

Recent trends in the enforcement of environmental law in South Africa: data from the National Environmental Compliance and Enforcement Reports *

Melissa Strydom, Senior Associate Public Law and Regulatory Bowmans

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Introduction

The Department of Environmental Affairs (**DEA**) annually publishes a National Environmental Compliance and Enforcement Report (**NECER**).¹ We have considered the NECERs published between 2008 and 2016 to determine whether any enforcement trends over this period have emerged. These trends may be indicative of certain patterns or practices in enforcement.

We focus on enforcement trends in the '**brown**' subsector, specifically compliance and enforcement action relating to industrial activities. The NECER distinguishes between "**green, blue and brown**" sub-sectors.² Compliance and enforcement activities taking place in the **green** sector relates to biodiversity and protected areas; **blue** relates to integrated coastal management; and **brown** to pollution, waste and Environmental Impact Assessments (**EIAs**).³ The **brown** sub-sector is associated with activities which, by their nature, have larger scale environmental impacts and are more likely to result in or have associated environmental pollution or contamination.

The data we have considered over this period has revealed certain trends in environmental enforcement, including the activities identified as focus / strategic areas and the enforcement mechanisms used by the authorities. We specifically consider the information regarding criminal enforcement, the monitoring and inspections of **brown** issues.

Criminal enforcement

The information regarding criminal enforcement is collated in **Figure 1** below,⁴ which illustrates the relationship between:

- the criminal investigations registered by the environmental authorities, i.e. the DEA's network of environmental enforcement officials,⁵ including the Environmental Management Inspectors (**EMIs**) or 'Green Scorpions';
- the number of matters handed to the National Prosecuting Authority (**NPA**) for prosecution;
- the matters concluded through acquittals, convictions, plea and sentence agreements or where the NPA declined to prosecute.

The data in Figure 1 is combined in that it relates to green, blue and brown matters,⁶ and is unfortunately not divided into the different sub-sectors. The green sector, by its nature, has more criminal matters compared to the brown sector.⁷

*Information in this article has been extracted from a presentation at Bowmans on Environmental Compliance and Enforcement, Targets, Trends and Tips on 11 May 2017.

¹<https://www.environment.gov.za/otherdocuments/reports#legal> and http://cer.org.za/virtual-library/gvt_docs/national-environmental-compliance-and-enforcement-reports

² As defined in the NECER, 2015/2016 at page ix.

³ As defined in the NECER, 2015/2016 at page ix.

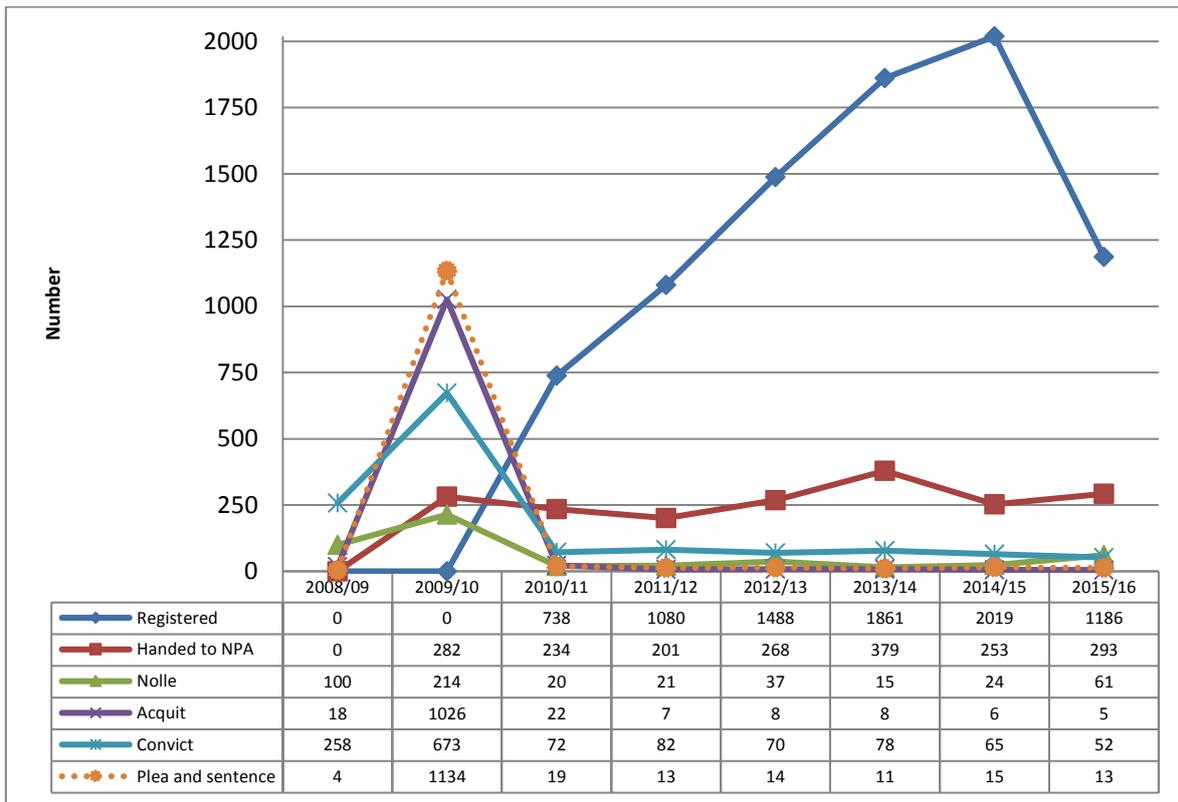
⁴ This is to the extent the information is obtainable from the NECERs, and our analysis places reliance on the underlying data as being accurately reported in the NECERs. Although it appears that the DEA has prepared these NECERs from 2008, only the reports from 2009 onwards are published on the publicly accessible website / online resources.

⁵ <https://www.environment.gov.za/projectsprogrammes/emi>

⁶ Obtained from the NECER reports from 2008/2009 to 2015/2016.

⁷ With SANPARKS having recorded 147 criminal cases handed to the NPA (of the total of 293) in 2015/16, see NECER 2015 / 16, page 2 and 23. Michael Kidd, *Environmental Law*, (2011) Juta & Company Ltd, page 270 – reference to the example of 'perlemoen poaching'.

Figure 1: Criminal investigations and enforcement activities



The **blue** line in Figure 1 indicates the progression (over the years) of the number of matters the DEA has registered for criminal investigation. This ranges between 700 to 1200 matters in 2010/11 and 2015/16, peaking at 2019 in 2014/15. It is not clear what the reason for the decrease in the last reporting year (from 2019 to 1186) may be as this is not explained. The decline could possibly have been due to capacity constraints or a decrease in the number of EMLs. However, the total number of EMLs has increased consistently over the years, and in the last reporting year it increased from 2294 in 2014/15 to 2411 in 2015/16.⁸

The **red** line shows the number of criminal investigations that were handed to the NPA for prosecution. The **purple**, **turquoise**, and **orange** lines respectively indicate the number of acquittals, convictions and plea and sentence agreements, all below a 100 in the last seven years. The **green** line indicates the number of matters where the NPA declined to prosecute (i.e. *nolle prosequi*).

There is a much higher number of cases handed to the NPA for prosecution (between 201 and 379 from 2008 to 2016) compared to those that have been concluded. For example, the 2015/16 NECER states that 293 matters / dockets were handed to the NPA. Whereas, the matters that have been concluded (either through convictions, acquittals, plea and sentence agreements and refusals to prosecute) combined are 110. This is nearly a third of matters handed to the NPA. The explanation for this is likely to be that matters are not concluded in the same year as it is initiated (i.e. when prosecution is instituted) because criminal prosecution is generally delayed. Therefore, the number of matters instituted in a year would not typically be the same as the number of matters that have been concluded.

There is also no explanation for the general upsurge of these factors in the 2009/10 reporting year. This may be an anomaly and different factors may have been taken into account in that year, such as 'smaller scale' biodiversity related offences.

⁸ NECER 2015/16, page 5.

In summary, there appears to be some consistency in the progression of the above factors in the graph. That is to say, the number of matters handed to the NPA for prosecution and the matters concluded follow similar patterns in the graph.

Focus industries and brown issues inspected

In the 2014/15 reporting period the following key focus or strategic sectors were identified for compliance and enforcement action in the brown sector: ferro-alloy steel and iron; refineries; cement; paper and pulp; health care risk waste treatment or disposal; hazardous landfill; power generation.⁹

According to the last year's report the most prevalent crimes reported for the brown sector include unlawful commencement of listed activities as the most common non-compliance.¹⁰ The focus areas identified in the last year relate to EIA requirements and pollution regarding waste water treatment facilities. Similar strategic sectors, to those listed in the previous reporting year, were identified for proactive compliance inspections with the addition of 'waste tyres'.¹¹

Figure 2 below outlines the number of brown matters investigated over the last six years, although not categorised or divided by the mentioned focus or strategic sectors.

Figure 2: Brown issues inspected over the last 5 years

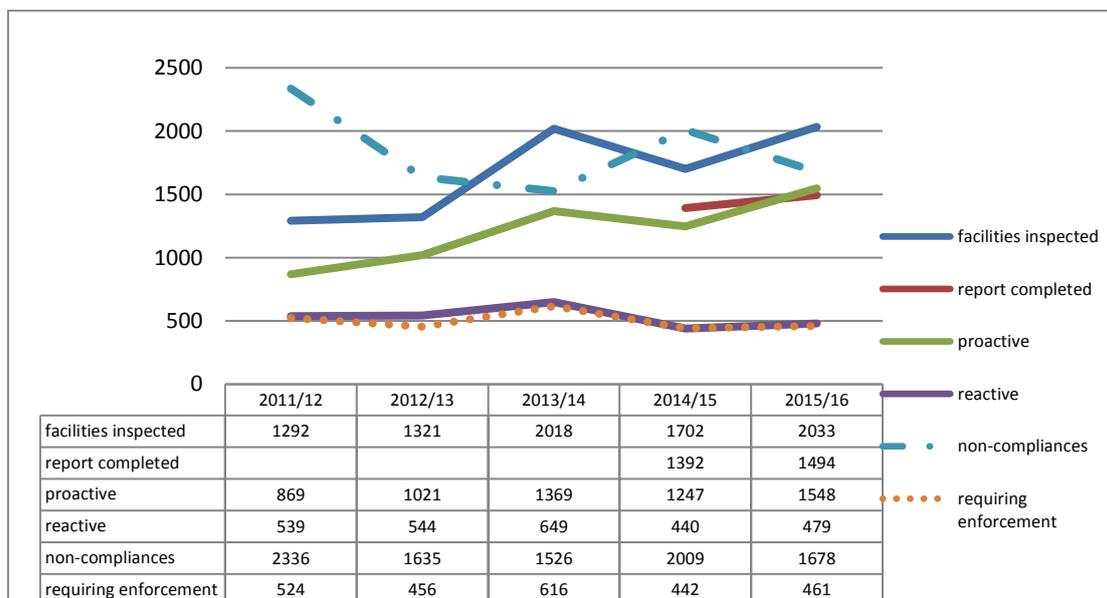


Figure 2 illustrates: the number of facilities inspected over the last five years; which of the inspections were proactive as opposed to reactive; the number of non-compliances that were noted; and the matters flagged for enforcement.¹² It was only in the last two reporting years that the DEA indicated the number of reports completed by the authorities from these inspections (the red line).

The orange dotted line indicates the matters that were flagged as "matters requiring enforcement action". These fluctuated between 442 and 616 and are much less than the number of facilities inspected or non-compliances noted. Administrative compliance measures may have resolved a number of non-compliances, and proceeding with criminal enforcement action may thus have been unnecessary.

⁹ NECER 2014/15, page 3.

¹⁰ NECER 2015/16, page 17.

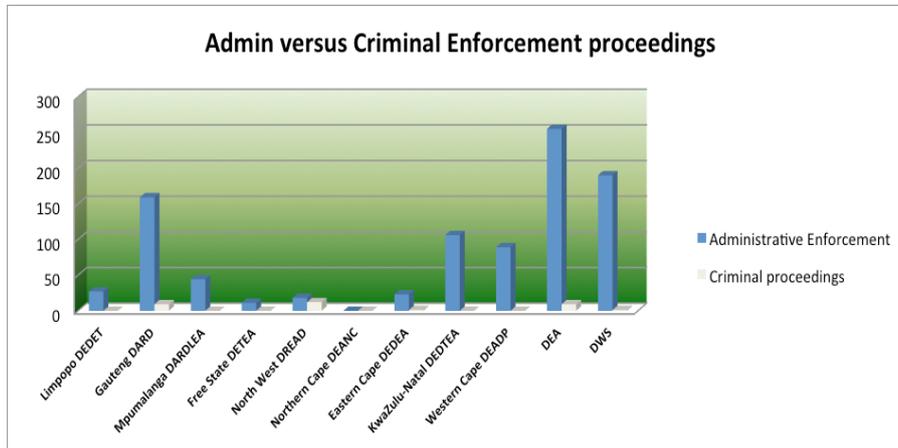
¹¹ NECER 2015/16, page 49.

¹² NECER 2011/12, page 15, NECER 2012/13, page 13, NECER 2013/14, page 16, NECER 2014/15, page 13 and NECER 2015/16, page 20.

Administrative sanctions compared to criminal sanctions

Compliance monitoring data and administrative enforcement measures are reported separate from criminal enforcement in the NECER. It states that the use of administrative enforcement mechanisms, namely directives and compliance notices, remain the preferred tools for the authorities to deal with **brown** issues;¹³ this is illustrated in **Figure 3** below.¹⁴

Figure 3



From this graph it is evident that administrative enforcement mechanisms (indicated by the blue columns) significantly outweigh criminal proceedings (indicated by the white). The reason for this may be that criminal enforcement and prosecution may be reserved for serious transgressions or matters that may not have been addressed or resolved through administrative measures.

Kidd outlines the circumstances when the criminal sanction may be appropriate, including that it should be reserved for: intentional wrongdoing, such as “midnight dumping” offences; persistent wrongdoing; or where serious harm to people or the environment is caused.¹⁵

Accordingly, it is important to thoroughly consider, address or respond to adverse audit or compliance monitoring findings, administrative enforcement measures, at the outset or appropriate time, to avoid unnecessary criminal measures being instituted.

Conclusion

In summary, we have observed trends in respect of:

Criminal enforcement: The last six years’ NECER data indicates that:

1. The total number of EMIs has increased consistently over the years.
2. Matters handed to the NPA for **prosecution** fluctuated between 201 (the lowest being recorded in 2011/12) and 379 (the highest being recorded in 2013/14);
3. **Acquittals** varied between 22 (the highest being recorded in year 2010/11) and 5 the lowest being recorded in 2015/16);
4. **Convictions** were between 82 (the highest being recorded in 2011/12) and 52 (the lowest being recorded in 2015/16);
5. The 2015/16 reporting year had the most matters that the NPA **declined** to prosecute, at 61;
6. **Plea and sentence agreements** have fluctuated between 19 (the highest being recorded in 2010/11) and 11 (the lowest being recorded in 2013/14).

¹³ NECER 2015/16, page 14 and 15.

¹⁴ Extracted from NECER 2015/16, page 14 and 15.

¹⁵ Michael Kidd, *Environmental Law*, (2011) Juta & Company Ltd, page 277.

There are significantly more criminal proceedings pending in each reporting year than those that are concluded. This may be explained by the fact that the institution and conclusion of matters may extend beyond a particular reporting year. There appears to be relative consistency in the data regarding matters handed to NPA, acquittals, convictions, plea and sentence agreements.

Brown sector compliance monitoring

In the 2014/15 reporting year the ferro-alloy steel and iron; refineries; cement; paper and pulp; health care risk waste treatment / disposal; hazardous landfill; and power generation sectors were identified as strategic focus sectors for enforcement.¹⁶ In the last report the focus areas identified relate to EIA requirements and pollution regarding waste water treatment facilities; and similar areas identified in the previous reporting year, with the addition of waste tyres.¹⁷

There appear to be a lot more matters investigated by DEA than handed to NPA. Administrative enforcement measures and actions still significantly outweigh criminal prosecution. Matters classified as "requiring enforcement action" are much lower (between a fourth and a fifth less) than the number of facilities inspected or non-compliances recorded.

This may be due to administrative compliance measures possibly resolving many non-compliance findings and therefore it is unnecessary to proceed with criminal enforcement action. This emphasises the importance of thoroughly considering any non-compliance findings at the outset, to avoid unnecessary criminal investigation and prosecution.

¹⁶ NECER 2014/15, page 3.

¹⁷ NECER 2015/16, page 49.