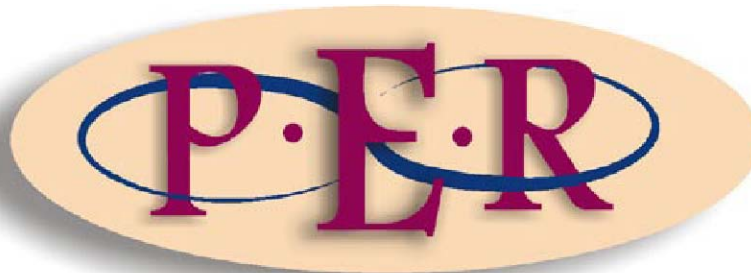


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**COMPLIANCE NOTICES – A NEW TOOL IN ENVIRONMENTAL ENFORCEMENT**

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## COMPLIANCE NOTICES – A NEW TOOL IN ENVIRONMENTAL ENFORCEMENT

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### 1 Introduction

Environmental enforcement remains a problem in South African environmental law. This may be attributed partly to the lack of capacity and insufficient resources within national and provincial government.<sup>1</sup> It also may be a consequence of the continued use of so-called 'command and control' approaches to environmental enforcement, as environmental regulation does not provide sufficient incentives to encourage sustainable industrial practices by way of self-regulation. The predominant 'command and control' mechanism for enforcement is the criminal sanction.<sup>2</sup> Whilst criminal sanctions may play an important deterring role, they have until recently, largely been ineffective in South African environmental law mainly because the penalties for environmental damage are seldom severe enough to deter polluters. It has been noted also that the use of criminal sanctions may not necessarily lead to environmental improvement.<sup>3</sup> Authors have thus advocated the adoption of alternatives to criminal sanctions to address environmental abuse in South Africa.<sup>4</sup>

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1 See, however, *Hichange Investments v Cape Produce* 2004 2 SA 393 (E), where the court found that a lack of resources is not sufficient reason for lack of enforcement.

2 Kidd 2002 *SAJELP* 21.

3 Boyden Gray, Marzulla and Shanahan 1998 *JLPOL* 363, 378. The authors point out that in the USA "...since the early 1990s, the measuring stick for progress in environmental enforcement has become the number of prosecutions as opposed to true environmental improvement. The result is a bean-counting mentality which leads to increased prosecutions of technical permit violations, paperwork mistakes, and other easily provable offences. Meanwhile, federal agents have largely avoided the difficult prosecution of more damaging crimes".

4 *Ibid.*

An important addition to environmental enforcement has been the use of directives such as section 31A of the *Environment Conservation Act* (ECA)<sup>5</sup>, section 19 of the *National Water Act* (NWA),<sup>6</sup> section 45 of the *Mineral and Petroleum Resources Development Act* (MPRDA)<sup>7</sup> and section 28 of the *National Environmental Management Act* (NEMA).<sup>8</sup> These provisions establish a duty of care and empower competent authorities to direct transgressors to take a number of steps to remedy harm to environment. Over the last few years, national and provincial governments have utilised these provisions with some measure of success.<sup>9</sup>

In 2005 the *NEMA Amendment Act*<sup>10</sup> was promulgated which created a new enforcement section and a new Part 2 which was inserted into Chapter 7 of NEMA in terms of which the Minister of the Department of Environmental Affairs and Tourism (DEAT) and Members of the Executive Council (MECs) of provincial departments responsible for the environment may appoint Environmental Management Inspectors (EMIs) tasked with the monitoring and enforcement of certain environmental legislation.<sup>11</sup> EMIs are designated to enforce the specific environmental legislation they have been mandated to enforce in their designations by the Minister or relevant MEC.<sup>12</sup> The Inspectorate thus has the challenging task of filling the 'enforcement gap' that exists in environmental law and management in South Africa. For the first time a national network of environmental enforcement officials will, through collaboration with other enforcement agencies in the country, such as the South African Police Services (SAPS), ensure compliance and enforcement in important areas, including, *inter alia*: pollution and waste, biodiversity, protected areas, marine and coastal environments and environmental impact assessments.

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5 *Environment Conservation Act* 73 of 1989.

6 *National Water Act* 36 of 1998.

7 *Mineral and Petroleum Resources Development Act* 28 of 2002.

8 *National Environmental Management Act* 107 of 1998.

9 See, eg, *Harmony Gold Mining v Regional Director: Free State, Department of Water Affairs and Forestry* Unreported case no 269/05 (SCA).

10 *National Environmental Management Amendment Act* 46 of 2003.

11 Ss 31B, C and 31D.

12 Ss 31B and 31C.

In exercising this mandate, EMIs have a new administrative remedy at their disposal, namely compliance notices.<sup>13</sup> This note examines this new tool and assesses its effectiveness and the extent to which it is likely to be utilised by EMIs in the exercise of their mandate.

## **2 An overview of compliance notices**

### **2.1 Aim of compliance notice**

The overall aim of a compliance notice is to bring non-compliant actors into compliance with environmental legislation or with the conditions of permits, authorisations or other regulatory instruments. In this regard, section 31L(1) of NEMA states that an EMI may issue a compliance notice –

...if there are reasonable grounds for believing that a person has not complied with a provision of the law for which that inspector has been designated ...;<sup>14</sup> or with a term or condition of a permit, authorisation or other instrument issued in terms of such law.<sup>15</sup>

For example, section 30(3) of NEMA places a duty on the person responsible for an environmental emergency to report without delay on a number of aspects related to the incident to specified authorities (such as DEAT, provincial authorities, local authorities, SAPS, and fire prevention services) and individuals whose health may be affected. If such a person fails to report on all aspects of the emergency incident or fails to report to all the stated entities, an EMI may issue a compliance notice requiring the person to comply with the provisions of section 30(3).

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13 Ss 31G and 31L.

14 S 31L(a).

15 S 31L(b).

## 2.2 *Scope of compliance notices*

Whilst EMIs may only issue compliance notices in line with their legislative mandate,<sup>16</sup> that is, the legislation that they have been designated to enforce, the scope for issuing a compliance notice is quite wide in that it can be issued for non-compliance with any "...provision of the law for which that inspector has been designated."<sup>17</sup> This begs the question whether compliance notices can also be used to enforce provisions that require the relevant authority to issue a directive. Section 28 of NEMA, for example, places a general duty of care on everyone to prevent environmental pollution and degradation. It states that:

Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

Section 28(4) provides for the enforcement of section 28(1) and stipulates that:

The Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests, *direct* any person who fails to take the measures required under subsection (1) to –

- (a) investigate, evaluate and assess the impact of specific activities and report thereon;
- (b) commence taking specific reasonable measures before a given date;
- (c) diligently continue with those measures; and
- (d) complete them before a specified reasonable date:

Provided that the Director-General or a provincial head of department may, if urgent action is necessary for the protection of the environment, issue such directive, and consult and give such opportunity to inform as soon thereafter as is reasonable.<sup>18</sup>

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16 See discussion in par 3 below.

17 S 31L.

18 Emphasis added.

NEMA neither defines 'directive' nor does it stipulate the format of a directive. It also does not specify that section 28(1) can only be enforced by way of a defined directive. Given the wide ambit of section 31L(1)(a), there is no reason why EMIs cannot issue a compliance notice to enforce section 28(1) of NEMA. This power is of particular importance in light of the view that non-compliance with a section 28(4) directive is not deemed to be an offence in terms of the Act.<sup>19</sup> Non-compliance with a compliance notice, however, is an offence.<sup>20</sup> Thus, using a compliance notice to direct a transgressor to comply with section 28(1) provides some teeth to environmental compliance and enforcement.

### **2.3 The process of issuing a compliance notice**

In terms of section 31L(1) of NEMA, an EMI may issue a compliance notice in the prescribed form and following a prescribed procedure. These forms and procedures are set out in the regulations.<sup>21</sup> Regulation 8 prescribes that before issuing a compliance notice, the EMI must give the person to whom the inspector intends to issue the compliance notice advance warning of the intention to issue such compliance notice.<sup>22</sup> The Regulations also provide for a reasonable opportunity to make representations to the EMI regarding why a compliance notice should not be issued.<sup>23</sup> The EMI may thus issue a so-called 'pre-compliance notice'. If an EMI has reason to believe, however, that the issuing of a pre-compliance notice will cause a delay resulting in significant and irreversible harm to the environment, the inspector may issue a compliance

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19 In cases of non-compliance with a directive an application can be made to the High Court to make the directive an order of court, a so-called order *ad factum praestandum*, i.e. an order to do or abstain from doing a particular act or to deliver a thing. See *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* Unreported case no 2005/7655 (W) 14.4. Non-compliance with the court order could in turn lead to a contempt of court order and a fine. See generally *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd* Unreported case no 2005/7655 (W).

20 S 31N(1) of NEMA.

21 National Environmental Management Regulations Relating to Qualification Criteria, Training and Identification of, and Forms to be used by, Environmental Management Inspectors, GG 28869 of 2006.

22 Reg 8(2)(a). This conforms with s 33(1) of the *Constitution of the Republic of South Africa*, 1996, which guarantees the right to administrative action that is "lawful, reasonable and procedurally fair" and also s 6(2)(c) and s 3 of the *Promotion of Administrative Justice Act* 3 of 2000, which gives effect to the requirement of procedural fairness in s 33(1).

23 Reg 8(2)(b).

notice without meeting this requirement.<sup>24</sup> If an EMI, for example, wants to issue a compliance notice to ensure compliance with section 28(1) of NEMA in a situation where harm to the environment is significant and imminent, he or she may issue a compliance notice directly. In such an instance the EMI must explain the reasons for not issuing a pre-compliance notice in the eventual compliance notice.<sup>25</sup>

The compliance notice must set out the details of the conduct constituting non-compliance; any steps the person must take and the period within which those steps must be taken. It must further set out anything which the person may not do, the period during which the person may not do it; and the procedure to be followed in lodging an objection to the compliance notice with the Minister or MEC.<sup>26</sup> In terms of section 31L(3) an EMI may, on good cause shown, vary the compliance notice and extend the period within which the person must comply. In practice, this would require an application to the EMI requesting the variation.

#### **2.4 Objections to compliance notices**

Section 31M provides that a person who objects to the notice may make representations, in writing, to the Minister or MEC within 30 days of receipt of the notice (or a longer period determined by the Minister or MEC). The Minister or MEC may confirm, modify or cancel a notice or any part of the notice and must specify the period within which the person who received the notice must comply with any part of the notice that is confirmed or modified. Whilst this is an attempt to comply with the administrative justice requirement of procedural fairness, it is not entirely clear which aspect thereof is being complied with. Section 3(2)(b) of the *Promotion of Administrative Justice Act* (PAJA)<sup>27</sup> provides, amongst others, that an administrator must give a person a reasonable opportunity to make representations. This provision gives effect to

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24 Reg 8(3).

25 Reg 8(3)(b).

26 S 31L(2).

27 *Promotion of Administrative Justice Act* 3 of 2002.

the common law rule of *audi alterem partem*. Section 31M indeed does provide such an opportunity for representations in line with the *audi alterem partem* rule. What is curious, however, is that presentations can be made directly to the Minister or MEC. This makes it seem more like a form of internal appeal. Yet, NEMA provides for an internal appeals procedure in sections 43(1) and 43(2). In terms of these provisions an affected person may appeal to the Minister or MEC against a decision taken by any person acting under a delegation of power delegated by the Minister under NEMA or a specific environmental management act. Thus, if an affected person has already lodged an objection to the Minister or MEC objecting to the compliance notice and the Minister or MEC upheld the decision of the EMI, appealing to the Minister or MEC in terms section 43 may not lead to a different outcome and will, in fact, be a waste of time and resources from both the perspective of the affected person and the Minister or MEC. One solution may be to amend section 31M and to allow for objections to be lodged to the EMI. However, given that the regulations allow for objections to be raised to the EMI in the pre-compliance notice, section 31M would then only be effective under those circumstances where no pre-compliance notice was issued.

Section 31L(4) of NEMA determines that a person who receives a compliance notice must comply with that notice within the time period stated in the notice. The Minister or MEC may, however, agree to suspend the operation of the compliance notice whilst considering objections in terms of S31M.<sup>28</sup> The mere lodging of an objection would not, however, suspend the compliance notice. NEMA indicates that the Minister must agree to suspend the compliance notice, which suggests that the affected person will need to lodge a separate application for suspension. The Act does not, however, prescribe any time period within which to consider the suspension application or the merits of the objection. An unreasonable time period may, however, fall foul of the requirements of PAJA. In *Noupoort Christian Care Centre v Minister of National*

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28 S 31L(5).



*Department of Social Development and Another*,<sup>29</sup> the court held that 'administrative action' meant any decision taken, or any failure to take a decision, by an organ of state when exercising a public power or performing a public function in terms of any legislation. It stated that –

...a 'failure' to take a decision could include a refusal to take a decision, but was not necessarily restricted to an explicit or positive refusal. In appropriate circumstances an unreasonable delay in taking a decision would constitute a failure to take a decision.<sup>30</sup>

The Minister or MEC thus will have to be mindful that he or she does not cause an unreasonable delay in considering the suspension application or the objections to the compliance notice.

## **2.5 Non-compliance with a compliance notice**

NEMA makes non-compliance with a compliance notice an offence.<sup>31</sup> As mentioned above, this is in contrast with the section 28(4) directive of NEMA. In case of such failure the EMI must report the non-compliance to the Minister or MEC and the Minister or MEC may revoke or vary the relevant permit, authorisation, or other instrument which is the subject of the compliance notice; take whatever steps necessary and recover the costs of doing so from the person who failed to comply and report the matter to the Director of Public Prosecutions.<sup>32</sup> The party who, accordingly, fails to comply with the conditions of a bioprospecting permit, for instance, may not only lose the permit, but may also face criminal charges. The provision, however, only states that the Minister or MEC may report the matter to the Director of Public Prosecutions. This provides the Minister or MEC with discretionary powers in reporting the matter to the Director of Public Prosecutions. As a result, it waters down the effect of the criminal sanction. It is in contrast, for example, with the NWA that simply

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29 *Noupoort Christian Care Centre v Minister of National Department of Social Development* 2005 10 BCLR 1034 (T).

30 Par D-F.

31 S 31N(1).

32 S 31N(2).

makes failure to comply with a section 19 directive an offence.<sup>33</sup> A better approach may be to place an obligation on the Minister or MEC to report the offence to the authority most appropriate to exercise the discretion to prosecute, that is, the Director of Public Prosecutions.

A more problematic oversight is the failure to include a penalty provision in NEMA. Thus, whilst creating an offence, no guidance is given to courts on the kind of penalties that can be laid down for the offence. This seems to be an administrative oversight and the Act hopefully will be amended in the near future. It is hoped that the legislature, in developing penalties, will move beyond simply fines and imprisonment and will seek to lay down more innovative penalties, specifically penalties that will inculcate a duty of care towards the environment.<sup>34</sup>

### 3 The mandate to issue compliance notices

Section 31D of NEMA provides that an EMI may be designated for the enforcement of a specific act, which may include NEMA<sup>35</sup> or a specific environmental management act (SEMA)<sup>36</sup> such as the *National Environmental Management: Biodiversity Act* (NEMBA),<sup>37</sup> the *National Environmental Management: Protected Areas Act* (NEMPAA)<sup>38</sup> and the *National Environmental Management: Air Quality Act* (NEMAQA).<sup>39</sup> EMIs may also be mandated to enforce specific provisions of NEMA or a SEMA.<sup>40</sup> They may further be designated to enforce NEMA and all SEMAs<sup>41</sup> or any combination of

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33 S 151(1) read with s 151(2) of the NWA.

34 This could include publication of the offence (especially where a company is involved), or community service that involves an environmental restoration or enhancement project that does not have to be related to the offence.

35 S 31D(1)(a).

36 S 31D(1)(b).

37 *National Environmental Management: Biodiversity Act* 10 of 2004.

38 *National Environmental Management: Protected Areas Act* 57 of 2003.

39 *National Environmental Management: Air Quality Act* 39 of 2004.

40 S 31D(1)(c) of NEMA read with ss 31B and 31C.

41 S 31D(1)(d) of NEMA read with ss 31B and 31C.

these acts or provisions thereof.<sup>42</sup> An MEC may similarly designate an EMI for the enforcement of NEMA or a SEMA which is administered by the MEC or a provincial organ of state, or in respect of which the MEC or a provincial organ of state exercises or performs assigned or delegated powers or duties.<sup>43</sup>

A ranking system is used in the appointment of EMIs where they are ranked from one to five on the basis of levels of seniority and expertise.<sup>44</sup> Grade 1 EMIs are the highest ranked and are mandated to exercise all the powers given to EMIs under the Act. They are likely to be senior administrators in DEAT and provincial environmental government departments. At the lowest level are Grade 5 EMIs who only have routine inspection and administrative powers. The powers of grade 2, 3 and 4 vary according to rank, but include powers of inspection, investigation and enforcement.<sup>45</sup> In practice it will be the Grade 2 to 5 EMIs that will be actively involved in effecting monitoring, compliance and enforcement. The power to issue compliance notices, however, rests with Grade 1 EMIs.<sup>46</sup> This has the effect that Grade 2 to 5 EMIs will only be able to make a recommendation to a Grade 1 EMI to issue a compliance notice. Thus, for example, if a Grade 2 EMI in the course of an investigation determines that a person is engaged in the commercial breeding of an alien species without a permit,<sup>47</sup> the EMI will have to report the transgression to a Grade 1 EMI who then may exercise the discretion to issue a compliance notice.

The ranking system may raise some challenges in compliance and enforcement. It creates a hierarchical system of enforcement where enforcement officials may have to cut through bureaucratic red tape in order to use an environmental enforcement tool. Senior administrators may in many instances be too far removed from the practicalities of day-to-day enforcement

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42 S 31D(1)(e) of NEMA read with ss 31B and 31C.

43 S 31D(2) read with ss 31B and 31C of NEMA. The MEC may also designate officials from local government.

44 Annexure A of the Regulations read with reg 3.

45 Ss 31H, 31J and 31K of NEMA read with Annexure A of the Regulations.

46 Annexure A of the Regulations.

47 S 65 of NEMBA requires a permit for any restricted activity that involves an alien species. Regulations will determine what 'restricted activities' are. For the purpose of this example we assume that one such activity may be the breeding of alien species.

and as a result may not act with the necessary insight or speed to ensure that compliance notices are in fact issued when required. Extending the power to issue compliance notices to other EMIs, at the least to Grade 2 and 3 EMIs who also have investigative powers (in the case of Grade 3 EMIs) and enforcement powers (in the case of Grade 2 EMIs), may serve the cause of environmental enforcement more effectively.

#### **4 The designated legislation**

Compliance notices may be issued under NEMA in a number of instances. Section 24 for instance, provides for environmental authorisations and for the identification of activities, which may not commence without environmental authorisation from the competent authority.<sup>48</sup> Once environmental authorisations are issued, holders will have to adhere to the conditions thereof including the minimum conditions set out in section 24E.<sup>49</sup> In those instances where conditions attached to the environmental authorisation are not fulfilled, a compliance notice may be issued directing the holder to comply with such conditions. Further provisions that can be enforced by way of a compliance notice include: section 28, which establishes a duty of care and provides for prevention, remediation and minimisations of environmental damage;<sup>50</sup> section 29, which provides for the protection of workers refusing to do environmentally hazardous work<sup>51</sup> and section 30, which provides for the control of emergency incidents. A compliance notice can be issued if a person fails to notify an emergency incident 'forthwith' after obtaining knowledge about the incident to

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48 S 24 of NEMA.

49 S 24E states that –

Every environmental authorisation must as a minimum ensure that:

- (a) adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity;
- (b) the property, site or area is specified; and
- (c) provision is made for the transfer of rights and obligations when there is a change of ownership in the property.

50 See discussion at par 2 above.

51 For instance an employer, who dismissed an employee for refusing to perform environmentally hazardous work, can be directed to reinstate such worker.

the appropriate authorities<sup>52</sup> or if the responsible person fails to comply with any of the section 30(4) obligations.<sup>53</sup>

NEMBA creates a number of activities for which a permit is required. These include section 57(1) which mandates a permit for restricted activities in relation to threatened or protected species; section 57(2) which mandates a permit for activities regulated by way of a notice published under this section; section 65(1) which mandates a permit for restricted activities involving alien species; section 70(1) which mandates a permit for restricted activities involving invasive species; and section 80(1) which mandates a permit for bioprospecting and for exporting indigenous biological resources for the purpose of bioprospecting. A compliance notice may be issued if someone is found engaging in any of the aforementioned activities without the requisite permit.

Under NEMPAA and the *Regulations regarding the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites*,<sup>54</sup> a number of provisions would require compliance. NEMPAA regulates access to enter, reside, or perform activities in protected areas<sup>55</sup> and provides for restricted access in specific protected areas.<sup>56</sup> It also places restrictions on the operations of aircraft;<sup>57</sup> on prospecting and mining<sup>58</sup> and on commercial and

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52 S 30(3) of NEMA states that –

...the responsible person or, where the incident occurred in the course of that person's employment, his or her employer must forthwith after knowledge of the incident, report through the most effective means reasonably available –

- (a) the nature of the incident;
- (b) any risks posed by the incident to public health, safety and property;
- (c) the toxicity of substances or by-products released by the incident; and
- (d) any steps that should be taken in order to avoid or minimise the effects of the incident on public health and the environment.

53 These include including taking reasonable measures to contain and minimise the effects of the incident on the environment and on the health, safety and property of persons; undertaking clean-up procedures; and assessing the immediate and long-term effects of the incident on the environment and public health.

54 Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites, issued in terms of s 86(1) of NEMPAA. GN 1060, GG 28181 of 2005.

55 See Part 3 of NEMPAA.

56 See, eg, s 45 relating to special nature reserves. The Regulations also contain rules regarding access.

57 S 47 of NEMPAA.

58 S 48 of NEMPAA.

community activities<sup>59</sup> in certain protected areas. Non-compliance with any of the above may be addressed by way of a compliance notice. Thus if an EMI, whilst on a routine inspection in a special nature reserve, encounters a scientist who is performing scientific work without adhering to the conditions of a permit, he or she may be directed by way of a compliance notice to adhere to those conditions and to cease all activities until those conditions are met.

## **5 The ability of EMIs to issue compliance notices beyond the designated legislation**

EMIs are currently designated to enforce NEMA and certain SEMAs. This begs the question whether compliance notices may be issued with respect to violation of other environmental legislation such as the MPRDA, the *Marine Living Resources Act* (MLRA),<sup>60</sup> the *National Forests Act*,<sup>61</sup> the *Hazardous Substances Act*,<sup>62</sup> and, whilst still operative, parts of the *Atmospheric Pollution Prevention Act* (APPA)<sup>63</sup>. This may happen, for example, where the pollution or degradation is directly linked to non-compliance with the conditions of a mining permit issued in terms of the MPRDA.

EMIS may only issue compliance notices with respect to that legislation or provisions of the legislation that they are explicitly authorised to enforce. Section 31G(1)(a) provides in this regard that an EMI must, within his or her mandate in terms of section 31D, monitor and enforce compliance with a law for which he or she has been designated. As noted above,<sup>64</sup> this mandate is quite wide and an EMI may issue a compliance notice if it is believed that a person has not complied 'with a provision of the law' for which that inspector

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59 S 50 of NEMPAA.

60 *Marine Living Resources Act* 18 of 1998.

61 *National Forest Act* 84 of 1998.

62 *Hazardous Substances Act* 15 of 1973.

63 *Atmospheric Pollution Prevention Act* 45 of 1965.

64 See discussion at par 2 above.

has been designated.<sup>65</sup> This effectively means non-compliance with any provision of that law.

One such law for which an EMI may be designated is NEMA and section 28(1) of NEMA places a general duty of care on everyone to prevent environmental pollution and degradation. As argued above, an EMI may issue a compliance notice to the polluter to ensure compliance with section 28(1). This has the effect that EMIs designated to enforce NEMA may be able to act against any person who causes, has caused or may cause significant pollution or degradation of the environment, irrespective of whether such pollution or degradation is regulated by NEMA or by other environmental legislation, that is, degradation or pollution linked to mining or to degradation of marine resources. Thus it can be argued that EMIs who are designated to enforce NEMA will not be acting outside of his or her mandate if they use section 28 to enforce other environmental legislation.

## **6 Green versus brown and the penchant for criminal sanctions**

EMIs have been granted this new enforcement tool, but to what extent will they actually utilise it? Kidd<sup>66</sup> suggests that nature conservation offences are very often more akin to what he terms 'traditional' crimes such as murder and assault in that their commission is not usually the unintended side effect of otherwise social behaviour. Environmental enforcement officials operate within this tradition and as such they strongly favour the use of criminal sanctions in so-called 'green enforcement'.<sup>67</sup> This is what they are familiar with and as a result, some enforcement officials regard the use of administrative tools with a fair amount of suspicion and do not view it as an appropriate tool for 'green enforcement'. Some enforcement officials are of the view that there are instances where a compliance notice may not be the most effective tool: for

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65 S 31L(1).

66 Kidd 2002 SAJELP 24.

67 These include mostly nature conservation offences. Based on discussions with officials during Environmental Management Inspector training workshops.

instance, where there is a need to act swiftly as in the case of apprehending someone who is trying to smuggle a cycad out of the country without a permit; or where the offence is particularly heinous, for example, illegal trade in severely endangered species; or when dealing with a 'repeat offender' where a pattern of criminal intent has clearly been established.

It is argued that administrative tools may be more appropriate when dealing with so-called 'brown issues', for example, an industry that is emitting noxious gasses beyond what is permissible under his or her permit. This is the type of transgression where the transgressor is not likely to flee – he or she has a vested interest in compliance so as to keep operating. The transgressor will be more likely to comply where a compliance notice is issued and in addition, the EMI will be able to monitor compliance in terms of the notice on an ongoing basis.

However, to classify environmental violations into 'green' versus 'brown' issues and to argue that 'green' issues should be dealt with by way of criminal sanctions, whilst compliance notices can be reserved for 'brown' issues, amounts to an oversimplification of the issue. Environmental violations ('green' or 'brown') do not fall into factually or even legally homogenous classes. Take, for instance, the example mentioned above where someone is illegally trading in severely endangered species. This is an act that may be considered so serious that criminal prosecution may be the only remedy, not only to punish the offender, but also to deter other possible future offenders. A second group of violations under the SEMAs has the potential to have a lesser impact. Those would be instances where, for example, a permit has been issued, but the conditions of the permit are not being met, for example, if someone is conducting a scientific experiment in a protected area in terms of an authorisation of the management authority which specifies that only a specific number of people may be allowed in the protected area at any period of time. If this condition is violated, a compliance notice may remedy the situation.

Thus, in those instances where the violation of the act or a provision thereof may have serious consequences for the environment, punishment by way of



criminal prosecution would be the more effective route. This is in line with the notion that criminal sanctions be reserved for the most serious of offences.<sup>68</sup>

## 7 Conclusion

South Africa has come a long way in terms of enforcement of environmental legislation. Over the last decade, law-makers have indicated a willingness to address pollution and environmental degradation and new emboldened legislation provides for comprehensive new standards for environmental protection, coupled with and reinforced by clear sanctions. NEMA now also has created a new body of enforcement officials and has provided those officials with a range of tools with which to fight non-compliance of environmental laws.

Compliance notices as one such new tool, must be welcomed. It is an administrative remedy that could play an important role in ensuring adherence to environmental laws and regulations. It is imperative, however, that the remaining concerns relating to the use of these enforcement mechanisms be addressed.

Finally, given the potential for effective use in the area of enforcement, it is hoped that compliance notices eventually will be utilised more broadly. This could be done through the expansion of the mandate of EMIs to other environmental legislation such as ECA, NWA, and MPRDA. This would enable EMIs to use compliance notices in respect of the violation of these acts, which hopefully will bring about broader compliance with environmental laws.

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68 Kidd 2002 *SAJELP* 25, and Lazarus 1994 *Loyola LA LR* 883.

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**List of abbreviations**

APPA	<i>Atmospheric Pollution Prevention Act</i>
DEAT	Department of Environmental Affairs and Tourism
ECA	<i>Environment Conservation Act</i>
EMI	Environmental Management Inspectors
GG	<i>Government Gazette</i>
GN	Government Notice
MEC	Member of the Executive Council
MLRA	<i>Marine Living Resources Act</i>
MPRDA	<i>Mineral and Petroleum Resources Development Act</i>
NEMA	<i>National Environmental Management Act</i>
NEMAQA	<i>National Environmental Management Air Quality Act</i>
NEMBA	<i>National Environmental Management: Biodiversity</i>
NEMPAA	<i>National Environmental Management: Protected Areas Act</i>
NWA	<i>National Water Act</i>
PAJA	<i>Promotion of Administrative Justice Act</i>
par	paragraph
SAPS	South African Police Services
s	section
ss	sections