



TERMS OF REFERENCE FOR A SOLICITED WRC PROJECT

KEY STRATEGIC AREA	1&2 (Water resources and ecosystems)
THRUST	1 (Governance and institutional arrangements)
PROGRAMME	2 (Policy, science, and implementation)
TITLE	Enabling the incorporation of administrative penalties into the National Water Act
ToR NUMBER	1009916

Objectives:

General:

To provide for the research and calculation methodology of the quantum of administrative penalties to be imposed for offences in terms of the National Water Act (No. 36 of 1998) and selected subordinate legislation, for inclusion and application in the National Environmental Management Amendment Bill, 2022, when passed

Specific:

To undertake the following research in alignment with the preliminary draft of the National Environmental Management Amendment Bill, 2022; Draft Policy on Introduction of an Administrative Penalty System into National Environmental Legislation¹ and the National Water and Sanitation Master Plan [Volume 1: Call to Action v 10.1 31 October 2018]:

1. Examine how administrative penalties can be applied, within the context of the National Water Act, to best support the strategic objectives of the Act, while complementing existing provisions for compliance, deterrence, polluter-pays, rehabilitation etc.
2. Develop criteria and guidelines for distinguishing between minor administrative offences (subject only to fixed administrative penalties) and more serious offences (subject to variable administrative penalties and/or criminal sanction) in terms of the National Water Act and selected subordinate legislation (see Appendix 2), and apply such criteria and guidelines by categorizing the identified offences as minor administrative or more serious offences.
3. Review the current criteria for determination of appropriate variable administrative penalties outlined in the draft National Environmental Management Amendment Bill (refer

¹ NEM Amendment Bill and the draft policy are not publicly available but will be shared with the project team appointed to undertake this project. Refer to Appendix 1 for a summary of aspects of the draft policy relevant to these ToR.

to summary of policy in Appendix 1) in order to determine their effectiveness in guiding the application of administrative penalties within the context of the National Water Act and selected subordinate legislation, and propose any necessary amendments.

4. Propose appropriate quanta for fixed administrative penalties for the minor administrative offences identified in objective 2.
5. Develop a user-friendly calculator template that can be used to calculate the quantum of variable administrative penalties in line with the proposed criteria referred to in objective 3.
6. Develop a mechanism to give effect to sections 152 and 153 of the National Water Act, within the context of an administrative penalty system, for the determination of damages for any harm or loss, or damage that has been caused to a water resource.
7. Undertake the activities in objective 1-5 above, where appropriate, in a manner that could be equally applied to national legislation regulating other environmental sectors (biodiversity, protected areas, waste, air quality, oceans and coast etc.) to which the envisaged administrative penalties system will be applied.

Rationale:

The Department of Forestry, Fisheries and Environment (DFFE) initiated a project to research the feasibility of applying administrative penalties to contraventions of national environmental legislation, develop national policy and prepare draft legislation on the introduction of administrative penalties into national environmental legislation.

The research project and engagement with 14 environmental compliance and enforcement authorities (including the Department of Water and Sanitation, DWS) examined the views and experiences of officials in relation to the efficacy of criminal enforcement in improving compliance with environmental legislation. This assessment made it apparent that there is definite scope for the current set of enforcement mechanisms provided for in environmental legislation in South Africa to be supplemented by a system of administrative penalties.

An administrative penalty is a regulatory response to a legal violation in which the violator is subject to a monetary fine after a fair administrative process. The goal of an administrative penalty is to punish violators. It should be contrasted from a remedial regulatory response to a legal violation, for example, the issuance of directives/notices, which aims to repair the harm caused by the legal violation. The envisaged administrative penalty system will fall outside the criminal justice system, and the imposition of an administrative penalty on a contravener does not necessarily require the launch of criminal proceedings. There does however need to be interplay between the implementation of the administrative penalty system and the criminal sanction system.

Having the mechanism of fixed administrative penalties that can be applied to certain violations without having to follow cumbersome and costly criminal and/or civil court processes has the potential to strengthen regulators' ability to reinforce the polluter pays principle and recoup costs of non-compliance. As a result, an additional device is added to the 'toolbox' approach to environmental enforcement, assuming that administrative sanctions should complement and be compatible with the existing enforcement framework. Very minor offences and offences that are unlikely to be effectively enforced through criminal law can be dealt with administratively. At the same time, those offences that are more serious may be subject to criminal prosecution and/or the issuance of a variable monetary penalty.

This administrative penalty method provides for more flexibility and variety in enforcement methods and ensures that appropriate sanctions are used for various types of non-compliance. The costs that flow from non-compliance are usually externalised onto (or borne by) broader society. The administrative penalty system attempts to prevent this burden from being passed

onto taxpayers unnecessarily. Sometimes the costs are direct and can be easily determined. In other instances, they are indirect and difficult to quantify, such as when companies gain an unfair competitive advantage because their market prices do not reflect the real cost of the environmental impact.

The pervasive use and application of an administrative penalty framework will enable environmental and water regulatory authorities to undertake a greater volume of enforcement in response to detected non-compliance. This motivates compliance by users desiring to rather comply with legislation to avoid further penalties and future liability. In so doing they “save money” by using more cost efficient and environmentally sound practices thereby avoiding the “Polluter Pays Principle” which is one of the guiding principles of the National Environmental Management Act, Act 106 of 1998 [which is an umbrella Act for all environmental related matters] and the National Water Act, 1998 respectively.

Against this background, DWS is an authority involved in the management of environment and mandated to enforce the National Water Act, which is a Specific Environmental Management Act (SEMA). Criteria, guidelines and tools are required that will enable the application of administrative penalties for offences in terms of the National Water Act. This development will supplement the amendment process of the National Environmental Management Act, 1998, which will provide for the imposition of administrative penalties for failure to comply with provisions of NEMA and the SEMAs.

This project should focus on the development of criteria and guidelines to determine penalty amounts for water related offences, bearing in mind that the development of the deliverables takes place in the context of non-compliances with NEMA and the SEMAs. While the focus of this project focuses on water related offences, the development of the deliverables should take the broader context of application into consideration. Wherever possible, tools that are developed through this project, such as the calculator, should ideally be sufficiently specific to guide application of administrative penalties under the National Water Act, while being sufficiently generic to be of use under other SEMAs. Implementation of the project will require close collaboration and alignment to the National Environmental Management Amendment Bill, 2022 and the Draft Policy: Introduction of an Administrative Penalty System into National Environmental Legislation.

Deliverables:

The following deliverables are indicative and may be tailored to suit the proposed research approach:

1. Project design that facilitates continuous engagement and knowledge co-generation between the project team and relevant units in DWS and DFFE, in support of the administrative penalty project, including an inception meeting.
2. At least one stakeholder workshop at appropriate stage/s of the research process
3. Draft final report for review by the reference group, including:
 - Criteria and guidelines for distinguishing between minor administrative offences and more serious offences under the National Water Act and selected subordinate legislation;
 - Proposed list of offences that will be subject to fixed administrative penalties, as well as the quanta of these penalties;
 - Proposed list of offences that will be subject to variable administrative penalties, as well as criteria, guidelines and a user-friendly calculator template for variable administrative penalties.
4. Final report, covering all aspects researched as per specific objectives, incorporating

comments received from the reference group.

Impact Areas (WRC Knowledge Tree):

Inform policy and decision-making
Sustainable development solutions
New products and services for economic development

Time Frame:

12 months (start date 1 April 2023)
Draft final report to be submitted no later than 31 January 2024

Total Funds Available:

R800,000

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Appendix 1

Summary of relevant aspects of the Draft Policy on Introduction of an Administrative Penalty System into National Environmental Legislation

The Department of Forestry, Fisheries and the Environment (“the Department”) has initiated an administrative penalty project that aims to supplement the existing enforcement mechanisms available to Environmental Management Inspectors (EMIs) to address non-compliances with national environmental legislation falling within their mandate. The objectives of the project are to research the feasibility of applying administrative penalties to contraventions, develop a national policy and draft legislation on the introduction of administrative penalties into national environmental legislation. A project discussion document was initially developed as the basis for intergovernmental consultation between the Department and other EMI Institutions on the different options for the introduction of an administrative penalty system. Based on these deliberations, a policy was developed that proposes a model for the introduction of an administrative penalty system into national environmental legislation in South Africa. The Department is currently in the process of drafting a preliminary version of a Bill with the relevant clauses required to bring the system into effect.

The Policy document contains a discussion on the current enforcement regime within the environmental sector in South Africa, and the mechanisms available for enhancing environmental legal compliance, including current criminal and administrative enforcement sanctions. The Policy goes on to evaluate the international and national use of administrative penalties in other legal regimes and the potential benefits and costs of introducing an administrative penalty system into national environmental legislation. The framework for a model for an administrative penalty system is explored, including the requisite standard of proof, the nature of administrative penalties (fixed vs variable), the link with section 24G of the National Environmental Management Act 107 of 1998 (NEMA) and section 22A of the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA) and the potential use of administrative penalties to ensure rectification, repair and rehabilitation. The manner of recovery of administrative penalties is also discussed, as well as the management of the proceeds. Institutional arrangements and procedures are furthermore set out, including aspects surrounding the initiating, adjudicating and appeal authority and judicial review. Lastly, aspects surrounding disclosure of information and reporting are discussed. The draft Policy concludes with recommendations on law reform required to incorporate the administrative penalty system into South African environmental legislation.

Most notably for this Terms of Reference, the Policy also includes sections relating to the determination of the quantum of fixed and variable monetary penalties, noting that “*variable monetary penalties should be designed to make environmental non-compliance uneconomical and maximum variable monetary penalties should constitute an effective deterrent.*” The Policy further provides an initial indication of the criteria that may be considered in determining variable monetary penalties, including the nature of the contravention; the environmental effect of the contravention; the costs of rehabilitation; the costs of investigation and enforcement; the financial benefits to the offender arising from the contravention. In addition, aggravating and mitigating factors for determining variable penalties should include blameworthiness and foreseeability; the history of non-compliance by the offender; the foreseeability and risk of environmental harm; any preventative measures taken by the offender; and co-operation with enforcement officials, self-reporting and immediate voluntary remediation and restoration.

Appendix 2

List of subordinate legislation to be included in the scope of this project

Regulations

- Regulations requiring that a water use be registered (GN R1352, 12 November 1999)
- Regulation on use of water for mining and related activities aimed at the protection of water resources (GN R704, 4 June 1999)
- Regulations regarding the safety of dams (GN R139, 24 February 2012)
- Regulations requiring that the taking of water for irrigation purposes be measured, recorded and reported (GN R131, 17 February 2017)
- Regulations regarding the procedural requirements for water use licence applications and appeals (GN R267, 24 March 2017)
- Regulations in terms of s26 and s12A of the Water Act, 1956 for the erection, enlargement, operation and registration of water care works (revised 2001 draft of R2834, 27 December 1985)
- Regulations for the establishment of a water resource classification system (GN R810, 17 September 2010)
- *Draft Regulations relating to access and use of government waterworks and surrounding state-owned land for recreational purposes (R1046, 30 October 2015)*
- *Draft Regulations for the use of water for exploration and production of onshore naturally occurring hydrocarbons that require stimulation, including hydraulic fracturing and underground gasification, to extract, and any activity incidental thereto that may impact detrimentally on the water resource (R406, 7 May 2021)*

General Authorisations

- Revised General Authorisation for the taking and storing of water (GN 538 in GG 40243 of 2 September 2016)
- General Authorisation for water uses as defined in terms of section 21(c) or section 21(i) of the National Water Act (GN 509 in GG40229 of 26 August 2016)
- General Authorisation in terms of section 21(c) and (i) of the Act for the purpose of rehabilitating a wetland for conservation purposes (GN 1198 in GG32805 of 18 December 2009)
- Revision of General Authorisations in terms of section 39 of the National Water Act (GN 665 in GG 36820 of 6 September 2013)