COMPLIANCE NOTICES – A NEW TOOL IN ENVIRONMENTAL ENFORCEMENT

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THE EVOLUTION OF ENFORCEMENT

1. Command & control
2. Market based approaches
3. Hybrid - IEM
   - 2 & 3 requires environmentally sophisticated market place
   - Thus: need for command & control remain
Command & Control in SA

- Preference for criminal sanctions, especially in “green enforcement”
  - The “intentional transgressor”

- Administrative remedies
  - S31A
  - S28
NEW ENFORCEMENT MEASURES

- 2005 NEMA Amendment Act promulgated
- New enforcement section - new Part 2 inserted into Chapter 7 of NEMA
  - Creation of environmental management inspectors
  - Creation of new administrative remedy – compliance notices
EMIs

- Minister/MEC may designate
- Among officials employed by national, provincial or local government
- Functions:
  - Monitor compliance with legislation
  - Enforce legislation
  - Powers: routine inspections, investigations, stop, search, seizure, arrest, admission of guilt fines, s56 notice, compliance notices
COMPLIANCE NOTICE

- Overall aim = bring non-compliant actors into compliance with specific environmental legislation or with the conditions of any permit, license or authorization they may hold

- S31L(1): 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 …; or with a term or condition of a permit, authorisation or other instrument issued in terms of such law”
ADMINISTRATIVE JUSTICE REQUIREMENT

- Pre-compliance notice - a reasonable opportunity to make representations to the EMI

- Unless - issuing of a pre-compliance notice will cause a delay resulting in significant and irreversible harm to the environment
REQUIREMENTS

- Compliance notice must set out details of conduct constituting non-compliance
- Any steps person must take and period within which those steps must be taken
- Any thing which the person may not do, and period during which the person may not do it
- Procedure to be followed in lodging an objection to the compliance notice with the Minister or MEC
NON-COMPLIANCE

- Non-compliance = offence
- EMI report non-compliance to Minister/MEC
- Revoke/vary the relevant permit, authorisation or other instrument which is 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 a Director of Public Prosecutions
MANDATE

- NEMA
- **Specific environmental management act (SEMA)**
  - NEMA Biodiversity Act (NEMBA)
  - NEMA Protected Areas Act (NEMPA)
  - NEMA Air Quality Act (NEMAQA) – In future
- They may also enforce specific provisions of NEMA or a SEMA
NEMA

- S24 – environmental authorisations
- S28 – duty of care
- S29 – hazardous work
- S30 – emergency incidents
Permits:
- activities re threatened/protected species
- Restricted activities re alien/invasive species
- bioprospecting
NEMPAA & REGS

- Restricted access to enter, reside or perform activities in protected areas
- Restrictions on the operations of aircraft
- Restrictions on prospecting and mining
- Restrictions on commercial and community activities
SOME CHALLENGES
&
QUESTIONS
THE CRIMINAL SANCTION PREFERENCE

- “Green enforcers” prefer the criminal sanction:
  - Act fast
  - “intention”
  - Repeat offenders
- CN more appropriate for “brown enforcement”?
  - “Invested transgressor”
- NEMBA & NEMPAA – more prone to criminal sanction?
Can EMIs enforce other environmental legislation?

Mandate limited to NEMA, NEMBA, NEMPAA

But S28(4) directive enforced by way of compliance notice – reach of 28 = wide
“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 authorized by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.”

BUT: Permit, license, authorization under another act breached? – see 31L
POWER TO ISSUE CN

- Creation of hierarchy:
  - CN can only be issued by grade 1 EMI = administrators
  - Monitoring, investigations, inspections = grade 2-4
  - Are administrators appropriate to issue CN – removed from situation?
CONCLUSION

- **EMIs & CN advance enforcement in SA**
- **CN adds to existing administrative tools**
- **Advantage**
  - Unlike directive - clearly spelled out procedure
  - Used in range of scenarios
  - Penalty
- **But:**
  - will it be used to enforce NEMBA & NEMPAA, or only really effective for NEMAQA
  - Uncertainty re scope of mandate