (van der Linde, 2009) At the same time, "there has been seemingly widespread non-compliance with the requirement to obtain authorisations where required by NEMA, and the previous remedies (when there were any) were clearly not perceived as being a deterrent." (Kidd, 2011: 246)

A certain number of challenges have emerged and some perverse effects have been observed over the past six years of implementation of S24G provisions. This research critically analyses the effectiveness of S24G by assessing the extent to which it has contributed to improving compliance by addressing the problem of unlawful activities; it also examines how S24G has contributed to undermining progress towards better environmental management and governance.

It is argued that although many previously unlawful activities have now become lawful thanks to the S24G process, most of the concerns relating to S24G have actually materialised and S24G has in some cases resulted in a big step backwards in terms of sound environmental management and governance by effectively providing a mechanism which accommodates environmental crime.

Keywords: *environmental compliance and enforcement, Section 24G, rectification, environmental crime, environmental management, EIA*.

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ACRONYMS

CER	Centre for Environmental Rights
CPA	Criminal Procedure Act, 55 of 1977
DEA	Department of Environmental Affairs
DoJ	Department of Justice and Constitutional Development
EA	Environmental Authorisation
EAP	Environmental Assessment Practitioner
ECA	Environment Conservation Act, 73 of 1989
EIA	Environmental Impact Assessment
EIRIS	Ethical Investment Research and Information Service
ELA	Environmental Law Association
EMF	Environmental Management Framework
EMI	Environmental Management Inspector
EMS	Environmental Management System
EPA	Environmental Protection Agency
GDARD	Gauteng Department of Agriculture and Rural Development
GRI	Global Reporting Initiative
HoD	Head of Department
IAIA	International Association for Impact Assessment
INECE	International Network for Environmental Compliance and Enforcement
NECER	National Environmental Compliance and Enforcement Report
NEM:WA	National Environmental Management: Waste Act, 59 of 2008
NEMA	National Environmental Management Act, 107 of 1998
NPA	National Prosecuting Authority
OECD	Organisation for Economic Cooperation and Development
PAIA	Promotion of Access to Information Act, 2 of 2000
RoD	Record of Decision
S24G	Section 24G of the National Environmental Management Act, 107 of 1998
SANPARKS	South African National Parks
SAPS	South African Police Service
SEA	Strategic Environmental Assessment
SEMA	Specific Environmental Management Act
SoE	State-owned Enterprise

1. INTRODUCTION

1.1 BACKGROUND AND CONTEXT

Once upon a time there was a businessman who wanted to build a paper mill. He found a piece of verdant land, with a pretty river running through it and decided this would be the ideal place to build his new factory. He bought the land and built the factory.
The End.

Those were the bad old days.

The development of environmental legislation and the emergence of environmental assessment in South Africa and internationally has marked a definitive end to an era characterised by a perception of the environment as merely a resource for development, and not a condition to it. Undeniably, great strides have been made to establish progressive environmental legislation and entrench environmental management principles from project level to the most strategic forms of decision-making in policies and plans.

Environmental Impact Assessment (EIA) is the most known and applied tool to achieve integrated and proactive environmental management and give effect to the principles of the National Environmental Management Act (107 of 1998) (NEMA). It is also at the core of the authorisation system envisaged in NEMA, and is one of the primary mechanisms to inform decision-making regarding activities which have a detrimental effect on the environment. EIA thus holds the potential to create a paradigm shift, rise above anarchic, destructive and unjust development, and set South Africa on the track of sustainability.

However, despite state-of-the-art environmental framework legislation by international standards, regulation alone has not proven sufficient to bring about sustainable development. As a matter of fact, “governance and regulation are largely meaningless without compliance” (Craigie et al., 2009a: 41), and environmental non-compliance is rife in South Africa. (Craigie et al., 2009b, Kidd, 2011).

Illegal harvesting of protected species, illegal dumping, non-compliance with permit or authorisation conditions..., environmental non-compliance is widespread and deeply entrenched. But while rhino and abalone poaching may be dominating the mainstream news headlines, a very different type of offence may be quietly upstaging the others: indeed, wildlife and conservation related crimes aside, the 2010/11 National Environmental Compliance and Enforcement Report revealed that the unlawful commencement of listed activities (i.e. activities which may have a detrimental effect on the environment and require an environmental authorisation in terms of S22 of ECA and S24F of NEMA prior to commencement) was the most prevalent crime in eight out of the nine provinces[1]. (DEA, 2011)

It is precisely this type of offence that Section 24G of NEMA (S24G) seeks to ‘rectify’. Introduced in the National Environmental Management Amendment Act (Act 8 of 2004), this

[1] The Northern Cape was the only exception.

provision entitled “Rectification of unlawful commencement of activity” allows for retrospective authorisation of unlawful activities, following a prescribed administrative process.

1.2 PROBLEM STATEMENT

Concerns were raised from the outset (Paschke and Glazewski, 2006) from a legal point of view, but also from an environmental management and governance perspective. Indeed, this provision is somewhat of a ‘legislative anomaly’ (van der Linde, 2009: 207) and its consistency with the other provisions of NEMA as well as its alignment with some constitutional and administrative justice principles have been questioned. (van der Linde, 2009, and Paschke and Glazewski, 2006) Van der Linde notably argued that S24G should be unconstitutional as it goes against the principles of the rule of law and of administrative legality in that a lawful activity can follow from unlawful administrative conduct.

Aside from the purely legal issues, S24G raises significant dilemmas from an environmental management perspective. Indeed, this “rather odd procedure” (Kidd, 2011: 245) is widely regarded as a paradox, if not a contradiction vis-à-vis with the intention and principles of NEMA. In particular, by opening the door for retrospective environmental authorisation, S24G has the potential to considerably undermine the very purpose of environmental assessment, the principles of integrated environmental management and sustainable development, and ultimately, the fundamental right to environmental protection. (van der Linde, 2009)

To be sure, S24G of NEMA and its application over the past few years have generated mixed reactions from stakeholders, ranging from confusion and perplexity, to frustration and consternation, and perhaps even cynical enthusiasm. This was reflected in a recent submission (2011) by the Centre for Environmental Rights (CER) to the Department of Environmental Affairs (DEA), which pointed out that “the application of the rectification mechanism in S24G has had unfortunate unintended consequences for environmental management, and it has been a thorn in the flesh of civil society organisations for some years.”

Ironically, after all the trials and tribulations experienced in establishing environmental legislation, compelling environmental compliance and promoting sound environmental management practices, regulators may have effectively shot themselves in the foot by introducing a ‘rectification’ provision in NEMA, thus making sustainable development an even more elusive goal. Indeed, what is the point of having such strong and progressive environmental legislation if it contains the very seeds of its own demise?

As a matter of fact, a certain number of challenges have emerged and some perverse effects have been observed since the introduction of S24G in NEMA in 2005. In particular, it appears S24G provisions have been abused in an attempt to circumvent the prescribed EIA process and may have thereby effectively provided an escape route for criminals, thus suggesting that blatant disregard of the law and the environment may be tolerated, and environmentally reckless behaviour reminiscent of the ‘bad old days’ condoned.

As a result, while the S24G rectification process aims to restore compliance, it may paradoxically be detrimental to compliance and environmental management in general; in fact, it contains the potential to actually exacerbate the very problem it seeks to resolve.

1.3 RESEARCH QUESTION AND OBJECTIVES

It is in this context that this research has sought to engage in an in depth and critical discussion on S24G and its effectiveness in bringing about increased levels of compliance by asking the following question: to what extent has S24G improved compliance relating to listed activities and what have been the implications for environmental management and governance?

Based on a case study of the Gauteng Province, this research seeks to uncover and analyse the major opportunities, risks and challenges that S24G of NEMA presents for compliance and enforcement. Following a dialectical approach, this dissertation critically analyses the effectiveness of S24G by assessing the extent to which it has contributed to improving compliance, and examining whether and how S24G has contributed to undermining progress toward better environmental management and governance. Much debate in that regard has taken place over the past few months in certain circles and the main issues and views which have emerged during the course of the research are reflected in the discussion.

1.4 OUTLINE OF THE DISSERTATION

S24G needs to be viewed in the broader context of environmental planning, compliance and enforcement in South Africa. In line with this, the literature review provides an overview of the environmental authorisation regime in South Africa and presents theoretical and practical perspectives on non-compliance, which are at the core of the debates around S24G (**Chapter 2**). This context is critical to analyse and interpret findings of the research. The methods used to collect and analyse data are detailed in **Chapter 3**, while **Chapter 4** provides an overview of key findings, focusing on the statistical data collected. **Chapter 5** critically analyses the impact of S24G on compliance, in light of the theoretical framework and practical context outlined in **Chapter 2**, and against the background provided in **Chapter 4**. Finally, **Chapter 6** presents the concluding remarks.

2. CONTEXTUAL OVERVIEW: ENVIRONMENTAL PLANNING, COMPLIANCE AND ENFORCEMENT IN SOUTH AFRICA

The environmental authorisation law in South Africa functions primarily through NEMA and associated regulations, and is based on a general prohibition of certain activities that have an impact on the environment without the prior issue of an authorisation or permit. EIAs are the primary tool used as part of the authorisation process and play a major role in environmental planning and environmental governance in general.

Failure to obtain authorisation prior to undertaking the above-mentioned activities, and hence comply with the authorisation law, constitutes an offence, which may be 'rectified' through a S24G process. S24G therefore aims at restoring compliance and as such is an integral component of the South African environmental compliance and enforcement regime. Understanding the concepts of 'compliance' and 'enforcement' and their theoretical underpinnings is thus a prerequisite to understanding the debates on how to achieve effective environmental compliance and enforcement.

In view of the above, this chapter starts by outlining the South African environmental planning context, concentrating on the environmental authorisation regime, centred around EIA (**section 2.1**). It then presents theoretical and practical perspectives on non-compliance, which are at the core of the debates around S24G: **section 2.2** provides an overview of environmental regulation and compliance theories; **section 2.3** discusses the current South African compliance and enforcement regime, including the main tools and role-players in the system; and s**ection 2.4** takes the discussion further by providing an overview of practical approaches and measures to improve the effectiveness of the sanctioning regime. Finally, this chapter concludes with a review of recent developments in environmental compliance and enforcement, which in the view of the author constitute major game changers in the field and herald important changes to come (**section 2.5**).

2.1 THE SOUTH AFRICAN ENVIRONMENTAL AUTHORISATION REGIME

S24G needs to be viewed in the broader context of development planning and decision-making with regard to environmental issues. This takes place mainly through the environmental authorisation system (**section 2.1.1**), which aims to integrate environmental considerations in project planning and implementation phases, based on an EIA (**section 2.1.2**). In this context, S24G of NEMA is somewhat of a legislative 'anomaly', in that it allows for retrospective authorisation of listed activities (**section 2.1.3**).

2.1.1 Introduction: environmental authorisation regime and rationale for EIA

S24(1) of NEMA states that in order to give effect to the general objectives of integrated environmental management, the potential consequences for, or impacts on the environment of listed or specified activities must be considered, investigated, assessed and reported to the decision-making authority. The rationale underpinning environmental assessment is that better results are achieved by carefully considering the consequences of an action before implementing it.

NEMA, like the Environment Conservation Act (73 of 1989) (ECA) before it, requires specific activities (i.e. 'listed' or 'specified' activities) to be authorised on the basis of an EIA before commencing. This is a pivotal aspect of land use today and in fact, "the environmental authorisation process is probably the most frequently encountered aspect of South African law in practice". (Kidd, 2011: 239)

Section 24 of NEMA, entitled "Environmental authorisations" applies to specific activities which are 'listed' or 'specified' in terms of that section.

The EIA regulations Listing Notices 1, 2 and 3 of 2010 (the latest version of the EIA Regulations) enumerate the activities which may not commence without an environmental authorisation.

Chapter 5 of NEMA fleshes out the environmental authorisation process while the EIA regulations provide more detail on the contents of EIAs and procedures to be followed.

2.1.2 EIA: an established tool for delivering sustainability

Environmental assessment consists in applying a variety of ex ante techniques and procedures to predict and evaluate the consequences of human actions. It is a critical component of modern environmental management and one of the primary measures to achieve environmental sustainability in development (Kidd and Retief, 2009: 971).

"South Africa has a proud history of environmental assessment dating back to the early 1970s." (Kidd and Retief, 2009: 973) From an *ad hoc*, voluntary tool, to the formalised environmental assessment system in place today, EIA has evolved over the past 40 years to adapt and respond to changing environmental, social and political priorities.

In South Africa, like in most countries worldwide, EIAs have become the tool of choice for environmental, and more broadly development planning, and an integral part of the authorisation law and permitting system (Kidd and Retief, 2009). Thousands of EIAs are undertaken each year (Kidd and Retief, 2009: 1033) (**Figure 1**), and they have accordingly become a well established and recognised tool.

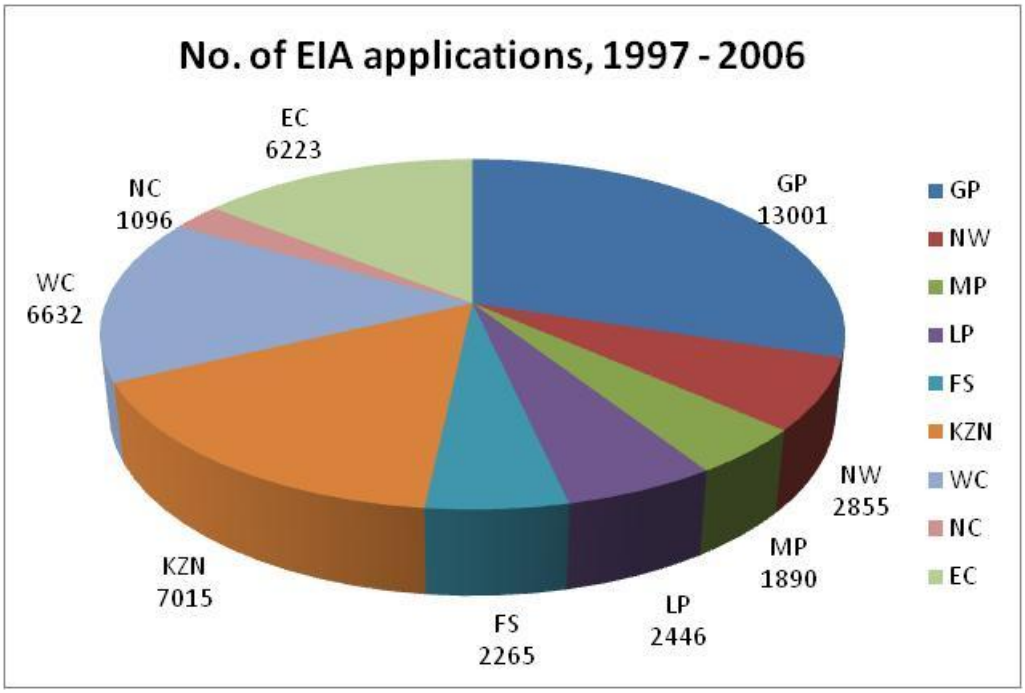

Figure 1: Number of EIA applications in South Africa, 1997-2006 (adapted from Kidd and Retief, 2009)

Purpose

EIA is driven by the concept of sustainability and participatory decision making, as set out in the NEMA principles (section 2), and is the primary tool used to achieve the objectives of integrated environmental management, as described in S23 of NEMA. Their purpose is to identify, predict, and assess the actual and potential impacts (positive and negative) of activities on the environment (as defined in section 1 of NEMA), their alternatives, and options for mitigation, in order to minimise negative impacts, maximise benefits and promote compliance with the principles of NEMA.

Ultimately, the objective of EIA is to facilitate informed decision-making. EIAs can be complemented by other environmental management tools such as Strategic Environmental Assessments and Environmental Management Frameworks, which bridge the gap between small scale planning and planning at strategic level, with a better view of cumulative impacts.

Although the merits of EIA are unquestionable, it is not exempt from criticism. As a matter of fact, there is a lot of debate and literature on the shortcomings of EIA, the weakness of EIA reports and ultimately, the value that EIA adds to decision-making and how it influences the developmental path of society in general. Indeed, “while there is a general consensus that EIA has led to enhanced consideration of environmental factors in decision-making, its achievements appear most favourable when compared to past neglect and failings, rather than when measured against sustainable development goals.” (Cashmore, 2004: 404)

In addition to debates on the intrinsic value of EIA, concerns exist on a more practical level around the time and cost involved (Retief and Chabalala: 2009), as well as the inconsistent quality of EIA reports (Sandham and Pretorius, 2008, Sandham et al., 2010). Indeed, EIA

tends to be perceived as an addition to the bureaucratic procedures required to obtain approval for a project, thereby making them even more cumbersome, and accordingly is often accused to hinder development and economic growth. These issues are particularly relevant in the South African context "where calls have been made at a high level for the reconsideration of the need for EIA, based on the perceived associated costs and time delays affecting job creation and economic growth." (Kidd and Retief, 2009: 1043)

Despite these weaknesses, EIA remains the primary tool to take environmental factors into consideration and incorporate them in the planning and implementation of projects, and facilitate decision-making with respect to the issuing of environmental authorisations. In 2004 though, NEMA created a mechanism to issue environmental authorisations retrospectively: 'rectification", which is typically invoked once a development has started without an EIA being conducted.

2.1.3 Section 24G: the introduction of ex-post facto authorisation

Background and rationale

While the environmental authorisation law is increasingly well known and applied, there remains non-compliance which results in illegal developments, and until 2005, there was no remedy to bring these back into lawfulness; as Kidd and Retief (2009: 994) point out, "persons who commenced identified activities without the necessary authorisation presented problems to the authorities in dealing with the unauthorised development." Indeed, undertaking listed activities without authorisation was a criminal offence in terms of ECA, but there were no remedies directly applicable to this situation and authorities resorted to methods such those in S28 of NEMA (i.e. duty of care and remediation of environmental damage). This changed in 2005, after the 2004 National Environmental Management Amendment Act (Act 8 of 2004) came into effect and introduced S24F, which notably states that commencement or continuation of a listed activity without authorisation is a criminal offence and can be subject to a maximum of R5 million fine and/or ten years imprisonment if convicted; and S24G, which makes provision for ex-post facto authorisation by allowing an offender in terms of S24F (i.e. a person who started a listed activity without authorisation) to apply for 'rectification'. (See **Appendix A** for full excerpts from NEMA of Sections 24F and 24G)

The S24G application process relating to NEMA listed activities[2] would typically involve the submission of an application form to the competent authority, who then directs the applicant to compile an environmental assessment report. Once the report is submitted, an administrative fine, not exceeding R1 million is issued, and upon payment, the competent authority reviews the report and makes a decision.

S24G applications can result from non-compliance detection by enforcement authorities, or from applicants coming forward 'spontaneously' (cf. **Chapter 4**). Whatever the case may be, applying for rectification remains voluntary and authorities cannot compel offenders to apply

[2] S24G effectively covers waste management activities, which were listed in the NEMA EIA Regulations until 3 July 2009, and are now covered under the National Environmental Management: Waste Act (58 of 2008) (NEM:WA).

for rectification. They may however take enforcement action against offenders at any time if, even if a S24G process is underway.

Kidd (2011: 246) comments that the enforcement powers given to authorities in terms of S24F and S24G of NEMA are "welcome as there has been seemingly widespread non-compliance with the requirement to obtain authorisations where required by NEMA, and the previous remedies (when there were any) were clearly not perceived as being a deterrent."

Objectives and purpose

The objectives of S24G are unclear and to some extent ambivalent. On one hand, the S24G process aims to halt illegal and environmentally harmful activities and restore compliance, thus focusing on the environmental impacts and administrative aspects of activities with a view of mitigating impacts and providing the required 'paperwork' to continue with the activity. On the other hand, the process aims to sanction non-compliance through the issuing of an administrative fine.

Thus, S24G is on the face of it a compromise between the rationalist and normative theory of compliance (**section 2.2**). In reality, the ambiguity surrounding this provision blurs the message for both authorities and offenders.

This is detrimental, as it leads to inconsistent treatment of applications by authorities (e.g. fine amounts, see **Chapter 4 and figure 10**), which in practice means that some provinces or even officials may effectively be lenient toward offenders and accommodate environmental crime, while others are more stringent. This compromises the ability of would-be offenders to make informed decisions with respect to compliance; as a result, potential offenders who do not know what to expect may rely on perceptions and anecdotal evidence, which currently send the wrong message about S24G (i.e. low risk, high reward alternative to obtain environmental authorisation. cf. **Chapter 5**), which in turn hampers the effectiveness of the compliance and enforcement effort. As van der Linde (2009: 207) points out : "Section 24(G) has become somewhat of a legislative 'anomaly'. It has proven to be controversial and frustrating in its scope, its application and its operation to both applicants and decision-makers alike." These issues are all the more concerning as there is widespread environmental non-compliance in South Africa, which requires clear and decisive compliance and enforcement action.

2.2 COMPLIANCE AND ENFORCEMENT: THEORETICAL AND CONCEPTUAL FRAMEWORK

Understanding the concepts of 'compliance' and 'enforcement' and their theoretical underpinnings is a prerequisite to understanding the debates on how to achieve effective environmental compliance and enforcement. This section provides an overview of theoretical perspectives on compliance and enforcement, while **section 2.3**. presents the main instruments and institutions dealing with environmental non-compliance in South Africa.

2.2.1 Background and definitions

Compliance refers to a particular state of adherence to legal requirements or standards (Craigie et al., 2009a: 44) while enforcement consist of the actions taken by government against violators, to compel compliance with the law. (INECE, 2009: 13) Enforcement can take place through "compulsion and coercion, or by conciliation and compromise", depending on the regulatory context. (Hawkins, quoted in Craigie et al., 2009a: 44)

Traditional command-and-control mechanisms used to compel compliance and sanction non-compliance include criminal, judicial and administrative measures. Alternative measures, such as voluntary and incentive based-measures can be used to encourage and reward compliance (cf. **section 2.3**).

Craigie et al. (2009a: 44) state that the rationale underpinning environmental compliance and enforcement includes:

- Improving environmental quality;
- Reinforcing the credibility of environmental laws and the institutions responsible for their administration;
- Ensuring fairness towards those who willingly comply with legal requirements; and
- Reducing costs and liability associated with non-compliance.

2.2.2 Theories of compliance

Theories of compliance generally focus on motivations for behavioural change and formulate hypotheses on the factors influencing non-compliance. (Ayres and Braithwaite, 1992, Becker, 1968, Casey and Scholz, 1991, Cohen, 2000, Gunningham and Sinclair, 2002, Hart, 1994, Malloy, 2003, Spence, 2001, Young, 1999, Vandenbergh 2003 and 2005) They provide useful insights to reflect on effective environmental regulation and achieving the highest possible level of compliance.

The rationalist theory

The rationalist theory of compliance considers the regulated community as "rational actors who act to maximise their economic self-interest". (Zaelke et al., quoted in Craigie et al., 2009a: 42) Accordingly, a corporate entity, as a "rational profit-maximiser", would only obey the law when it is in its best economic interest. The decision to comply or not is thus based on a self-interested cost-benefit calculation and as a result, violations occur "when the perceived benefits of non-compliance exceed the anticipated cost of sanctions." (Malloy, 2003: 451) According to Becker's 'optimal penalty' model, "a person commits an offence if the expected utility ... exceeds the utility he could get by using his time and other resources at other activities." (Becker, 1968: 176)

There is therefore a direct correlation between the probability of conviction or punishment and the number of offences. Following the neoclassical economists' usual analysis of choice, the actions of rational actors with respect to compliance are strongly influenced by the likelihood of detection combined with the real risk of severe punishment (Craigie et al., 2009a: 43) (**Figure 2**), thus the notion of deterrence is central to the rationalist theory of compliance and focuses of those two determining factors.

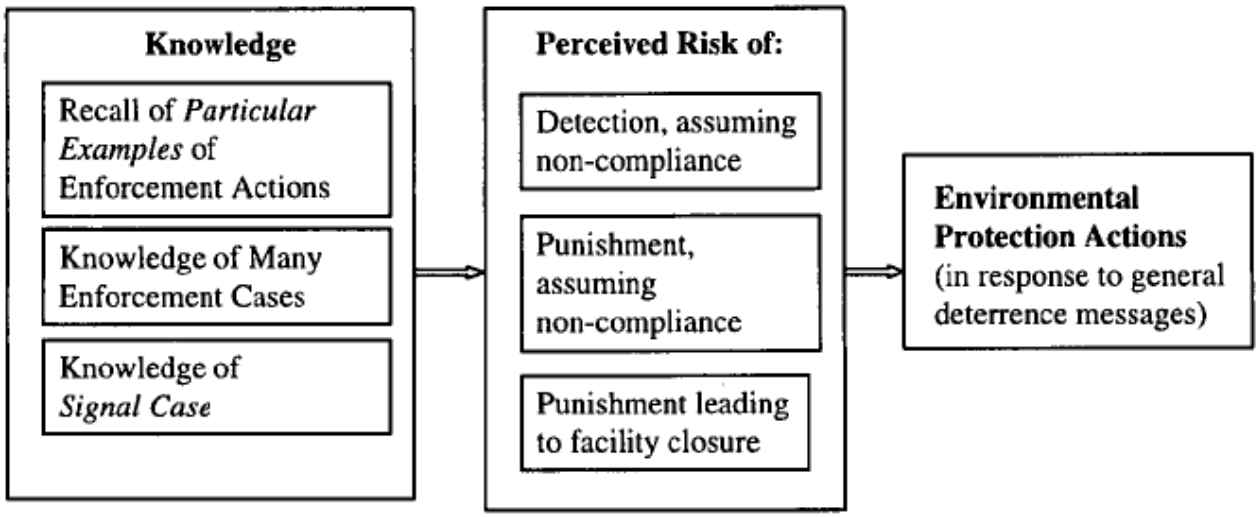

Figure 2: Classic deterrence model operationalised (Source: Thornton et al., 2005)

Traditional enforcement techniques such as government monitoring and inspections, as well as penalties for identified violations, are typically associated with the rationalist theory. (Malloy, 2003)

The normative theory

In contrast with the rationalist theory, the normative theory of compliance presumes that the regulated community generally seeks to comply with the law, but that its ability to do so may be hindered by a range of factors, such as a lack of awareness, expertise or resources, or the absence of adequate incentives. (Craigie et al., 2009a) Companies are accordingly considered as law-abiding actors, "struggling in good faith to comply with increasingly complicated and contradictory laws and regulations", with compliance being driven not by the threat of legal sanctions, but by the company's "drive to obey the law." (Malloy, 2003: 454-455)

In view of that, promoting compliance would entail a strategy geared towards preventing harm, rather than punishing evil. Accordingly, proponents of the normative theory focus on providing assistance to facilitate compliance and prefer conciliatory style strategies to the sanctioning strategies seeking to penalise non-compliance, advocated by proponents of the rationalist theory. (Malloy, 2003)

The rationalist and normative theories of compliance are thus diametrically opposed, and the compliance theory adopted by the regulator can have a major impact on the design and implementation of the compliance and enforcement strategy. These two models are however not mutually exclusive and most compliance and enforcement regimes, including in South Africa, contain elements of both the rationalist and normative theories of compliance, as described in **section 2.3**. Indeed, as Hart (1994) notes: "what reason demands is *voluntary* co-operation in a *coercive* system."

2.2.3 Environmental compliance and enforcement in the regulatory cycle

Environmental compliance and enforcement forms part of the 'regulatory cycle', which consists of the following five components (Craigie et al., 2009a):

1. *Problem identification and strategy development*
   This first step consists in identifying the problem requiring legal intervention, developing a policy for dealing with the problem and identifying potential compliance and enforcement mechanisms (e.g. command and control instruments).
2. *Legislation and permitting*
   In South Africa, certain activities may not take place without an authorisation or permit. The permitting process allows authorities to make informed decisions, set conditions for the activities, and establish a database for compliance monitoring.
3. *Compliance promotion, education and awareness*
   Providing information, education and compliance advice; promoting self-regulatory tools (e.g. Environmental Management Systems) and offering incentives can all contribute to achieve voluntary compliance.
4. *Compliance monitoring*
   This can take the form of on-site inspections, or reviewing of audit reports for example.
5. *Enforcement*
   This is a key element of the regulatory cycle and takes place in response to detected non-compliance. Administrative, criminal and civil measures may be used to facilitate enforcement.

2.3 DEALING WITH NON-COMPLIANCE: THE SOUTH AFRICAN COMPLIANCE AND ENFORCEMENT REGIME

Craigie et al. (2009a: 45) point out that historical factors, including unjust and discriminatory laws and inadequate legal enforcement, have contributed to ensconce environmental non-compliance in South Africa. The scope and extent of non-compliance (Kidd, 2011, Craigie et al., 2009a, Fourie, 2009), combined with capacity and resource constraints in government departments make compliance monitoring and enforcement an arduous task at the best of times. This section discusses the main tools (**section 2.3.2**) and institutions (**section 2.3.3**) currently used to deal with non-compliance in South Africa.

2.3.1 Constitutional mandate and approach

Everyone has the right to have the environment protected, for the benefit of present and future generations, "through reasonable legislative and other measures": the environmental right enshrined in section 24 of the Constitution of the Republic of South Africa, and S24(b) in particular, imposes a clear constitutional duty to ensure environmental compliance and enforcement.

The South African compliance and enforcement approach has shifted in recent times from a rationalist approach in the conservation sector, relying on arrest and criminal prosecution, to a more normative approach based on cooperation and community-based participation. Conversely, while authorities tended to adopt a conciliatory approach with the industrial sector in the past, the advent of the Environmental Management Inspectorate marked a new era for compliance and enforcement in that sector, with punishment being the key

enforcement strategy. (Craigie et al., 2009a: 45) Craigie et al. (2009a) nevertheless argue that authorities are increasingly moving towards a hybrid approach to enforcement.

2.3.2 Environmental compliance and enforcement mechanisms

Compliance and enforcement authorities can choose from two broad categories of mechanisms: *firstly*, traditional command-and-control mechanisms, which include criminal, administrative and civil measures, and *secondly*, alternative compliance mechanisms, such as voluntary and incentive-based measures. This section provides a brief overview of these measures, focusing on the first category of measures, much more widely used and of greater relevance to this thesis.

As its name suggests, the command-and-control approach consists in prescribing legal requirements and obligations, and compelling compliance through enforcement measures. Command-and-control mechanisms include criminal, administrative and civil measures, which are all designed to enforce compliance, punish violators and/or deter future non-compliance. (Craigie et al., 2009a)

The approach is fairly simple to understand and administer but its effectiveness suffers from important pitfalls and shortcomings. Indeed it is resource-intensive, time-consuming and expensive, it is also rigid and does not allow authorities to exercise discretion when needed, and finally, it offers no incentive to exceed the prescribed standards. (du Plessis and Nel, 2011)

Nevertheless, command-and-control mechanisms remain a fundamental pillar of the environmental compliance and enforcement regime.

2.3.2.1 Criminal measures

In South Africa, punitive sanctions generally are the result of a conviction in a criminal court, following investigation and prosecution.

Maximum penalties for environmental offenders have significantly increased in the past few years from hundreds of thousands of Rands to 5 years imprisonment/ R5 million (first offence) and 10 years imprisonment/ R10 million (second or subsequent offence). (DEA, 2010)

As Craigie et al. (2009a: 53) point out, there is a close link between environmental and commercial crime, and substantial financial gains can be secured through the contravention of environmental laws (e.g. sale of ivory or illegal dumping). The sanctions contained in environmental laws are however often insufficient to adequately penalise the offender and as a result, prosecutions for environmental offences are often coupled with commercial and common-law offences. In addition, the potential forfeiture of the instrumentalities and proceeds of environmental crime has played an important role in translating the ‘polluter pays’ principle into effect and has a strong deterrent value. (Craigie et al., 2009a: 54)

Although criminal measures are inherently ill-equipped to address environmental harm, the criminal court may impose additional 'penalties' under S34 of NEMA for offences listed in Schedule 3 of NEMA, such as recovering the costs incurred in rehabilitating the environment, compensation for civil damage, any monetary gain secured through the commission of the offence and the costs of investigating and prosecuting the offence. (Craigie et al., 2009a: 54) Schedule 3 however currently excludes many important environmental offences.

For less serious offences, admission of guilt fines play a significant role. (Craigie et al., 2009a: 55)[3]

2.3.2.2 Administrative measures

While criminal measures are primarily aimed at punishing offenders for causing harm to the environment or disregarding the law, administrative measures focus on halting illegal or environmentally harmful activities, ensuring compliance, and/or imposing measures to prevent, remediate or mitigate harm. (Winstanley, 2009)

The most prevalent forms of administrative measures used in South Africa are compliance notices (issued in terms of S31L of NEMA), directives (issued in terms of S31A of ECA and S28(4) of NEMA), abatement notices and the suspension or withdrawal of environmental authorisations. (Craigie et al., 2009a: 55) Notices and directives are issued in response to a suspected non-compliance, and instruct the offender to take corrective action (e.g. ceasing an activity, undertaking rehabilitation, submitting information etc), failing which they may be guilty of a criminal offence.

Failure to comply with an administrative measure within the specified timeframe can thus result in further legal action, undertaking of the work set out in the notice and recovering associated costs or withdrawal of authorisations.

Directives can also be used in conjunction with criminal prosecution, in order to ensure that clean-up and rehabilitation take place immediately prior to, or simultaneously with the finalisation of a criminal case. (Craigie et al., 2009b: 86) Administrative measures can thus achieve enforcement in a far more expedient and cost-effective way than criminal measures, notably because they are administered by environmental authorities directly, and do not need the onus of proof required for criminal proceedings.

The use of administrative enforcement tools varies across provinces, Mpumalanga, Gauteng, and Eastern Cape made the most extensive use of administrative measures in the 2010/11 financial year (**Figure 3**).

[3] See Kidd (2011) for a comprehensive discussion on the strengths and weaknesses of criminal sanctions in South Africa.

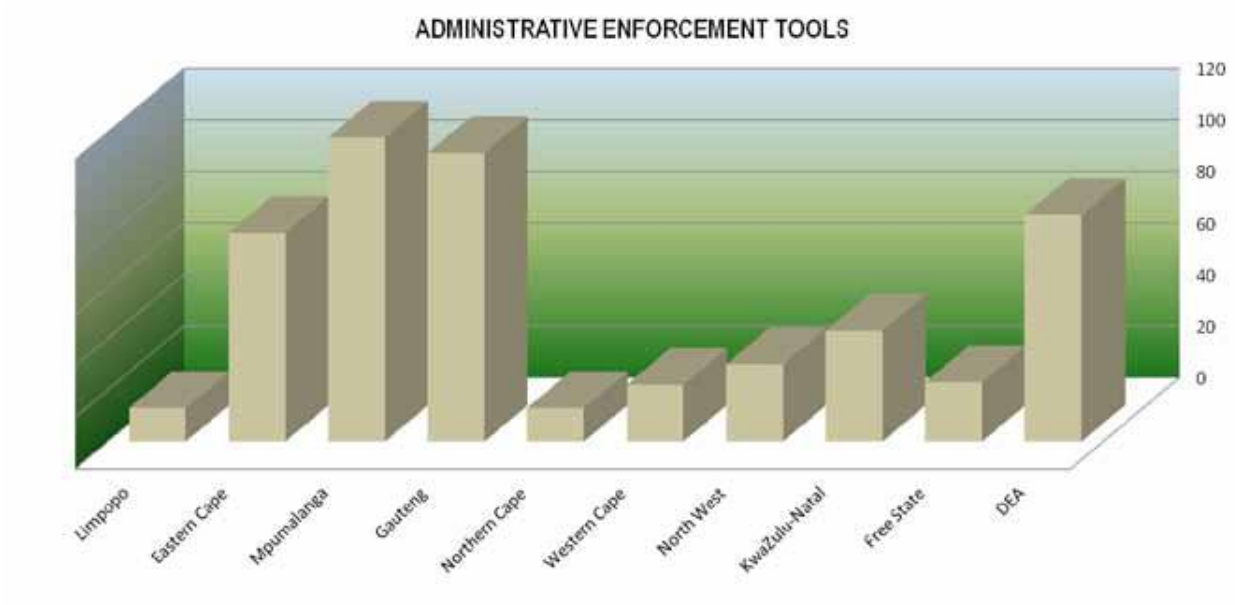

Figure 3: Use of administrative enforcement tools per institution in 2010/11 (source: DEA, 2011b: 30)

They can also be a more appropriate way to deal with criminal offences, in cases where criminal prosecution would not constitute an efficient use of resources, where the offender has reported the offence immediately upon detection and has taken measures to mitigate the harm caused and prevent future violations for instance, or in cases where the violation did not result in direct harm, such as the late filing of required reports.

2.3.2.3 Civil measures

Civil measures are administered through the courts and can take the form of common-law remedies for restraining or preventing a certain conduct (e.g. interdict) and claiming for damages.

2.3.2.4 Alternative mechanisms

Incentive-based measures such as market-based incentives, regulatory incentives and information-based incentives are based on the idea that it is more effective and efficient to encourage and reward certain forms of behaviour than sanction non-compliance. This can be done by providing tax benefits and subsidies to reward compliance and imposing costs on those who fail to comply (e.g. effluent, emission and disposal charges). (Craigie et al., 2009a: 58)

Traditional environmental and compliance measures can be complemented and environmental performance can be improved through voluntary measures, including self-regulatory (e.g. labelling schemes) and co-regulatory measures (e.g. environmental management co-operative agreements).

In addition, non-binding standards, such as the Department of Water Affairs' *Minimum Requirements for the Handling, Classification and Disposal of Hazardous Waste*, contribute to enhancing the compliance effort.

2.3.3 Environmental compliance and enforcement institutions

The environmental compliance and enforcement system in South Africa rests on three main institutions, namely the Environmental Management Inspectorate, the NPA and the courts. These are discussed below.

2.3.3.1 The Environmental Management Inspectorate and the NPA

Craigie et al. (2009b: 90) define the Environmental Management Inspectorate as "a network of environmental enforcement officials from different spheres of government, mandated to monitor compliance with, and enforce the SEMAs." Environmental Management Inspectors (EMIs) represent the environmental compliance and enforcement capacity in respect of NEMA and specific pieces of environmental legislation and according to Craigie et al. (2009b: 66), "potentially hold one of the keys to improved environmental compliance and enforcement in South Africa."

The Environmental Management Inspectorate was born with the promulgation of the first National Environmental Management Amendment Act in 2003, which provided for the designation, powers and functions of EMIs. The number of EMIs has been growing steadily and the total number of EMIs for the 2010/11 financial year stood at 1076, most of whom (603) are SANPARKS officials. (DEA, 2011b) The reason for this is the legacy of traditional environmental compliance and enforcement strategies, which placed biodiversity and conservation at the centre of compliance and enforcement efforts, and capacity therefore tends to be stronger in these areas. On the other hand, Craigie et al. (2009b: 81) point out that "institutions responsible for enforcing pollution, waste management and environmental impact assessment legislation are relative newcomers to the field of compliance and enforcement" and the development of compliance and enforcement capacity in these areas has been slow. The creation of the EMIs was partly intended to address these capacity issues. (Craigie et al., 2009b: 89)

The compliance and enforcement strategy is centred around a number of priority sectors and projects. Pro-active compliance inspections target facilities in the industrial sector, including ferro-alloy, steel and iron facilities, cement, paper and pulp sector, as well as power generation. (DEA, 2011b)

Powers

EMIs are granted wide powers in terms of NEMA: they can perform inspections, conduct investigations, and have enforcement and administrative powers (e.g. EMIs may issue compliance notices). These powers are linked to the grade of individual EMIs, and are distributed as follows:

Table 1: EMI ranking system (source: Craigie et al., 2009b)

Grade 5 EMIs	Grade 4 EMIs	Grade 3 EMIs	Grade 2 EMIs	Grade 1 EMIs
Powers of **search, seizure and arrest** in terms of S31H(5) (Chapters 2 and 5 of the Criminal Procedure Act (CPA) 55 of 1977), S31I and S31J.	**Inspection** powers in terms of S31K(1) to (4)	**Inspection and investigation** powers in terms of S31H(1) to (4).	**Inspection and investigation** powers in terms of S31K and S31H(1) to (4). **Enforcement powers** in terms of S31I and S31J and S31H(5) (CPA powers of search and seizure and arrest)	**Inspection and investigation** powers in terms of S31K and S31H(1) to (4). **Enforcement powers** in terms of S31I and S31J and S31H(5) (CPA powers of search and seizure and arrest) **Administrative powers** in terms of S31L and S31N.
Note: This grade is reserved for field rangers only.	Note: Investigation and enforcement powers (e.g. search, seizure and arrest) are excluded for this grade.	Note: Investigation and enforcement powers (e.g. search, seizure and arrest) are excluded for this grade.	Note: Administrative powers (e.g. issuing compliance notices) are excluded for this grade.	

Capacity building

As Craigie et al. (2009b: 95) note: "building skilled and trained personnel has been one of the keys to the success of the EMI." In addition to the Basic Training Programme which all EMIs undergo, specialised training is being developed. In 2010 for instance, 43 EMIs attended a one-week course on criminal docket management, covering the investigative and procedural aspects of docket management, in order to strengthen their ability to effectively utilise criminal sanctions as an enforcement mechanism (DEA, 2011b); and 42 officials attended a one-week course on waste and pollution crime scene management.

Effectiveness

There has been much progress over the last six years in the design and roll-out of Basic Training for EMIs, including training on conducting criminal investigations (DEAT, 2008, 2009 and DEA, 2010 and 2011); however, as Fourie (2009) points out, training alone cannot adequately prepare officials to conduct the type of investigations that are conducted by detectives of the South African Police Service (SAPS). The pollution, waste and development crimes are particularly acute manifestations of this problem, which may be the reason environmental departments are often reluctant to initiate criminal proceedings for these crimes. (Fourie, 2009) These factors result in slow or inadequate investigation of environmental crimes, or worst case scenario, in the abandonment of enforcement action altogether.

Challenges around the effectiveness of EMIs are compounded by difficulties to secure support from the SAPS where required. Indeed, "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 cannot benefit from the expertise of the SAPS Organised Crime Unit. (Fourie, 2009: 5)

The DEA has been publishing compliance and enforcement statistics for the past five years and it appears there are persistent weaknesses in the investigation of environmental crimes, as reflected by the number of criminal dockets under investigation and the number of acquittals per number of dockets (**Table 2**).

Table 2: National environmental compliance and enforcement statistics (adapted from DEAT, 2008, 2009 and DEA, 2010, 2011b)

	2006/07	2007/08	2008/09	2009/10	2010/11
Arrests by EMIs	898	2 614	2 614	2 384	1 988
Criminal dockets under investigation	Not available	1 762	2 412*	2 877*	738
Acquittals	Not available	441	18	1026	22
Convictions (per accused)	134	748	258	673	72
Conviction rate**	Not available	42.4 %	Not available	Not available	9.7 %

* incl. admission of guilt fines.
** this number cannot be an accurate calculation due to the fact that at least some of the convictions in a given financial year relate to criminal dockets that pre-date that particular year.

In comparison, the National Prosecuting Authority (NPA) reported a total of over 1 million new cases in each year over the past five years (**Table 3**), of which environmental cases would then represent less than 0.25 % over the period.

Table 3: National prosecution statistics (adapted from NPA, 2007, 2008, 2009, 2010, 2011)

	2006/07	2007/08	2008/09	2009/10	2010/11
New cases	1 062 147	1 037 538	1 058 376	1 044 346	1 065 269
Conviction rate*: District Courts	85 %	88 %	88.1 %	90.5 %	90.7 %
Conviction rate*: Regional Courts	75 %	73 %	73.7 %	73.6 %	73.4 %

*this number cannot be an accurate calculation due to the fact that at least some of the convictions in a given financial year relate to criminal dockets that pre-date that particular year.

Even when criminal dockets make it to completion, their prosecution remains a challenge. This is the role of the NPA, which does not have dedicated environmental prosecutors, even though "environmental crimes are often complex and accordingly require specialised and experienced prosecutors". (Craigie et al., 2009b: 98) This, according to Fourie (2009) is likely to be the primary reason for the poor conviction rates of environmental crimes compared to the overall conviction rates in District and Regional Courts (**Tables 2 and 3**). On the other hand, the Specialised Commercial Crimes Unit for example reported conviction rates of over 90% for the past four years. (NPA, 2008, 2009, 2010, and 2011)

Training and support has been developed though, and training courses facilitated by the Department of Justice's (DoJ) Justice College, including advanced prosecutor training workshops, are available for prosecutors within the NPA who routinely prosecute environmental crimes. In addition, court officials involved in the prosecution and adjudication of environmental crimes are provided with reference material, such as a training manual called "*The Prosecution of Environmental Crime: A Guide for Prosecutors*", first launched in 2007 and now in its 2nd edition. (DEA, 2011b) And an annual award of excellence was created for prosecutors of environmental crime. Nevertheless, poor results persist in spite of the DEA's and the Environmental Management Inspectorate's efforts to train and support

NPA prosecutors, and the 2010/11 National Environmental Compliance and Enforcement Report (NECER) indicates that the DEA and the NPA are exploring the feasibility of establishing a unit within the NPA, dedicated to the prosecution of environmental crimes. (DEA, 2011b: 64)

Although prosecutions remain remarkably low in the context of widespread and serious non-compliance in South Africa and roleplayers in the criminal enforcement process should certainly concentrate their efforts on increasing these numbers, caution should be exercised to ensure that criminal prosecution is justified and does not amount to a waste of precious resources.

2.3.3.2 Courts and environmental crimes

> *"We express our conviction that the deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to the lack of effective implementation, development and enforcement of environmental law."*
> Johannesburg Global Judges Symposium, 2002

In addition to the many hurdles to overcome in the investigation and prosecution of environmental crimes, when environmental crimes eventually reach the courts, sentences are generally poor. Indeed, apart from a few exceptions, fines imposed by district and regional magistrates (who adjudicate almost all environmental prosecutions) tend to be very low, especially in pollution, waste and development related prosecutions[4]. (Fourie, 2009) Overloaded courts, the absence of adequate training for magistrates, together with the relatively low maximum penalties for environmental offences are some of the main reasons for this.

This is a major challenge for compliance and environmental management in general. Nonetheless, a number of training initiatives have taken place over the past few years in a bid to address these shortcomings. In the 2010/11 financial year for instance, 67 magistrates and 177 prosecutors received training "aimed at developing their capacity to understand the nature, scope, impacts and legislation related to environmental crimes." (DEA, 2011b: 63) The DEA has secured the support of Justice College and the Judicial Officers Association of South Africa to train magistrates and prosecutors.

The reliance on criminal prosecution to enforce punitive sanctions for environmental offences is problematic in the context of an already overcommitted criminal justice system and the challenges involved in obtaining convictions and meaningful sentences. This tends to discourage authorities from investigating and prosecuting cases, which in turn perpetuates the low prosecution rate for environmental crimes. On a side note, this vicious cycle does not allow a critical mass of cases to develop which is also the reason a dedicated environmental court cannot be justified. The following section takes a pragmatic approach on the issue of how to improve the effectiveness of sanctions in order to reduce non-compliance.

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[4] The best results in criminal enforcement action tend to be achieved in the wildlife and conservation sector.

2.4 DESIGNING EFFECTIVE SANCTIONS: PRACTICAL PERSPECTIVES

In *Regulation, Enforcement and Governance in Environmental Law* (2010), Macrory examines how sanctions for breaches of environmental law have been treated in the United Kingdom (UK). The challenges that the UK experiences with respect to environmental non-compliance have great resonance in the South African context: "under-enforcement, low fines in the courts, and a judiciary that is often unfamiliar with the detailed complexities and dynamics of modern environmental regulation" (Macrory, 2010: 20) all undermine environmental compliance, and the solutions proposed can to a large extent be imported and adapted to the South African regulatory framework.

As Macrory (2010: 47) points out, "regulations are introduced where Government cannot be confident that the whole of the sector covered will voluntarily comply with the standards or achieve desired outcomes." Although there is value in advice and incentives to ensure regulatory compliance, an effective sanction regime is vital to the success of the regulatory regime, "it underpins the regulator's advisory functions, and its very existence will often act as an inducement to compliance without the need to invoke the formal sanctions." (Macrory, 2010: 47)

2.4.1 Principles for effective penalties

Penalty regimes tend to be cumbersome and ineffective, the objective is thus to increase compliance by creating a "transparent system with appropriate sanctions that would aim to get firms back into compliance, ensure future compliance, provide a level playing field for business and enable regulators to pursue offenders who flout the law in a more effective manner." (Macrory, 2010: 37)

In view of that, Macrory (2010: 64-67) developed six penalty principles, outlined below, which are broadly in line with the EPA's Policy on Civil Penalties (EPA, 1984).

A sanction should:

1. **Aim to change the behaviour of the offender**
   A sanction should not just focus on punishment but also ensure the offenders moves back into compliance. This could involve a culture change within an organisation, or a change in production processes for example.
2. **Aim to eliminate any financial gain or benefit from non-compliance**
   "An effective regime should ensure that no economic gains are made from non-compliance." (Macrory, 2010: 15) Sanctions should therefore ensure that businesses that have saved costs by not complying do not gain an unfair advantage over businesses that comply. Tailoring sanctions to remove financial benefits can ensure that these financial gains are not a sufficient incentive to break the law in future.
3. **Be responsive**
   Sanctions should consider what is appropriate for the particular offender and regulatory issue, which can include punishment and the public stigma associated with a criminal conviction. Some degree of discretion is recommended here, whereby the regulator should decide what sort of sanction would be most appropriate and effective to bring the

offender back into compliance and induce a durable change of behaviour. These can include administrative sanctions, or criminal prosecution. At the same time, the regulator "should have the flexibility to apply a sanction for punitive reasons even though a lesser sanction could be applied." (Macrory, 2010: 65) This may be relevant in dealing with repeat offenders for instance, or where a single offence had very serious external consequences.

4. **Be proportionate to the nature of the offence and the harm caused**
   Sanctions should take into account the nature of the non-compliance and its consequences so that offenders are held accountable for the impact of their actions. Sanctions should therefore reflect the individual circumstances of the offender as well as the circumstances surrounding the non-compliance.
5. **Aim to restore the harm caused**
   Where offences result in damage or other costs to society, sanctions should contain incentives to institute prompt remedial action and ensure that offenders provide proper recompense.
6. **Aim to deter future non-compliance**
   Sanctions should send a strong signal that non-compliance will not be tolerated. Although the form of the sanction should remain at the discretion of the regulator, offenders should not be led to believe that non-compliance will be ignored or that they can 'get away with it'.

For better regulatory outcomes, these principles should be applied within a risk-based approach to regulation, whereby sanctions signal the threat of a punishment for potential offenders: "Sanctions demonstrate that non-compliance will not be tolerated and that there will be a reprimand or consequence that will put the violator in a worse position than those that complied with their regulatory obligations on time." (Macrory, 2010: 37) At the same time, regulators should make sure to distribute the regulatory burden in a fair and equitable manner. Indeed, Macrory (2010: 35) observes that "small and legitimate businesses" often feel "more of a regulatory burden than larger companies, or those firms engaged in rogue trading activity." He adds that this is "counterintuitive as repeat offenders as well as those that have an intentional disregard for the law should, under a risk based system, face tough sanctions." (Macrory, 2010: 36)

2.4.2 Benefits and limitations of financial penalties

There are two types of financial penalties: monetary administrative penalties and financial penalties in criminal courts.

Criminal fines

As stated previously (**section 2.3**), obtaining meaningful sentences for environmental crimes in court tends to be a challenge in South Africa and internationally. Often, the level of fines seen in criminal courts tends to be small in relation to the size and financial position of large businesses.

There are well publicised cases of apparently poor sanctions in the UK, such as an Oxfordshire man fined by the court £ 30 000 for dumping 184 drums of toxic waste. He had

been paid £ 58 000 for doing so, and it cost the waste authorities £ 167 000 to incinerate them properly. In another case, a fine of £ 25 000 was handed down to a small waste disposal company which was operating without a licence. The company saved £ 250 000 by operating illegally over two years. (Macrory, 2010: 20)

This type of sanctions does not meet any of the penalty principles outlined above, and send the wrong signal. Indeed, they fail to reflect the financial gain from non-compliance, and as a result, fines could be seen as an acceptable risk.

Administrative fines

On the other hand, monetary administrative penalties are widely used throughout the world in areas of environmental regulation, health and safety and financial services for instance, and are arguably a more effective way to deter from non-compliance. They are administered directly by government authorities and criminal courts are generally not involved in issuing or enforcing such penalties. Recipients of administrative fines have the right to appeal through an administrative appeals mechanism. (Macrory, 2010: 79)

Empirical evidence has shown that administrative fines are an effective way to ensure compliance (Macrory, 2010: 80, Fourie, 2009), while criminal prosecution can be reserved for the most serious cases of non-compliance.

A large amount of this evidence comes from research conducted in the United States. A 2005 study in the industrial sector for instance (one of the specific focus areas of the EMI) found that the majority of respondents remembered at least one instance of a fine against another company and at least one fine against an official on their own company, and almost all respondents (97 %) remembered the infraction that led to the fine. (Thornton et al., 2005) Interestingly, there was no apparent correlation between these facts and an increased perception of risk of detection and punishment. Rather, as Thornton et al. (2005: 262) argued: “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.” Indeed, 65 % of companies took compliance-related actions after learning about fines imposed on other companies (**Figure 4**).

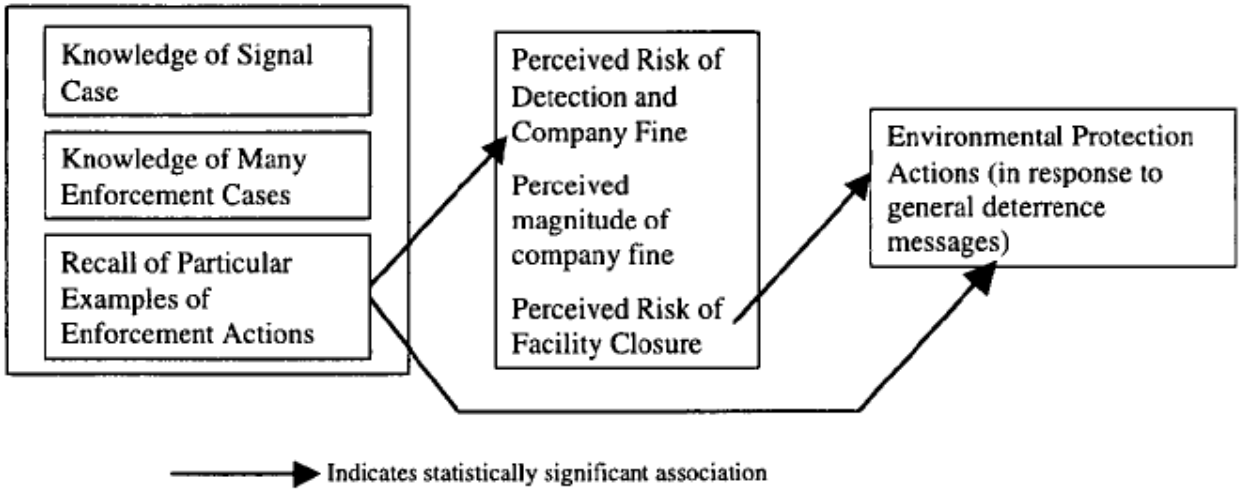

Figure 4: Relationship between deterrence and corporate behaviour (Source: Thornton et al., 2005)

Another study (Shimshack and Ward, 2005) which analysed data from 1988 to 1996 proved that fines issued by the US Environmental Protection Agency's (EPA) permit compliance system in terms of the Clean Water Act resulted in a 64 % reduction in probability of violations in the year following the fine in the same jurisdiction. This impact appeared to be largely due to "reputation enhancement by the regulator", a non negligible indirect benefit. In contrast, non-monetary enforcement actions (e.g. directives, compliance notices etc.) were found to have had "statistically insignificant" impacts on compliance. This led the authors to conclude that "empirically large improvements follow even from modest sanctions, as long as they have economic teeth." (Shimshack and Ward, 2005: 538)

These examples demonstrate that administrative fines can play a major role in deterring the regulated community from contravening environmental laws and have significant positive impacts on compliance. They have the benefit of constituting a formal sanction, without involving the costly and stigmatising aspects of criminal prosecution.

Variable monetary penalties (i.e. fines that are not fixed according to criteria such as the nature of the offence) can allow the regulator to take into account the compliance history of the offender, the seriousness of the offence and its impact on the environment and community, as well as aggravating and mitigating factors and the size of the business, thereby ensuring that the level of the monetary penalty is appropriate. (Macrory, 2010: 80-81) One of the objectives of variable administrative penalties is to remove any financial gain made from non-compliance, which, as discussed above, criminal conviction may not always achieve.

Macrory recommends that there should be no fine maxima for variable monetary administrative penalties, as this could cause legal complexity and encourage regulators to set administrative fines at inappropriately high levels. (Macrory, 2010: 88) On the contrary, he argues that authorities should have the flexibility to capture any financial benefits of offences, while ensuring that the method for calculating the penalty remains transparent.

With the exception of administrative fines issued in terms of S24G and admission of guilt fines, there is no provision for administrative monetary penalties for environmental offences in South Africa. Fourie (2009) argues that introducing such a system could significantly improve environmental compliance and go a long way in overcoming the current limitations of criminal prosecution (see **section 2.4.4**).

Limitations of financial penalties

Although financial penalties have been shown to have a positive effect on compliance, they are not always the most appropriate sanction to change behaviour and relying on fines alone can involve a number of shortcomings. Macrory (2010: 100) enumerates some of the limitations of financial penalties, which include:

- **Deterrence**: the effectiveness of a financial penalty is intrinsically linked to its amount. Thus, unless the fine is of the optimal amount, large companies may easily absorb small fines which could then become part of doing business, like overhead costs, and as a result have a limited impact on day-to-day decision-making with regard to compliance. Coffee has even argued that relying on fines to change business behaviour is to some extent futile and amounts to what he calls a "deterrence trap", as the fine necessary to render compliance the 'rational' choice for amorally calculating businesses would have to be beyond the means of the business being punished. (Coffee, quoted in Macrory, 2010: 100) It is therefore essential that authorities have access to and consider all relevant details in the calculation of the fine.
- **Spill over**: fines may also fail to change behaviour if the offender is able to pass on the financial cost to third parties, such as shareholders, employees, creditors or customers, and defer responsibility away from company management.

  It is however increasingly difficult for large corporations to do so surreptitiously as this will inevitably impact on the value of shares and future dividends and result in price increases, or reduced staffing and wages. In addition, financial and environmental reporting brings such offences and financial penalties to the public eye and the above-mentioned parties are ever more informed and exercise increasingly high scrutiny (cf. **section 2.5**).
- **Unequal impact**: small businesses are generally more vulnerable to financial penalties due to finance and credit constraints.
- **Reflecting the harm caused**: in most cases, environmental non-compliance results in more than just financial harm, and can involve physical or environmental damage which is not reflected in the fines administered.
- **Lack of rehabilitation**: taking the necessary steps to ensure sustained compliance can be costly and companies may find it more advantageous to treat fines as recurrent business losses rather than address non-compliances, especially if non-compliance results in large financial gains and fines imposed are insufficient to negate these financial benefits.

2.4.3 Using criminal courts effectively

In the UK, as in South Africa, there is a heavy reliance on criminal prosecution as the main sanction for individuals or businesses unwilling or unable to comply with legal obligations.

(Macrory, 2010: 37) However, criminal prosecution is not necessarily the most appropriate sanction to address environmental non-compliance, remedy damage caused, or change behaviour.

Indeed, Macrory (2010: 48) has found that criminal prosecution can be ineffective for a number of reasons:

- Criminal sanctions often do not constitute a sufficient deterrent to the 'truly' criminal or rogue operators, as the financial sanctions (i.e. fines) imposed in some cases are too low to be a sufficient punishment;
- Criminal prosecution may be disproportionate where there has been no intent or wilfulness, although a formal sanction, as opposed to simply advice or a warning, may be appropriate and justified. However, authorities may not have any alternative in their enforcement toolkit and thus prosecute, even where a different type of sanction may be more effective;
- Some offences are not addressed at all, due to the costly and time-consuming nature of bringing criminal proceedings;
- Where being prosecuted is regarded as part of the business cycle, criminal convictions for non-compliance have somewhat lost their stigma. This partly stems from the fact that there is little differentiation in the way strict liability offences committed by legitimate business, and the deliberate flouting of the law by rogues is prosecuted. And finally,
- The impact of the offence on the victim may not be fully explored, as the focus of criminal proceedings is on the offence and the offender.

Macrory (2010: 41) recommends that the following actions be implemented in order to increase the effectiveness of criminal courts for regulatory offences:

- Draft sentencing guidelines for cases of regulatory non-compliance;
- Prosecutors should make clear to the court any financial benefits resulting from non-compliance as well as the policy significance of the relevant regulatory requirement;
- Prosecutions in particular regulatory fields be heard in designated Magistrates' Court where appropriate;
- Provide specialist training for prosecutors.

He also recommended that UK courts consider alternative sentencing, which could be of high relevance to South Africa, including:

- Profit orders: where the profits generated from non-compliance are clear, criminal courts may require payment of such profits, in addition to any fine that may be imposed (Macrory, 2010: 43);
- Corporate rehabilitation orders: in addition or in place of any fine imposed, criminal courts may impose a period of monitoring of the activities, policies and procedures of a business in order to rehabilitate the offender and ensure that concrete steps are taken to address the company's poor practices and prevent future non-compliance, with a view to organisational reform. Failure to comply with the order would lead to the offender being brought back to court and receiving alternative sentencing. (Macrory, 2010: 124-125)
- Publicity orders: in addition or in place of any fine imposed, criminal courts may impose reputational sanctions, such as publishing a notice stating the background to the offence

and the steps taken to remedy and prevent repetition which can have more of an impact than financial penalties. (Macrory, 2010: 129)

Macrory argues that some cases of non-compliance, involving carelessness or negligence for example, are better suited for administrative sanctions (fixed or variable) than criminal proceedings where a sanction is required because of harm caused or financial gain made.

2.4.4 Thinking outside of the box: alternative measures and hybrid solutions

Given the resource intensity and capacity constraints hindering effective and prompt prosecution, it is necessary to give the regulator a range of sanctions which do not require the intervention of a criminal court, such as the use of enforceable undertakings and monetary administrative penalties. A few alternatives to prosecution are proposed here.

2.4.4.1 Extending the use of administrative monetary penalties

Fourie (2009) proposes the adoption of an administrative penalty system to complement existing criminal enforcement programmes in South Africa and fill in a gap in the range of enforcement measures available to regulators.

Although financial penalties have been shown to have significant positive impacts on compliance and effectively deter non-compliance (**section 2.4.2**), Fourie (2009) points out that, aside from S24G fines and admission of guilt fines, the use of financial penalties remains reserved to criminal courts. She argues that "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." (Fourie, 2009: 7) It was estimated that in the UK, 60 % of cases normally prosecuted would be replaced by administrative sanctions; thus, an administrative monetary penalty system would substantially reduce reliance on the NPA and criminal courts.

In the US, the EPA has fined corporate offenders the equivalent of several tens of thousands of Rands[5] for environmental offences (Fourie, 2009), colossal amounts by South African standards; and many fines have be agreed between the authority and the violator without the need for a hearing.

There is no reason to believe the South African regulated community would respond to fines in a different way. In fact, Fourie (2009) suggests that given the extent of environmental non-compliance in South Africa and the fact that the industry in the country is neither familiar with, or prepared for significant fines, it is likely to take more drastic action in response to fines.

In addition to improving compliance, the benefits of an administrative monetary penalty system could include empowering officials in the complaints procedure, who are familiar with environmental legislation and the impact of environmental offences, and accordingly reducing the burden on EMIs and other enforcement officials involved in criminal prosecution; eliminating competition with other crimes in the criminal justice system and

[5] In February 2009 for instance, BP was fined R 108 million for air quality violations at its Texas City refinery and had to spend R 54 million on a project to reduce air pollution in Texas City. (Fourie: 2009)

reach decisions quicker; and ultimately, this will result in more environmental violations being pursued and significantly more fines being imposed. (Fourie, 2009) Last but not least, such a system would enhance the reputation of environmental enforcement agencies like the Environmental Management Inspectorate.

In addition to the potential effects on non-compliance, financial penalties could contribute to prompting and reinforcing a shift in mindsets in the corporate sector, and the embracing of more sustainable business practices (cf. **Section 2.5**) which would ultimately lead to improvements in environmental quality.

2.4.4.2 The role of restorative justice

Restorative Justice is based on a philosophy that views harm and crime as violations of people and relationships. “It is a holistic process that addresses the repercussions and obligations created by harm with a view of putting things right.” (Macrory, 2010: 115) The focus is therefore not on the past, but on what needs to be restored and how to prevent harm in the future. This is determined jointly by those who caused harm and those who were affected by it, based on the needs and capabilities of all stakeholders involved.

Therefore, by concentrating on the harm caused and what can be done to make things right, rather than on fault and punishment, restorative justice has the potential to yield long term, mutually beneficial outcomes for both offenders and victims. (Macrory, 2010: 116)

2.4.4.3 Hybrid solutions

Macrory (2010: 109) recommended that the UK government consider introducing a combination of enforceable undertakings (i.e. legally binding agreement between authority and business to carry out specific activities to rectify non-compliance) and administrative financial penalties as an alternative to criminal prosecution. Both these measures would be new in South Africa and would have to fit in the compliance and enforcement strategy and capacity.

2.4.5 Improving the effectiveness of the compliance and enforcement regime: a strategic view

As Craigie et al. (2009a) argue, an effective environmental compliance and enforcement regime requires an integrated approach. This means moving away from the prevailing piecemeal approach, which focuses on various priority areas and relies heavily on traditional criminal and administrative measures.

Irrespective of the compliance theory adopted, an effective environmental compliance and enforcement regime requires incentives for those who want to comply and sanctions for those who do not (Hart, 1994), to achieve the best chance of success. It also requires transparency (e.g. known enforcement policy, disclosure of enforcement actions taken, offenders concerned, and their outcomes), which the annual environmental compliance and enforcement report achieves to a large extent in South Africa.

Essential components of an effective compliance and enforcement programme include (Craigie et al., 2009a, INECE, 2009):

- Requirements that are enforceable;
- Knowing who is subject to the requirements;
- Fair and equitable rules;
- Compliance promotion;
- Compliance monitoring;
- Responding to violations;
- Clear roles and responsibilities; and
- Performance evaluation and review of the compliance and enforcement programme.

Figure 5 recapitulates the main components for developing and implementing an effective sanctioning system.

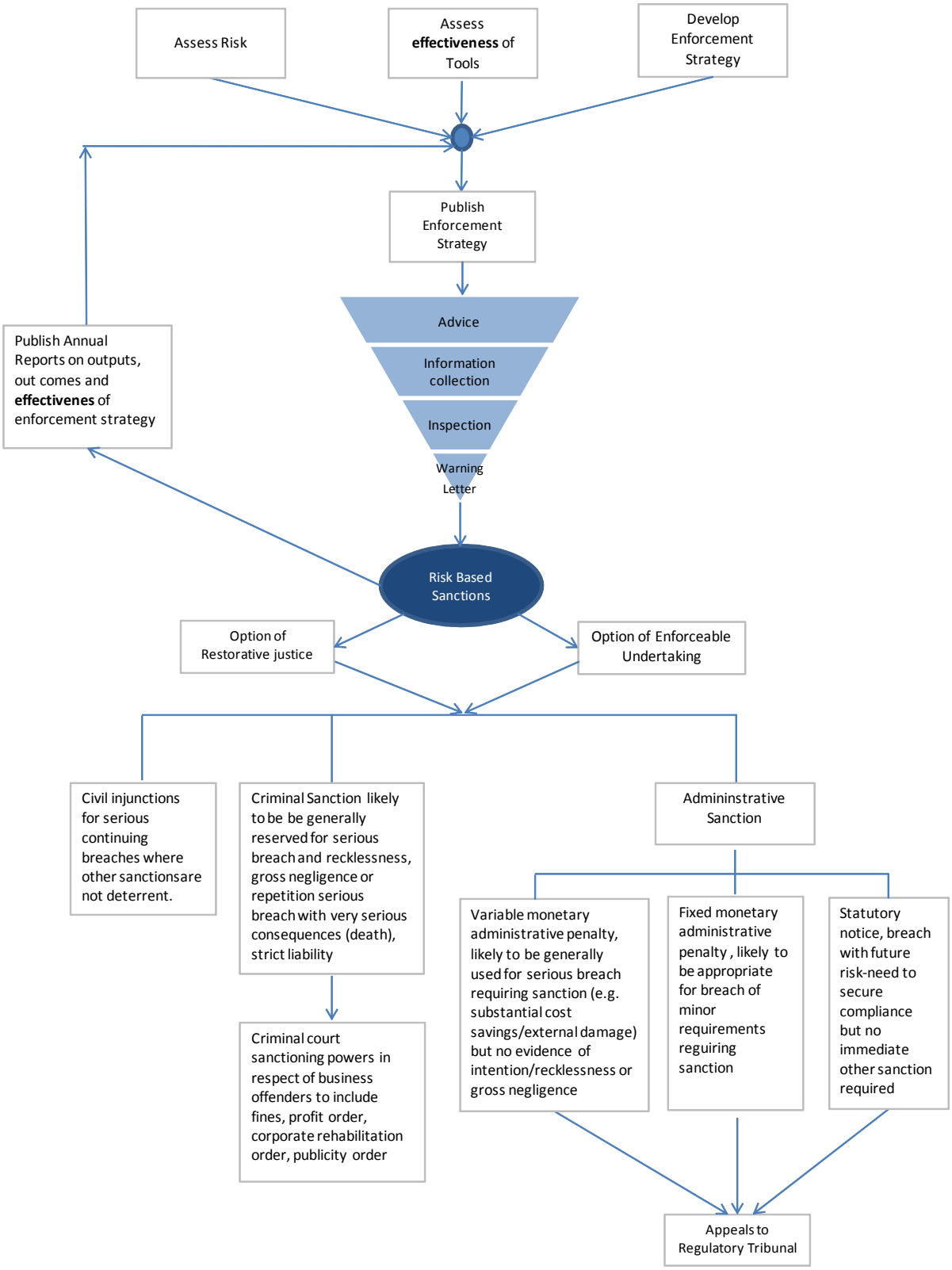

Figure 5: An effective sanctioning system (adapted from Macrory, 2010)

Lastly, in the context of the pressing need for economic growth and development in South Africa, the complementarities and synergies between environmental compliance and enforcement and economic development should be emphasised and enhanced. Indeed, compliance, like other aspects of corporate environmental management, can yield economic

benefits by stimulating innovation and promoting improved efficiency, and ensuring that compliant individuals and organisations are not unduly prejudiced compared to offenders. Furthermore, compliance can reduce the financial burden of remediation for the state. Finally, compliance contributes to the protection of natural resources on which we depend. (Craigie et al., 2009a: 61)

2.5 GAME CHANGERS: RECENT DEVELOPMENTS IN ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT IN SOUTH AFRICA

Corporate non-compliance has been significantly affected by recent developments in environmental and corporate law, as well as international trends putting the spotlight on companies' environmental performance.

As a matter of fact, in the corporate world, environmental compliance is less and less viewed as a financial cost and an administrative burden and increasingly envisaged from a risk perspective, whereby non-compliance can lead to costs, liability, and generally impact on business profitability by affecting the organisation's image and competitiveness. (Fet, 2002) This relatively new outlook is rapidly gaining ground in South Africa and internationally and has manifested itself through the exponential uptake of Environmental Management Systems (EMS) (ISO World, 2007), disclosure of environmental performance and legal compliance in sustainability reports (Antonites and de Villiers C.J., 2003, de Villiers and Barnard, 2000, de Villiers and Lubbe, 2001, KPMG South Africa, 2001 and 2006, KPMG International, 2008, GRI, 2010), and the adoption of labelling schemes, carbon disclosure projects, and product stewardship programmes, *inter alia*.

This trend is the result of a combination of factors, ranging from increased awareness of human impacts on the environment and tighter regulatory controls, down to stakeholders expectations of ethical corporate behaviour, and investors' growing sensibility to sustainable business practices.

In practice, this has meant that approaches to corporate environmental management have evolved from reactive approaches, where short-term interventions, representing temporary add-on costs, are initiated to respond to social legality threats, to preventative measures, whereby business operations are re-evaluated and reformed in order to incorporate environmental considerations; to a proactive approach, in which the impacts of corporate activities are analysed in relation not only to the environment, but also in relation to the company's broader social and economical role. (Howes, 2005 and Raufflet, 2006)

Some of the drivers for improvements in corporate environmental compliance are discussed below.

2.5.1 A tighter regulatory framework and stricter enforcement

Until the NEMA EIA regulations came into force in 2006, very few criminal prosecutions took place for development and land use cases, due to, *inter alia*, "the lack of capacity and investigative expertise within environmental departments law enforcement agencies and the prosecuting authority; the realisation that the criminal process did not address environmental

damage; the insignificant penalties available ... and other political priorities." (Craigie et al., 2009b: 86) Massive efforts have been made to address these challenges and as a result, criminal prosecution is a much more viable option today than it was ten years ago, and progress is being made on an ongoing basis to strengthen criminal enforcement.

Indeed, steady growth in the number of EMIs has been associated with improved compliance monitoring and enforcement, and thanks to the DEA and the DoJ's Justice College pulling their resources and expertise together to strengthen capacity in the NPA and the courts, there are progressive improvements in the way environmental crime is dealt with in court. (see **section 2.3**)

In addition, the DEA is constantly reviewing the effectiveness of its compliance and enforcement strategy; reporting in the form of the NECER, which has been published for the past five years is notably an important tool to track progress and identify problem areas. The 2011 compliance and enforcement report for instance states that the approach adopted in relation to industrial compliance and enforcement (i.e. allowing facilities a period of time to come into compliance) has not achieved the desired results and enforcement action, both administrative and criminal, has and will take place at those facilities. (DEA, 2011b: 5)

2.5.2 Stakeholder scrutiny and an increasingly conscious business environment

The current business environment is characterised by increased scrutiny by stakeholders. Concepts of 'corporate governance', 'corporate social responsibility', 'triple bottom line', 'social licence to operate', and terms such as accountability, transparency, efficiency, and ethical corporate practices have crept into the business jargon and are increasingly firmly entrenched, if not in day to day business operations, at least in the minds of stakeholders, including shareholders, investors, customers, credit institutions, regulatory agencies and the public, and have accordingly given rise to certain expectations from these stakeholders.

As a result, negative publicity concerning environmental mismanagement can cause a company's customer base to dwindle, alienate host communities, result in loss of market share, and induce closer, more suspicious scrutiny by regulators. (Thornton et al., 2005: 264) Corporate concern for maintaining a reputation as a good environmental citizen may explain why many companies nowadays regard "overcompliance" with regulatory obligations as a good business strategy (Mehta and Hawkins, 1998).

In line with pressures from stakeholders, the business environment has also evolved to become more conducive to sustainable business practices, by creating incentives to improve environmental performance and constraints to reduce environmental risks.

Indeed, financial institutions now include environmental risks in their assessments of loan requests, and environmental compliance may be a condition to have access to finance (OECD & EIRIS, 2003).

Corporate governance is also an increasingly important factor in the current business environment. The King code of corporate governance aims at ensuring transparency and

accountability within companies and emphasises the importance of risk management, sound corporate governance structures and the triple bottom line, in order to conform to international best business practices. (Institute of Directors, 2009) Corporate governance was institutionalised in South Africa by the publication of three consecutive King reports (King I in 1994, II in 2002, and III in 2009) and the principles contained in the King reports have been adopted by and entrenched in the 2008 Companies Act.

The emergence of ‘ethical’, ‘sustainable’ and ‘socially responsible’ listed companies on stock exchanges has also contributed to provide incentives for improved environmental performance. Indeed, after the FTSE4Good, and the Dow Jones Sustainability Index, the Johannesburg Stock Exchange (JSE) Socially Responsible Investment (SRI) Index was launched in 2004, in response to the demands of a growing number of investors who scrutinise the environmental and social impacts related to the business of listed companies. In line with the King code of governance, the JSE SRI index advocates principles of transparency, accountability, responsibility and fairness, and is specifically intended for companies which have integrated the triple bottom line approach in their business activities.

These external drivers, which entail forced environmental responsiveness, are supplemented by internal motivations, such as avoiding legal liabilities, increasing competitiveness, opening market opportunities, and putting into action ethical values, which push towards voluntary implementation. (Tutore, 2010). Berry and Randinelli (1998) argue that environmental sustainability has now become a value embraced by most successful multinational companies.

3. METHODS

This research is largely of the pre-structured type and follows a classical dialectical form of argumentation, testing the following hypothesis: 'S24G has been beneficial to compliance', in order to assess the impact of S24G on compliance. Examining the underlying causes of non-compliance and potential motivations for abuse of S24G provisions on the other hand involved elements of unfolding, emerging research. The research design and choice of methods reflect these characteristics.

3.1 RESEARCH DESIGN

This research involves a combination of quantitative and qualitative research methods and consists of the collection and analysis of statistical data, document review and content analysis as well as survey research (interviews).

3.1.1 Choice of case study

It had originally been envisaged to conduct this research across three to four provinces[6], in the view of carrying out a comparative analysis. However, it rapidly became evident that insufficient financial resources and time constraints, in addition to anticipated data collection problems would not allow for such a broad scope.

The scope was thus narrowed down to one province. The Gauteng province was chosen for the following reasons:

- The S24G Unit at GDARD has kept records of S24G applications since 2005 and is widely considered to have the best quality and most consistent dataset available.
- Gauteng has processed many S24G applications and consistently records the highest fines collected (see **Chapter 4**).
- From an administrative and institutional point of view, a dedicated Section 24G Unit has been set up in Gauteng in 2007 under the compliance and enforcement directorate[7], capacity has been built over the years, and a certain degree of institutional memory exists.
- Last but not least, Gauteng is the economic heartland of South Africa and therefore represents a region high level of economic activity and resultant pressure on natural resources and conservation.

3.1.2 Scope

S24G applications for NEMA listed activities (i.e. activities listed in the NEMA EIA regulations and commenced on or after 7 July 2006) are the focus of this research. S24G applications for ECA listed activities (i.e. activities listed in the ECA EIA regulations and commenced before 7 July 2006) are mentioned for completeness and historical context, but not elaborated on.

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[6] S24G applications are primarily dealt with at provincial level. The National Department of Environmental Affairs only deals with a very small number of applications, for projects of national relevance or entities such as Eskom for instance.

[7] Other provinces have not always set up specialised/dedicated units to handle S24G applications and S24G applications are often processed by officials in the impact assessment line function.

The rationale behind this is that this research aims to provide insights into current challenges experienced with S24G with the view of providing the necessary background and information to reflect on ways to approach offences more effectively in the future.

ECA applications consist for the most part of existing activities (i.e. commenced before 7 July 2006) for which much less can be done from a compliance and enforcement perspective and are thus irrelevant to this objective.

3.1.3 Statistical data

Statistical data was used mainly to inform and complement qualitative data collection and analysis. The data obtained from GDARD's S24G unit consisted of the S24G registers for NEMA and ECA related applications for the period 7 January 2005 to 31 December 2010, as well as a record of all fines issued and paid between July 2007 and December 2010. The registers contain information pertaining to each individual application, including the reference number, date of application, topic of investigation, location of the unlawful activity, as well as the status of the application (e.g. awaiting environmental assessment report, request for additional information, environmental authorisation issued, matter referred to prosecutions etc.).

This data served to provide a comprehensive account of the state of S24G applications in the province, as well as to identify trends and patterns and highlight unforeseen issues and new areas of research to be explored further during interviews.

3.1.4 Interviews

In order to obtain further insight into the various aspects of the research, interviews were conducted with government officials involved in compliance and enforcement activities, particularly related to S24G.

Material from interviews constitute the core of this research and has been essential to shed some light on complex issues such as the underlying causes of non-compliance and potential motivations for violation of the law.

Semi structured, in-depth interviews were conducted and brought out a rich understanding of the application process, circumstances surrounding applications and challenges encountered at an operational level in the Department. The material from these interviews was used to extract qualitative data needed to develop an analysis of the opportunities and challenges associated with S24G in relation to compliance.

Consideration was given to incorporating the views of other stakeholders, such as Environmental Assessment Practitioners (EAPs) and developers, to the research, conditional on relevance, relative value, and feasibility. However, not counting the time and cost implications, little value was expected to be added from such interviews based on informal discussions with EAPs and other stakeholders. Furthermore, implications for the validity of findings were deemed marginal (see **section 3.3**).

3.1.5 Content analysis

The study of documents and records on environmental compliance and enforcement, as well as the environmental authorisations and directives issued by the Department in terms of S24G, supported the interpretation and analysis of the findings from the survey research and statistical analysis.

In particular, the analysis of the National Environmental Compliance and Enforcement Reports produced over the past five years provided some context on the nature, scope and extent of non-compliance in South Africa and allowed for some degree of comparison between Gauteng and the other provinces, thus providing an indication of the extent to which findings could be generalised to other provinces (cf. **section 3.3**).

3.2 PROCEDURE FOR DATA COLLECTION

Extensive communication and consultation took place with Department officials during the research planning and implementation phases. Initial contact was made with the S24G Unit in December 2010 to outline the objectives of the research project and proposed research plan, request input and guidance in that regard, establish what data was available and confirm the procedure to access it. Potential informants to be interviewed were also identified at that stage. Data collection commenced in February 2011.

3.2.1 Departmental records

Very little data was readily accessible and the recommended approach to obtain information was to formally request the data through an application in terms of the Promotion of Access to Information Act, 20 of 2000 ('PAIA request').

This was done in February 2011, two PAIA requests were sent to the Department's PAIA administrator on 1st February and 15th February 2011 respectively, requesting the following information:

a) Details of all Section 24G applications received between 7 January 2005 and 31 December 2010.
    - The applications should be divided between ECA applications and NEMA applications
    - Each application should include the following details:
        - Activities applied for.
        - Name of applicant (will not be divulged or published).
        - Type of applicant (public/private sector, organisation/company, individual...).
        - Project value (if available).
        - Processing time for issuing fine and finalisation of application (where application finalised).
        - Amount of fine administered.
        - Whether application is the result of a voluntary process (applicant came forward voluntarily) or as a result of a directive/compliance notice etc. (authority instructed applicant to apply).
        - State of advancement of activities when application is lodged (if known)

- Whether activity(ies) are allowed to continue while the application is being processed and why.
- Whether the finalised application resulted in an environmental authorisation, withdrawal, referral to prosecution, instruction to cease/demolish activity or other.

b) All Records of Decision (RoDs) issued by the Department for NEMA S24G applications (i.e. no ECA applications) from 7 January 2005 to 31st December 2010.

c) All monthly reports submitted by the S24G unit from 7 January 2005 to 31st December 2010 showing *inter alia* the number of applications received and finalised during the course of the month for ECA and NEMA applications.

d) Outcomes of all applications for environmental authorisation received between 7 January 2005 and 31 December 2010.
This refers only to "first time" applications for which an EIA or BA is conducted and does NOT include amendment applications and applications for rectification.
The record should:
- Indicate how many applications were received during the period and how many were finalised; and
- Indicate, for finalised applications, how many authorisations were granted (in 2005, 2006, 2007, 2008, 2009 and 2010), how many authorisations were refused (also per year), or any other decisions (to be specified) taken in respect of the applications.

A letter from the University was also forwarded to the PAIA administrator, confirming registration for the degree of Masters in Environmental Management, research topic, and providing the contact details of my supervisor.

Hard copies of the ECA and NEMA S24G registers containing part of the information requested in item a) above were ready for collection within a month. However, the information provided was insufficient for statistical analysis. This was conveyed to the PAIA administrator in a telephonic conversation and in writing, who then raised the issue with the S24G unit directly.

Officials from the S24G Unit, who were responsible for compiling the information, then requested a meeting in order to clarify the purpose of the information requested, how it would be used, and generally to obtain a better understanding of the research objectives and process (including how officials themselves would be involved). The meeting took place in March 2011 at GDARD's offices in Johannesburg. Concerns were notably raised regarding the sensitive nature of some of the information requested (e.g. identity of offenders) and associated liability of the Department. In addition, officials emphasised that the information

requested would take some time to compile and therefore there would be delays in responding to the PAIA request[8].

The necessary clarifications were given during the meeting and some concessions were made regarding the amount of information required in order to avoid potential liability issues and alleviate the additional workload engendered by the PAIA request. It was thus agreed that the data to be provided would be limited to the records already available and would not require any information or detail to be added, and would exclude the identities of S24G applicants. On that basis, officials estimated that the requested information would be available within one month (i.e. April 2011). It was also reiterated that interviews were part of the research design and that cooperation of S24G officials in that regard would be requested at a later stage; officials agreed in principle to allocate some of their time for that purpose.

Follow up on progress with PAIA requests was conducted telephonically and by email over the following 7 months.

Following concerns raised about the accuracy of data provided on the fines and directives issued (see **section 3.4** below), a third PAIA request was forwarded to the Department's information officer, requesting the following information in respect of NEMA Section 24G applications received between 7 July 2006 and 31 December 2010:

1. Fines issued over the period:
   - Amounts of fines issued and paid over the period,
   - number of appeals, and
   - outcomes of these appeals (i.e. fine reduced/increased/unchanged).

2. Number of directives (i.e. negative RoDs) issued over the period

3. Copies of directives or case numbers if copies not accessible.

At the time data collection was finalised (November 2011), most of the information requested had been provided, with the noteworthy exception of records of directives issued as per items 2 and 3 above, as well as 11 copies of environmental authorisations as per item b) above.

3.2.2 Interview strategy

Qualitative data was collected during 12 months of mostly informal interviews with informants, which took place through telephonic conversations, emails and face to face meetings. Key informants were identified from the outset and were directly involved in compiling the information requested through PAIA. As a result, ongoing communication took place with those officials (see **section 3.2.1).**

A round of formal interviews took place in August 2011. Informant interviews involved two officials directly involved in processing and reviewing S24G applications (project level) as well as the Director: Enforcement (strategic level). All three officials interviewed had been

[8] PAIA officers have 30 days to respond to PAIA requests in terms of the Act and this response time can be extended once.

working in the directorate for three years or more and were involved with S24G from a relatively long time; institutional memory was therefore a plus, in addition to a fairly decent degree of historical perspective. No sampling technique was required as the informants selected covered virtually all officials working with S24G applications with the necessary knowledge and experience.

Informants were interviewed individually in their respective offices in Johannesburg, during office hours and on a weekday. All interviews were recorded, an agreement with each interviewee had been reached in that regard beforehand. The interviews lasted between forty five minutes and one hour and a half; assurance was given to informants that interviews would not exceed 1h30 in order not to impose on their time and courtesy. Informants were very welcoming and open, and willing to provide me with the material I needed.

3.2.3 Consent, access and participants protection

It emerged much later in the research, once the data collection phase had been completed, that the prescribed procedure for conducting interviews with Department officials had not been followed. This was brought to the attention of the researcher by an official from legal services during a routine follow up on the PAIA requests. The procedure notably involved formally applying through the appropriate channels and obtaining the approval of the Head of Department before proceeding with the interviews. However, this was neither indicated during the introductory meeting, nor while interviews were being organised and conducted. The official in question also suggested that the interviewees were not fully aware of how and where the information would be used, notably of the fact that it may be used in the public domain.

This procedure was admittedly, albeit involuntarily, bypassed in the organisation of formal interviews, and note has been taken for future reference that such a procedure does exist and should be adhered to in conducting interviews. Nevertheless, all efforts were made to make the data collection process as transparent and predictable as possible, in particular, the purpose and objectives of the research were clearly spelt out to interviewees in writing prior to scheduling the interviews and reiterated at the beginning of each interview, and a list of questions was also sent to officials one week before the interviews to give them a sense of the information that would be required.

In light of this procedural oversight however, and due to concerns expressed around liability (both personal and of the Department) (see **section 3.2.1**), a conservative approach was adopted in the transcription and use of interview material in the interest of participants' protection (e.g. no naming, direct quotes, etc.). This however does not diminish in any way the accuracy, reliability and credibility of the data collected, which based on the interview method and strategy applied remains high.

3.3 DATA ANALYSIS

3.3.1 Statistical data analysis

For the purpose of this research, descriptive statistics were used to analyse quantitative data and results were represented graphically for more clarity and reader friendliness.

Descriptive statistics capture a large set of observations and provide an idea about the data set by presenting its basic characteristics. The measures of central tendency like average, median, and mode all fall under descriptive statistics. Data distributions, such as normal distribution (e.g. representation of applicants) and corresponding standard deviations (e.g. variation across applications of the fine amount issued for one particular activity) are another branch of descriptive statistics.

Microsoft Excel was used to structure the data provided (i.e. S24G register as well as data provided on fines issued and EIA applications) and present it in a clear and coherent manner, and extract meaningful patterns and trends.

It was originally intended to apply a regression analysis to the data. The primary objective of a regression analysis is to determine a relationship between two sets of data and to explain the variation of one parameter vs. other parameters (e.g. do companies apply more often for one type of activity rather than the other?). This is done by measuring how the typical value of a dependant variable changes when any one of the independent variables varies, while the other independent variables are fixed. In order to attempt a regression analysis that allows for the definition of relationships, it is important to decide which parameters in a regression analysis are determinants of a relationship. Taylor (1977), states that there are three aspects generated by a regression analysis that are determinant of relationships between two sets of data, namely:

1. Correlation coefficient: indicator of strength of a linear relationship (between -1 and +1);
2. Coefficient of determination: This is the square of the correlation coefficient, it measures the proportion of variability in one variable that can be accounted for, determined from predicted or explained by variability in the second variable; and
3. Regression coefficient: measures the amount of change (gradient of the regression line).

Applying a regression analysis to the dataset was not possible however due to a lack of detailed data.

3.3.2 Reliability of data

As far as the records provided by the Department are concerned, their reliability depends on how well they were kept. Certain assumptions had to be made in that regard, based on criteria such as the consistency with which records were kept and their completeness. It was thus assumed that records were reliable; nevertheless, the main risk for this research is that the S24G register provided was not fully up to date. This risk was mitigated by ironing out any uncertainties during interviews (e.g. confirmation of number of referrals to prosecution).

The reliability of interview material is complicated to assess objectively. Indeed, even though informants are considered to be highly reliable and knowledgeable, a number of pitfalls and shortcomings are associated with informant interviews. In particular, there is considerable controversy about the real meaning of verbal communication, and although most people try to be truthful in what they report, it is worth keeping a few points in mind:

- The material supplied by informants may be unreliable because they may not be as knowledgeable as they seem, because they do not want the information to fall into the wrong hands; because it reflects unflatteringly on them; because it could be used against them; or because they are deliberately attempting to mislead the interviewer.
- Communication can also be affected by the respondent's feelings about the interviewer: small clues to status and attitudes can make the difference between cooperation and reliability or refusal to cooperate.
- What is reported is filtered through the informant's position in society, including age, gender, education etc., as well as their values and opinions.
- Individuals' recollections of events are subject to all the biases of unsystematic observation, rationalisation and memory decay. However, as Peil notes: *"[Respondents'] most important contribution is their well-considered interpretation of complex events*." (Peil, 1995).

Despite these pitfalls, the reliability of information collected through interviews is considered high due to the following reasons:

- As much information as possible about the informants, their role and experience in dealing with non-compliance and more particularly S24G applications was gathered in order to evaluate the accuracy of the information, which on that basis is regarded as highly accurate.
- With the exception of a few questions along the lines of: "what do you think of..."/what is your opinion on...?" most questions related to objective facts and figures and did not involve subjectivity, perceptions or sensitive topics which could have altered the informants' answers to questions and recollection of events.
- The informants' responses were found to be internally consistent as well as consistent between each other.

3.3.3 Validity of findings

The potential pitfall of conducting interviews with officials on the processing and decision-making side only was that the researcher would not be able to capture the full story and that the absence of views from EAPs and developers would be detrimental to the accurate analysis of the research problem. It appears this pitfall was largely avoided, as informal discussions with other stakeholders, including EAPs, as well as participants at the 2011 International Association for Impact Assessment (IAIA) conference where preliminary findings were presented, largely corroborated the findings and analysis. In addition, this research does not claim to reflect the views of stakeholders which were not consulted in the data collection process. Validity is therefore regarded as high.

3.3.4 Generalisation of findings

The extent to which findings can be generalised to other provinces is difficult to determine. Even though it is highly likely that similar challenges are encountered in other provinces, the way unlawful activities and S24G applications are dealt with in Gauteng appears to be distinct in several respects (e.g. much higher fines, dedicated S24G Unit within the enforcement branch of GDARD etc.). In addition, the province's characteristics may set it

apart in a number of ways (e.g. economic hub with high rate of development, relatively fewer sensitive/conservation areas compared to other provinces etc.).

Thus, whereas similarities do exist, the situation in Gauteng with regard to non-compliance, enforcement and administrative capacity is unique in many regards, which make generalisation of findings for the most part undesirable. Recommendations though can be applied across all provinces, where appropriate.

3.4 LIMITATIONS

A few unexpected setbacks and shortcomings were experienced during the data collection and analysis stages and have implications for the research. These are described below.

3.4.1 Access to information

Not all data could be obtained (see **section 3.2**), despite numerous and persistent attempts to secure the data requested (including lodging an internal appeal on 20 October 2011 to obtain copies of the remaining RoDs). Data from interviews supplemented statistical data and bridged the gaps in many instances. However, the information obtained from interviews is mainly of qualitative nature and did not suffice to fill in all the gaps in the quantitative data; the scope of the research was adjusted where necessary. With the exception of directives issued, where no definite answer was provided as to their existence and number, these gaps did not involve any critical information and had no material consequences for the value and validity of the research.

3.4.2 Accuracy and reliability of information

Aside from the reliability concerns inherent to the methods used and data collected detailed in **section 3.3**, the following limitations were identified with respect to the accuracy and reliability:

- Data was of insufficient detail to do regression analysis and determine correlations between variables and accurately quantify activities involved. Inferences were made where appropriate but may still not capture the full picture. Where this is the case, it is specifically mentioned in the relevant data analysis section.

- Where statistics from the NECER were used, their reliability, validity and consistency is subject to the constraints indicated in the respective NECERs, including absence of independent verification of figures provided and possible variations in format in which reporting institutions submitted their statistics. Some inconsistencies were detected from one NECER to another in the figures reported and may affect the reliability of the data (e.g. total amount of S24G fines collected in Limpopo for 2008/09 was reported to be R 987 203 in the 2008/09 NECER and 1 987 203 in the 2010/11 NECER), where this was the case, the latest figure provided was used.

The following chapters are the result of the application of the methods described above. **Chapter 4** presents an overview of findings, which are analysed and discussed in **Chapter 5**.

4. S24G APPLICATIONS IN GAUTENG: STATISTICAL OVERVIEW

This chapter provides an overview of key findings, focusing on the statistical data collected, and is intended to provide background and inform the discussion in **Chapter 5**. Unless otherwise stated this chapter deals with S24G applications related to NEMA listed activities, for the period from 6 July 2006 to 31 December 2010.

4.1 APPLICATIONS RECEIVED

1468 applications were received for ECA listed activities between January 2005 and December 2010, of which 1407 were received in 2005 alone. Most of these applications (1031) have been finalised (i.e. environmental authorisation granted, withdrawal of application or directive issued).

195 applications were received for NEMA listed activities and 52 finalised between July 2006 and December 2010 (**Figure 6**). The first NEMA EIA regulations were promulgated on 6 July 2006 and only one rectification application for NEMA listed activities was received during that year. The largest number of applications was received in 2008, this could be ascribed to the fact that the new legislation was becoming increasingly known and understood. The last two years seem to point to a decreasing trend, although it is in all probability too early to draw such conclusions.

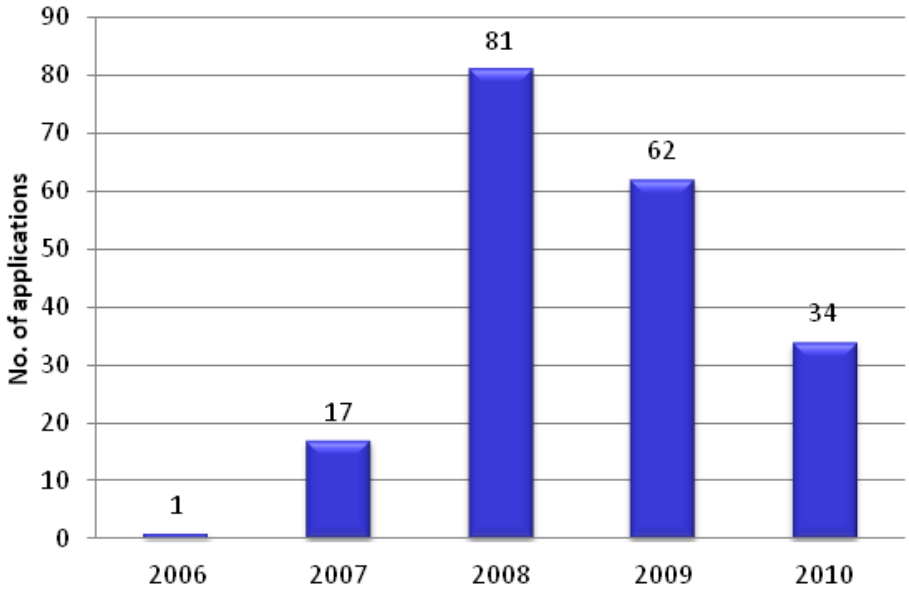

Figure 6: Number of S24G applications received for NEMA listed activities 2006-2010.

4.2 MOST COMMON SCENARIOS LEADING TO S24G APPLICATIONS

Interviews with officials in the S24G Unit revealed that most S24G applications in Gauteng result from non-compliance detection by enforcement authorities (i.e. EMIs), either prompted by complaints from the public or discovered during routine inspection activities. Once an offence in terms of S24F(2)(a) is detected (i.e. illegal development) the authority may advise the offender to apply for rectification.

A smaller portion of applicants come forward 'spontaneously' after having become aware through one way or another that the activity was undertaken illegally. This can occur when a property is being sold and liabilities are being assessed for example, or when applying for municipal services (where the environmental authorisation is requested), or can simply be the result of cynical abuse of the provision (i.e. deliberate flouting of the law).

Officials estimated that over 90% of cases were a result of ignorance of the law, or to a lesser extent negligence. A small proportion of cases are however acknowledged to originate from intentional offences. These are only estimates, and the extent of intentional non-compliance cannot be precisely determined as there are no ways of formally identifying and quantifying intentional offences. Nevertheless, officials have in depth knowledge of non-compliance issues and of the individual applications presented to them over the years and benefit from a fairly extensive institutional memory (cf. **Chapter 3**), and their estimates can thus be regarded as a fairly accurate indication of the extent of intentional non-compliance.

Cases of abuse of S24G were reported for both the public and the private sector. As one can expect, economic motives prevail for the private sector, notably in cases where time is of the essence and developments are undertaken illegally to meet rapidly growing demand, and increase production within a short space of time for example. In these cases, conducting a formal EIA and applying for authorisation through the normal channels could mean losing a major client or result in reduced market shares. This was for instance the case with telecommunications masts (see **section 4.4**).

In the public sector, service delivery imperatives are the primary cause for offences being committed, where basic services need to be provided to a new informal settlement for instance. No examples could be extrapolated from the data collected but I was personally involved in a S24G application in Mpumalanga in 2009, where a local municipality had undertaken an activity unlawfully, in spite of knowing the legal requirements. The unlawful activity was the construction of a drinking water pipeline which was destined to provide a reliable supply of drinking water to one of the local communities. This had to be done as a matter of urgency as the community concerned faced an erratic drinking water supply due to continuous failure of the existing pipeline. The Municipality was under pressure to expedite the upgrading of the water pipeline, initially scheduled for a later date, and the process of obtaining the necessary environmental authorisation had therefore not been initiated yet. It was thus decided to install a new pipeline, with the view of subsequently applying for rectification.

Cases of negligence are perhaps easier to identify in that assumptions can be made based on the size of an organisation, its resources and capacity. Large companies are thus expected to have sufficient resources and capacity to identify and comply with legal obligations, while smaller businesses and individuals may genuinely be unaware of certain legal requirements, and have more difficulties keeping abreast of rapidly changing environmental legislation.

In line with the various scenarios leading to an offence in terms of S24F, the CER (2011) created a typology of offenders:

- "innocent" violators are those who did not know and could not have reasonably known that they required an environmental authorisation, such as a member of a rural community without access to information about the legal requirements.
- Negligent offenders are those who should have known that there was a requirement to apply for environmental authorisation but failed to do so, or should have had better control over the subcontractors who illegally commenced an activity without authorisation being in place.
- Intentional offenders are by default those unable to prove that the offence was committed without the intention to do so. Repeat offenders would fall under this category.

4.3 PROFILE OF APPLICANTS

Data from the S24G register for NEMA applications shows that the vast majority of applicants belong to the private sector and 80% are companies (**Figure 7**). Within this category, most (over 85%) are large companies (i.e. proprietary limited), while the remainder are closed corporations.

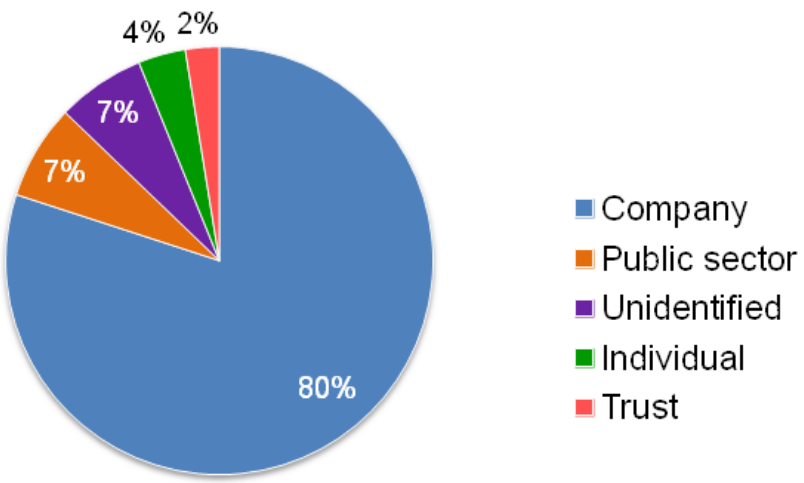

Figure 7: Representation of applicants

The relatively small proportion of public sector applicants may be somewhat unexpected, given the known difficulties that local government has with compliance. However, this can be explained by the fact there are three Metropolitan Municipalities in the Gauteng province which may be better capacitated than other local municipalities in the country, and their ability to maintain a good compliance record can accordingly be expected to be higher.

Some applicants could not be identified, due to insufficient data in the register, these are reflected under 'unidentified'.

4.4 ACTIVITIES INVOLVED IN THE OFFENCES

Figure 8 shows the range of activities applied for through a S24G process. Note should be taken that the graph below represents a skewed picture, due to the high number of applications for telecommunication masts. Indeed, over 30% of all applications received over

the period (July 2006 to December 2010) were for antennas, and all of them were from one single applicant. The continued prevalence of this particular activity (telecommunication masts were also a very common activity for ECA applications) can be attributed to the rapid growth of the cell phone and mobile internet market, which required antennas to be erected on a massive scale and over a short period of time.

In reality, there is no 'typical' S24G activity, and aside from antennas, there is a relatively even spread between the various activities applied for.

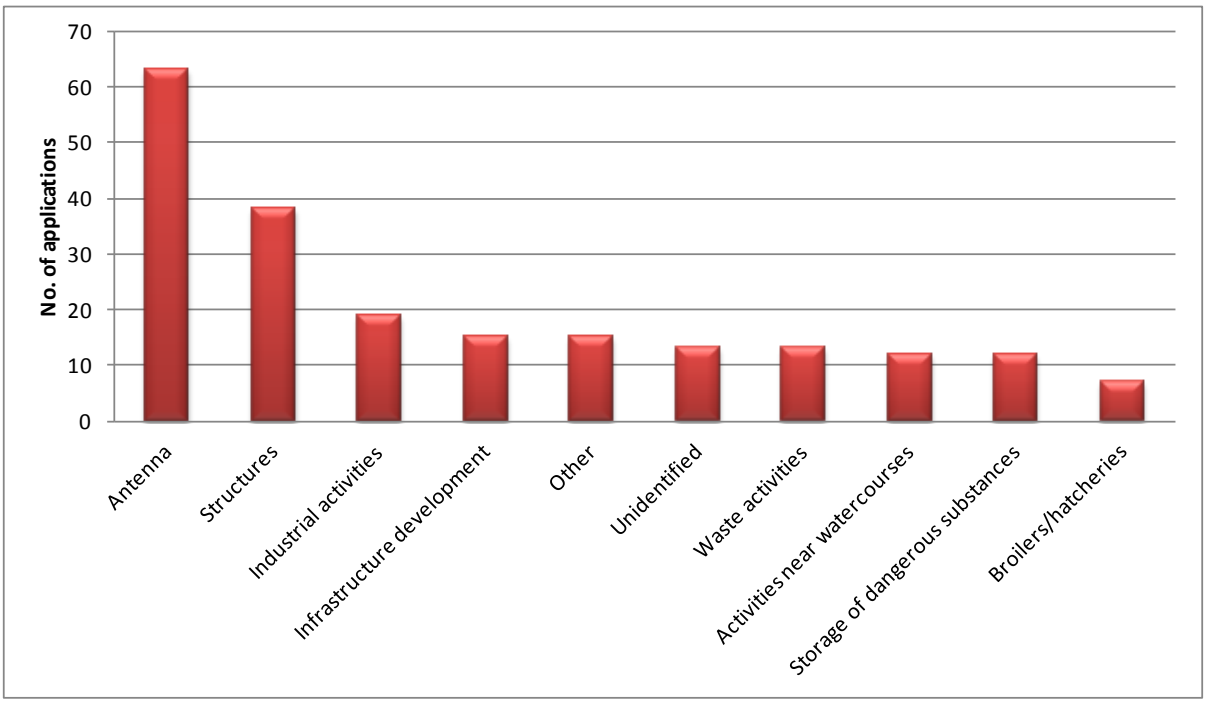

Figure 8: Activities applied for (NEMA listed activities only)

Activities categorised under 'structures' encompass structures for residential, retail, commercial, industrial, institutional and recreational purposes, such as housing developments, offices, schools, community centres, and shopping centres.

'Industrial activities' include furnaces and manufacturing plants amongst other activities, some of which require an atmospheric emissions licence.

'Infrastructure development' encompasses the construction of sewage/stormwater pipelines, roads, bridges etc.

'Waste activities' cover sewage treatment plants, storage of hazardous waste, and landfill sites, *inter alia*.

'Activities near watercourses' include any activities within the 1:10 year flood line or within 32m of a watercourse.

‘Storage of dangerous substances’ mainly involves storage tanks for fuel, notably for filling stations.

It should be noted that categories above are not mutually exclusive. For example, the construction of a road involving a river crossing would fall under the ‘infrastructure development’ and ‘activities near watercourses’ categories and therefore be accounted for twice, despite being the subject of a single application.

Due to the lack of available detailed information, inferences were made with respect to the activities involved where appropriate, but may still not capture the full picture. For example, where the S24G register referred to an “unlawful residential development”, only the structures category was triggered, but it is possible that the residential development was within 32 metres of a river, in which case “activities near watercourses” should have also been accounted for. Certain categories may be underrepresented for this reason.

No records are kept in the S24G register regarding the state of advancement of activities at the time applications are lodged. According to officials though, there are no rules in that regard, and applications are submitted at all stages of development, from earthworks and foundations, to fully operational activities. This is in contrast with applications for ECA listed activities, the bulk of which (95 %+) involve complete or operational activities, and in some cases even decommissioned operations.

4.5 FINES ISSUED/PAID

GDARD received in excess of R3.5 m in payments for S24G fines in the 2010/11 financial year (**Table 4**). This includes payments in respect of applications for both NEMA and ECA listed activities. The table and figure below shows the fines issued and paid in Gauteng over the past four years.

Table 4: Fines issued by GDARD for NEMA and ECA listed activities (source: DEA, 2009, 2010, 2011)

Gauteng	2007/08	2008/09	2009/10	2010/11
No. of fines issued	Not available	Not available	83	58
No. of fines paid	30	333	17	43
Total amount paid	R 4 440 330	R 8 408 905	R 5 898 000	R 3 597 370
Average amount per fine	R 148 011	R 25 252	R 346 941	R 83 660

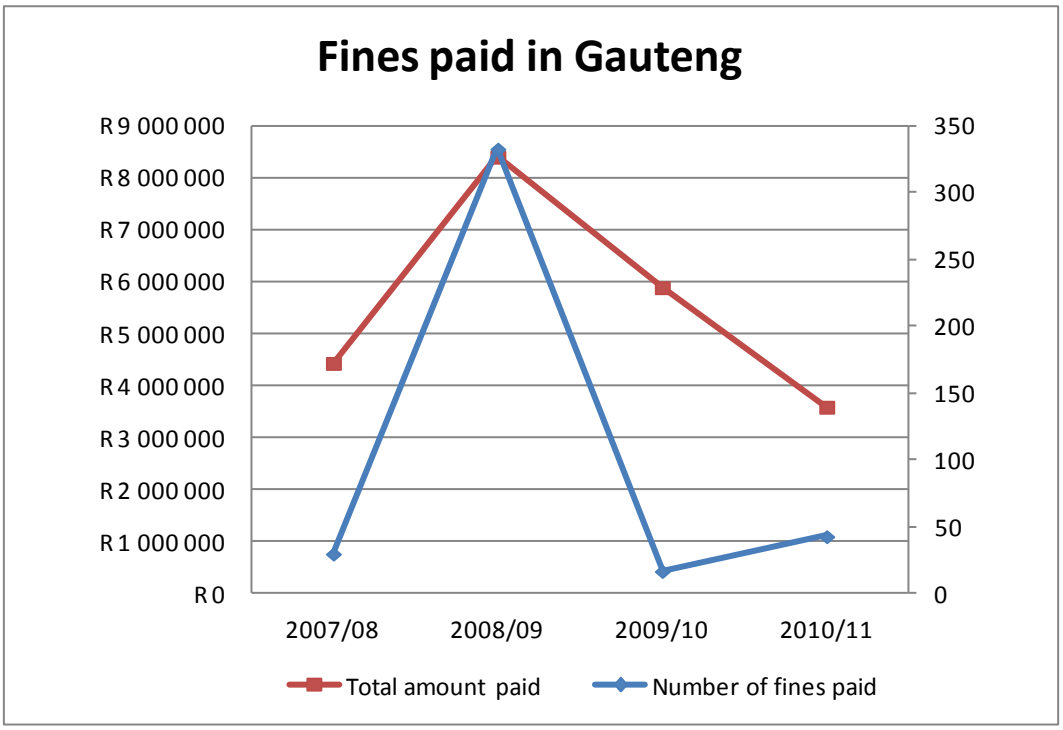

Figure 9: Fines paid in Gauteng for NEMA and ECA listed activities (source: DEA, 2009/10 and 2010/11)

It is worth comparing here the fines issued in Gauteng and in other provinces, and commenting on the vast difference in amounts fined **Figure 9**. Indeed, over the past five years, Gauteng consistently recorded the highest number of S24G fines issued and the highest amount collected through the issuing of S24G fines. **Figure 10** shows a comparison of fines paid in all nine provinces in the last three financial years.

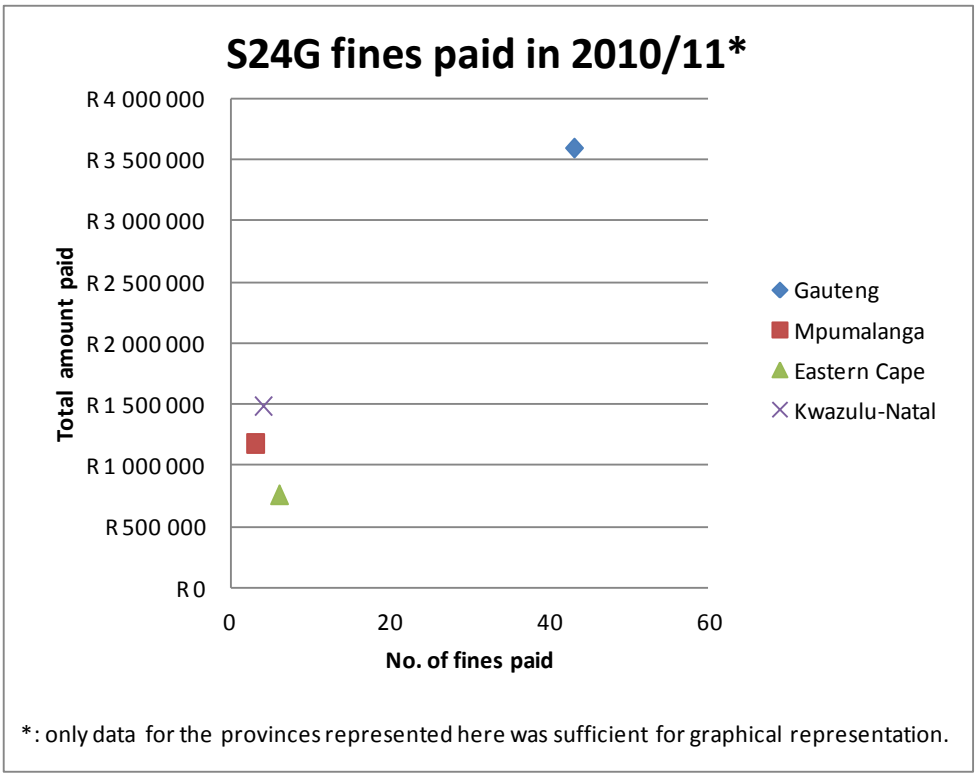

Figure 10: Comparison of S24G fines paid between provinces in 2010/11

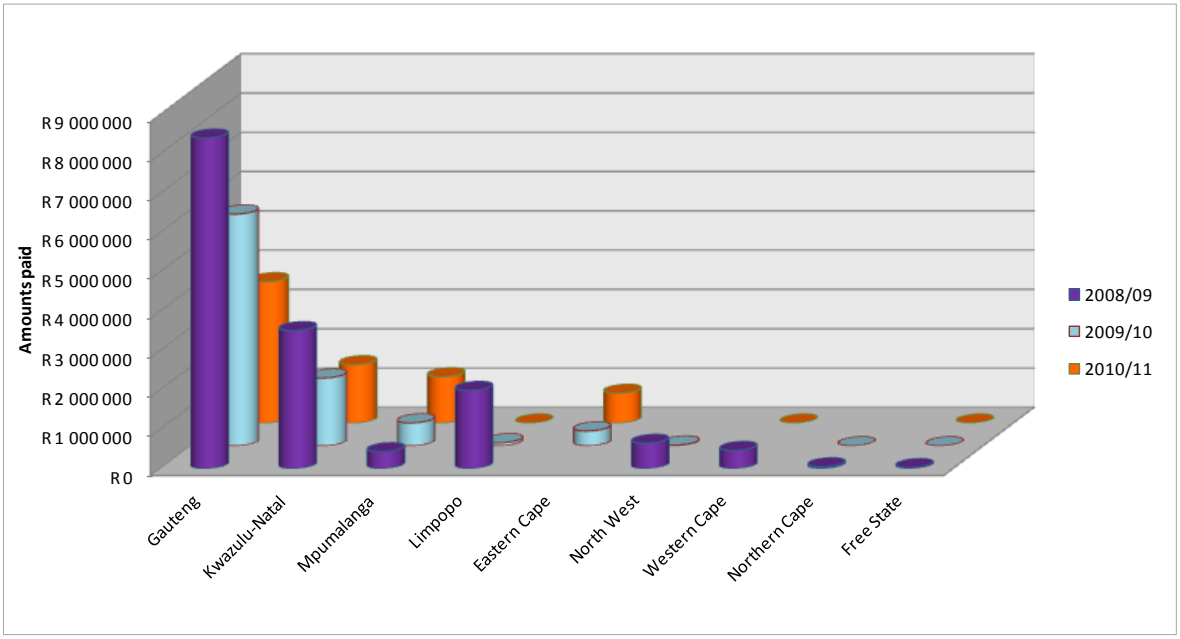

Figure 11: S24G fines paid per province

It is not possible to draw any conclusions from this as the number of fines is not always specified, and one can reasonably assume Gauteng concentrates an important proportion of developments in South Africa. It would nonetheless seem GDARD is exploiting the fine potential to a bigger extent than others. The latest NECER indicates that R 8 364 870 were paid in respect of S24G fines nationally in 2010/11 (DEA, 2011), of which Gauteng's contribution amounted to 43%. Gauteng has consistently been the largest recipient of payments made in respect of S24G fines. (**Table 5**)

Table 5: S24G fines paid nationally, 2007-2011 (source: DEA, 2009, 2010 and 2011)

National	2007/08	2008/09	2009/10	2010/11
No. of fines paid	707	440	53	Not available
Total amount paid	R 6 880 246	R 15 499 518	R 8 874 966	R 8 364 870
Average amount per fine	R 9 732	R 35 226	R 167 452	Not available
GP contribution to amount collected	65%	54%	66%	43%

The highest S24G fine paid to GDARD between 2006 and 2010 amounted to R778 500 and involved grading and blasting in a highly sensitive area for the purpose of the construction of a residential development.

Regarding fines appealed, data over the full period was not available and the following results are for the period from July 2007 to December 2010: 72 fines were issued in respect of NEMA listed activities over the period; 21 were appealed and 17 of those were reduced upon appeal. Fines were reduced up to 95% in that manner.

4.6 OUTCOMES OF APPLICATIONS

Approximately one quarter of cases were finalised between 2006 and 2010. 52 environmental authorisations were issued for NEMA listed activities over the period. Authorisations are usually subject to certain conditions and may cover the activities partially

or in full. Some applicants were required to demolish certain structures (notably within 32 m of a watercourse) before authorisation was issued.

There are no records of directives issued (i.e. negative record of decision) over the period for NEMA listed activities. Conflicting information was given during formal and informal interviews regarding the existence and number of such directives, attempts to clarify the matter through a formal PAIA request were unsuccessful.

14 out of the 195 applications were referred to prosecution over the period, however, the S24G unit does not have data regarding the outcomes of prosecution as this is the responsibility of a separate branch within the Department. Officials interviewed recalled that some of the applicants were prosecuted, notably where telecommunication masts were involved.

5. SECTION 24G AND ENVIRONMENTAL COMPLIANCE: OPPORTUNITIES AND CHALLENGES

This chapter discusses the findings presented in **Chapter 4**, and critically analyses them in light of the theoretical framework and practical context outlined in **Chapter 2**. In terms of the scope, this discussion applies to Gauteng and is exclusively related to S24G applications for NEMA listed activities (i.e. ECA applications are excluded unless otherwise indicated). The focus of this chapter is on the effectiveness of S24G. It assesses the extent to which this provision has contributed to improving compliance by addressing the problem of unlawful activities (**section 5.1**) and takes a close look at the growing concerns regarding whether, and in which way S24G may have negatively impacted on compliance (**section 5.2**), and contributed to undermining progress towards better environmental management and governance (**section 5.3**). It also suggests a number of key focus areas to address the challenges associated with S24G and improve compliance (**section 5.4**).

5.1 BENEFITS OF S24G FOR COMPLIANCE

5.1.1 Restoring compliance

S24G aims to restore compliance and eliminate illegal activities, either by issuing the required authorisation for the activity(ies) to proceed legally, or by directing applicants to cease illegal activities and rehabilitate. By providing a mechanism to render illegal activities legal and hence eradicate unlawful activities, where there was previously a regulatory void, S24G has, albeit artificially, brought about increased levels of compliance with NEMA and the authorisation law in particular.

In practice, the large number of applications finalised for ECA listed activities (over 70%) and growing number of applications finalised for NEMA listed activities (over 25%) demonstrate that compliance is being restored on an ongoing basis. In this sense, S24G has contributed to improving environmental compliance.

The number one reason at the origin of offences in terms of S24F(2)(a), and hence S24G applications, is ignorance of the legal requirements (cf. **Chapter 4**), whereby applicants simply do not know the activity(ies) undertaken require an environmental authorisation. The rectification process offers them an opportunity to restore compliance and ensure that offences are not committed again in the future.

5.1.2 Preventing future non-compliance

In addition to building awareness of the legal requirements for those offenders ignorant of the law, S24G of NEMA contains in theory adequate provisions to effectively deter future non-compliance. Indeed, the competent authority may authorise the activity and attach conditions to the authorisation, or direct the offender to cease the activity, either wholly or in part, and to rehabilitate the environment. Thus, in addition to the cost of the environmental assessment study, and an administrative fine of up to R1 million, the offender may also be required to demolish parts of, or the entire development, and/or rehabilitate the environment. Moreover, offenders are still liable and may be prosecuted at any time, which upon conviction can lead

to a fine of up to R5 million and/or up to ten years imprisonment in terms of S24F(4). Non-compliance therefore bears important risks for offenders.

Interviews with officials dealing with S24G also revealed that the administrative fine issued had in some cases had been crippling for offenders, some of whom had to take loans to pay the fine. Without being this debilitating, fines can still constitute an effective deterrent if they are for instance unexpectedly large. This happened in the case of antennas, where the same offender was in for a surprise after submitting 63 NEMA applications for rectification between 2006 and 2010. S24G applications for telecommunication masts were already common under ECA and offenders were typically subject to a 4-digit fine (the maximum fine for ECA listed activities is R100 000). However, the fines issued under NEMA were much higher and frequently over R100 000. As a result, the applicant received fines amounting to over R4 million in total in the same year.

Although officials interviewed generally considered the fines issued as an effective deterrent for non-compliance, they conceded that the extent to which the fine was a deterrent largely depends on the applicant. Indeed, while they may constitute a significant burden for individuals and small businesses, they may well be a minor expense for bigger companies. Whatever the case may be, Fourie (2009: 15) remarked that “the maximum administrative fine of R1 million [one of the highest fines in South African environmental legislation] caused some consternation amongst potential violators.”

In practice, the manner in which Gauteng authorities are dealing with S24G applications can reinforce the deterrence factor in many regards. Indeed, application for a S24G rectification is automatically followed by a pre-compliance and/or compliance notice directing the applicant to cease all unlawful activities. Construction thus has to be halted and no revenue can be generated from the activity(ies) unless express authorisation has been obtained. From an enforcement perspective, officials also emphasised the fact that the risk of prosecution is real, and that criminal action would systematically be taken for developments in environmentally sensitive areas.

Nevertheless, a number of pitfalls and shortcomings experienced since the introduction of the provision have raised concerns that the existence and implementation of S24G provisions may actually be detrimental to compliance. Some stakeholders (CER, 2011) notably contend that the provision is written in permissive language and the very term “rectification” minimises the seriousness of the offence and as a result, detracts from the value of environmental assessment, discredits the authorisation system and undermines the whole intention of NEMA. This argument is discussed below.

5.2 PITFALLS AND SHORTCOMINGS OF S24G

A number of challenges have emerged and some perverse effects have been observed over the past six years of implementation of S24G provisions. Key issues in that regard include:

- Abuse of S24G provisions and repeat offenders;
- Fine amounts and transparency in their calculation;

- Perception that authorisation is always granted; and
- Perception that the risk of prosecution is low for offenders applying for rectification.

Issues directly related to the above include:

- The extent to which S24G contains sufficient provisions to constitute an effective deterrent for potential offenders; and
- The inadequacy of S24G to deal with different levels of fault.

Ultimately, the extent to which S24G is consistent with the principles of NEMA is questioned.

These issues are discussed in detail in the following sections.

5.2.1 Abuse of S24G provisions: an 'inconvenient truth'

> *"The Section 24G process is actually a tool that's used by the developer to develop in a sensitive area, especially if he feels he won't get authorisation from the outset. Bribes are paid by the developers to the officials and the development is inevitably allowed to continue. The defence of the developer has become known as the "scrambled egg" approach, they state the damage has been done so they might as well be allowed to continue and of course they quote at length all the jobs that will be lost, etc. The fines were ridiculously low when compared to what the developer stood to gain from his development continuing."*
> Nicole Barlow, ECA (submission to the CER, 2011)

Although no statistics or formal quantification exist, there is substantial anecdotal evidence of abuse of S24G provisions by unscrupulous businesses (cf. **Chapter 4**). This evidence was gathered through formal and informal interviews with officials and other stakeholders, and cases of abuse were also decried by a number of stakeholders in their submissions to the CER. (2011)

As mentioned in **Chapter 4**, motivations for abuse of S24G provisions are varied, but it appears time is the most determining factor. The underlying issue is of course the time required to conduct a formal EIA process and to obtain authorisation from the competent authority(ies).

The studies and public participation processes involved in EIAs usually take several months and commonly exceed a year. The authorisation process is further extended by delays in decision-making processes.[9] (Kidd, 2011, Kotzé, 2009) As the saying goes: "time is money", and for businesses, such delays can have major economic repercussions, such as losing clients and market shares if not able to meet demand in time, or bearing the brunt of escalating construction costs. Ultimately, delays can significantly impact on the viability of the

[9] Whether or not the S24G authorisation process is quicker than the normal EIA process could not be positively ascertained (the data provided was insufficient to draw conclusive statements on the question), but being a 1-step process, with no or reduced baseline determination, and public participation periods as much as half those of a Basic Assessment and four times less than for a scoping and EIA, (unlike scoping and EIA), it should in theory be a swifter process. In practice though, the rectification process is not necessarily a short cut. Indeed, the process can be protracted, and depending on the studies required, requests for additional information, and delays in decision-making which also affect the S24G authorisation process.

project requiring authorisation and have crippling effects for businesses (especially small businesses) which do not have the resources to sustain additional costs and time delays, not to mention the detrimental impact on the holy grail of job creation.

In this context, the introduction of a 'rectification' provision in NEMA may have been perceived as a stroke of luck for certain developers, and an opportunity to avoid a lengthy and costly EIA process.

This was the case of a timber treatment company, which was relocating to new premises and required an environmental authorisation for the new site. The applicant rather unashamedly admitted to knowing the legal requirements for such a development but in order to gain time, chose to obtain authorisation through a S24G process. Criminal action was taken against the company and a R522 500 administrative fine was issued (see court judgment in **Appendix D**).

Very few applicants however admit to deliberately violating the law, which renders the effective sanctioning of such offenders a delicate task. Indeed, although there are numerous accounts of abusive use of S24G provisions, there is little evidence that such cases are treated differently. In fact, the CER (2011) deplores that intentional and repeat offenders tend to be let off too easily while innocent offenders are prejudiced by the criminal stigma that attaches to S24G in the context of strict liability under S24F.

Organs of state have also been responsible for deliberately bypassing the law. In these instances, S24G has been abused in order to fast track the provision of basic services, often justified by urgency (e.g. dam overflowing, provision of basic services etc.) (cf. **Chapter 4**).

Based on a number of reported cases of abuse of S24G provisions, it would therefore appear that S24G has effectively provided an avenue to circumvent the authorisation law and bypass the prescribed authorisation process.

The issue of abuse is directly related to the issue of deterrence. Indeed, flouting of the law is only an attractive option because the perceived risks of non-compliance (notably in terms of the fine amount and probability of prosecution) are low in comparison with the perceived benefits. This is in accordance with deterrence theory, which posits that there is an inverse relationship between the probability of conviction or punishment and the number of offences (cf. **Chapter 2**).

Deterrence is a complex concept and involves a combination of factors, actual and perceived, making effective deterrence difficult to achieve. It is however essential to reflect on the issue of deterrence when considering the effectiveness of S24G in relation to compliance. In the case of S24G, effective deterrence of non-compliance is widely considered to be based on a combination of three main factors, namely: the level of fine, the probability of authorisation and the risk of prosecution. These three factors are discussed in more detail below.

5.2.2 The role of fines in deterring non-compliance

> *"It is about money. If the fine is less than the money lost due to a later start or no start at all, then the practice will continue."*
> Koos Pretorius, Federation for a Sustainable Environment (CER, 2011)

Fourie (2009: 15) notes that the S24G administrative fine is "not a punitive measure in the conventional sense" but merely serves to trigger the authority's consideration of the application for rectification. Proposed amendments to S24G of NEMA (**Appendix C**) however include an increase of the fine maxima to R5 million, which would suggest that legislators intend to exploit and increase the punitive potential of S24G administrative fines.

The question of whether or not the fines administered in terms of S24G constitute a sufficient deterrent for potential offenders is a major bone of contention and recurring topic of discussion for commentators. Even though officials consider that the fines administered in most cases are sufficient to deter future non-compliance, it is widely held that these fines are far too low to constitute a proper disincentive for non-compliance (CER, 2011), which the presence of repeat of offenders confirms. The CER (2011) as well as the Department of Environmental Affairs itself (South Africa, 2011b: 27) have pointed to the cynical abuse of S24G whereby offenders simply "budget" for the fine, treating it like an overhead cost, and proceed with contraventions of S24F. This is a common shortcoming of monetary penalties (cf. **Chapter 2**) and is not particular to S24G fines. It is however difficult to overcome as it requires calculating the optimal fine amount to achieve effective deterrence, for which there is no set formula. One major stumbling block in the calculation of the optimal fine amount is arguably the elimination of any economic benefits derived directly or indirectly from the offence. Indeed, substantial financial gains can be secured through the contravention of the authorisation law, which should be taken into account in the calculation of the S24G fine. This is assuming the maximum fine, currently standing at R1 million is sufficient to reflect those benefits.

Failure to adequately penalise the offender for financial gains accrued through S24F offences may create and fuel the perception that S24G is a cost-effective way to obtain authorisation. This, in addition to the time savings discussed in **Section 5.2.1** above, creates an unacceptable situation whereby law-abiding individuals and organisations are effectively at a disadvantage compared to offenders. Some guidelines and criteria for the calculation of fines are outlined in **section 5.4**.

The effectiveness of S24G fines is further hampered by a number of challenges. Indeed, fines are often reduced on appeal (cf. **Chapter 4**), there is a lack of transparency in the calculation of the fine amount, which gives rise to concerns about corruption, and lastly, the fine system does not provide for differential treatment of repeat offenders vs. innocent violators.

5.2.3 To prosecute or not to prosecute? Risk and adequacy of criminal prosecution

> *Anyone breaking the law ... should be charged in court and have a criminal record if found guilty by a judge.*

John Wesson, National Association of Conservancies of South Africa (CER, 2011)

The rate of prosecution is very low for offenders applying for rectification. This can be attributed to two main factors. *Firstly*, officials interviewed pointed out that illegal developments in sensitive areas[10] are generally referred directly to prosecution once non-compliance is detected (either by enforcement authorities or through the complaints mechanism) and before the offender applies for rectification. This limits the number of prosecutions during the S24G process. *Secondly*, the time and resources required for prosecution, overloaded courts and inadequate convictions are major challenges to prompt and successful prosecution, and officials accordingly have little incentive to pursue the criminal route for developments in less sensitive areas. (cf. **Chapter 2**) This correlates with Macrory's (2010) observations of criminal prosecutions of environmental offences in the UK. Indeed, regulators may choose not to refer cases for prosecution because of the low expected outcome. Conversely, enforcers may not pursue cases because they consider that the level of penalty does not justify the time, effort and resources required to bring a successful prosecution.

This creates what has come to be known as a 'compliance deficit' (Macrory, 2010: 57), where non-compliance exists and is identified, but the time and costs involved in bringing criminal proceedings deters authorities from using their limited resources to take action.

These pragmatic considerations have led officials dealing with S24G in Gauteng to adopt a 'choose your battles' type of approach to prosecutions, whereby only certain offenders are referred to prosecution, and in which environmental sensitivity, availability of resources and chances of success are determining factors.

The low rate of prosecution however is not necessarily indicative of weak enforcement or inadequate sanctioning of S24F offences. In fact, given the circumstances leading to the majority of S24G applications, prosecution may not be an adequate sanction and yield the best results in terms of compliance. As Macrory (2010: 50) argues, "[criminal prosecution] may not be an appropriate route in achieving a change in behaviour and improving outcomes for a large number of businesses where the non-compliance is not truly criminal in its intention", which is the case for the large majority of offences sought to be 'rectified'. On the other hand, the use of compliance notices has proven to be very effective in addressing non-compliance (cf. **Chapter 2**) and halting activities harmful for the environment.

In addition, given strict liability under S24F (i.e. fault is not a necessary element for criminal liability), S24G in its current form does not provide for differential treatment of repeat offenders vs. innocent violators. (Kidd, 2009) Yet, by using a single criminal sanction to deal with "both the truly egregious 'rogue' trader as well as legitimate businesses who through oversight or carelessness breached regulations" (Macrory, 2010: 15), the stigma of criminal law is at danger of being devalued by being overused. What's more, "the time, expense,

[10] Determination of environmental sensitivity is done based on the Gauteng C-Plan.

moral condemnation and criminal record involved ... is burdensome to both the regulator and business." (Macrory, 2010: 50)

However, Macrory (2010: 74) argues that the use of criminal prosecutions is "appropriate for serious breaches where there is evidence of intentional or reckless or repeated flouting of the law." They may also be justified in cases of gross negligence, and/or if the consequences are such that the public interest demands criminal prosecution.

Lastly, in addition to all the above factors the rate of prosecutions may also be influenced by the approach of enforcement authorities. Although no data was collected in that regard, it can be posited that officials dealing with S24G applications may prefer a non-confrontational relationship with those they regulate when deciding on whether or not to take criminal action, depending on the extent to which the emphasis is on smooth environmental administration rather than law enforcement as such.

5.2.4 Does rectification equal authorisation?

> *"Ideally, one wants to halt the perception that once you've effectively transformed a site you're guaranteed authorisation."*
> Susie Brownlie, EAP and member of the CER's Expert Panel (CER, 2011)

Although in theory, authorisation in terms of S24G is far from guaranteed, the widely held perception regarding S24G authorisations is that authorities are presented with a 'fait accompli', which leaves them little choice but to authorise the development. The data collected largely supports this view, and although no conclusive evidence was provided regarding the existence and number of directives issued (i.e. negative records of decision), it can be reasonably assumed that the authorisation rate for S24G applications is very close to the authorisation rate for normal EIA applications (in the region of 97%[11]), if not higher.

One major cause for concern however is that some activities which would not have received authorisation under normal circumstances (i.e. had the normal EIA process been followed) can and have received authorisation following a S24G process. Typically, this would occur in a situation where the harm already caused by the development cannot be repaired by rehabilitating the area. For example, a development which involved the destruction of a pristine wetland may be authorised if it is estimated that it is not possible to rehabilitate it to its pre-development state. In practice, this has happened for a housing development in Krugersdorp on a site found to be highly sensitive and of high conservation importance. Grading and blasting activities had taken place, including blasting of a ridge.

Aside from the 'fait accompli' factor, other less tangible factors may influence the rate of authorisation in the case of S24G applications. The fact that the political agenda is unequivocally 'pro-development' for instance, may influence the rate of authorisation to some extent. Indeed, it appears decision-makers are more inclined to be lenient towards offenders

[11] This 97% authorisation rate was calculated over a period of 21 months (April 2009 to December 2010), over the course of which 1038 environmental authorisations were granted and 34 refused in Gauteng.

because they create jobs and contribute to the economy, however, as Craigie et al. (2009a: 61) argue, environmental compliance and economic development are not necessarily mutually exclusive and economic growth and job creation cannot systematically justify harm to the environment. (cf. **Chapter 2**)

Nevertheless, the high rate of authorisation does not reflect the fact that activities may be only partially authorised, and possibly reduced to such an extent that they become unviable. In addition, some structures may have to be demolished for an authorisation to be issued (this is usually the case for structures within 32m of a watercourse).

Finally, the high rate of authorisation could be interpreted as a sign that the S24G authorisation process is reduced to a mere formality or rubber-stamping exercise. Although it is not possible to assess this objectively, it would seem that authorities in Gauteng consider offences in a serious light and exercise sufficient scrutiny to avoid this pitfall. The risk does nevertheless exist, and is possibly higher in provincial departments which have incorporated S24G applications in the impact assessment line function.

5.2.5 Compliance assistance vs. punitive sanctions: dealing with different levels of fault

> *"S24G must turn out to be punitive in nature for the bulk of applicants, and the fines should be commensurate."*
> Mark Botha, WWF (CER, 2011)

> *"... the process should encourage a genuine defaulter who didn't know better to report a mistake to the authorities and to have the mistake assessed."*
> Andrew Muir, Austen Smith (CER, 2011)

There is much theoretical debate in the academic world and at a practical level in government departments on whether offenders should be punished for violating the law or helped in their efforts to restore compliance (cf. **Chapter 2**). In the absence of a clear legal or political position on the issue, both views continue to exist and are reflected in the everyday decisions authorities make in relation to compliance and enforcement.

This is particularly relevant in respect of S24G and the same dichotomy exists on the ground as in theory with regard to the way in which offences should be dealt with from a compliance and enforcement point of view. The question of how to approach the sanctioning aspect of S24G arises from two specific dilemmas: *firstly*, how to ensure a differential approach for intentional and 'innocent' offenders, and *secondly*, whether or not public sector offenders should be granted preferential treatment.

5.2.5.1 Crime and punishment: how to approach the sanctioning aspect of S24G?

Should S24G aim to punish? The answer to this is not clear-cut, and while the proposed amendments to S24G (**Appendix C**) seem to endorse a punitive strategy, supported by those officials who advocate a significantly tougher approach to offenders (in particular repeat offenders) in terms of both enforcement action and maximal fines, other officials value the opportunity that S24G provides to 'genuine' offenders to 'make things right', and are of

the view that a person who seeks to make amends and be brought back into compliance by applying for rectification should be assisted in doing so by authorities, rather than penalised.

Given that the crime of the majority of S24G applicants is ignorance of the law, rather than intentional violation or recklessness, it can reasonably be contended that the approach to S24G applications should in most cases be geared towards restoring compliance, rather than punishing non-compliance.

However, the danger of a general tendency to be lenient toward offenders can send the wrong message to the regulated community, especially since rumours of abuse are spreading. In this context, it is critical that authorities convey to potential offenders that abuse cannot be tolerated and will be severely sanctioned, and that the message is unequivocal in that regard. Failure to do so will only exacerbate the problem by allowing deliberate bypassing of the normal EIA process to proliferate, which may very well already be the case.

Yet, it appears that the message is blurred, and this can be attributed to a number of reasons. One probable cause is that authorities have been and may still be grappling with this relatively new provision from an administrative (procedural), and human resource (capacity and skills) perspective, and have had to face this learning curve under severe capacity and resource pressures and while applications were pouring in (over 1400 applications were received between January and July 2005 and only two officials were processing S24G applications during that period).

In practice, all these factors are conducive to the adoption of a procedural approach to applications, whereby officials are essentially just "going through the motions" of the prescribed legal process, but are not in a position to exercise a differential approach to applications, leading to a situation where 'innocent violators' are essentially treated the same as intentional and reckless offenders. Indeed, dealing with applications on a case by case basis, with the aim to identify intentional flouting of the law or gross negligence, and uncovering whatever motives may be behind the offence basically entails a full investigation, which requires time, something most officials, already working in under-staffed departments, do not have. Given the fact that one can reasonably assume applicants would not be forthcoming with such information, it is virtually impossible for officials to determine which case scenario applies to each application, let alone quantify potential financial benefits which may have resulted from the offence (cf. **section 5.4.1**).

Without attempting to give a definite answer to the compliance assistance vs. crime punishment debate opposing partisans of the normative and rationalist theories of compliance, we argue that while the application process and sanctions imposed as part of S24G need not necessarily come down hard on offenders, one should a least ensure they do not actually amount to incentives for non-compliance.

This would entail exploiting the full potential and improving the effectiveness of the sanctions imposed in terms of S24F and S24G (whether financial or criminal). Indeed, the sanctioning aspect of S24G, in the form of the administrative fine and possible prosecution, to a large

extent is not in line with Macrory's penalty principles (cf. **Chapter 2**). Firstly, the presence of repeat offenders demonstrates that behaviour does not necessarily change after rectification. Secondly, there is evidence that substantial economic gains can be made from non-compliance and S24G fines may be insufficient to offset these gains, thus giving offenders an unfair advantage over compliant individuals and organisations. Thirdly, responsive and proportionate sanctioning is only achieved if the optimal fine amount is imposed and prosecution is pursued where appropriate, and these conditions are difficult to achieve at the best of times, even though the determination of the fine amount provides for a more or less punitive sanction, and prosecution of a few targeted cases also reflects responsive and proportionate sanctioning. Finally, the relatively low fines, coupled with the very low risk of prosecution, are often cited as insufficient to deter (future) non-compliance.

As Craigie et al. (2009a) argue, an effective environmental regime requires incentives for those who want to comply and sanctions for those who do not. Given the potential benefits of non-compliance, and the time and costs involved in following the prescribed environmental authorisation process, one should be wary not to convey the opposite message, and create a dangerous situation where law-abiding individuals and organisations are penalised while offenders are at a relative advantage. Some recommendations to improve the effectiveness of S24G are proposed in **section 5.4**.

5.2.5.2 The issue of public sector offenders

Though both the private and public sectors have used the S24G provision to fast track their agendas, the motives for abuse are very different and may warrant a differential approach. In addition, the question of whether or not public sector applicants (i.e. municipalities and provincial government departments) should be treated differently is influenced by a variety of other considerations, such as whether it is sensible and desirable to transfer public funds from one organ of state to the other, in which instances will sanctioning organs of state produce the desired effect (i.e. double penalty or effective deterrent), and whether minimal punitive measures will effectively condone poor planning (notably in local government structures).

Some circumstances specific to the public sector could warrant preferential treatment to some degree. In particular, in view of debilitating capacity problems, sanctioning municipalities and government departments through S24G could amount to a second penalty. Indeed, across South Africa, lack of skills and resources and high turnover in local government are at the root of its poor track record in terms of compliance. Provincial government departments suffer from these problems as well, albeit to a lesser extent. These challenges contribute to poor planning which eventually leads to activities being undertaken without authorisation. In order not to further cripple under-resourced and poorly capacitated municipalities and government departments, the focus should then be on restoring compliance, mitigating negative impacts and applying remediation and rehabilitation measures where appropriate, and assisting them as far as possible in preventing future non-compliance.

However, preferential treatment of organs of state should not be interpreted as condoning poor planning and although offences may certainly be justified in cases of urgency, they cannot be accepted where they are simply the result of poor planning.

Although somewhat beyond the scope of this research, it is worth mentioning here the question of non-compliance by state-owned enterprises (SoEs) and providing some food for thought on the issue of how offences in terms of S24F and corresponding S24G applications should be considered for these SoEs. Indeed, can one justify similar leniency when it comes to parastatals such as Eskom? Eskom is well capacitated and has adequate systems (including EMS) and checks and balances (including management control procedures) to ensure that it remains compliant and adheres to all legal requirements. (DEA, 2011) Nevertheless, Eskom has been on the DEA's radar in recent times due to repeated incidences of non-compliance, which have incidentally lead to a number of S24G applications being submitted over the past few months. As a result, Eskom is now prominently featured as one of the EMI's focus for reactive enforcement in the latest NECER (DEA, 2011). It remains to be seen whether DEA will make an example of Eskom or adopt a more merciful approach toward the parastatal.

5.2.6 Enforcement: the Achilles' heel of S24G

The objectives of environmental compliance and enforcement include reinforcing the credibility of environmental laws and the institutions responsible for their administration, and ensuring fairness towards those who willingly comply with legal requirements. (Craigie et al., 2009a: 44) This is critical in the context of S24G and its current abuse.

Indeed, if the credibility of environmental laws and authorities enforcing it is not upheld, offenders are not adequately punished, and compliant individuals and organisations are effectively at a disadvantage, the risk of generating more non-compliance becomes high, as an increased number of offenders, following a rational cost-benefit analysis weighing the perceived risk of severe punishment against the perceived benefits of non-compliance, find deliberate violation of the law an attractive option.

This relates directly to the issue of deterrence and the question of how to approach the sanctioning aspect of S24G (cf. **section 5.2.5**) Indeed, considering compliance at the domestic level, Bowles (1971) (quoted in Craigie et al., 2009a) argued that "20 percent of the regulated population will automatically comply with any regulation, 5 percent will attempt to evade it, and the remaining 75 percent will comply as long as they think that the 5 percent will be caught and punished." The danger with S24G is that the 75 % of the regulated community perceive that intentional offenders do not get adequately punished (very low prosecution rate coupled with relatively low fines) and systematically obtain authorisation, and start non-complying as a result, thereby increasing the proportion of non-compliance and potentially making a small problem unmanageable.

This is not to say enforcement action is necessarily absent, ineffective or insufficient, but the perception does exist that it is possible, and even easy, to get away with crimes by applying for rectification.

Compliance and enforcement mechanisms (cf. **Chapter 2**) can be and are used in parallel or in conjunction with the S24G process to overcome some of its pitfalls and shortcomings and increase its effectiveness to eliminate and deter non-compliance. Effective enforcement is thus essential to support S24G processes and uphold the integrated and proactive approach to environmental management. It also contributes to addressing the problem of non-compliance upstream, before criminal offences occur. Without adequate enforcement, S24G in its most procedural interpretation effectively undermines the realisation of the above objectives, as it condones environmental harm, undermines the credibility of NEMA and authorities administering it and potentially gives non-compliant individuals and organisations an unfair advantage over those willing to comply.

The difficulty when applying enforcement measures to complement the S24G process is that no uniform framework exists in law to ensure consistency, and it is therefore the prerogative of the various authorities to use these measures appropriately. Since the purpose of S24G is not clearly spelt out (i.e. punish offenders vs. help offenders to comply and/or restore harm caused), they can be used to achieve very different objectives and for very different agendas. Moreover, the capacity issues and lack of resources (notably for monitoring) affecting many government structures may render effective enforcement action more problematic, as it relies on authorities identifying when enforcement action is required, selecting the most adequate measure(s) and ensuring they are carried out.

5.2.7 Conclusion: is asking for forgiveness easier than asking for than permission?

S24G aims to restore compliance and eliminate illegal activities, either by issuing the required authorisation for the activity(ies) to proceed legally, or by directing applicants to cease illegal activities and rehabilitate. In practice, the large number of applications finalised for ECA listed activities (over 70%) and growing number of applications finalised for NEMA listed activities (over 25%) (**Chapter 4**) demonstrate that these objectives are being realised on an ongoing basis.

The extent to which S24G improves environmental compliance is thus reflected in those numbers and is not subject to much debate. The concern however is that by opening an avenue for non-compliance, and suggesting that non-compliance can be tolerated and even accommodated if the proper process is followed, S24G may paradoxically be detrimental to environmental compliance, based on the idea that it is easier to ask for forgiveness than permission.

This is a legitimate concern in view of widespread non-compliance with the authorisation law[12] and evidence of abuse of S24G.

The potential of S24G to create an escape route for criminals, discredit environmental laws and authorities and undermine compliance and enforcement efforts is all the more disturbing

[12] Unlawful commencement of listed activity is the most prevalent environmental crime in South Africa, together with biodiversity and conservation related crimes (DEA, 2011b)

given the broader environmental compliance and enforcement context in South Africa. Indeed, a number of authors (Craigie et al., 2009a, Fourie, 2009, Kidd, 2011) have pointed out that environmental non-compliance in South Africa is rife, and enforcement institutions already experience a number of challenges in their efforts to curb non-compliance and establish compliance as the norm. (cf. **Chapter 2**)

Intended as an exception to the rule, S24G in itself is not inherently detrimental to compliance; it is undeniable however that it contains the potential to generate intentional non-compliance and in fact, abuse has indeed taken place. This is due to the predominant perception of S24G as a low risk (of authorisation being refused, of prosecution, of a debilitating fine) and high reward (potential financial gains and time savings) alternative to obtain authorisation. It thus sends the wrong message to stakeholders, especially potential offenders, in contradiction with the efforts currently made to improve environmental compliance. It is therefore imperative that S24G processes be coherent with, and complement the overall compliance and enforcement strategy, and not work against it.

5.3 IMPLICATIONS FOR ENVIRONMENTAL MANAGEMENT AND GOVERNANCE

There are also concerns that S24G's adverse effects on compliance may only be the tip of the iceberg, and are in reality indicative of a deeper problem. As a matter of fact, S24G raises significant dilemmas from an environmental management perspective and there are fears that S24G may unsettle the very foundations of environmental management in South Africa. In particular, S24G has the potential to considerably undermine the purpose of environmental assessment, the principles of Integrated Environmental Management and sustainable development, and ultimately, the fundamental right to environmental protection. (Paschke and Glazewski, 2006, CER, 2011, van der Linde, 2009)

Much of the focus of discussions around S24G revolves around its unintended consequences, and in particular the issue of abuse, and the fact that S24G has effectively provided potential offenders with an avenue to bypass the prescribed authorisation process. The authorisation law, with at its core, the environmental impact assessment process, is designed to give effect to the principles of NEMA by anticipating and assessing potential impacts of activities on the environment, and devising ways to avoid or mitigate negative impacts and maximise benefits, prior to undertaking said activities, thus allowing for informed decision-making; and by taking into consideration factors such as the planning context, the availability of services and resources, and cumulative effects, EIA allows for an integrated approach to environmental management. (cf. **Chapter 2**)

The rectification process on the other hand is an administrative tool to deal with activities that have already commenced, and in some cases have been completed. Being an ex-post facto authorisation process, S24G has limited value for environmental management and constitutes at best a damage control mechanism. These are inherent shortcomings and are not the focus of this discussion. Nevertheless, by essentially opening up another route to obtain authorisation, which does not entail the same requirements of prior evaluation of impacts, S24G has the potential to undermine the very purpose of environmental

assessment. As discussed in previous sections, this potential has materialised and the incidences of abuse of the provision as well as the presence of repeat offenders reflect serious undermining of EIA and principles of NEMA.

Furthermore, the retrospective authorisation of activities which would not have been normally been authorised effectively condones irreversible harm caused to the environment and is greatly concerning for environmental management.

For these reasons, S24G has to some degree contributed to undermining progress towards better environmental management and governance. This is all the more deplorable as South Africa has made great strides to improve environmental management and governance by establishing progressive environmental legislation, and entrenching EIA as the primary tool for environmental planning. However, as Craigie et al. (2009a: 41) point out : "governance and regulation are largely meaningless without compliance", and given the difficulties already experienced with environmental compliance, S24G (and its potential to increase non-compliance) may contribute to further discredit environmental regulations and divest integrated environmental management of its meaning.

S24G may be at odds with the principles of NEMA in a number of other ways. Stakeholders (CER, 2011) are particularly concerned about public participation and the lack of clarity and insufficient communication to stakeholders about the process. Indeed, NEMA places a strong emphasis on public participation in a bid to make the EIA process as inclusive, transparent and democratic as possible. S24G largely falls short in that regard. There are also concerns about the lack of considerations of alternatives in S24G applications, as would be required in an EIA.

All these concerns have led stakeholders to question the need and value of a rectification provision in NEMA. The two most fundamental questions are arguably whether there is a need and justification for such a provision, and whether the very existence of S24G is detrimental to environmental compliance, management and governance, or if the problem stems from its implementation at operational level. These questions pertain more to the legal and even philosophical realm and fall outside the scope of this research, which has taken the existence of S24G as a given and its formulation at face value, and posited them as a basis for the research. In other words, we do not seek to delve into the question of whether or not there should be a provision for 'rectification' in NEMA, and how it should be formulated, but rather what can be done within the existing framework. It is however noteworthy to mention that these questions are being reflected upon within environmental authorities.

5.4 IMPROVING COMPLIANCE: KEY PERFORMANCE AREAS

A pre-requisite for improving the effectiveness of S24G is to contain the intrinsic risk of abuse. The purpose of this is to limit the number of intentional offenders and hence reduce the administrative burden for Departments already under strain due to lack of capacity and resources. The underlying objective is to ensure that the S24G process remains reserved to

exceptional circumstances (e.g. activities undertaken in emergency) and does not cater for negligence or intentional flouting of the law.

Realising this objective involves addressing the pitfalls and shortcomings discussed in this chapter, with the view of achieving a transparent system with appropriate sanctions, aiming to bring offenders back into compliance, ensure sustained compliance, provide a level playing field for business and enable authorities to pursue offenders who deliberately flout the law in a more effective way. (Macrory, 2010)

The issue of fines concentrates a lot of attention and is discussed below; but suggestions are also made to open up the debate to other issues which should be given more attention in the context of risks and challenges surrounding S24G, including the emphasis on a differential approach.

In those efforts to overcome the challenges associated with S24G, one should not lose sight of the bigger picture and neglect the possible root cause of all these challenges. Indeed, improving compliance with the authorisation law requires not only sanctions to punish non-compliance, but also incentives to make compliance more attractive and achievable. There are thus two sides to the coin, and accordingly the problem should be tackled on both fronts. Firstly, the unfair advantage (gain in time and cost) that offenders may secure through S24G must be eliminated, and secondly, following the normal EIA route should as far as possible be rewarded through incentives, so that it is less regarded as a burden and additional red tape, and more as a tool that can add value and save costs in the future (through improved compliance). Shedding the negative image of EIAs could involve streamlining EIAs and fast-tracking decision-making, as well as eliminating the need for EIAs in some sectors through the adoption of norms and standards (Alberts, 2011).

5.4.1 Fine calculation

The administrative fines issued in terms of S24G of NEMA are effectively an exception in a system where monetary penalties are largely reserved to criminal convictions. The way these fines are, and should be used is at the centre of most debates around S24G. Many believe the deterrence potential of these fines is under-exploited, while other believe they are not meant to punish in the first place. Both views have their merits for different cases and some suggestions are provided here on how the fine component of S24G can be used more effectively. As a prerequisite, a better understanding of the impacts and implications of the administrative fine (i.e. either a punitive measure in itself if appropriate, or a complement to enforcement measures with no intrinsic punitive aspect attached to it), can ensure fines administered produce the desired effect. This understanding is reflected in the fine amount, the calculation of which can be improved in a number of ways.

More transparency and accountability

Lack of transparency in the way fines are calculated is conducive to corruption (i.e. applicants may negotiate a bribe in order to secure a reduced fine). Making the method for fine calculation public would kill two birds with one stone by reducing the potential for

corruption and enabling members of the regulated community to make informed decisions with respect to compliance, in line with a risk-based approach to regulation.

Mitigate conflicts of interest

S24G fines, contrary to criminal fines, end up in the administering authority's coffers, and not in the National Revenue Fund at Treasury, and have therefore the potential to create perverse financial incentives for authorities issuing the fines. However, Macrory (2010: 91) warns that administrative fines should not be viewed by authorities as a way to raise revenue. More transparency in fine calculations can safeguard authorities and offenders against this pitfall.

Reach the optimal fine amount

Improving the calculation of the fines issued in terms of S24G can contribute to eliminate cynical abuse of S24G provisions by businesses who simply 'budget' for the fine.

The US EPA's Policy on Civil Penalties (1984) suggests a 3-step process to calculate the optimal fine amount:

- Step 1: calculate the preliminary deterrence amount, based on the economic benefit component (e.g. delayed costs of pollution abatement equipment, avoided costs of maintenance of the equipment, and illegal competitive advantage gained by the violation) and the gravity component (e.g. actual or possible harm, importance to the regulatory scheme and the size of the company/organisation[13]).
- Step 2: applying adjustment factors (cf. **Table 6**) to arrive at the "Initial Penalty Target Figure".
- Step 3: making adjustments to take into consideration the violators ability to pay, or reassessments of adjustments used in the calculation of the Initial Penalty Target Figure, for instance.

The following aggravating and mitigating factors should be considered in the calculation of variable administrative monetary penalties, such as fines administered under S24G.

Table 6: Aggravating and mitigating factors to be considered in the calculation of S24G fines (adapted from Macrory, 2010: 89, CER, 2011: 8, and EPA, 1984)

Aggravating factors	Mitigating factors
Severity of the offence (e.g. harm or potential harm to human health, well-being, safety or the environment, duration of non-compliance etc.).	Actions taken to eliminate or reduce the risk of damage resulting from the offence.
Evidence/extent of intention or negligence (if any) behind the offence.	Actions taken to repair the harm done by regulatory non-compliance.
Disciplinary record or history of non-compliance of the offender (i.e. previously found in contravention of NEMA or any specific environmental management Act).	No disciplinary record or history of non-compliance of the offender (i.e. no previous contraventions of NEMA or any specific environmental management Act).

[13] On the basis that a violation by a bigger company is more serious than the same violation committed by a smaller company.

Aggravating factors	Mitigating factors
Financial gains or other benefits accrued to the offender as a result of non-compliance.	Fast and accurate reporting of regulatory non-compliance.
Non-cooperation with authority(ies).	Co-operation with the authority(ies).
Size and financial resources of the organisation that failed to comply.	Size and financial resources of the organisation that failed to comply.
Behaviour of the person who committed the offence	Behaviour of the person who committed the offence

Calculating the economic benefit of non-compliance

One major stumbling block in the calculation of the optimal fine amount is arguably the elimination of any economic benefits derived directly or indirectly from the offence. As Fourie (2009: 25) notes: "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."

These benefits can take various forms and occur over time, and officials issuing S24G fines are not equipped to quantify the financial gains accrued from non-compliance. In addition, the maximum fine, currently standing at R1 million rand could be plain insufficient to reflect those benefits.

The EPA has developed a computer model known as the BEN Model[14] to calculate the economic benefits of non-compliance for the purpose of determining administrative fine amounts. The model is controversial but at least attempts to render fines more objective, transparent and consistent. On a side-note, fines increased dramatically after the introduction of the BEN Model. (Fourie, 2009)

Despite the difficulties in accounting for the financial benefits of non-compliance and the absence of a universally accepted method to quantify those benefits, it is critical to at least attempt to reflect them, particularly in the case of corporate offenders. Failure to do so puts companies who invest the time and resources to remain compliant at a disadvantage, while offenders enjoy the benefits of increased profits and/or reduced costs and hence, an unfair competitive advantage, at least in the short term.

Should offenders be inadequately sanctioned financially, and be allowed to continue their activities after authorisation is issued, this could lead compliant businesses and the regulated community as a whole to seriously question the credibility of the regulatory system and authorities administering it, and even re-consider the validity of compliance as a sensible business decision.

[14] http://www.epa.gov/compliance/civil/econmodels/

The question of fines should be envisaged together with and complementary to that of enforcement, which can contribute to address the potential shortcomings of fines and avoid repeat and intentional offenders.

5.4.2 Enforcement action

As indicated previously (**Chapter 2** and **section 5.2.3**), the use and effectiveness of criminal prosecution (which can take place despite the submission of a S24G application) is hampered by a number of factors, including the time and resources required and unsatisfactory outcomes. In addition, criminal prosecution may not necessarily be desirable for all offenders and criminal conviction may lose its stigma as "both strict liability offences committed by legitimate business, and the deliberate flouting of the law by rogues is prosecuted in the same manner with little differentiation between these two types of offender." (Macrory, 2010: 48)

Other enforcement measures can however be applied in order to avoid a compliance deficit; in particular, administrative enforcement measures can be very effective without being cumbersome. Enforcement officials at GDARD for instance make extensive use of compliance notices, which have proven to yield very good results, while being more time and cost-effective than criminal measures. Indeed, "In many instances, a notice or directive alone will result in compliance, without further action (such as prosecution or civil litigation)". (DEAT, 2008) This, in addition to EMI deployment and training, as well as publication of enforcement action taken are all moves in the right direction (cf. **Chapter 2**).

For cases that do reach the courts, corporate rehabilitation orders (cf. **Chapter 2**) can prevent future non-compliance and can also be an appropriate alternative to punitive sanctions in the context of strict liability offences (such as those under S24F), where no intention or recklessness was involved.

5.4.3 Conditions of environmental authorisations

Environmental authorisations issued in terms of S24G of NEMA contain a number of standard and specific conditions. Where appropriate, conditions could also incorporate principles of restorative justice (cf. **Chapter 2**), which would perhaps suit the proponents of the normative theory of compliance, for whom S24G should be used to assist offenders to restore compliance and prevent future non-compliance, and not punish them for not complying. For this approach to be coherent, a non-punitive administrative fine would have had to be administered.

5.4.4 Differential approach

There are a multitude of circumstances leading to an offence in terms of S24(2)(a): some offenders apply for rectification as a result of genuine ignorance, others deliberately bypass the normal EIA process in an attempt to save time, and possibly money, or increase their chances of authorisation, while others are simply negligent. Some offenders have taken measures to mitigate harm to the environment while others have not taken environmental issues into account at all. Some unlawful activities result in irreparable harm to the

environment while others have minimal impacts. Hence, dealing with these offences cannot be done with a 'one size fits all' approach.

The recommendations in the **sections 5.4.1, 5.4.2** and **5.4.3** can all contribute to improve the degree to which authorities are able to apply a differential approach towards offenders and cater for different case scenarios. However, this remains dependent on the extent to which time and resources (the two major constraints hindering it) can be made available. Thus the number of applications has to be drastically reduced or departments dealing with S24G have to increase the resources allocated to this function.

Officials should also be afforded some discretion to impose the most effective combination of sanctioning tools. For instance, where harm was caused or financial gains were accrued, a punitive (i.e. high) fine and/or rehabilitation orders can be imposed. Coupling this with the creation of a register of offenders to identify repeat offenders, and capture violators who commit S24G offences in different provinces, would allow for more targeted compliance monitoring and enforcement activities.

5.4.5 Legislative amendments

Following a call for submissions from the public, the CER compiled a submission to the DEA in May 2011 for proposed amendments to S24F and S24G (**Appendix B**). The CER solicited inputs from various groups of stakeholders in order to compile its submission to the DEA. These included non-government and community organisations, academics, and environmental assessment practitioners and other consultants who had worked with S24G, from various parts of the country.

The proposed amendments are broadly in line with the above recommendations and emphasise the need for a differential approach which aims at eliminating repeat offenders and non-compliance in general. They advocate a tougher approach towards offenders, notably zero tolerance for repeat and intentional offenders. A reform of the fine system is also considered necessary, including higher thresholds, and more transparency. Finally, authorities should make use of effective enforcement tools, including prosecution, where appropriate. (CER, 2011)

In order to prevent the cynical use of S24G as an alternative to conducting an EIA, the CER recommends that a person who intentionally commences or continues with a listed activity without authorisation should not be able to apply for rectification and should simply cease and rehabilitate. The onus would then be on the violator to prove that the offence was not committed intentionally. This would address the issue of repeat offenders as once one has applied for S24G on the basis of negligence or innocence, it would be virtually impossible to argue that the offence was not committed intentionally. Only a criminal fine can apply to such offenders, as there would be no rectification application available.

Negligent offenders (i.e. offenders who should have known that there was a requirement to apply for environmental authorisation but failed to do so, or should have had better control over the subcontractors who illegally commenced an activity without authorisation being in

place) should be instructed to cease the activity and pay an administrative fine (amounting to up to R10 million) before being allowed to apply for rectification. “Innocent violators” (i.e. able to prove that the offence was committed neither intentionally or negligently) would not be subject to the fine.

The CER also recommends that competent authorities be allowed to exercise some discretion regarding whether or not to accept applications in order to ensure that applications are only accepted where authorisation is an actual possibility. Where authorisation would never be granted, the person would simply be instructed to rehabilitate.

In terms of the process, the CER recommended that offenders in terms of S24F should immediately cease the unlawful activity and put measures in place to mitigate degradation of the environment and prevent further degradation.

Where environmental authorisation is refused, the applicant should be directed to rehabilitate.

Apart from ‘innocent’ violators, no application shall derogate from liability under section 24F(2). This aims to ensure that intentional or negligent offenders do not escape criminal prosecution, although the administrative penalty should be taken into account in determining the criminal fine in the case of negligent offenders. In addition, offenders convicted of an offence in terms of S24F(2) could be liable to a fine amounting to up to 10 % of annual turnover, or R 10 million for companies. This aims to ensure that the criminal fines imposed in terms of S24F (especially for bigger companies) constitute a proper disincentive to contravention of S24F.

Finally, the CER suggested that the reference to ‘rectification’ be taken out and that S24G be renamed “Additional consequences of unlawful commencement or continuation of listed activity”, in order to change the perception around this section.

6. CONCLUSION

Six years after the introduction of the S24G rectification provision in NEMA, its ability to bring about increased levels of compliance is seriously questioned. Indeed, the findings of this research show that S24G has had an ambivalent effect on compliance: while on one hand it has artificially increased compliance by rendering illegal activities legal, on the other, it has seriously undermined the overall compliance and enforcement effort by opening the door to abuse and providing a mechanism which effectively accommodates environmental crime. This has had some non negligible implications for the credibility of the authorisation law as well as the authorities administering it, and has compromised progress toward better environmental management and governance.

It has been argued that the schizophrenic character of S24G (**sections 2.1.3** and **5.2.5**) is at the heart of this dilemma, and is a reflection of the delicate position regulators find themselves in vis-à-vis non-compliance with the authorisation law. Indeed, though the intention of S42G is to afford 'innocent' violators an opportunity to make amends and restore compliance, it should not give intentional or reckless offenders an easy way out.

6.1 CAUSES FOR CONCERN

S24G has generated a lot of interest and debate, which this research has engaged with and drawn from. As can be expected, much of the attention is focused on intentional offenders who have abused S24G in order to bypass the prescribed authorisation process. Concerns around abuse are legitimate in view of the repercussions described above and considering the broader environmental compliance and enforcement challenges in South Africa.

Indeed, S24F(2) offences are already one of the most prevalent crimes reported in the country and there are fears that S24G may have created a loophole for potential offenders to circumvent the EIA process, and may thus contribute to fuelling the problem of environmental non-compliance in South Africa. These fears have materialised in a number of instances and give credit to claims of many detractors of S24G that the deterrence element in S24G is inadequate and underutilised. As one commentator pointed out: "The environmental legislation in this country must be the only case of 'ignorance of the law is not only a good excuse but allows you to be forgiven with the right paperwork...'" Yolan Friedmann, Endangered Wildlife Trust, in CER, 2011) This is all the more regrettable in light of the efforts and resources deployed by administrative and judicial institutions to improve the environmental compliance and enforcement record in South Africa.

6.2 A STORM IN A TEACUP?

Although these concerns are valid and should no doubt be addressed, one could wonder if this is not after all just a storm in a teacup. Indeed, 'innocent' and negligent offenders form the bulk of applicants, for whom the S24G process was designed. Moreover, S24G applications remain marginal in relation to the normal environmental authorisation application process: less that 200 S24G applications were received over 5 years, while about 3000 EIAs

are undertaken each year in South Africa, thus representing 3% of the total number of EIA applications at the most. It would thus seem the rule of law and the principles of NEMA are still well entrenched.

Furthermore, self-regulation may well take care of the problem of corporate non-compliance without the need for government intervention. Indeed, the perception that non-compliance is an attractive option may change due to a combination of factors: first of all, intentional offenders may actually overestimate the benefits of applying for authorisation through S24G and underestimate the costs. Indeed, the rectification process can be protracted, the fines issued can come as an unpleasant surprise and constitute a real disincentive, authorisation can be partial, and activities may be reduced to such an extent that they become financially unviable, and lastly, despite a lack of convincing numbers to substantiate it, the risk of prosecution is real and there are reasons to believe that intentional offenders will be dealt with harshly by enforcement authorities in the future (cf. **section 2.5**). Secondly, the business environment itself is becoming less and less tolerant to environmental recklessness, and the consequences of corporate non-compliance, including impacts on reputation and image, as well as access to finance, customer support, and ultimately profits, are increasingly taken into account, especially by larger companies, and influence decision-making in that regard (cf. **section 2.5**).

Nevertheless, it is argued that however small the extent of abuse may be, it should be tackled head on and 'killed in the egg' in order to uphold the principles of NEMA, the reputation of environmental authorities and the rule of law. Beyond these honourable considerations, there are some very practical reasons to effectively deal with intentional offenders, as abuse can only proliferate if left unaddressed or under-sanctioned, thereby making an embryonic problem grow into a potentially unmanageable burden for both administrative and criminal authorities.

A number of practical interventions can be initiated without changing the regulatory framework in order improve the effectiveness of S24G and bring about increased levels of compliance (cf. **Chapter 5**).

6.3 ARE WE BARKING UP THE WRONG TREE?

While efforts should be made to treat the symptoms, and some solutions have been proposed in that regard (**section 5.4**), one should not neglect to look at the underlying causes of the problem.

Indeed, it would seem the determining factor for most cases of abuse is not necessarily money or the issue of whether a development may not be authorised through the normal authorisation process, but time; and eliminating this motivation would thus involve addressing the recurring issue of lengthy EIAs and decision-making processes. (Kidd, 2011, Kotzé, 2009) Hence, by blaming offenders and their alleged cynicism, we may actually be barking up the wrong tree.

Similarly, addressing the current weaknesses in the regulatory cycle (cf. **Chapter 2**), notably in the field of compliance promotion, education and awareness, is key to reducing offences and corresponding S24G applications. (Craigie et al., 2009a)

To be sure, the challenges associated with S24G cannot be addressed in isolation and the remedies proposed can only have limited success if they are not supported by a coherent compliance and enforcement framework. It is therefore critical to consider the issue of non-compliance and possible responses to it holistically and reflect not only on the perverse incentives for non-compliance, but also on the perverse disincentives (or lack of incentives) for compliance.

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APPENDIX A

Sections 24F and 24G of NEMA

Sections 24F and 24G of NEMA (as amended) read as follows:

24F Offences relating to commencement or continuation of listed activity

(1) Notwithstanding any other Act, no person may-

(a) commence an activity listed or specified in terms of section 24(2)*(a)* or *(b)* unless the competent authority or the Minister of Minerals and Energy, as the case may be, has granted an environmental authorisation for the activity; or

(b) commence and continue an activity listed in terms of section 24(2)*(d)* unless it is done in terms of an applicable norm or standard.

(2) It is an offence for any person to fail to comply with or to contravene-

(a) subsection (1)*(a)*;

(b) subsection (1)*(b)*;

(c) the conditions applicable to any environmental authorisation granted for a listed activity or specified activity;

(d) any condition applicable to an exemption granted in terms of section 24M; or

(e) an approved environmental management programme.

(3) It is a defence to a charge in terms of subsection (2) to show that the activity was commenced or continued in response to an emergency so as to protect human life, property or the environment.

(4) A person convicted of an offence in terms of subsection (2) is liable to a fine not exceeding R5 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment.

24G Rectification of unlawful commencement or continuation of listed activity

(1) On application by a person who has committed an offence in terms of section 24F(2)*(a)* the Minister, Minister of Minerals and Energy or MEC concerned, as the case may be, may direct the applicant to-

(a) compile a report containing-

(i) an assessment of the nature, extent, duration and significance of the consequences for or impacts on the environment of the activity, including the cumulative effects;

(ii) a description of mitigation measures undertaken or to be undertaken in respect of the consequences for or impacts on the environment of the activity;

(iii) a description of the public participation process followed during the course of compiling the report, including all comments received from interested and affected parties and an indication of how issues raised have been addressed;

(iv) an environmental management programme; and

(b) provide such other information or undertake such further studies as the Minister or MEC, as the case may be, may deem necessary.

(2) The Minister or MEC concerned must consider any reports or information submitted in terms of subsection (1) and thereafter may

(a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister or MEC may deem necessary; or

(b) issue an environmental authorisation to such person subject to such conditions as the Minister or MEC may deem necessary.

(2A) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed R1 million and which must be determined by the competent authority, before the Minister or MEC concerned may act in terms of subsection (2) *(a)* or *(b)*.

(3) A person who fails to comply with a directive contemplated in subsection (2) *(a)* or who contravenes or fails to comply with a condition contemplated in subsection (2) *(b)* is guilty of an offence and liable on conviction to a penalty contemplated in section 24F (4).

APPENDIX B

CER submission to DEA: proposed amendments to Sections 24F and 24G of NEMA

APPENDIX C

National Environmental Management Laws Amendment Bill, 2011.
Proposed amendments to Sections 24F and 24G of NEMA

Amendment of section 24F of Act 107 of 1998, as amended by section 3 of Act 8 of 2004 and section 5 of Act 62 of 2008

7. Section 24F of the National Environmental Management Act, 1998 is hereby amended by the substitution for subsection (1) of the following subsection:

"(1) Notwithstanding any other Act, no person may-

(a) commence an activity listed or specified in terms of section 24(2)(a) or (b) unless the competent authority or the Minister responsible for [**of Minerals and Energy**] mineral resources, as the case may be, has granted an environmental authorisation for the activity; or"

Amendment of section 24G of Act 107 of 1998, as amended by section 3 of Act 8 of 2004 and section 6 of Act 62 of 2008

8. Section 24G of the National Environmental Management Act, 1998 is hereby amended -

(a) by the substitution for the introductory portion of subsection (1) of the following:

"(1) On application by a person who-

(a) has committed an offence in terms of section 24F(2)(a);
(b) has commenced, undertaken r conducted a waste management activity without a waste management licence as contemplated in section 20(b) of the National Environmental Management: Waste Act, 2008;
(c) has commenced or continued with a listed or specified activity in an emergency response situation so as to protect human life, property or the environment,

the Minister, Minister responsible for mineral resources [**of Minerals and Energy**] or MEC concerned, as the case may be, may direct the applicant to -";

(b) by the substitution for paragraph (b) of subsection (1) of the following paragraph:

"(b) provide such other information or undertake such further studies as the Minister, Minister responsible mineral resources or MEC, as the case may be, may deem necessary.";

(c) by the substitution for subsection (2) of the following subsection:

"(2) The Minister, Minister responsible for mineral resources or MEC concerned, as the case may be, must consider any reports or information submitted in terms of subsection (1) and thereafter may-

(a) direct the person to cease the activity, either wholly or in part, and to rehabilitate the environment within such time and subject to such conditions as the Minister, Minister responsible for mineral resources or MEC may deem necessary; or
(b) issue and environment authorisation to such person subject to such conditions as the Minister, Minister responsible for mineral resources or MEC mat deem necessary.";

(d) by the substitution for subsection (2A) of the following subsection:

"(2A) A person contemplated in subsection (1) must pay an administrative fine, which may not exceed [**R1 million**] R5 million and which must be determined by the competent authority, before the Minister, Minister responsible for mineral resources or MEC concerned may act in terms of subsection 2(a) or (b).",

"(4) Subsection (2A) is not applicable to a person who has commenced or continued with a listed or specified activity in an emergency response situation so as to protect human life, property and the environment.

APPENDIX D

North Gauteng High Court judgment in the matter opposing Pretoria Timber Treaters cc v. The Gauteng Department of Agriculture, Conservation and the Environment