

**OFFENCES AND PENALTIES FOR WATER POLLUTION
IN SOUTH AFRICA – A COMPARATIVE ANALYSIS OF
SOUTH AFRICAN, BRITISH, AMERICAN AND
AUSTRALIAN LEGISLATION**

J C KANAMUGIRE

**Offences and Penalties for Water Pollution in South Africa – A Comparative
Analysis of South African, British, American and Australian Legislation**

by

Jean Chrysostome Kanamugire

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Abstract

The growth of industrialization has increased waste pollution, especially water pollution. Industries and individuals produce pollutants that are discharged into waters. Uncontrolled water pollution results in health hazards to human beings, animals and other living things. Thus there is a need to impose water pollution control measures which can reduce pollution to an extent where very little pollutants are discharged into waters. Many states have enacted statutes for controlling water pollution, as they believe this is the best way to impose measures to achieve the safety of waters.

Legislations impose measures, such as a permit and its conditions, that must be respected to discharge pollutant or trade effluent into waters, otherwise the discharger becomes a polluter and liable to criminal sanctions. Statutes create offences and penalties for water polluters. They provide fines or imprisonment, or both, and severely punish a subsequent offender. In most countries, a continuing offence is criminalised. Corporations, as well as corporate officers, are punished for the offence of polluting waters or other environmental crimes. This is because environmental law does not allow corporate officers to hide behind the legal structure of the corporation.

Some measures such as remediation or clean-up orders are implemented before a prosecution is engaged, in order to ensure the protection of the environment. Environmental audit or service orders emphasise the protection of the environment and may prevent future pollution of waters. Environmental service orders rectify one of the

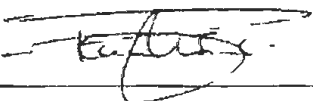
criticisms of fine or imprisonment, in that they fail to restore the environment to its previous condition.

Most environmental crimes are caused not by a deliberate intention or negligence, but by poor or ineffective management systems. As a result, environmental audit orders may be used to detect and correct an inappropriate management system. Environmental law should be a user-friendly and prosecution must be used as a last resort.

This dissertation examines offences and penalties for water pollution in South Africa, the United Kingdom, the United States of America and Australia and offers a comparative analysis and recommendations for South Africa. These countries have been selected not only because they are developed and tend to have best laws, but they are also located in different continents. The examination and analysis of how they provide offences and penalties for water pollution gives a chance to South Africa to find recommendations on how it may improve its legislation and maintain its water quality.

DECLARATION

I declare that the whole of this dissertation, save as specifically acknowledged in the text, is my own, unaided work and has neither been published elsewhere nor submitted to any other university.



JEAN CHRYSOSTOME KANAMUGIRE

09/04/2008

DATE

As a supervisor, I agree to the submission of this thesis.



PROF. MICHAEL KIDD

09/04/2008

DATE

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DEDICATION

To God, who protects and keeps me safe.

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OFFENCES AND PENALTIES FOR WATER POLLUTION IN SOUTH AFRICA – A COMPARATIVE ANALYSIS OF SOUTH AFRICAN, BRITISH, AMERICAN AND AUSTRALIAN LEGISLATION

CHAPTER ONE

INTRODUCTION

1.1 What is water pollution?

The National Water Act¹ defines pollution as the direct or indirect alteration of the physical, chemical or biological properties of a water resource so as to make it less fit for any beneficial purpose for which it may reasonably be expected to be used; or harmful or potentially harmful to the welfare, health or safety of human beings; to any aquatic or non-aquatic organisms; to the resource quality; or to the property.² The Act stipulates that watercourse means a river or spring, a natural channel in which water flows regularly or intermittently; a wetland, lake or dam into which, or from which, water flows, and any collection of water which the Minister may, by notice in the Gazette, declare to be a watercourse, and a reference to a watercourse includes, where relevant, its bed and banks.³ Water resource includes a watercourse, surface water, estuary, or aquifer.⁴

¹ National Water Act 36 of 1998.

² Ibid s. 1 (definition).

³ Ibid s. 1 (definition).

Pollution of water may occur at a point source or non-point source. "The term 'point source' means any discernible, confined and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft from which pollutants are, or may be, discharged."⁵ This can be legally regulated in order to control the amount of waste discharged into a watercourse. Persons must respect the legal requirements to discharge waste into water so that they can keep pollution at an acceptable level. Non-point source discharges include area-wide or plant site run-off.⁶ They are managed separately from point source discharges. They require a proper and adequate land use management so that they can be controlled. The common characteristic of these point sources is that they discharge pollutants into the receiving water bodies at an identifiable single – or multiple – point location.⁷ If persons disregard legal requirements in discharging trade waste into a watercourse, they become water polluters. Penalties for water pollution ensure that pollution is kept in an acceptable level.

1.2 Consequences of water pollution

In 1969, the Cuyahoga River in Cleveland, Ohio, which served as a dump site for industries, was so contaminated by chemicals that it caught fire.⁸ This demonstrates the dangers of uncontrolled pollution of water. The polluted water becomes unusable for any

⁴ Ibid s. 1 (definition).

⁵ V Novotny. *Water Quality. Diffuse Pollution and Watershed Management*. 2ed. (2003) 33, Clean Water Act (CWA) s. 502 – 14, US Congress, 1987.

⁶ G A Lucero & J D Praitis. "US Clean Water Act Regulation of Point Source Discharges" in P Thomas. *Water Pollution Law and Liability* (1993) 145 at 146.

⁷ V Novotny op cit (n.5) 33.

⁸ V Shiva. *Water Wars. Privatization, Pollution and Profit* (2002) 32.

human needs and a threat to flora and fauna. Unsafe water may cause the death of many human beings. This may materialised when diseases, such as diarrhea, caused by polluted or contaminated water detrimentally affect individuals. Countries have made laws to regulate the discharge of waste into watercourses and ensure that water is always usable. They have established the levels of waste that may be introduced into the receiving water resource. Dischargers or disposers introducing substances into the environment above these levels of acceptability are not users, but polluters, and are liable to carry the cost to prevent such harm (e.g. by constructing and operating waste treatment facilities) and liable to carry the cost of remedying the effects of pollution by, amongst others, rehabilitating the damage caused.⁹ Water pollution causes enormous consequences to human health, as well as to the environment, and the polluter cannot fully remediate the situation to its previous position. In order to minimise the consequences of water pollution, offences and penalties need to be created.

1.3 The importance of clean water

Food and water are our most basic needs. Without water, food production is not possible.¹⁰ Human beings and other living things depend on water to support their lives. In determining vital human needs, special attention must be paid to providing sufficient water to sustain human life, including both drinking water and water required for

⁹ L J Kotze & C Bosman. A Legal Analysis of the Proposed Waste Discharge System in Terms of the South African Environmental and Water Law Framework. *Obiter* (2006) 128 at 132 - 133.

¹⁰ V Shiva op cit (n. 5) 107.

production of food in order to prevent starvation.¹¹ Water plays a significant role in human health and countries need to take measures to ensure that it is not polluted to an unacceptable level. The control of water pollution is necessary to use, keep or conserve water for present and future generations. It assists persons to acquire sufficient water and ensure conservation of biodiversity in a sustainable manner. Glazewski states that ‘...between 12 and 14 million South Africans do not have access to safe water and over 20 million South Africans are without sanitation.’¹² Unsafe drinking water causes sicknesses that result in the death of many human beings. Polluted water also causes harm to environment. For instance, a polluted river may fatally affect flora as well as fauna and they may take many years to recover. Persons need to maintain and conserve clean water. To achieve this aim, legislation is required to criminalise and punish conduct that pollutes water.

1.4 Criminal sanction and prevention of water pollution

Environmental harms are serious harms and deliberate contraventions of environmental laws and those that cause significant harm ought to be punished with serious penalties.¹³ Criminal sanctions have to meet both the deterrent and retributive goals of environmental criminal law. Retribution, as a theory of punishment, rests upon a principle of proportionality in terms of which the retribution visited upon the wrongdoer must bear

¹¹ A Kok. “Introduction to the Right of Access to Sufficient Water in the South African Constitution” in L Mashave. A Compilation of Essential Documents on the Right to Water Environment. *Economic and Social Rights Series*. Vol 7 (2000) 1 at 2.

¹² J Glazewski. *Environmental Law in South Africa*. 2ed. (2005) 427.

¹³ M Kidd. Sentencing Environmental Crimes. (2004) 11 *SAJELP* 51 at 54.

some relationship to the harm done to society.¹⁴ Deterrence may be either individual or general. The object of the individual deterrence is to teach the offender a lesson so that he will be deterred from repeating his offence.¹⁵ The theory of general deterrence is that persons threatened with punishment will abstain from committing crime.¹⁶ This general notification of the consequences of criminal conduct will, it is assumed, deter persons generally from contravening the criminal law.¹⁷ The principal objective of deterrent law enforcement systems is to secure conformity with law by detecting violations of law, determining who is responsible for their violations, and penalizing violators to deter violations in future, either by those who are punished or by those who might do so were violators not punished.¹⁸ The threat of environmental criminal sanction must be severe enough to deter persons from committing such offences with regard to water pollution. The consequences of water pollution are significant to both individuals and society and people have to refrain from committing such crimes. Once a situation arises which detrimentally affect waters, measures should be taken to restore the environment to its previous conditions. This ensures the protection and enhancement of water for the present and future generations. The following chapter examines the legislative regime governing penalties for water pollution in South Africa.

¹⁴ J Burchell. *Principles of Criminal Law*. 3rd ed. (2005) 69.

¹⁵ *Supra* 74.

¹⁶ *Supra* 75.

¹⁷ *Supra* 76.

¹⁸ M Kidd. *Alternatives to the Criminal Sanction in the Enforcement of Environmental Law* (2002) *SAJELP* 21 at 22 (quoting Albert J Reiss Jr 'Selecting strategies of social control over organizational life' in Keith Hawkins & John M Thomas (eds) *Enforcing Regulation* (1984) 23 at 23-4.

CHAPTER TWO

THE LEGAL REGIME GOVERNING PENALTIES FOR WATER POLLUTION IN SOUTH AFRICA

2.1 Regulation of water pollution

Everyone has the right to an environment that is not harmful to their health or well-being, and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation.¹⁹ Environmental right is enshrined in the Bill of Rights in the constitution. This is a significant improvement as the state has a duty to take legislative and other measures to protect the environment. Clean and clear water links closely with an environment that is not harmful and the need to prevent pollution.²⁰ Water is essential for human health and the environment, and measures must be taken to ensure that it is not polluted to an unacceptable level.

One of the purposes of the National Water Act is to reduce and prevent pollution and degradation of water resources.²¹ Section 19 deals with prevention and remedying effects of pollution. It provides that an owner of land, a person in control of land or a person who occupies or uses the land, on which any activity or process is or was performed or undertaken; or any other situation exists, which causes, has caused or is likely to cause

¹⁹ The Constitution of the Republic of South Africa Act 108 of 1996 s. 24 (a) and (b) (1).

²⁰ A Kok op cit (n. 11) 4.

²¹ National Water Act op cit (n. 1) s. 2 (h).

pollution of a water resource, must take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.²² The reasonable measures that may be taken include measures to cease, modify or control any act or process causing the pollution; to comply with any prescribed waste standard or management practice; to contain or prevent the movement of pollutants; to eliminate any source of pollution; to remedy the effect of the pollution and to remedy the effect of any disturbance to the bed and banks of a watercourse.²³ Any person who fails to take reasonable measures required may be directed by a catchment management agency to commence taking specific measures before a given date; diligently continue with those measures; and complete them before a given date.²⁴ If a person fails to comply, or complies inadequately with any given directive, the catchment management agency may take the measures it considers necessary to remedy the situation.²⁵

There is a provision for the catchment management agency to recover all costs incurred as a result of taking necessary reasonable measures to remedy the situation jointly and severally from different persons. These persons include any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or potential pollution; the owner of the land at the time when the pollution or potential for pollution occurred, or the owner's successor in title. They also include the person in control of the land or any person who has a right to use the land at the time when the activity or the process is or was performed or undertaken; or the situation came about. They include any

²² Ibid s. 19 (1).
²³ Ibid s. 19 (2) (a) - (f).
²⁴ Ibid s. 19 (3) (a) - (c).
²⁵ Ibid s. 19 (4).

person who negligently failed to prevent the activity or the process being performed or undertaken, or the situation from coming about.²⁶ In order to recover incurred costs from taking reasonable measures, the catchment management agency may claim from any person who, in its opinion, benefited from the undertaken measures.²⁷ The cost claimed must be reasonable and may include, without being limited to, labour, administrative and overhead costs.²⁸

If more than one person is liable for incurred costs, the catchment management authority must, at the request of those persons, and after giving an opportunity to be heard to the others, apportion the liability. However, such apportionment does not relieve any of them of their joint and several liability for the full amount of the costs.²⁹ In practice, environmental officers mostly perform necessary activities and claim from the responsible persons later.³⁰ This is a result of the need to always protect waters in every situation.

The Minister has established 19 Water Management Areas and determined their boundaries as a component of the National Water Strategy in terms of s. 5 (1) of the National Water Act.³¹ The Catchment Management Agencies are institutions created 'to manage water resources in each of the 19 Water Management Areas (WMAs) across the country.³² A Water Management Area is an area established as a management unit within

²⁶ Ibid s. 19 (5).

²⁷ Ibid s. 19 (6).

²⁸ Ibid s. 19 (7).

²⁹ Ibid s. 19 (8).

³⁰ Personal communication with Mr. Clive Anthony Co-ordinator – Pollution Environmental Health Services at the Msunduzi Municipality.

³¹ GN 1160 in GGN 20491 of 1 October 1999.

³² Supporting water, sanitation and integrated development.

which the water resources are protected, used, developed, conserved, managed, and controlled.³³ The CMAs play an important role in the management, protection and conservation of water.

The interpretation of s. 19 of NWA was the issue in *Harmony Gold Mining Co Ltd v Regional Director: Free State, Department of Water Affairs and Forestry*.³⁴ The appellant, Harmony Gold Mining Co Ltd, is one of the five gold mining companies with mines in the Klerksdorp – Orkney – Stilfontein – Hartebeesfontein (KOSH) basin of the North-West province. The mines are Stilfontein, Buffelsfontein, Hartebeesfontein, Harmony and AngloGold. The first three are the northernmost, the shallowest and defunct. They ceased their mining operation years ago, but they continued dewatering groundwater from their shafts. The ultimate dispute followed the liquidation of one of the companies (Buffelsfontein) and the consequent threat of dewatering of that mine. The purposes of dewatering were to extract water at the highest possible level before it became polluted and to prevent the deeper mines becoming flooded. Dewatering would lead to the flooding of the applicant's mine and severe water pollution problems.

As a result, the first respondent (Regional Director) issued two directives in terms of s. 19 (3) of the National Water Act. The directives required Harmony to pump water from its shafts and, in addition, to share in the cost of pumping water from disused shafts. Harmony was aggrieved by the latter aspect of the directive and challenged it in the High

www.mvula.co.za/pave/521 (accessed on 28 March 2008). For the role of CMAs in managing water, see H Thompson. *Water Law A Practical Approach to Resource Management & the Provision of Services*, 2006 p. 615 – 647.

³³ S. 1 (definition) Water management area” of National Water Act (NWA).

³⁴ [2006] SCA 65 (RSA).

Court, on the basis that s. 19 did not authorise it. Goldstein J held that inadequate dewatering at the northernmost mine would result in the unremoved water reaching appellant's mine and becoming polluted and the matter therefore fell within the provision of s. 19 of the Act, duly enabling the directive in question.³⁵ The appellant appealed against the decision and argued that the measures referred to in s. 19 (1) could not lawfully be taken beyond the boundaries of its land. The court held that:

The legislature intended by the term 'reasonable measures' to lay down a flexible test dependent on the circumstances of each case. On the facts here it was in my view a reasonable anti-pollution measure to take steps to prevent groundwater from the defunct mines reaching the active ones. The constitutional and statutory anti-pollution objectives would be obstructed if the measures required of the persons referred to in s 19 (1) were limited to measures on the land mentioned in that subsection. If the choice were between an interpretation confining preventive measures to one's own land and a construction without that limitation it is clear that the latter interpretation would be consistent with the purpose of the Constitution and the Act and the former not.³⁶

The appeal was dismissed with costs.

The National Water Act provides for the control of emergency incidents, such as any incident or accident or in which a substance pollutes or has the potential to pollute a water resource; or has, or is likely to have, a detrimental effect on a water resource.³⁷ A responsible person³⁸ must take all reasonable measures to contain and minimize the effects of the incident; undertake clean-up procedures, remedy the effect of the incident, and take such measures as the catchment management agency may either verbally or in

³⁵ Ibid para 12.

³⁶ Ibid para 33.

³⁷ National Water Act op cit (n. 1) s. 20 (1) (a)– (b).

³⁸ Responsible person includes any person who is responsible for the incident; owns such substance involved in the incident; or was in control of the substance involved in the incident at the time of the incident (see s. 20 (2)).

writing direct within the time specified by such institution.³⁹ If the responsible person fails to comply, or inadequately complies with a directive; or if it is not possible to give the directive to the responsible person timeously, the catchment management agency may take measures it considers necessary. These measures must be necessary to contain or minimize the effects of the incident; undertake the clean-up procedures; and remedy the effect of the incident.⁴⁰ The catchment management agency may recover all reasonable costs it has incurred from every responsible person jointly and severally.⁴¹

2.2 Water use and pollution

Water use is widely defined to include not only consumptive uses but also activities which pollute or degrade water resources.⁴² Those activities include discharging waste or water containing waste into a water resource through a pipe, canal, sewer, sea outfall or other conduit; disposing of water in a manner which may detrimentally impact on a water resource; and disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process.⁴³ The so-called *de minimis* uses of water set out in Schedule 1 of the Act are not subject to the licence requirements and this includes certain water polluting activities.⁴⁴ A person may, without a licence, discharge waste or water containing waste; or run-off water, including stormwater from any residential, recreational, commercial and industrial site into a canal, sea outfall or

³⁹ Ibid s. 20 (4) (a) – (d).

⁴⁰ Ibid s. 20 (6).

⁴¹ Ibid s. 20 (7).

⁴² J Glazewski op cit (n. 12) 620.

⁴³ National Water Act op cit (n. 1) s. 21 (f), (g) and (h).

⁴⁴ J Glazewski op cit (n. 12) 621.

other conduit controlled by another person authorised to undertake the purification, treatment or disposal of waste or water containing waste, subject to the approval of the person controlling the canal, sea outfall or other conduit.⁴⁵

2.3 Water pollution offence

2.3.1 Common law

Although provisions controlling water pollution appear in statutory law, these must be seen in the context of common law, particularly nuisance and neighbour law.⁴⁶ In *Rainbow Chicken Farm (Pty) Ltd v Mediterranean Woollen Mills (Pty) Ltd*,⁴⁷ the court held that the producer of the effluent, quite apart from the statutory duties imposed upon him by s. 21 (1) and (2) (of the Water Act 1956), owes a common law duty of care towards others.⁴⁸ Where the producer of effluent discharges it from his factory into a public stream and such effluent pollutes it, both in the sense that it does not conform to the standards laid down in terms of the statute and that it amounts to pollution at common law, an injured third party may elect whether to proceed against the producer for breach of the statutory duties ... or under the common law.⁴⁹ In this case, the applicant obtained an interim interdict to stop the respondent from discharging effluent from its factory into the river. The significant of this case is that it creates a duty of care for the producer of the effluent to prevent it from causing harm to others. This is crucial as everybody is

⁴⁵ National Water Act op cit (n. 1) Schedule 1 (1) (f).

⁴⁶ J Glazewski op cit (n. 12) 618.

⁴⁷ 1963 1 SA 201 (N).

⁴⁸ Ibid 205 A.

⁴⁹ Ibid 205 B-C.

expected to control his or her behaviour and refrain himself or herself from harming others.

An interdict may order the offender to refrain from establishing a threatening nuisance that has not yet occurred or from continuing an existing nuisance.⁵⁰ In *Colonial Government v Mowbray Municipality and Others*,⁵¹ the plaintiff applied for an interdict to restrain the defendants from allowing dirty water to flow down onto its premises, so as to cause a nuisance. The defendant Council constructed within the Municipality certain gutters to carry off the storm and surface-water and discharge them onto the ground of the plaintiff. Dirty water, through the gutters, was discharged onto railway ground and created a nuisance. The court held the Council had the power to prevent such misuse of their gutters and was responsible for the nuisance. An interdict was granted to restrain the defendant Council from allowing offensive matter and dirty water, other than storm-water, to flow down the gutters onto the railway ground so as to cause a nuisance.⁵²

In *Robb v Maxwell*,⁵³ the case dealt with an action for damages for nuisance caused by the defendant having polluted water in the plaintiff's well. The defendant had negligently thrown dirty water and salt water refuse on to the surface of his stand and down a disused well on the same property. The defendant owned a butter factory and through his activities, a considerable amount of dirty water and water strongly impregnated with salt

⁵⁰ J Glazewski op cit (n. 12) 549.

⁵¹ (1901) 18 SC 453.

⁵² Ibid 462 – 463; for other pollution cases see M A Rabie 'Water Pollution Control' in Environmental Conservation *LAWSA* Vol 9 (first re-issue) 161 – 178.

⁵³ 1925 SR 49.

and fatty matter was accumulated.⁵⁴ The dirty water percolated through the soil and underground strata, and contaminated water in the plaintiff's well. As a result, the water in the well was rendered unfit for human consumption. The plaintiff owned a stand on which there were three houses and a well which was used by the tenants (of the houses) to obtain a large proportion of the water supply for human consumption and general domestic purposes. The plaintiff suffered loss or damage in taking other measures to supply water to his tenants because the well was polluted. The court held that the defendant was liable for damages and ordered him to pay to the plaintiff the cost of supplying water to tenants. This case is used in law of delict to recover damages suffered as a result of water pollution.

In *Lascon Properties (Pty) Ltd v Wadeville Investment Co (Pty) and Another*,⁵⁵ the escape of water containing injurious matter from the mine was in issue. The mines and works regulations prohibited the escape of such water without having been rendered innocuous. The purpose of the regulation was to benefit the owner of land which might be polluted as a result of the actions of a mining company.⁵⁶ The court held that the legislature would not have imposed an obligation to prevent the escape of noxious water without intending persons harmed thereby to be entitled to be compensated by the person permitting the water to escape.⁵⁷ The legislature intended to provide a civil remedy for damage caused

⁵⁴ Ibid 49.

⁵⁵ 1997 4 SA 578 (W).

⁵⁶ Ibid 583 B-C.

⁵⁷ Ibid 583 C-D.

by a breach of the regulation extending beyond a mere interdict.⁵⁸ The law of delict may be used to recover damages caused as a result of polluted water from mining activities.

2.3.2 Criminal offence or provisions

The National Water Act creates an offence to unlawfully and negligently commit any act or omission which pollutes or is likely to pollute a water resource.⁵⁹ It is also an offence to unlawfully and intentionally or negligently commit any act or omission which detrimentally affects or is likely to affect a water resource.⁶⁰ Any person who fails to comply with a directive issued under the prevention and remedying effects of pollution or control of emergency incidents commits an offence.⁶¹

Any person who contravenes any of these provisions is guilty of an offence and liable, on the first conviction, to a fine or imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.⁶² In the case of a second or subsequent conviction, the offender is liable to a fine or imprisonment for a period not exceeding ten years or to both a fine and such imprisonment.⁶³ The fine is not determined with regard to this offence. However it can be ascertained by the application or use of Adjustment of Fines Act.⁶⁴ This Act stipulates that:

⁵⁸ Supra 583 F.

⁵⁹ National Water Act op cit (n. 1) s. 151 (1) (i).

⁶⁰ Ibid s. 151 (1) (j).

⁶¹ Ibid s. 151 (1) (c).

⁶² Ibid s. 151 (2).

⁶³ Ibid.

⁶⁴ Adjustment of Fines Act 101 of 1991.

if any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum of which is not specified or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the maximum fine which may be imposed shall be an amount which in relation to the said imprisonment is in the same ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Court Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1) (a) of the said Act, where the court is not a court of a regional division.⁶⁵

In a criminal matter, the maximum jurisdiction of a Magistrates' Court in terms of section 92 of the Magistrates' Court Act and its regulations is a R 60 000 fine or three years imprisonment.⁶⁶ The maximum penal jurisdiction for a regional court is a R 300 000 fine or fifteen years imprisonment.⁶⁷ The National Water Act provides for a fine or five years imprisonment, or both, for the first offender and a fine or ten years imprisonment for a subsequent conviction. The maximum appropriate fine is R 100 000 for the first offender or a R 200 000 fine for a second or subsequent conviction.⁶⁸ The Adjustment of Fines Act applies both to instances where a maximum fine is not provided for, and in those cases where there is a prescribed fine,⁶⁹ which suggest that it can be used to update inadequate provision for fine in legislation.⁷⁰ There is a low rate of successful criminal prosecutions in South Africa and environmental officers choose to initiate proceedings only if they have enough evidence to secure a conviction. Lack of competent personnel is one of the

⁶⁵ *Supra* s. 1 (1) (a).

⁶⁶ Magistrate Court Act 32 of 1944 s. 91 (1) and GN 1411 in GG 19435 of 30 October 1998. The ratio between fine and years of imprisonment is 20:1 (60 000: 3).

⁶⁷ *Ibid*.

⁶⁸ 3 years imprisonment or R 60 000 fine in Magistrates' Court; 5 years imprisonment corresponds to R 100 000 (R 60 000: 3) * 5 = 100 000).

⁶⁹ Adjustment of Fines Act *op cit* (n. 64) s. 1 (b).

⁷⁰ M Kidd, *Sentencing Environmental Crimes*, (2004) 11 *SAJELP* 52 at 56.

challenges facing municipalities or departments dealing with environmental issues.⁷¹ To improve the prosecutions, the Department of Justice must provide environmental training to prosecutors and judges.

2.3.3 Inquiry and award of damages

A situation may exist where a person is convicted of an offence relating to water pollution and another person has suffered harm or loss as a result of the act or omission constituting the offence; or damage has been caused to a water resource. In the same proceedings, the court may, at the written request of the person who suffered the harm or loss; or at the written request of the Minister in respect of damage caused to a water resource; and in the presence of the convicted person, enquire without pleadings into the harm, loss or damage and determine the extent thereof.⁷²

After making a determination of the harm to the person or damage to a water resource, the court may award damages for the loss or harm suffered by the victim against the accused; order the accused to pay for the cost of any remedial measures implemented or to be implemented; and order that the remedial measures to be implemented, be undertaken either by the accused or the relevant water management institution.⁷³

⁷¹ Personal communications with Mr. Clive Anthony Co-ordinator – Pollution Control Environmental Health Services at the Msunduzi Municipality.

⁷² National Water Act op cit (n.1) s. 152.

⁷³ Ibid s. 153.

2.3.4 Offence in relation to employer and employee relationships

Whenever an act or omission by an employee or agent constitutes an offence in terms of water pollution, and takes place with the express or implied permission of the employer or principal, as the case may be, he or she is, in addition to the employee or agent, liable to conviction for that offence.⁷⁴ Furthermore, if an act or omission by an employee or agent would constitute an offence by the employer or principal, as the case may be, in terms of water pollution, that employee or agent will, in addition to that employer or principal, be liable to conviction for that offence.⁷⁵

2.3.5 Interdict or other high court order

A high court may, on application by the Minister or the water management institution concerned, grant an interdict or any other appropriate order against any person who has contravened any provision relating to water pollution, including an order to discontinue any activity constituting the contravention and to remedy its adverse effects.⁷⁶

2.3.6 Prosecuting corporations and corporate officers

Most (and the most serious) environmental harm today is caused by corporate entities.⁷⁷ Corporate criminal liability entails two interrelated ideas: first, the liability of the

⁷⁴ Ibid s. 154 (a).

⁷⁵ Ibid s. 154 (b).

⁷⁶ Ibid s. 155.

⁷⁷ M Kidd, Liability of Corporate Offices for Environmental Offences. (2003) 17 *SAPL* 277.

corporation itself and, second, the liability of the individual persons (directors, managers or similar) who are responsible for the activities of the corporation.⁷⁸ The most important provision in South African environmental legislation that provides for vicarious liability of controlling officers of corporations is s. 34 (7) of the National Environmental Management Act.⁷⁹ This section provides that:

Any person who is or was a director of a firm at the time of the commission by that firm of an offence under any provision listed in Schedule 3 shall himself or herself be guilty of the said offence and liable on conviction to the penalty specified in the relevant law, ... if the offence in question resulted from the failure of the director to take all reasonable steps that were necessary under the circumstances to prevent the commission of the offence: Provided that proof of the said offence by the firm shall constitute *prima facie* evidence that the director is guilty under this subsection.⁸⁰

The Act provides that any such manager, agent, employee or director may be so convicted and sentenced in addition to the employer or firm.⁸¹ A firm is defined as a body incorporated by or in terms of any law as well as a partnership.⁸² Director means a member of the board, executive committee, or other managing body of a corporate body and, in the case of a close corporation, a member of that close corporation or in the case of a partnership, a member of that partnership.⁸³

⁷⁸ M Kidd. Corporate Liability for Environmental Offences. (2003) 17 *SAPL* 1 at 1 – 2.

⁷⁹ M Kidd *op cit* (n. 72) 278.

⁸⁰ National Environmental Management Act (NEMA) 107 of 1998 s. 34 (7).

⁸¹ *Ibid* s. 34 (8).

⁸² *Ibid* s. 34 (9) (a).

⁸³ *ibid* s. 34 (9) (b).

This provision is important since it applies to any prosecution listed in Schedule 3 of the Act.⁸⁴ This Schedule is important to water pollution in respect of a person who unlawfully and intentionally or negligently commits any act or omission which pollutes or is likely to pollute a water resource.⁸⁵ It also applies to a person who unlawfully, intentionally and negligently commits any act or omission which detrimentally affects or is likely to affect a water resource.⁸⁶ Any person who commits any of these offences can be personally punished together with the corporation.

There is a provision for 'piercing of the corporate veil'. Whenever any manager, agent or employee does or omits to do an act which it had been his or her task to do or to refrain doing on behalf of the employer and which would constitute an offence under any provision listed in Schedule 3 for the employer to do or omit to do, he or she shall be liable to be convicted and sentenced in respect thereof as if he or she were the employer.⁸⁷ This section targets the manager, agent or employee for their act or omission that constitute an offence. It encourages them to think twice before they commit an offence because they may be held personally liable regardless of their position in the employment relationships or company. This may stimulate the protection and conservation of environment especially water.

⁸⁴ M Kidd op cit (n. 72) 278. Schedule 3 contains national and provincial legislations including s. 151 (1) (i) and (j) of the National Water Act 36 of 1998.

⁸⁵ National Water Act op cit (n.1) s. 151 (1) (i).

⁸⁶ Ibid s. 151 (1) (j).

⁸⁷ NEMA op cit (n. 80) s. 34 (6). Schedule 3 includes s. 151 (1) (i) and (j) of NWA.

2.3.7 Industrial trade effluent

The Water Services Act⁸⁸ stipulates that no person may dispose of industrial effluent in any manner other than that approved by the water services provider nominated by the water services authority having jurisdiction in the area in question.⁸⁹ It allows a person who, at the commencement of the Act, obtains water for industrial use or disposes of industrial effluent from a source, or in a manner requiring the approval of a water service authority to continue to do so, for a period of 60 days after the relevant water services authority has requested him or her to apply for approval.⁹⁰ If the person complies with the request for application within 60 days, he or she continues to make industrial use before the period of approval is granted, after which the conditions of the approval will apply. If the application for approval is refused, the person continues to perform industrial water use until the expiry of a reasonable period determined by the water services authority.⁹¹ Finally, the Act provides that the approval given by a water service authority does not relieve anyone from complying with any other law relating to the use and conservation of water and water resources; or the disposal of effluent.⁹² The Act provides that the Minister may, from time to time, prescribe compulsory national standards relating to the quality of water taken from, or discharged into, any water services or water resource system.⁹³

⁸⁸ Water Services Act 108 of 1997.

⁸⁹ Ibid s. 7 (2).

⁹⁰ Ibid s. 7 (3) (a).

⁹¹ Ibid s. 7 (3) (b).

⁹² Ibid s. 7 (4).

⁹³ Ibid s. 9 (1) (b).

The water services authority whose approval is required (in terms of s. 6 or 7) may not unreasonably withhold the approval; and may give approval subject to reasonable conditions.⁹⁴ This power is important in relation to water pollution. As administrative control of pollution is set to become the principal pollution management mechanism, it is likely that the water authority will attach onerous pollution prevention or waste minimisation provisions to its sewage disposal permits.⁹⁵ The persons must respect the reasonable conditions attached to the sewage disposal permits. Failure to adhere to these conditions may result in the permit being withdrawn, thereby effectively preventing the discharge of any trade effluent into the sewage disposal system.⁹⁶ Industries do not often comply with trade effluent permits and they are not detected due to lack of environmental practitioners.⁹⁷ Qualified individuals are needed to work in environmental matters and force companies to comply with trade effluents.

2.3.8 Offences or penalties

The Water Services Act prevents any person to intentionally utilise water services, use water or dispose of effluent in contravention of the industrial use of water.⁹⁸ The contravention of this provision is an offence and the offender is liable, upon conviction, to a fine or to imprisonment, or to both such a fine and imprisonment.⁹⁹

⁹⁴ *Ibid* s. 8 (1).

⁹⁵ I Sampson Deloitte & Touche. *Introduction to a legal framework to pollution management in South Africa*. WRC Report No TT 1949/01 March 2001 p. 102.

⁹⁶ *Ibid* 103.

⁹⁷ Personal communication with Johann van der Merwe, legal advisor at the Msunduzi Municipality.

⁹⁸ Services Water Act op cit (n.88) s. 82 (1) (c).

⁹⁹ *Ibid* s. 82 (2).

Whenever an act or omission by any employee or agent constitutes an offence in terms of this Act, and takes place with the express or implied permission of any employer, he or she shall, in addition to the employee or agent, be liable to conviction for that offence.¹⁰⁰

If an act or omission by an employee or agent would constitute an offence by the employer in terms of this Act, that employee or agent shall, in addition to that employer, be liable to conviction for that offence.¹⁰¹

The Water Services Act stipulates that a water authority which provides water for industrial use; or controls a system through which industrial effluent is disposed of, must make bylaws providing for at least the standards of service, the technical conditions of provision and disposal, the determination and structure of tariffs, the payment and collection of money due; and the circumstances under which the provision and disposal may be limited or prohibited.¹⁰² Bylaws make provision to regulate water pollution, whereby non-compliance is an offence. These provisions aim to protect the quality of water and prevent it from being polluted at an unacceptable level.

The NEMA provides that whenever any person is convicted of an offence under any provision listed in Schedule 3 and it appears that such person has by that offence caused loss or damage to any organ of state or other person, including the cost incurred or likely to be incurred by an organ of state in rehabilitating the environment or preventing damage to the environment, the court may in the same proceedings at the written request of the Minister or other organ of state or other person concerned, and in the presence of

¹⁰⁰ Ibid s. 82 (3) (a).

¹⁰¹ Ibid s. 82 (3) (b).

¹⁰² Ibid s. 21 (c).

the convicted person, inquire summarily and without pleading into the amount of the loss or damage so caused.¹⁰³ After ascertaining such amount, the court may give judgment in favour of the organ of state or other person concerned against the convicted person, and such judgment shall be executable in the same manner as if it has been given in a civil action duly instituted before a competent court.¹⁰⁴ The offender has to pay for the damages he or she has caused to the environment so that it may be remediated. This is a significant improvement as the criminal court goes beyond the traditional punishment of a fine or imprisonment for the offence and awards damages for loss the environment has suffered.

Whenever a court convicts any person for an environmental offence listed in Schedule 3, the court convicting such a person may summarily inquire into and assess the monetary value of any advantage gained or likely to be gained by such a person in consequence of that offence. In addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed.¹⁰⁵ This provision ensures that the offender is not enriched by the crime he or she has committed. Upon application by the public prosecutor or another organ of state, the court may order the convicted person to pay the reasonable costs incurred by the public prosecutor or the organ of state concerned in the investigation and prosecution of the offence.¹⁰⁶

¹⁰³ NEMA op cit (n. 80) s. 34 (1). Schedule 3 includes s. 152 (1) (i) and (j) of the NWA.

¹⁰⁴ NEMA op cit (n. 80) s. 34 (2).

¹⁰⁵ Ibid s. 34 (3).

¹⁰⁶ Ibid s. 34 (4).

If any manager, agent or employee commits an act or omission that constitutes an offence listed in Schedule 3 due to the failure of the employer to take all reasonable steps to prevent such act or omission, the employer shall be guilty of the said offence and be convicted only to a fine.¹⁰⁷ Proof of such act by the manager, agent or employee constitutes a *prima facie* evidence that the employer is guilty. This section imposes liability on the employer for the act or omission committed by his or her manager, agent or employee as a result of his or her negligence. The employer may improve his or her services in order to avoid the commission of the offence.

2.3.9 Permissible discharge of trade effluents

The Minister has made a Government Gazette¹⁰⁸ to allow the general authorisations for the use of water in terms of s. 39 of the National Water Act. In Chapter 3, the Government Gazette deals with the discharge of waste or water containing waste into a water resource through a pipe, canal, sewer or other conduit; and disposing in any manner of water which contains waste from, or which has been heated in, any industrial or power generation process. The authorisation replaces the need for a water user to apply for a licence in terms of the National Water Act, provided that the discharge is within the limits and conditions set out in this authorisation.¹⁰⁹ However, this authorisation does not apply to a person who discharges wastewater through sea outfalls, or to an aquifer, or any other groundwater resource, or any water resource with a closed drainage system.¹¹⁰ In

¹⁰⁷ Ibid s. 34 (5).

¹⁰⁸ Government Gazette No 26187, Notice No 399, 26 March 2004

¹⁰⁹ Ibid 3.1.

¹¹⁰ Ibid 3.2.

these areas, no person may discharge waste or water containing waste in the specified areas without a permit to do so.

The Government Gazette provides for the discharge of domestic and industrial wastewater into a water resource. It states that a person who owns or lawfully occupies property registered in the Deeds Office, or lawfully occupies or uses land that is not registered surveyed, or lawfully has access to land on which the use of water takes place, may on that property or land, outside the area excluded in paragraph 3.4, discharge up to 2000 cubic metres on any given day into a water resource that is not a listed water resource referred to in Table 3.3.¹¹¹ There are certain conditions attached to this waste disposal that must be respected. The discharge must comply with the general limit values set out in Table 3.1; it must not alter the natural ambient water temperature of the receiving water resource by more than 3°C; and the discharge must not be a complex industrial wastewater.¹¹² The Government Gazette also allows any person to discharge up to 2000 cubic metres of wastewater on any given day into a listed water resource referred to in Table 3.3, provided (i) the discharge complies with special limit values set out in Table 3.1; (ii) the discharge does not alter the natural ambient water temperature of the receiving water resource by more than 2°C; and (iii) the discharge is not complex industrial wastewater.¹¹³ Finally, a person may discharge stormwater runoff from any premises, not containing waste or wastewater emanating from industrial activities and premises, into a water resource.¹¹⁴ All these conditions must be respected when persons

¹¹¹ Ibid 3.7.1 (a), (b) (c) (i).

¹¹² Ibid (a) – (c).

¹¹³ Ibid 3.7.1 (a) (b) (c) (ii).

¹¹⁴ Ibid 3.7 (2).

discharge waste or wastewater into a water resource. There is no permit required to perform these discharges because they are allowed by the general authorisation.

The contravention of any provision in this authorisation is a criminal offence punishable by the penalty set out in section 151 (2) of the National Water Act.¹¹⁵

2.3.10 Offence for water pollution under the Health Act

S. 20 of the Health Act¹¹⁶ deals with duties and powers of the local authorities. It enables every local authority to take all lawful, necessary and reasonable practicable measures to prevent the pollution of any water intended for the use of the inhabitants of its district, irrespective of whether such water is obtained from sources within or outside its district, or to purify such water which has become so polluted.¹¹⁷ The Minister may pass regulations in this matter in order to avoid conditions dangerous to health.¹¹⁸

The Health Act provides that any person who contravenes or fails to comply with any of its provisions, including the prevention of water pollution, is guilty of an offence. Unless this Act expressly provides for another penalty for such an offence, the offender shall be liable on the first conviction, to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding six months, or to both such a fine and

¹¹⁵ Ibid 3. 12.

¹¹⁶ Health Act 63 of 1977.

¹¹⁷ Ibid s. 20 (1) (c).

¹¹⁸ Ibid s. 34 (b), (i) and (j).

imprisonment.¹¹⁹ On a second conviction of a similar offence, the offender shall be liable to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year, or to both such a fine and imprisonment.¹²⁰ On the third or subsequent conviction of a similar offence, the offender shall be liable to a fine not exceeding one thousand five hundred rand or to imprisonment for a period not exceeding two years, or to both such a fine and imprisonment.¹²¹ The fine imposed for this offence is lenient, but the Adjustment of Fines Act¹²² may be used to rectify the situation.

2.3.11 Penalties for mining activities polluting water

The holder of reconnaissance permission, prospecting rights, mining permit or retention permit is responsible for any environmental damage, pollution or ecological degradation as a result of his or her reconnaissance, prospecting or mining operations and which may occur inside and outside the boundaries of the area to which such rights, permit or permission relates.¹²³ A drastic measure is made by providing that a director of a company or members of a close corporation are jointly and severally liable for any unacceptable negative impact on the environment, including damage, degradation or pollution advertently or inadvertently caused by the company or close corporation which they represent or represented.¹²⁴ The environment is defined as the surroundings within which humans exist and that are made up of the land, water and atmosphere of the

¹¹⁹ Ibid s. 57 (a).

¹²⁰ Ibid s. 57 (b).

¹²¹ Ibid s. 57 (c).

¹²² Adjustment of Fines Act op cit note 64 s. 1 (1) (a).

¹²³ Mineral and Petroleum Resources Development Act 28 of 2002 s. 38 (1) (e).

¹²⁴ Ibid s. 38 (2).

earth.¹²⁵ Mining activities may pollute water and have disastrous consequences on the environment.

Prospecting, mining, reconnaissance or production operations may cause, or result in, ecological degradation, pollution or environmental damage, which may be harmful to the health or well-being of anyone and requires urgent remedial measures. In this situation, the Minister may direct the holder of the relevant right, permit or permission to investigate, evaluate, assess and report on the impact of any pollution or ecological degradation; take such measures as may be specified in such a directive; and complete such measures before a date specified in the directive.¹²⁶

If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the health and well-being of any affected person, or to remedy ecological degradation and to stop pollution of the environment.¹²⁷ The Minister must afford the holder an opportunity to make representations to him or her before he or she implements any measure.¹²⁸

¹²⁵ 'Environment' means the surrounding within which humans exist and that are made up of

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organism, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well being. (s. 1 (definition) of National Environmental Management Act 107 of 1998).

¹²⁶ Mineral and Petroleum Resources Development Act op cit (n. 123) s. 45 (1) (a), (b) and (c).

¹²⁷ Ibid s. 45 (2) (a).

¹²⁸ Ibid s. 45 (2) (b).

In order to implement any measure..., the Minister may, by way of an *ex parte* application, apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.¹²⁹ Furthermore, the Minister may use funds appropriated for that purpose by parliament to fully implement such measures.¹³⁰ There is a provision for the Minister to recover, from the holder concerned, an amount equal to the funds necessary to fully implement the measures.¹³¹

The Minister has made regulations on the use of water for mining and related activities aimed at the protection of water resources.¹³² The regulations contain measures to deal with water pollution that may result from mining activities. They oblige every person in control of a mine or activity to take reasonable measures to prevent wastewater or any substance which causes or is likely to cause pollution of a water resource from entering any water resource, either by natural flow or by seepage.¹³³ He or she must retain or collect such substance or water containing waste for use, re-use, evaporation or for purification and disposal in legally appropriate terms.¹³⁴ Everyone in the control of a mine or activity must take reasonable measures to design, modify, locate, construct and maintain all water systems, including residue deposits, in any area so as to prevent the pollution of any water resource.¹³⁵

¹²⁹ *Ibid* s. 45 (2) (c).

¹³⁰ *Ibid* s. 45 (2) (d).

¹³¹ *Ibid* s. 45 (2) (e).

¹³² GN 704 in GG 20119 dated 4 June 1999.

¹³³ *Ibid* reg. 7 (a).

¹³⁴ *Ibid*.

¹³⁵ *Ibid* reg. 7 (b); for other provision relating to water pollution in relation to mining activities see reg. 7 (d), (e) and (f).

Regulations provide security and additional measures to prevent water pollution. They require everyone in the control of a mine or activity to ensure access control in any area used for the stockpiling or disposal of any residue or substance which causes, has caused or is likely to cause pollution of a water resource so as to protect any measures taken in terms of the regulations.¹³⁶ He or she must not allow such an area to be used for any other purpose, if such use causes or is likely to cause pollution of a water resource.¹³⁷ The existing pollution control measures need to be protected in order to avoid pollution of a water resource which might occur, is occurring or has occurred as a result of mining operations.¹³⁸

The regulations provide for offence and penalties. Anyone who contravenes any provision preventing water pollution in mining activities is guilty of an offence and liable to a fine or to imprisonment for a period not exceeding five years.¹³⁹ The Adjustment of Fines Act¹⁴⁰ may be used in order to ascertain the appropriate amount of the fine, because it is not provided.

The regulations create liability for both managers and employees. They provide that whenever an act or omission by a manager or employee of a mine or activity constitutes an offence in terms of the regulations, and takes place with the express or implied permission of the person in control of a mine or activity, that person is, in addition to the

¹³⁶ Ibid reg. 8 (b).

¹³⁷ Ibid reg. 8 (c).

¹³⁸ Ibid reg. 8 (d).

¹³⁹ Ibid reg. 14 (1).

¹⁴⁰ Adjustment of Fines Act op cit note 64 s. 1 (1) (a).

manager or employee, liable to conviction for that offence.¹⁴¹ If an act or omission by a manager or employee would constitute an offence by the person in control of a mine or activity in terms of the regulations, that manager or employee is, in addition to that person, liable to conviction for that offence.¹⁴² The employee cannot simply obey the instruction given by the manager as both of them may be punished when their act or omission constitutes an offence. The employee may refuse to honour a command from his or her employer when it amounts to an offence. Furthermore, employer cannot hide behind the corporation and escape liability when he or she commits an offence of polluting water in mining activities. The simultaneous imposition of liability to manager and employee is very important, as it may prevent both of them from committing an offence in mining activities with regard to water pollution.

2.4 Private and other prosecutions

Any person may, in the public interest, or in the interest of the protection of the environment, institute or conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of state, in any national or provincial legislation or municipal by-law, or any regulation, licence, permission or authorisation issued in terms of such legislation, where that duty is concerned with the protection of the environment and breach of such duty is an offence.¹⁴³ This provision may be used by a person to institute a prosecution against another person who does not, for instance, comply with the standards limit in his or her licence to discharge trade

¹⁴¹ GN 704 in GG 20119 op cit (n.132) reg. 14 (2) (a).

¹⁴² Ibid reg. 14 (2) (b).

¹⁴³ NEMA op cit (n. 80) s. 33 (1).

effluent into a watercourse. However, the person prosecuting privately must fulfil certain requirements. Firstly, he or she must do so through a person entitled to practice as an advocate or an attorney in the Republic.¹⁴⁴ Secondly, he or she must give a written notice to the appropriate public prosecutor that he or she intends to do so.¹⁴⁵ Thirdly, the public prosecutor must have not, within 28 days of receipt of such notice, stated in writing that he or she intends to prosecute the alleged offence. The person prosecuting privately shall not be required to produce a certificate issued by the Attorney-General stating that he or she refused to prosecute the accused; and that person shall not be required to provide security for such action.¹⁴⁶ This provision is relevant to water pollution offences as it stimulates individuals to prosecute private persons and compel them to respect their trade effluent licence.

The provision of legal standing to enforce environmental laws may be used to prosecute offenders who commit the offence of polluting water. Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of a specific environmental management Act, or any other statutory provision concerned with the protection of the environment or the use of natural resources.¹⁴⁷ The person has a legal standing in environmental matters if he or she acts in the public interest or in the interest of protecting the environment.¹⁴⁸ A court may decide not to award costs against a person, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision of environmental legislations, if the court is

¹⁴⁴ Ibid s. 33 (2) (a).

¹⁴⁵ Ibid s. 33 (2) (b).

¹⁴⁶ Ibid s. 33 (2) (c).

¹⁴⁷ Ibid s. 32 (1).

¹⁴⁸ Ibid s. 32 (1) (d) and (e); see also s. 32 (1) (a), (b) and (c).

of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.¹⁴⁹ This section may be used to ensure that the environment and the use of natural resources, such as water, are protected for the present and future generations.

2.5 Blue scorpions and enforcement mechanism

The Department of Water Affairs and Forest (DWAF) has established blue scorpions to provide enforcement of legislations. They play an important role in enforcing legislation relating to water and forests. The Department indicates that the blue scorpions, have issued many directives to dozens of farmers countrywide, ordering them to dismantle illegal dams, lakes and pipes.¹⁵⁰ The dismantling of illegal pipes is crucial to avoid or prevent water pollution and amounts to a penalty for offenders. Blue scorpions have a mandate to find persons and prevent them to engage in activities that pollute water. They have a crucial role in avoiding water pollution.

¹⁴⁹ Ibid s. 32 (2).

¹⁵⁰ Christy van der Merwe. Water week highlights water conservation. 23 March 2007 www.engineeringnews.co.za/article.php?id=105007 (accessed on 30 March 2008).

2.6 Additional orders in prosecution of environmental crimes

2.6.1 Cancellation or revocation orders

The National Environmental Management Act¹⁵¹ provides that the court convicting a person of an offence in terms of a specific environmental management Act may withdraw any permit or other authorisation issued to that person, if the rights conferred by the permit or authorisation were abused by that person.¹⁵² The court may also disqualify that person from obtaining a permit or other authorisation for a period not exceeding five years.¹⁵³ Finally, the court may issue an order that all competent authorities authorised to issue permits or other authorisations be notified of any disqualification.¹⁵⁴ The Act does not provide for a suspension of a permit. This defect needs to be corrected, as suspension has an effect on the deterrence because it may amount to the suspension of all activities.

2.6.2 Orders to recover incurred costs for investigation

Where a person or group of persons secures the relief sought in respect of any breach or threatened breach of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment, a court may order that the party against whom the relief is granted pays to the person or group concerned any reasonable costs incurred in the investigation of the matter and its

¹⁵¹ NEMA op cit (n. 80).

¹⁵² Ibid s. 34C (1) (a).

¹⁵³ Ibid s. 34C (1) (b).

¹⁵⁴ Ibid s. 34C (1) (c).

preparation for proceedings.¹⁵⁵ The persons who incurred costs have to make an application to the court. The public prosecutor or another organ of state may also recover, from the offender, any reasonably incurred costs as a result of the investigation and prosecution of the offence.¹⁵⁶

2.6.3 Orders for monetary benefit

Whenever any person is convicted of an offence under any provision listed in Schedule 3, the court convicting such a person may summarily enquire into and assess the monetary value of any advantage gained, or likely to be gained, by such a person, in consequence of that offence.¹⁵⁷ This provision ensures that the offender does not benefit from the commission of the offence. The amount recovered must correspond to the monetary benefit received by the offender. Chapter Three analyses offences and penalties for water pollution in the United Kingdom.

¹⁵⁵ Ibid s. 32 (3) (b).

¹⁵⁶ Ibid s. 34 (4).

¹⁵⁷ Ibid s. 34 (3). Schedule 3 refers to the provisions of the National Water Act s. 151 (1) (i) and (j).

CHAPTER THREE

WATER POLLUTION OFFENCES AND PENALTIES IN THE UNITED KINGDOM (UK)

3.1 Introduction

The United Kingdom (UK) is made up of the countries of England, Wales, Scotland and Northern Ireland.¹ The British approach to water pollution control has traditionally been founded on defining quality objectives for receiving waters, in the light of which varying emission standards are set individually.² In the UK certain discharges containing prescribed substances of a dangerous nature (known as Red List substances) must now meet both fixed emission standards for those substances and the relevant quality standard for the receiving water concerned.³ Integrated pollution control addresses the cross-media impact. By providing a single authorization to be granted for prescribed discharges to air, land and water, account can be taken of the impact on each medium and allowance made for the interaction of one on another.⁴ Persons must respect conditions enumerated in the emission standards. They also have to avoid the entry of any polluting matter to the controlled waters. Failure to comply with emission standards or other water pollution laws is a criminal offence. This chapter deals with water pollution offences and penalties in England, Wales and Scotland.

¹ A O Akinnusi. *A Comparative analysis of approaches to air pollution control* (1999) 48 – 49.

² T Turtle. “Approaches to enforcement of water pollution control regulations in the UK.” in P Thomas. *Water Pollution Law and Liability* (1993) 237 at 240.

³ *Ibid* at 241.

⁴ *Ibid* at 242.

3.2 Water pollution offences and penalties in England and Wales

3.2.1 Offence and penalties for water pollution

Section 85 of the Water Resources Act⁵ provides that it is an offence for a person to cause or knowingly permit any poisonous, noxious or polluting matter, or any solid waste matter, to enter any controlled waters.⁶ It is also an offence for a person to cause or knowingly permit any matter, other than trade effluent or sewerage effluent, to enter controlled waters by being discharged from a drain or sewer in contravention of an imposed prohibition.⁷ The section creates an offence for a person to cause, or knowingly permit, any trade effluent or sewerage effluent to be discharged into any controlled waters; or from land in England and Wales, through a pipe, into the sea outside the seaward limits of controlled waters.⁸ A person commits an offence if he causes or knowingly permits any trade effluent to be discharged, in contravention of any condition imposed, from a building or any fixed plant on or into any land; or into any water of a lake or pond which are not inland freshwaters.⁹ It is an offence for a person to cause or knowingly permit any matter whatever to enter any inland freshwaters so as to tend (either directly or in combination with other matter which he or another person causes or permits to enter those waters) to impede the proper flow of the waters in any manner

⁵ Water Resources Act 1991 (c. 56).

⁶ Ibid s. 85 (1).

⁷ Ibid s. 85 (2).

⁸ Ibid s. 85 (3).

⁹ Ibid s. 85 (4).

leading, or likely to lead, to a substantial aggravation of pollution due to other causes; or the consequences of such pollution.¹⁰

A person who commits an offence or fails to comply with the conditions of any consent given shall be guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding three months, or to a fine not exceeding £ 20 000, or to both; on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or both.¹¹ Controlled water means broadly, territorial, coastal and inland waters, including rivers, lakes, ponds and reservoirs which discharge into rivers, and groundwater.¹²

It should be added that, in the case of sewerage undertaker, the offence is virtually one of strict liability, since even where the pollution is actually attributable to polluting matter released into the undertaker's sewer by a third party, the undertaker will be deemed to

¹⁰ Ibid s. 85 (5).

¹¹ Ibid s. 85 (6).

¹² T Turtle *op cit* (n. 2) 242; see also *Water Resources Act op cit* (n.5) s. 104 (1). This subsection stipulates:

References in this Part to controlled waters are references to waters of any of the following classes—

(a) relevant territorial waters, that is to say, subject to subsection (4) below, the waters which extend seaward for three miles from the baselines from which the breadth of the territorial sea adjacent to England and Wales is measured;

(b) coastal waters, that is to say, any waters which are within the area which extends landward from those baselines as far as:

(a) the limit of the highest tide; or

(b) in the case of the waters of any relevant river or watercourse, the fresh-water limit of the river or watercourse, together with the waters of any enclosed dock which adjoins waters within that area;

(c) inland freshwaters, that is to say, the waters of any relevant lake or pond or of so much of any relevant river or watercourse as is above the fresh-water limit;

(d) ground waters, that is to say, any waters contained in underground strata;

and, accordingly, in this Part "coastal waters", "controlled waters", "ground waters", "inland freshwaters" and "relevant territorial waters" have the meanings given by this subsection.

have caused its discharge in many cases, i.e. where he was bound, either unconditionally, or subject to the conditions which were observed, to receive the matter into his sewer.¹³

In *Empress Car Co (Abertillery) Ltd v National Rivers Authority*,¹⁴ the interpretation of section 85 (1) was in issue. The appellant company maintained a diesel oil tank in a yard on its premises, which drained directly into a river. The tank was surrounded by a bund to contain the spillage and the appellant (E Ltd) had overridden that protection by fixing an extension pipe to the outlet of the tank so as to connect it with a smaller drum standing outside the bund. The outlet from the tank was governed by a tap which had no lock. It appeared that an unknown person had opened the tap and, as a result, the entire contents of the tank ran into the drum, overflowed into the yard and passed down a storm drain into the river. The National Rivers Authority charged the appellant with causing polluting matter to enter controlled waters from its premises, contrary to section 85 (1) of the Water Resources Act 1991.

Lord Hoffman quoted with approval the analysis of Lord Wilberforce, in *Alphacell Ltd v Woodward*,¹⁵ of the two limbs of s. 2 (1) (a) of the Rivers (Prevention of Pollution) Act 1951, which was in the same terms as s. 85 (1) of the 1991 Act: “The subsection evidently contemplates two things- *causing*, which must involve some active operation or chain of operations involving as the result the pollution of the stream; *knowingly permitting*, which involves a failure to prevent the pollution, which failure, however,

¹³ T Turtle *op cit* (n. 2) 243.

¹⁴ *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 ER 481 (HL).

¹⁵ [1972] 2 All ER 475 (HL).

must be accompanied by knowledge.”¹⁶ The subsection imposed strict liability: it did not require *mens rea* in the sense of intention or negligence. Strict liability was imposed in the interests of protecting controlled waters from pollution.¹⁷

If the defendant did something which produced a situation in which the polluting matter would escape, but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices could consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was, in the general run of things, a matter of ordinary occurrence, it will not negate the causal effect of the defendant’s acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be open to the justice to hold that the defendant did not cause pollution.¹⁸

Whether an act or event was ordinary or extraordinary was one of the facts and degree to which the justices should apply their common sense and knowledge of what happened in the area.¹⁹ On the facts, the appellant had done something by maintaining a diesel oil tank on its land and it had caused the oil to enter controlled waters. The appeal was dismissed.

¹⁶ Ibid at 479.

¹⁷ *Empress Car Co (Abertillery) Ltd v National Rivers Authority* op cit (n.14) 489 D – E.

¹⁸ Ibid 492 – 493.

¹⁹ Ibid 482.

3.2.2 Clean-up measures and recovery

S. 161 deals with anti-pollution works and operations.²⁰ Where it appears to the agency that any poisonous, noxious or polluting matter, or any solid waste matter, is likely to enter, or to be, or to have been, present in any controlled waters, it shall be entitled to carry out necessary works and operations.²¹ These may include, in the case where the matter appears likely to enter any controlled waters, works and operations for the purpose of preventing it from doing so. Where the matter appears to be, or to have been, present in any controlled waters, the agency may perform works and operations for the purpose of removing or disposing of the matter.²² It may also remedy or mitigate any pollution caused by its presence in the waters; or, so far as is reasonably practicable to do so, restore the waters, including any flora and fauna dependent on the aquatic environment of the waters, to their state immediately before the matter became present in the waters.²³ The agency shall be entitled to carry out investigations for the purpose of establishing the source of the matter and the identity of the person who has caused or knowingly permitted it to be present in controlled waters, or at a place from which it was likely, in its opinion, to enter controlled waters.²⁴ The power to carry out works and operations shall only be exercisable in a case where the agency considers it necessary; or it appears (to the agency), after reasonable inquiry, that no person can be found on whom to serve a work notice.²⁵

²⁰ Water Resources Act op cit (n. 5).

²¹ Ibid s. 161 (1).

²² Ibid s. 161 (1) (i).

²³ Ibid s. 161 (1) (ii) and (iii).

²⁴ Ibid s. 161 (1).

²⁵ Ibid.

Where the agency carries out necessary works or investigations, it shall be entitled to recover the expenses reasonably incurred in doing so from any person who, as the case may be, caused or knowingly permitted the matter in question to be present at the place from which it was likely, in its opinion, to enter any controlled waters; or caused or knowingly permitted the matter in question to be present in any controlled waters.²⁶

The Act prohibits the recovery of such expenses from a person for any works in respect of water from an abandoned mine which that person permitted to reach such a place or to enter any controlled waters.²⁷ The recovery of expenses does not derogate any right of action or other remedy (whether civil or criminal) in proceedings otherwise instituted; or affect any restriction imposed by or under any other enactment, whether public, local or private.²⁸ The Environment Act s. 61 is primarily aimed at closed landfill sites but is drafted in such a way that it applies to any land the conditions of which may cause harm to health or pollution to the environment.²⁹

3.2.3 Defence to the offences of polluting controlled waters

A person shall not be guilty of an offence of polluting controlled waters in respect of the entry of any matter into any waters or any discharge if:

- a) the entry is caused or permitted, or the discharge is made, in an emergency in order to avoid danger to life or health;

²⁶ Ibid s. 161 (3).

²⁷ Ibid s. 161 (4).

²⁸ Ibid s. 161 (5).

²⁹ T G Peterkin, "Groundwater Contamination: Approaches to the Regulation and Clean-up in the UK and EC" in P Thomas. *Water Pollution Law and Liability* (1993) 335 at 343.

- b) that person takes all such steps as are reasonably practicable in the circumstances for minimizing the extent of the entry or discharge and its polluting effects; and
- c) particulars of the entry are furnished to the agency as soon as reasonably practicable after the entry occurs.³⁰

It is not an offence to cause or permit any discharge of trade or sewage effluent from a vessel.³¹ The same applies for a person who permits water from any abandoned mine or an abandoned part of the mine to enter controlled waters.³² However, the defence does not apply to the owner or former operator of any mine, or part of a mine, if it became abandoned after 31st December 1999.³³

A person shall not, otherwise than in respect of the entry of any poisonous, noxious or polluting matter into any controlled waters, be guilty of an offence by reason of his depositing the solid refuse of a mine or quarry on any land so that it falls, or is carried into, inland freshwaters if he deposits the refuse on the land with the consent of the agency; no other site is reasonably practicable; and he takes all reasonably practicable steps to prevent the refuse from entering those inland freshwaters.³⁴

In *Express Ltd (trading as Express Dairies Distribution) v Environmental Agency*,³⁵ the defence of causing pollution of waters was in issue. An employee of the defendant dairy company was driving a milk tanker along a motorway in the course of the company's business. As a result of a tyre blow-out, the delivery pipe was sheared, causing several

³⁰ Water Resources Act op cit (n. 5) s. 89 (1).

³¹ Ibid s. 89 (2).

³² Ibid s. 89 (3).

³³ Ibid s. 89 (3A).

³⁴ Ibid s. 89 (4).

³⁵ [2003] 2 All ER 778 (QBD).

thousand litres of milk to escape from the tank.³⁶ The driver pulled onto the hard shoulder and stopped at a point where two drains fed into a brook which constituted controlled waters. The company was successfully charged with causing polluting matter to enter controlled waters. It appealed to the Divisional Court. The Court held that the defence, provided by s. 89 (1) of the 1991 Act, to the offence of causing polluting matter to enter controlled waters, was available to a person whose act, in causing that entry, was done in an emergency in order to save life or health.³⁷ Parliament recognised that some of those acting in an emergency should be excused. The defence succeeded and the conviction was set aside. The significance of this case was that milk was considered as a water polluting substance. The appeal succeeded because the appellant committed a pollution of water in an emergency situation in order to avoid an accident and probably save life.

3.2. 4 Offence of supplying water unfit for human consumption

Where a water authority supplies water by means of pipes to any premises and that water is unfit for human consumption, the authority shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding the statutory maximum; on conviction on indictment, to a fine.³⁸ Where a person is guilty, together with a body corporate and any enactment where an individual is guilty of this offence, the penalty, on conviction on indictment, of the offence shall be deemed to include imprisonment (in addition to, or instead of, a fine) for a term not exceeding two years.³⁹ Proceedings shall not be

³⁶ Ibid at 778 D.

³⁷ Ibid para 26 at 784 G.

³⁸ Water Industry Act 1991 (c. 56) s. 70 (1); Water Act 1989 (c. 15) s. 54 (1).

³⁹ Water Industry Act op cit (n. 38) s. 70 (1); Water Act op cit (n. 38) s. 70 (2).

instituted except by the Secretary of State or the Director of Public Prosecutions.⁴⁰ A person can escape conviction if he or she can show that there were no reasonable grounds for suspecting that the water would be used for human consumption; or all reasonable steps had been taken and all due diligence exercised for securing that the water was fit for human consumption on leaving the pipes or was not used for human consumption.⁴¹

3.2.5 Contamination, waste and misuse of water

A person is guilty of an offence if he or she commits any act or neglect whereby the water in any waterworks which is used or likely to be used for human consumption or domestic purposes; or for manufacturing food or drink for human consumption, is polluted or likely to be polluted.⁴² The offender shall be liable, on summary conviction, to a fine not exceeding the statutory maximum and, in the case of a continuing offence, to a further fine not exceeding £ 50 for every day during which the offence is continued after conviction; on conviction on indictment, to imprisonment for a term not exceeding two years, or to a fine or to both.⁴³

If any person who is the owner or occupier of any premises to which a supply of water is provided by a water undertaker intentionally or negligently causes or suffers any water fitting for which he is responsible to be or remain so out of order, so in need of repair or so constructed or adapted, or to be so used:

- a) that water in a water main or other pipe of a water undertaker or in a pipe connected with such a water main or pipe is likely to be contaminated by the return of any substance from those premises to that main pipe;

⁴⁰ Water Industry Act op cit (n. 38) s. 70 (4); Water Act op cit (n. 38) s. 54 (4).

⁴¹ Water Industry Act op cit (n. 38) s. 70 (3); Water Act op cit (n. 38) s. 54 (3).

⁴² Water Industry Act op cit (n. 38) s. 72 (1).

⁴³ Ibid s. 72 (4) (a) and (b).

- b) that water has been supplied by the undertaker to those premises is, or is likely to be, contaminated before it is used; or
- c) that water so supplied is, or is likely to be, wasted or, having regard to the purposes for which it is supplied, misused or unduly consumed,

that person shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.⁴⁴

A person who uses any water supplied to any premises by a water undertaker for a purpose other than one for which it is supplied to those premises shall, unless the other purpose is the extinguishment of a fire, be guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.⁴⁵ The water undertaker is entitled to recover from the offender such amount as may be reasonable in respect of any water wasted, misused or improperly consumed in consequence of the commission of the offence.⁴⁶ The owner or occupier of any premises is regarded as responsible for every water fitting on the premises which is not a water fitting which a person, other than the owner or occupier, is liable to maintain.⁴⁷

3.2.6 Liability and offence by bodies corporate

A corporation is liable on the basis of an act in the corporation's business by those officers who control the affairs of the corporation (controlling officers).⁴⁸ Until recently, where a company committed an offence in the UK, it, and it alone, would be

⁴⁴ Water Act op cit (n. 38) s. 61 (1), see also Water Industry Act op cit (n. 38) s. 73 (1).

⁴⁵ Ibid s. 61 (2); see also Water Industry Act op cit (n. 38) s. 73 (2).

⁴⁶ Ibid s. 61 (3); see also Water Industry Water op cit (n. 38) s. 73 (3).

⁴⁷ Ibid s. 61 (4); see also Water Industry Act op cit (n. 38) s. 73 (4).

⁴⁸ M Kidd. "Corporate Liability in Environmental Offences" (2003) 18 *SAPL* 1 at 5.

prosecuted.⁴⁹ However, there is a growing tendency for enforcement agencies in the UK to consider prosecuting not only corporate bodies but also their directors and other senior managers personally.⁵⁰ Corporate policy is determined by an organized collectivity of individuals. Thus any effective response to environmental problems must target the decision dynamics with the corporation.⁵¹

Both Water Resources Act 1991, Water Industry Act 1991 and Water Act 1989 contain specific provisions enabling a body corporate, directors and other officers to be prosecuted for offences committed by a company.⁵² Water Resources Act provides that:

Where a body corporate is guilty of an offence under this Act and that offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, then he, as well as the body corporate, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.⁵³

In *Huckerly v Elliott*,⁵⁴ the court interpreted the meaning of the terms consent, connivance and neglect. The court held that consent exists where 'a director consents to the commission of an offence by his company, and he is well aware of what is going on and agrees to it.'⁵⁵ Connivance means that a director 'connives at the offences committed by the company, he is equally aware of what is going on but his agreement is tacit, not

⁴⁹ T Turtle *op cit* (n. 2) 247.

⁵⁰ *Ibid*.

⁵¹ Z Lipman. "Corporations, Crime and Environment" (1997) 4 *SAJELP* 67 at 75.

⁵² Water Resources Act *op cit* (n. 5) s. 217, Water Industry Act *op cit* (n 38) s. 210, and Water Act *op cit* (n. 38) s. 177.

⁵³ Water Resources Act *op cit* (n. 5) s. 217 (1).

⁵⁴ [1970] 1 All ER 189 (QBD) at 194.

⁵⁵ *Ibid* at 194 F-G.

actively encouraging what happens but letting it continue and saying nothing about it.⁵⁶

Where the offence is attributable to neglect, in the absence of authority on the point, it would seem that the offence which is being committed may well be without his knowledge but it is committed in circumstances where he ought to know what is going on and he fails to carry out his duty as a director to see that the law is observed.⁵⁷ This interpretation may assist other courts in water pollution offences committed by the controlling officers of a body corporate.

Where affairs of a body corporate are managed by its members, the acts or defaults of a member in connection with his functions of management are considered as if he were a director of the body corporate.⁵⁸ Where the commission by any person of an offence under the water pollution provisions is due to the act or default of some other person, that other person may be charged with, and convicted of, the offence, whether or not proceedings for the offence are taken against the first-mentioned person.⁵⁹ Apart from these specific provisions, where a company commits an offence, a director or other officer may be subject to criminal prosecution under the general law, as principal or as an accomplice or as a party to a conspiracy.⁶⁰

In *National Rivers Authority v Alfred McAlpine Homes East Ltd*,⁶¹ the issue was whether or not a company would be held liable for pollution of water caused by its junior

⁵⁶ Ibid at 194 G-H.

⁵⁷ Ibid at 194 H-J.

⁵⁸ Water Resources Act *op cit* (n. 5) s. 217 (2).

⁵⁹ Ibid s. 217 (3).

⁶⁰ T Turtle *op cit* (n. 2) 248.

⁶¹ [1994] 4 All ER 286 (QBD).

employees. The respondent company was engaged in building houses on a residential development. The wet cement was washed into a river during the building operations carried out by the company. In May 1992 the National Rivers Authority inspected the stream and found the water to be cloudy downstream of the building site, with a number of dead and distressed fish.⁶² The employees admitted liability. The applicant charged the respondent with causing polluting matter, wet cement, to enter controlled waters, contrary to s. 85 (1) of the 1991 Act. Justices dismissed the charge and held that the applicant had failed to show that the company itself was liable because neither the site agent nor the site manager were of a sufficient senior standing within the company to enable them to be categorised as persons whose acts were the acts of the company.⁶³ On appeal, the court held that a company would criminally be liable for causing pollution which resulted from the acts or omissions of its employees acting within the course and scope of their employment when the pollution occurred, regardless of whether they could be said to be exercising the controlling mind and will of the company, save only where some third party acted in such a way as to interrupt the chain of causation.⁶⁴ The appeal was allowed. This appears to be a straightforward application of the principle of vicarious liability, but it does not illustrate the need for companies to establish proper environmental management systems.⁶⁵

⁶² *Ibid* 286 H.

⁶³ *Ibid* 286 J – 287 A.

⁶⁴ *Ibid* 287 B – C.

⁶⁵ S Bell & D McGillivray. *Environmental Law*. 6th ed. (2006) 740.

3.3 Water pollution offences and penalties in Scotland

Scotland is renowned for the quality of its scenery, its fresh air and the quality of its water.⁶⁶ Many of its native industries are dependent on a reliable supply of fresh water, both in terms of quantity and quality.⁶⁷ There is no drinking water inspectorate, policy and monitoring in this respect being dealt with by the Scottish Office Environmental Department; its main objectives being to ensure that the quality of water, both surface and underground, is maintained to a standard that allows it to be used for any designated purpose.⁶⁸

3.3.1 Offence of polluting rivers and coastal waters

A person shall be guilty of an offence if he causes, or knowingly permits, any poisonous, noxious or polluting matters to enter controlled waters.⁶⁹ It is also an offence to cause, or knowingly permit, any matter to enter any inland water so as to tend (either directly or in combination with other matter which he or another person causes or permits to enter controlled waters) to impede the proper flow of the waters in a manner leading, or likely to lead, to a substantial aggravation of pollution due to other causes or the consequences of such pollution.⁷⁰ A person who causes or knowingly permits any solid waste matter to enter controlled waters commits an offence.⁷¹

⁶⁶ D A Reid. "Regulations of Non-point Source Water Pollution in Scotland." in P Thomas. *Water Pollution Law and Liability* (1993) 91.

⁶⁷ Ibid.

⁶⁸ Ibid 92.

⁶⁹ Water Act op cit (n. 38) Schedule 22 at 31 (1)(a).

⁷⁰ Ibid 31 (1) (b).

⁷¹ Ibid 31 (1) (c).

One of the defences the offender can use to escape liability is to show that the entry in question (pollution of water) is caused or permitted in an emergency in order to avoid danger to life or health.⁷² He must take all such steps as are reasonably practicable in the circumstances for minimising the extent of the entry in question and its polluting effects.⁷³ Furthermore, as soon as reasonably practicable after the entry occurs, particulars of the entry must be furnished to the river purification authority in whose area it occurs.⁷⁴ A person shall not be guilty of an offence by reason only of his permitting water from an abandoned mine to enter controlled waters.⁷⁵

3.3.2 Offences by bodies corporate and partnerships

Where a body corporate is proved to have been committed an offence, with the consent or connivance of, or to be attributable to any neglect on the part of any director, manager, secretary, member or other similar officer of the body corporate, or any person who was purporting to act in any such capacity, that person, as well as the body corporate, is guilty of the offence and liable to be proceeded against and punished accordingly.⁷⁶ If a Scottish partnership is proved to have committed an offence with the consent or connivance of, or to be attributable to any neglect on the part of, a partner, the partner, as well as the

⁷² Ibid 31 (2) (c).

⁷³ Ibid 31 (2) (c) (i).

⁷⁴ Ibid 31 (2) (c) (ii).

⁷⁵ Ibid 31 (2) (d).

⁷⁶ Water Industry (Scotland) Act 2002 s. 66 (1).

partnership, is guilty of the offence and liable to be proceeded against and punished accordingly.⁷⁷

3.3.3 Offences relating to water environment and water services

The regulations may provide for an offence to be punishable on summary conviction by imprisonment for a term not exceeding such period as is specified (which must not exceed six months), or a fine not exceeding such amount, as is defined (which must not exceed £ 20 000), or both.⁷⁸ The offence is punishable on conviction on indictment by imprisonment of a term not exceeding five years, or a fine or both.⁷⁹ The regulations may provide for a continuing offence and for any such offence to be punishable by daily or other periodic fine of such amount as is specified.⁸⁰ The Scottish ministers may substitute a specified sum by such other sum, as appears to them to be justified by a change in the value of money appearing to them to have taken place since the last occasion on which the sum was fixed.⁸¹

3.3.4 Offence of supplying water unfit for human consumption

Where a water authority supplies water by means of pipes to any premises and that water is unfit for human consumption, the authority shall be guilty of an offence and liable, on summary conviction, to a fine not exceeding the statutory maximum; on conviction on

⁷⁷ Ibid s. 66 (2).

⁷⁸ Water Environment and Water Services (Scotland) Act 2003 Schedule 2 paragraph 20 (2) (a).

⁷⁹ Ibid paragraph 20 (2) paragraph 20 (2) (b).

⁸⁰ Ibid paragraph 20 (3).

⁸¹ Ibid paragraph 20 (4).

indictment, to a fine.⁸² If an offence is proved to be attributable to any neglect on the part of an employee of the water authority, he, as well as the water authority, shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.⁸³ Where an employee is liable together with a body corporate, the penalty on conviction on indictment shall include imprisonment (in addition to, or instead of, a fine) for a term not exceeding two years.⁸⁴

A person shall not be convicted if he can show that there were no reasonable grounds for suspecting that the water would be used for human consumption; or all reasonable steps had been taken and all due diligence exercised for securing that the water was fit for human consumption on leaving the pipes or was not used for human consumption.⁸⁵ The following chapter examines offences and penalties for water pollution in the United States of America.

⁸² Water Act op cit (n. 38) Schedule 22 s. 76C (1).

⁸³ Ibid s. 76C (2).

⁸⁴ Ibid s. 76C (3).

⁸⁵ Ibid s. 76C (4).

CHAPTER FOUR

LEGAL REGIME GOVERNING OFFENCES AND PENALTIES FOR WATER POLLUTION IN THE UNITED STATES OF AMERICA

4.1 Introduction

The United States of America is made up of 50 states, the District of Columbia and four territories.¹ They have federal laws, state laws and local ordinances. The United States has established legislation to prescribe offences and penalties for persons who pollute water. Legislators have elaborated measures to prevent water pollution. This chapter deals with offences and penalties for water pollution, citizen suit and prosecuting corporations and corporate officers.

4.2 Offences and penalties for water pollution in the United States

The Clean Water Act² (CWA) creates offences and imposes penalties for water polluters. The goals of the Clean Water Act are to restore and maintain chemical, physical and biological integrity of the nation's waters.³ The pollution control strategy of the Clean Water Act centres upon a simple but broad prohibition forbidding the discharge of any pollutant by any person to waters of the United States, unless the discharger has obtained a permit and complies with its conditions, including restrictions on the amount of

¹ A.O. Akinnusi. *A Comparative Analysis of Approaches to Air Pollution Control* (1999) 39.

² Clean Water Act 33 USC 1251

³ Ibid § 101 (a).

concentration of a pollutant that may be discharged.⁴ Waters of the United States are broadly defined in EPA regulations to include navigable waters, tributaries of navigable waters, interstate waters, intra-state lakes and waters used by inter-state travellers for recreation or by businesses engaged in interstate commerce.⁵ The Clean Water Act requires certain industrial discharges of pollutants to comply with national technology-based effluent standards.⁶ These standards are primarily set by various states.⁷ The dischargers must comply or respect the national effluent standards in order to maintain and preserve fishable and swimmable waters.

4.2.1 Criminal penalties

4.2.1.1 Negligent violations

A person who negligently violates any condition in a permit or negligently introduces into a sewer system or into publicly owned works any pollutant or hazardous substances which such person knew, or reasonably should have known, to cause personal injury or property damage in contravention with all applicable Federal, State, local requirements or permits shall be punished by a fine of not less than \$ 2 500 nor more than \$ 25 000 per day of violation, or by imprisonment for not more than one year, or by both.⁸ Upon

⁴ W L Andreen. Water Quality Today – Has the Clean Water Act Been a Success? *Land Use and Environmental Law Review* (2005) 543 at 574, Clean Water Act op cit (n. 2) § 1311 (a).

⁵ G A Lucero & J M Praitis. “US Clean Water Act Regulation of Point Source Discharges” in P Thomas. *Water Pollution Law and Liability* (1993) 145 at 146 – 147.

⁶ Ibid at 145.

⁷ Ibid at 146.

⁸ Clean Water Act op cit (n. 2) § 309 (c) (1) (A) and (B).

subsequent conviction, the offender shall be liable to a fine not more than \$ 50 000 per day of violation, or by imprisonment of not more than two years, or by both.⁹

4.2.1.2 Knowing violations

Knowing violations are also criminalized. A person who knowingly introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew, or reasonably should have known, could cause personal injury or property damage or, other than in compliance with all applicable Federal, State or local requirements or permits, which causes such treatment work to violate any effluent limitation or condition in a permit, shall be punished by a fine not less than \$ 5 000 nor more than \$ 50 000 per day of violation, or by imprisonment of not more than three years, or by both.¹⁰ If the person is subsequently convicted of the same offence, he or she will be liable to a fine of not more than \$ 100 000 per day of violation, or imprisonment not exceeding six years, or by both.¹¹

4.2.1.3 Knowing endangerment

Knowingly putting individuals in danger is an offence. As a general rule, any person who knowingly contravenes any permit condition or limitation issued by the Administrator or a State and who knows at that time that he or she thereby places another person in imminent danger of death or serious bodily injury, shall, upon conviction, be subject to a

⁹ Ibid.

¹⁰ Supra § 309 (c) (2) (B).

¹¹ Ibid.

fine not exceeding \$ 250 000 or imprisonment of not more than 15 years, or both.¹² If the person is an organization, it shall, upon conviction, be liable to a fine not more than \$ 1 000 000.¹³ In the event of a subsequent conviction, the maximum punishment shall be doubled with respect to both fine and imprisonment.¹⁴

4.2.2 Administrative penalties

Whenever, on the basis of any information available, the Administrator or the Secretary of the Army finds that a person has violated any condition or limitation in a permit, the Administrator or Secretary, as the case may be, may, after consultation with the State in which the violation occurs, assess a class I or class II civil penalty.¹⁵ The amount of a class I civil penalty may not exceed \$ 10 000 per violation, except that the maximum amount of any class I civil penalty shall not exceed \$ 25 000.¹⁶ Before issuing an order assessing a class I civil penalty, the Administrator or Secretary, as the case may be, shall give to the person to be assessed such penalty written notice of the proposal to issue such an order and the opportunity to request, within 30 days of the date the notice is received by such person, a hearing on the proposed order.¹⁷ Such a hearing shall provide a reasonable opportunity to be heard and to present evidence.¹⁸

¹² Ibid § 309 (c) (3) (A).

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid § 309 (g) (1) (A) and (B).

¹⁶ Ibid § 309 (g) (2) (A).

¹⁷ Ibid.

¹⁸ Ibid.

The amount of class II civil penalty may not exceed \$ 10 000 per day for each day during which the violation continues; except that any class II civil penalty shall not exceed \$ 125 000.¹⁹ A class II civil penalty shall be assessed and collected after notice and opportunity for a hearing on the record.²⁰ The Administrator and the Secretary may issue rules for discovery procedures for hearings.²¹

In determining the amount of any penalty, the Administrator or the Secretary, as the case may be, shall take into account the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violations and such other matter as justice may require.²² A single operational upset which leads to simultaneous violations of more than one pollutant parameter is treated as a single violation.²³

4.3 State water pollution control revolving funds

The Administrator makes capitalization grants to each state for the purpose of establishing water pollution control revolving funds for providing assistance for construction of treatment works which are publicly owned, for implementing a management programme for developing and implementing a conservation and

¹⁹ Ibid § 309 (g) (2) (B).

²⁰ Ibid.

²¹ Ibid.

²² Ibid § 309 (g) (3).

²³ Ibid.

management plan.²⁴ The Administrator and each state jointly establish a schedule of payment, under which the Administrator pays to the state the grants for establishment of revolving funds.²⁵ After providing for public comment and review, each state annually prepares a plan identifying the intended uses of the amounts available to its water pollution control revolving fund.²⁶

4.4 Citizen suits

The Clean Water Act also has a citizen suit provision, that authorizes private citizens to bring enforcement actions against persons violating an effluent standard or limitation.²⁷ Any citizen may commence a civil action on his own behalf against a person who is alleged to be in violation of an effluent standard or limitation, or an order issued by the Administrator or a state with respect to such a standard or limitation.²⁸ The civil action may also be taken against the Administrator where there is an alleged failure of the Administrator to perform any act or duty which is not at his or her discretion.²⁹

The citizens who seek to bring a citizen suit must satisfy certain statutory requirements. No action may be commenced prior to 60 days after the plaintiff has given notice of the alleged violation to the Administrator, to the state in which the alleged violation occurs,

²⁴ Ibid § 601 (a).

²⁵ Ibid § 601 (b).

²⁶ Ibid § 601 (c).

²⁷ G M Gaba. Generally Illegal: NPDES General Permits Under the Clean Water Act. *The Harvard Environmental L R* Vol 31 No 2 (2007) 409 at 419. Citizen means a person or persons having an interest which is, or may be, adversely affected (see CWA op cit (n. 2) § 505 (g)).

²⁸ Clean Water op cit (n. 2) § 505 (a) (1). See also The Public Health and Welfare 42 USC § 300 J – 8 (a) (1).

²⁹ Ibid § 505 (a) (2). The Public Health and Welfare op (n. 28) § 300 J – 8 (a) (2).

and to any alleged violator of the standard, limitation or order.³⁰ No action may be commenced if the Administrator or state has commenced or is diligently prosecuting a civil or criminal action in a court of the United States, or a state to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.³¹ The plaintiff must give at least 60 days to the Administrator. The application may be brought immediately after a notification in the case of an action respecting a violation of sections 306 and 307 (a).³²

Any action respecting a violation by a discharge source of an effluent standard or limitation, or an order respecting such standard or limitation, may be brought only in the judicial district in which such source is located.³³ The Administrator, if not a party, may intervene as a matter of right.³⁴ Whenever any action is brought in a court of the United States, the plaintiff shall serve a copy of the complaint on the Attorney General and the Administrator.³⁵ No consent judgment shall be entered in an action in which the United States is not a party prior to 45 days following the receipt of a copy of the proposed consent judgment by the Attorney General and the Administrator.³⁶

The court, in issuing any final order, may award the cost of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing

³⁰ Ibid § 505 (b) (1) (A).

³¹ Ibid § 505 (b) (1) (B).

³² Ibid § 505 (b) (2).

³³ Ibid § 505 (c) (1).

³⁴ Ibid § 505 (c) (2).

³⁵ Ibid § 505 (c) (3).

³⁶ Ibid.

party, whenever the court determines such award is appropriate.³⁷ If a temporary restraining order or preliminary injunction is sought, the court may require filing of a bond or equivalent security, in accordance with the Federal Rules of Civil Procedure.³⁸ Nothing shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation, or to seek any other relief (including relief against the Administrator or a state agency).³⁹

In *Gwaltney of Smithfield, Ltd v Chesapeake Bay Foundation, Inc.*,⁴⁰ the issue was whether or not section 505 (a) (CWA) citizen suits apply for past violations. The court held that section 505 (a) does not confer federal jurisdiction over citizen suits for wholly past violations.⁴¹ The citizen plaintiffs need to allege a state of either continuous or intermittent violation, that is a reasonable likelihood that a past polluter would continue to pollute in the future.⁴² The language and structure of the citizen suit provisions made plain that the harm sought to be addressed lay in the present or future rather than the past, particularly in the light of the use of the persuasive and undeviated use of the present tense through § 505.⁴³ This interpretation may have a negative impact on the eradication of water pollution. Sometimes past water pollution incidents produce effects on the present or future and citizen suit cannot be used in this matter.

³⁷ Ibid § 505 (d).

³⁸ Ibid.

³⁹ Ibid § 505 (e).

⁴⁰ 484 US 49 (1987).

⁴¹ Ibid at 56 – 63.

⁴² Ibid at 49.

⁴³ Ibid at 50.

4.5 Prosecuting corporations

The scope of corporate criminal liability in the United States is very broad. A corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder.⁴⁴ Corporate liability in the United States is based on the imputation of agents' conduct to a corporation, usually through the application of the doctrine of *respondent superior*.⁴⁵ This doctrine has three requirements in order to impose liability on a corporation. First, a corporate agent must have committed an *actus reus* with *mens rea*, which can be imputed to the corporation regardless of the rank, status or position of the agent in the corporation.⁴⁶ Alternatively, *mens rea* can be shown on the basis of the 'collective knowledge' of the employees as a group, even though no single employee possessed sufficient information to know that the crime was being committed.⁴⁷

For instance, in *United States v T.I.M.E.-D.C., Inc.*,⁴⁸ a trucking company was found guilty of knowingly violating an ICC regulation which forbade truckers from driving when ill. The company had made harsh regulations regarding absenteeism. One of the employees, a dispatcher, knew the driver in question had telephoned to say that he could not work and then changed his mind after learning of the company's new absentee

⁴⁴ V S Khanna. Corporate criminal liability: what purpose does it serve? *Harvard L R* Vol. 109 No 7 May (1996) 1477 at 1488.

⁴⁵ V S Khanna op cit (n. 44) 1489 – quoting from *New York Cent. & Hudson Rives RR v United States*, 212 US 481, 494 – 95 (1909), see also M Kidd. Corporate liability for environmental offences (2003) *SAPL* 1 at 8. Anon Developments in the law – Corporate crime: Regulating corporate behaviour through criminal sanctions. 1979 *Harvard L R* 1227 at 1247 (hereafter referred to as 'Developments').

⁴⁶ M Kidd op cit (n. 45) 9; *United States v Basic Constr Co* 711 F 2d 570 (4th Cir 1983) at 573, *United States v Koppers Co* 652 F 2d 290 (2d Cir 1981) 298, Developments op cit (n. 45) 1247 – 8.

⁴⁷ V S Khanna op cit (n. 44) 1489.

⁴⁸ 382 F. Supp. 730 (W.D. Va. 1974).

policy.⁴⁹ The court found that corporate officers knew that the harsh new policy was likely to encourage truckers to drive despite being ill.⁵⁰ Through the collective knowledge of the dispatcher and the officer, the corporation was found to have known that the driver was unfit to drive, under the ICC regulation.⁵¹ Collective knowledge was used to impute liability on the corporation.

Second, the agent must have acted within the scope of his or her employment, which includes any act that occurred while the offending employee was carrying out a job-related activity.⁵² In *Domar Ocean Transport Ltd v Independent Ref Co*,⁵³ the court stated that:

“Acts committed by a servant are considered within the scope of employment when they are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment.”

In fact, this requirement is so broad that courts may hold corporations liable even when corporations have forbidden the wrongful activities.⁵⁴

The third requirement is that the agent must have intended to benefit the corporation.⁵⁵

Under this easily met standard, the employee need not act with the exclusive purpose of benefiting the corporation and the corporation need not actually receive the benefit.⁵⁶

⁴⁹ Ibid at 735.

⁵⁰ Ibid at 739.

⁵¹ Ibid.

⁵² M Kidd op cit (n. 45) 9.

⁵³ 783 F 2d 1185 (5th Cir 1986) 1190.

⁵⁴ V S Khanna op cit (n. 44) 1489, *Developments op cit* (n. 45) at 1249-50.

⁵⁵ M Kidd op cit (n. 45) 9, *Developments op cit* (n. 45) 1250, *United States v Basic Constr Co* 711 F 2d 570 (4th Cir 1983) at 573.

⁵⁶ V S Khanna op cit (n. 44) 1490.

Many states have adopted specific statutory language dealing with corporations, that requires criminal acts be committed by high ‘managerial agents’ in order to trigger liability.⁵⁷ Some states, however, have adopted the rule that actions taken by the corporation’s agent need not have been ratified by the corporation’s directors, officers or other high managerial agents in order to be chargeable to the corporation.⁵⁸ Moreover, a corporation can raise the defence that a supervisory agent with power over the area in which the offence took place acted with due diligence to prevent the commission of the offence.⁵⁹

4.6 Prosecuting corporate officers

The criminal liability of corporate officers in the United States is governed by the ‘corporate officer’ doctrine, which was established by the US Supreme Court cases of *United States v Dotterweich*⁶⁰ and *United States v Park*.^{61 62} In the *Dotterweich* case, the court addressed whether an individual corporate officer, not simply the company, could be prosecuted under a misdemeanor provision of the Food and Drug Act for introducing or delivering adulterated or misbranded drugs into interstate commerce.⁶³ The court held that *Dotterweich*, the president of the company, was subject to criminal prosecution. The court expressly promised its decision on the fact that the Food and Drug Act was designated to protect public health and welfare. The purposes of the Food and Drug Act

⁵⁷ C E Carrasco & M K Dupee. Corporate criminal liability. *American Criminal L R* vol 36 par 2 (1999) 445 at 450.

⁵⁸ *Ibid.*

⁵⁹ M Kidd op cit (n. 45) 10.

⁶⁰ 320 US 277 (1943).

⁶¹ 421 US 658 (1975).

⁶² M Kidd. Liability of corporate officers for environmental offences (2003) 17 *SAPL* 277 at 284.

⁶³ *Dotterweich* op cit (n. 60) 278.

“touch phases of the lives and health of people which, in the circumstances of modern industrialism, are largely beyond self- protection.”⁶⁴

The court sought to narrow the range of individuals subject to liability, by holding that “the offence is committed by all who do have such a responsible share in the furtherance of the transaction which the statute outlaws.”⁶⁵ However, the court declined to define the class of employees bearing such responsible share in the offence, leaving this definition to “the good sense of prosecutors, the wise guidance of trial judges, and the ultimate judgment of juries.”⁶⁶

In *Park*, the defendant was a CEO of Acme Markets, a national retail food operation.⁶⁷ He was held personally liable, despite the fact that he was not involved in the wrongful conduct, of breaching the Food and Drug Act. The court held that the government was not required to prove that *Park* himself engaged in wrongful conduct. Rather the government could establish the violation by demonstrating “that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he fails to do so.”⁶⁸

The principle that can be derived from *Dotterweich* and *Park* is that any corporate officer being in a responsible relationship to conduct prescribed by a health and welfare statute,

⁶⁴ Ibid at 280.

⁶⁵ Ibid at 284.

⁶⁶ Ibid at 285.

⁶⁷ *Park* op cit (n. 61) 660.

⁶⁸ *Supra* at 673 – 674.

who is not powerless to prevent others from committing such conduct, can be held criminally liable for a violation of that statute.⁶⁹

The Clean Water Act provides for a responsible corporate officer.⁷⁰ In *United States v Iverson*,⁷¹ the court held that any corporate officer who is answerable or accountable for the unlawful discharge is liable under the CWA. In this case, the appellant was the founder, president and chairman of the board of the company and he announced his retirement from the company. He continued to receive money from the company, conduct business on its facilities, give orders to employees and was occasionally present when the drums were cleaned. Sometimes he told employees that he had a permit for the operation and other times he told them that the consequences for getting caught were small. On the issue of corporate liability under the CWA, the court concluded that a person is a responsible corporate officer if he has authority to exercise control over the corporation's activity that is causing the unlawful discharges.⁷² The CWA does not require that the officer, in fact, exercises that authority, or that the corporation expressly grants the officer the duty to oversee the activity.⁷³

In the *United States v Brittain*,⁷⁴ the prosecution under the Clean Water Act of the director of public utilities for the city of Enid, Oklahoma, was at issue. The defendant was convicted of wilfully and negligently discharging pollutants into navigable waters, in

⁶⁹ J G Block & M A Voisin. The responsible corporate officer doctrine – can you go to jail for what you don't know? *Environmental Law* vol 22 Part 2 (1992) 1347 at 1354-5.

⁷⁰ The term 'person' includes any responsible corporate officer (see USC 33 § 1319 (c) (6)).

⁷¹ 162 F 3d 1015 (9th Cir 1998) at 1023.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ 931 F. 2d 1413 (10th Cir 1991)

noncompliance with the issued National Pollutant Discharge Elimination System (NPDES) permit.⁷⁵ The court held that the defendant was a person subject to criminal liability under the Act. The court reasoned that Congress added responsible corporate officers to the list of criminally liable persons in keeping with the public welfare nature of the Clean Water Act.⁷⁶ It further explained that a responsible corporate officer, to be held criminally liable, would not have to wilfully or negligently cause a permit violation. Instead the wilfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.⁷⁷ The liability under the CWA derives from the wilfulness or negligence of the corporate officer or offender. Therefore “the court’s broad language about imputing wilfulness or negligence may arguably be dismissed as clearly dicta.”⁷⁸

The corporate officer must have knowledge of the violation of the CWA. The knowledge requirement may also be satisfied by the use of the ‘wilful blindness’ doctrine, which arises when a corporate officer becomes suspicious of a criminal violation, but takes no further action to investigate or mitigate – in effect, closing his or her eyes to what is occurring.⁷⁹ In *United States v Jewell*,⁸⁰ the court held that:

“A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realized its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This and this alone, is wilful blindness.”⁸¹

⁷⁵ Ibid at 1418.

⁷⁶ Ibid at 1419.

⁷⁷ Ibid.

⁷⁸ J G Block & M A Voisin op cit (n. 65) 1369.

⁷⁹ M Kidd op cit (n. 58) 287, C E Carrasco & M C Dupee op cit (n. 53) 453.

⁸⁰ 532 F 2d 697 (9th Cir 1976).

⁸¹ Ibid at 700.

The wilful blindness doctrine may be used to impute knowledge to the corporate officer in order to establish criminal liability.

The primary goal of criminal prosecutions of environmental crimes is deterrence and the responsible corporate officer doctrine is an effective way of achieving that goal.⁸² A corporate officer will be deterred by the threat of any jail term, regardless of its length.⁸³ Holding responsible corporate officers criminally liable for the actions of their companies is intended to encourage corporations to police the actions of their employees and to initiate programmes that will prevent environmental violations before they occur.⁸⁴ The fact that most convicted violators will serve some time in prison is what a responsible corporate officer finds frightening; the length of the sentence is almost irrelevant.⁸⁵ This is because Federal Sentencing Guidelines have eliminated suspended sentences and probation.

In conclusion, “corporate officers have a duty to protect the public health and welfare from their corporation’s activities, but they cannot be convicted for their corporate wrong-doings simply because of their title.”⁸⁶ They should only be convicted of the unlawful activities of their corporation if they have been committed as a result of their intention or negligence in the performance of their duties. Simply being a responsible corporate officer is not, and should not be, enough to garner a felony conviction under

⁸² L A Harig. Ignorance is not bliss: responsible corporate officers convicted of environmental crimes and the Federal Sentencing Guidelines. *Duke L J* vol 42 Part 1 (1992) 145 at 163.

⁸³ *Ibid* at 164.

⁸⁴ *Ibid* at 163.

⁸⁵ *Ibid* at 164.

⁸⁶ J G Block & M A Voisin *op cit* (n. 65) 1347.

environmental statutes,⁸⁷ including the Clean Water Act. The following chapter deals with Australia and analyses its legislations with regard to water pollution offences and penalties.

⁸⁷ Ibid at 1374.

CHAPTER FIVE

AUSTRALIAN OFFENCES AND PENALTIES FOR WATER POLLUTION

5.1 Introduction

Australia is a federation of six sovereign states, namely New South Wales, Victoria, South Australia, Western Australia, Queensland and Tasmania and some additional territories such as the Northern Territory and the Australian Capital Territory.¹ Like the USA, Australia has a federal system of government and the Australian constitution allocates specific legislative powers to the Federal Parliament and residual legislative powers to the states.² The environment is not listed specifically among the matters on which the Australian Federal parliament may legislate.³ With few exceptions, federal powers are concurrent, not exclusive, so that in the absence of federal intervention, the states may regulate those activities which fall within federal competence.⁴ As a result, there “has been a complex demarcation of legislative authority in the field of environmental law between federal and state parliaments.”⁵ Water pollution is regulated by individual states. This chapter examines the offences and penalties for pollution of waters in Victoria, South Australia, Queensland and New South Wales and the liability for corporations and corporate officers.

¹ A O Akinnus. *A Comparative Analysis of Approaches to Air Pollution Control* (1999) 61.

² J Taberner. “Land-based sources of water pollution: Regulation of non-point source pollution in Australia” in P Thomas. *Water pollution law and liability* (1993) 11 at 115.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

5.2 Victoria

In Victoria, the legislation aims to achieve clean water by regulating the waste trade. The discharge or deposit of wastes into waters of the state of Victoria shall, at all times, be in accordance with declared State environmental protection policy or waste management policy specifying acceptable conditions for the discharge or deposit of wastes into waters in the environment and shall comply with the described standards.⁶ The legislation provides that a person shall not pollute any waters so that the condition of the waters is so changed as to make, or be reasonably expected to make, those waters noxious or poisonous; harmful or potentially harmful to the health, welfare, safety or property of human beings; poisonous, harmful or potentially harmful to animals, bird, wildlife, fish or other aquatic life, plants or other vegetation; or detrimental to any beneficial use made of those waters.⁷

In *Allen v United Carpet Mills Pty Ltd*,⁸ the court held that the offence of polluting waters created by s. 39 (1) of the Environmental Protection Act 1970 (Vic) was one of absolute liability that the defence of honest and reasonable mistake of fact did not apply.

A person shall be deemed to have polluted waters if that person causes, or permits to be placed in or on any waters or in any place where it may gain access to any waters, any matter, whether solid, liquid or gaseous which is prohibited; or does not comply with any

⁶ Environmental Protection Act 1970 (Victoria) s. 38.

⁷ *Ibid* s. 39 (1).

⁸ [1989] v R 323.

prescribed standards for that matter; or that person causes or permits the temperature of receiving waters to be raised or lowered by more than the prescribed limits.⁹

The Environmental Protection Act (EPA) prohibits a person to cause, or permit waste to be placed or left in any position whereby it could reasonably be expected to gain access to any waters in circumstances where, if access was gained, the waste would be likely to result in those waters being polluted.¹⁰ A person shall not cause or permit waste to be discharged or deposited onto the dry bed of any waterway in circumstances where, if the waterway had contained waters, the discharge or deposit would be likely to result in those waters being polluted.¹¹ The contravention of these provisions is an indictable offence punishable by a penalty of not more than 2 400 penalty units. In the case of a continuing offence, the offender is liable to a daily penalty not exceeding 1 200 penalty units for each day the offence continues after conviction or after service by the authority of notice of the contravention.¹²

A person must not cause or permit anything other than sewage, or trade waste discharged in accordance with a trade waste agreement, to be discharged into a sewerage system under the control and management of a licensee.¹³ Any person who contravenes this section is liable to 200 penalty units and, for a continuing offence, an additional penalty of 80 penalty units for each day the offence continues after service of a notice of

⁹ Ibid s. 39 (2).

¹⁰ Ibid s. 39 (3).

¹¹ Ibid s. 39 (4).

¹² Ibid s. 39 (5).

¹³ Water Industry Act 1994 (Victoria) s. 93 (a) and (b); see also Water Act 1989 (Victoria) s. 178 (a) and (b).

contravention on the person; or if no notice of contravention is served, after conviction of the person for the offence.¹⁴ Whether or not proceedings are instituted for the contravention of any terms or conditions of a trade waste agreement, a licensee may apply to a court for an order with respect to the enforcement of the agreement.¹⁵

The Water Industry Act provides for the protection of sewage treatment. A person who is not a water or sewerage licensee must not cause or permit sewage or any other thing to be discharged into a sewage treatment system under the control and management of a licensee.¹⁶ The contravention of this section is an offence and the offender is liable to 200 penalty units. In the case of a continuing offence, the person is liable to an additional penalty of 80 penalty units for each day the offence continues.¹⁷

5.3 South Australia

5.3.1 Notice in case of unauthorized release of pollutant

Where the Minister knows of, or has reason to suspect, the unauthorized entry of a pollutant into surface or underground water in a water protection area, and is of the opinion that the pollutant has degraded, or is likely to degrade, the water, he or she may, by notice served on the owner or occupier of the land, or the owner of the vessel or aircraft, from which the pollutant entered the water, direct the owner of the land or the

¹⁴ Water Industry Act op cit (n. 13) s. 93 (c) and (d); Water Act op cit (n. 13) s. 1178 (c) and (d).

¹⁵ Water Industry Act op cit (n. 13) s. 94; see also Water Act op cit (n. 13) s. 182.

¹⁶ Water Industry Act op cit (n. 13) s. 102.

¹⁷ Ibid.

owner of the vessel or aircraft to take such specified action to prevent further entry of a pollutant that has entered into the water or any other water.¹⁸ The notice may also require the person to remove a pollutant that has entered the water from the water or from land on which the pollutant has been deposited.¹⁹ The actions are specified by the Minister in the notice.

A person on whom a notice has been served is entitled to enter any land in order to comply with the notice.²⁰ If the person (on whom a notice has been served) fails to comply with the notice, the Minister may enter the land, vessel or aircraft and take action specified in the notice and other action as the Minister considers appropriate in the circumstances and the Minister's costs will be a debt due by that person to the Minister.²¹ In an emergency the Minister is not obliged to serve notice but may enter the land, vessel or aircraft and take such action as the Minister considers appropriate in the circumstances and the Minister's costs will be a debt due to the Minister by the owner and occupier of the land or the owner of the vessel or aircraft.²²

5.3.2 Escape of pollutant from the land

Where the Minister is of the opinion that precautions should be taken to ensure that a pollutant on, or under, any land or on any vessel or aircraft does not enter any surface or underground water in a water protection area, the Minister may, by notice served on the

¹⁸ Environmental Protection Act 1993 (South Australia) s. 64 A (1) (a).

¹⁹ Ibid s. 64 A (1) (b).

²⁰ Ibid s. 64 A (2).

²¹ Ibid s. 64 A (3).

²² Ibid s. 64 A (4).

owner or occupier of the land or owner of the vessel or aircraft, direct him or her to take such action (to be specified in the notice) as the Minister considers necessary or desirable.²³ A person who fails to comply with such a notice is guilty of an offence.²⁴ The offender may be a body corporate or a natural person. The maximum penalty for a body corporate is \$ 120 000 and \$ 75 000 for a natural person.²⁵

Where a person on whom a notice is served fails to comply with the notice, the Minister may enter the land, vessel or aircraft and take the action specified in the notice and such other action as the Minister considers appropriate in the circumstances and the Minister's costs will be a debt due by the person to the Minister.²⁶

The Minister may delegate his or her power to any person or body. Such delegation must be by instrument in writing; and may be absolute or conditional, and does not derogate from the power of the Minister to exercise any of those powers; and is revocable at will by the Minister.²⁷

5.3.3 Costs to be charged on land

Where costs are a debt due by a person to the Minister or to a delegate of the Minister, the Minister or delegate may, by notice in writing to the person, fix a period being not less than 28 days from the day of the notice, within which the amount must be paid by the

²³ Ibid s. 64 B (1).

²⁴ Ibid s. 64 B (2).

²⁵ Ibid.

²⁶ Ibid s. 64 B (3).

²⁷ Ibid s. 64 C (1) and (2).

person and, if the amount is not paid by the person within that period, the person is liable to pay interest charged at the prescribed rate per annum on the amount unpaid.²⁸ The amount together with any interest charge so payable is until paid a charge in favour of the Minister or delegate on any land owned by the person in relation to which the costs are due.²⁹ A charge imposed on the land by this section has priority over any charge on land (whether registered or not registered) that operates in favour of a person who is an associate of the owner of the land; and other charge on the land other than a charge registered prior to service of notice on the owner of the land.³⁰

5.4 Queensland

A person must not do anything likely to pollute water in a service provider's water service. The contravention of this provision is an offence punishable by a maximum penalty of 1000 penalty units.³¹

The Act also stipulates that a person must not discharge trade waste into a local government's infrastructure, without the approval of the local government.³² A service provider must not discharge trade waste into a local government infrastructure without the approval of the local government.³³ It is prohibited for a person to discharge trade waste into a service provider's infrastructure without its written consent.³⁴ A person must

²⁸ Ibid s. 64 D (1) (a).

²⁹ Ibid s. 64 D (1) (b).

³⁰ Ibid s. 64 D (2).

³¹ Water Act 2000 (Queensland) s. 824 A.

³² Ibid s. 824 (1).

³³ Ibid s. 824 (3).

³⁴ Ibid s. 824 (2).

not discharge a prohibited substance, surface water, soil, sand or rock into a service provider's infrastructure.³⁵ The violation of this section is an offence and the offender is liable to a maximum penalty of 1000 penalty units.³⁶

A person must not discharge water from an ornamental pond, a swimming pool or the filtration system of a swimming pool into a service provider's infrastructure without the written consent of the service provider. Contravention of this section is punishable by a maximum penalty of 500 penalty units.³⁷

The Sewerage and Water Supply Act³⁸ states that "a person must not discharge a prohibited substance into sewerage or stormwater drainage."³⁹ It also prohibits a person to discharge trade waste into stormwater drainage; or sewerage other than under a permit or approval issued or given by a local government under the sewerage standard law.⁴⁰ The Contravention of these provisions is an offence punishable by a maximum penalty of 1000 penalty units.⁴¹

³⁵ Ibid s. 824 (4).

³⁶ Ibid s. 824 (2), (3) and (4).

³⁷ Ibid s. 824 (5).

³⁸ Sewerage and Water Supply Act 1949.

³⁹ Ibid s. 17 A (2).

⁴⁰ Ibid s. 17 A (3).

⁴¹ Ibid s. 17A (2) and (3).

5.5 New South Wales

5.5.1 Offences and penalties for pollution of waters⁴²

A person who pollutes any water is guilty of an offence. In this section, pollute waters includes cause or permit any waters to be polluted.⁴³ In *Environmental Protection Authority v Tyco Water Pty Ltd*,⁴⁴ the court held that the offence created by s. 120 (1) of the PEO (Protection of the Environment Operations) Act was an offence of strict liability and that liability was susceptible to exculpation on the basis of honest and reasonable mistake of fact. However, the nature of the mistaken belief sufficient to raise the 'defence' to a charge of the subject offence was something more than inadvertence or a mere absence of knowledge.⁴⁵ Although the strict liability imposed by s. 120 (1) of the PEO Act in no way depended upon any requisite mental element or intent or negligence on the part of the offender, the purpose for imposing strict liability was not to punish a luckless victim.⁴⁶

⁴² The Hon. Justice N Pain and S Wright. *The Rise of Environmental Law in New South Wales and Federally: Perspectives from the past and issues of the future*. The paper presented to the National Environmental Law Association Annual Conference, Broken Hill NSW, Friday 24 October 2003 (1- 23) (http://www.lawlink.nsw.gov.au/lawlink/lec/ll lec.nsf/vwFiles/Speech_24Oct03_PainJ.pdf?5file/Speech_24Oct03_PainJ.pdf accessed on 4 November 2007); J Norberry. *Australian pollution laws – offences, penalties and regulatory agencies* (1 – 13) (<http://www.aic.gov.au/publications/proceedings/26/norberry.pdf> accessed on 4 November 2007); Comino, Maria and Leadbeter, Paul. *Enforcement of pollution laws in Australia – past experience and current trends*. Fifth International Conference on Environmental Compliance and Enforcement (57 – 82) (<http://www.inece.org/5thvol1/comino.pdf> accessed on 5 November 2007).

⁴³ Protection of the Environment Operations Act 1997 (New South Wales) s. 120 (1) and (2).

⁴⁴ 142 LGERA 241, 2005 WL 2038397, {2005} NSWLEC 453, [2006] ALMD 3980.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

The regulations may, for the purpose of water pollution, regulate the carrying out of an activity that pollutes waters. It is a defence in proceedings against a person for an offence in this part (water pollution) if the person establishes that the pollution resulted from an activity regulated by such a regulation, and the requirements of that regulation were not contravened.⁴⁷ It is also a defence in proceedings against a person for an offence under pollution of waters if the person establishes that the pollution was regulated by an environmental protection licence held by that person, or another person, and the conditions to which that licence was subject relating to the pollution of waters were not contravened.⁴⁸

The PEO Act provides for a maximum penalty for water pollution offences. A person who is guilty of an offence under pollution of waters is liable, on conviction, in the case of a corporation, to a penalty not exceeding \$ 1 000 000 and, in the case of a continuing offence, to a further penalty not exceeding \$ 120 000 for each day the offence continues.⁴⁹ In the case of an individual, the offender is liable to a penalty not exceeding \$ 250 000 and, in the case of a continuing offence, to a further penalty not exceeding \$ 60 000 for each day the offence continues.⁵⁰

In *Environmental Protection Authority v Mid Coast County Council*,⁵¹ the defendant council operated and managed a sewage treatment works and associated reticulation system in the Great Lakes and Tare Local Government Areas. It was charged and pleaded

⁴⁷ Protection of Environment Operations Act op cit (n. 43) s. 121 (1) and (2).

⁴⁸ Ibid s. 122 (a) and (b).

⁴⁹ Ibid s. 123 (a).

⁵⁰ Ibid s. 123 (b).

⁵¹ 136 LGERA 233; 2003 WL 17617; [2003] NSWLEC 416; [2006] ALMD 3267.

guilty to the offence of polluting waters at Niabic, in terms of s. 120 (1) of the PEO Act. The incident was preceded by a blockage which caused sewage to overflow from a manhole located on a dairy farm adjacent to the sewage treatment plant. The spill consisted of about 800 kilolitres of raw sewage. There was no evidence of actual harm to human health and the environmental impact was limited to the immediate vicinity of the spill. The court held that there was clearly harm to the environment and sentenced the defendant to a fine of \$ 30 000.

5.5.2 Orders in connection with offences

One or more orders may be made against the offender.⁵² Orders may be made in addition to any penalty that may be imposed or any other action that may be taken in relation to the offence.⁵³ Orders may be made regardless of whether any penalty is imposed or other action taken in relation to the offence.⁵⁴

Orders may be made for restoration and prevention. The court may order the offender to take such steps, as are specified in the order, within a specified time (or such further time as the court on application may allow) to prevent, control, abate or mitigate any harm to the environment caused by the commission of the offence, or to make good any resulting environmental damage, or to prevent the continuance or recurrence of the offence.⁵⁵

⁵² Protection of Environment Operations Act op cit (n. 43) s. 244 (1).

⁵³ Ibid s. 244 (2).

⁵⁴ Ibid s. 244 (3).

⁵⁵ Ibid s. 245 (a) – (c).

At the time the offence is proved, orders for costs, expenses and compensation may be made. A public authority may incur costs and expenses in connection with the prevention, control, abatement or mitigation of any harm to the environment caused by the commission of the offence or making good any resulting environmental damage.⁵⁶ A person (including a public authority) may, by reason of the commission of the offence, suffer loss of, or damage to, property or have incurred costs and expenses in preventing or mitigating, or attempting to prevent or mitigate, any such loss or damage.⁵⁷ If such circumstances materialise, the court may order the offender to pay to the public authority or person the costs and expenses so incurred, or compensation for the loss or damage so suffered, as the case may be, in such amount as is fixed by the order.⁵⁸ The person or public authority may recover from the offender the costs and expenses incurred, or the amount of the loss or damage, in the Land and Environment Court.⁵⁹ The amount of any such costs and expenses (but not the amount of any such loss or damage) may be recovered as a debt.⁶⁰

With regard to costs and expenses of investigation, the court may, if it appears to the court that a regulatory authority has reasonably incurred costs and expenses during the investigation of the offence, order the offender to pay the regulatory authority the costs and expenses so incurred in such amount as is fixed by the order.⁶¹

⁵⁶ Ibid s. 246 (1) (a).

⁵⁷ Ibid s. 246 (1) (b).

⁵⁸ Ibid s. 246 (1) (a) and (b).

⁵⁹ Ibid s. 247 (1).

⁶⁰ Ibid s. 247 (2).

⁶¹ Ibid s. 248 (1). "Costs and expenses", in relation to the investigation of the offence, means the costs and expenses: in taking any sample or conducting any inspection, test, measurement or analysis, or of transporting, storing or disposing of evidence, during the investigation of the offence (see s. 248 (3) (a) and (b)).

Orders regarding monetary benefits can be made. The court may order the offender to pay, as part of the penalty for committing the offence, an additional penalty of an amount the court is satisfied, on the balance of probabilities, represents the amounts of any monetary benefits acquired by the offender, or accrued or accruing to the offender, as a result of the commission of the offence.⁶² The amount of an additional penalty for an offence is not subject to any maximum amount of penalty provided elsewhere.

5.5.3 Additional orders

The court may issue various orders, when they are appropriate. The court may order the offender to take specified action to publicise the offence (including the circumstances of the offence) and its environmental and other consequences and any other orders made against the person.⁶³ It may also order the offender to take specified action to notify specified persons or classes of persons of the offence (including the circumstances of the offence) and its environmental and other consequences and of any orders against the person (including, for example, the publication in an annual report or any other notice to shareholders of a company or the notification of persons aggrieved or affected by the offender's conduct).⁶⁴

⁶² Ibid s. 249 (1). "Monetary benefits" means monetary, financial or economic benefits (see s. 249 (3)).

⁶³ Ibid s. 250 (1) (a).

⁶⁴ Ibid s. 250 (1) (b).

In *Environmental Protection Authority v Warringah Golf Club Ltd* [No 2],⁶⁵ the defendant (employee) had deliberately dispersed the harmful substance into Brookvale Creek and Manly Lagoon. The court found that, as a result of this polluting act, a significant number of fish and other wildlife, such as ducks, died. The number of poisoned ducks and fish was estimated at 10 000 species. In response to the pollution, the defendant club enacted a number of environmental protection policies and undertook works intended to minimise their impact on the environment. The court held that pollution that killed 10 000 fish and ducks could not be said to be short-term or temporary harm, despite evidence that the fish population had recovered since the offence. The employee committed the offence but the contribution by the defendant club was the essential ingredient to the offence. In fact, the club failed in its duty to provide conditions that would prevent the release of pollutants from its premises.

As a matter of policy, non-profit organisations should not be immune from liability, but should be made to understand the effects of their activities and policies on their surrounding environment.⁶⁶ Despite any altruistic aims the body might have, non-profit bodies must comply with their duty to protect the environment and be sentenced accordingly where they failed.⁶⁷ The defendant golf club and its former course superintendent were found guilty of polluting a local creek with pesticide. In delivering the judgment, the court ordered the Warringah Golf Club Ltd to publish a notice in its newsletter. The notice contained, *inter alia*, the offence committed, its facts, environmental consequences and conviction.

⁶⁵ 129 LGERA 211, 2003 WL 22234898, [2003] NSWLEC 222.

⁶⁶ *Ibid* 212.

⁶⁷ *Ibid* 213.

One of the criticisms of the publicity orders is that the corporations can dilute this sanction through counter-publicity. The corporations must refrain from making counter-publicity. The individual offender needs to be identified together with the body corporate. This publicity imposes costs on the culpable manager on three distinct levels: first, the manager suffers a loss of public – and self - respect, which some research suggests is the most potent deterrent for middle class potential offenders.⁶⁸ Second, adverse publicity substantially reduces the official's chances for promotion within the firm. Finally, disclosure of the identity of the culpable official also invites a derivative suit by which any costs visited on the firm can be shifted (at least in part) to the individual.⁶⁹ Publicity sanction can play a significant role in deterring corporate officers and individuals from committing an environmental crime such as water pollution.

The court may order the offender to carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit.⁷⁰ In *Environmental Protection Authority v Simplot Australia Pty Ltd*,⁷¹ the defendant was found guilty of polluting water with food wastes and was obliged to comply with two environmental service orders. One of the orders required the company to undertake, at a cost of \$ 20 000, restoration work of the river environment in the vicinity of the location where the initial offence took place. In Land and Environmental Court NSW, Justice Pearlam held: "An important factor in prosecutions of this kind is not so much a monetary penalty but a possibility of making orders that have the effect of enhancing the

⁶⁸ J C Coffee, JR. "No soul to damn: no body to kick": an unscandalised inquiry into the problem of corporate punishment. *Michigan LR* vol 79 part 1 (1981) 386 at p. 433.

⁶⁹ *Ibid.*

⁷⁰ Protection of Environment Operations Act op cit (n. 43) s. 250 (1) (c).

⁷¹ 2001 NSWLEC 264.

environment and encouraging its protection, and the avoidance of its degradation.”⁷²

Environmental service orders emphasise the protection of the environment and ensure that it is maintained in its previous condition.

The court may also order the offender to carry out a specified environmental audit of his or her activities.⁷³ When an environmental audit is performed, potential defects may be discovered and corrected immediately, before any offence is committed. They play a significant deterrence in the prevention of environmental crimes.

The court may order the offender to pay a specified amount to the Environmental Trust established under the Environmental Trust Act 1998, or a specified organization, for the purposes of a specified project for the restoration or enhancement of the environment or for general environmental purposes.⁷⁴ It may order the offender to attend, or to cause an employee or employees or a contractor or contractors of the offender to attend, a training or other courses specified by the court.⁷⁵ Furthermore, the court may order the offender to establish, for employees or contractors of the offender, a training course of a kind specified by the court.⁷⁶

If the EPA is a party to the proceedings, the court may order the offender to provide a financial assurance, of a form and amount specified by the court, to the EPA, if the court

⁷² *Environmental Protection Authority v Simplot Australia Pty Ltd* op cit (n. 71) para 20.

⁷³ Protection of Environment Operations Act op cit (n. 43) s. 250 (1) (d).

⁷⁴ *Ibid* s. 250 (1) (e).

⁷⁵ *Ibid* s. 250 (a) (f).

⁷⁶ *Ibid* s. 250 (1) (g).

orders the offender to carry out a specified work or program for the restoration or enhancement of the environment.⁷⁷

The court may, when making an order, fix a period for compliance and impose any other requirements it considers necessary or expedient for the enforcement of the order.⁷⁸

If the offender fails to publicise or make necessary notification, the prosecutor, or the person authorized by the prosecutor, may take action to carry out the order as far as may be practicable, including action to publicise or notify: the original contravention, its environmental and other consequences, and any other penalty imposed on the offender, and the failure to comply with the order.⁷⁹ The reasonable cost to publicise or notify is recoverable by the prosecutor or person taking the action, in a court of competent jurisdiction, as a debt from the offender.⁸⁰

A person who fails to comply with an order is guilty of an offence. The offender is liable to a maximum penalty, in the case of a corporation, of \$ 120 000 for each day the offence continues, or in the case of an individual, \$ 60 000 for each day the offence continues.⁸¹

This offence does not apply to the orders for, or recovery of, costs, expenses and compensation at the time the offence is proved; or the order regarding costs and expenses of investigation.⁸²

⁷⁷ Ibid s. 250 (1) (h).

⁷⁸ Ibid s. 250 (2).

⁷⁹ Ibid s. 250 (3).

⁸⁰ Ibid s. 250 (4).

⁸¹ Ibid s. 251.

⁸² Ibid read together with s. 246, 247 and 248.

5.6 Corporate liability

The general principles of corporate criminal liability stemming from the House of Lords decision in *Tesco Supermarkets Ltd v Natrass* [1972] AC 153, stipulate that a corporation would only be liable for the negligence or wilful default of its top-level management.⁸³ This principle does not make the corporation liable for the failure of its lower level management for environmental offences. It has been replaced in most statutory schemes with a concept of vicarious criminal liability that stretches not only to corporate officers, but also to corporate employees and agents.⁸⁴ As a general rule, criminal liability depends upon concepts of fault. Vicarious liability will only be imposed where interpretation of intent and purpose of the statute in question supports the application of the doctrine.⁸⁵ In *Fropowski v Fratelli D'Amato*,⁸⁶ the failure of the chief of a vessel to properly perform his functions, with the result that oil escaped into Sydney Harbour, was held to be attributable to the owner of the ultimate employer.

More recent environmental protection legislation often introduces a clear, statutory imputation of vicarious criminal liability. Some provisions extend this liability both to the conduct and state of mind of the officers, employees and agents of a corporation, others only to the mental element constituting the offence.⁸⁷ For instance, in South Australia, for the purpose of proceedings for an offence or the payment of an amount as civil penalty in respect of an alleged contravention, the conduct and state of mind of an officer, employee

⁸³ G Bates. *Environmental law in Australia*. 6th ed. (2006) 247.

⁸⁴ *Ibid* 247; see also Lipman, "Vicarious liability for independent contractors" (2000) 17 *EPLJ* 427.

⁸⁵ G Bates *op cit* (n. 83) 247-248.

⁸⁶ 2000 108 LGERA 88.

⁸⁷ G Bates *op cit* (n. 83) 249.

or agent of a body corporate acting within the scope of his or her actual, usual or ostensible authority will be imputed to the body corporate.⁸⁸ In New South Wales, the evidence that an officer, employee or agent of a corporation (while acting in his or her capacity as such) had, at any particular time, a particular state of mind, is evidence that the corporation had that state of mind.⁸⁹

5.7 Liability of corporate officers

It is usual for environmental statutes to provide that where a corporation has committed an offence under the legislation, then directors and other managers of the corporation are to be deemed guilty of the same offence.⁹⁰ This means that corporate officers, managers or agents may be individually liable for the offences committed by the corporation. Environmental law does not allow corporate officers to hide behind the legal structure of the corporation. Directors are deemed in effect to be the corporation, and will be responsible for whatever offences are attributed to the corporation.⁹¹ This provision plays an important role in deterring corporate officers from committing environmental offences.

In New South Wales, if a corporation contravenes, whether by act or omission, any provision of the Act or regulations, each person who is a director of the corporation or who is concerned in the management of the corporation is taken to have contravened the

⁸⁸ Environmental Protection Act op cit (n. 18) s. 127 (1) (a).

⁸⁹ Protection of the Environment Operations Act op cit (n. 43) s. 169 (4).

⁹⁰ G Bates op cit (n. 83) s. 250.

⁹¹ Ibid.

same provision.⁹² However, the person may escape liability if he or she satisfies the court that he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or he or she, if in such position, used all due diligence to prevent the contravention by the corporation.⁹³ A person may be proceeded against and convicted under a provision pursuant to this section whether or not the corporation has been proceeded against or been convicted under that provision.⁹⁴

In Victoria, it is a defence for a director or a manager of a corporation to prove that he or she was not in a position to influence the conduct of the corporation in relation to the contravention; or that he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.⁹⁵ The manager or director of a corporation also escapes liability if the corporation would not have been found guilty of the offence by reason of its being able to establish a defence available to it.⁹⁶ In South Australia, where the officer of a body corporate is convicted of an offence committed by the corporation, the officer is not liable to be punished by imprisonment for the offence.⁹⁷

In Queensland, the executive officers of a corporation must ensure that the corporation complies with the Water Act.⁹⁸ If a corporate officer commits an offence against a provision of this Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complied with the

⁹² Protection of Environment Operations Act op cit (n. 43) s. 169 (1), see also Environmental Protection Act op cit (n. 18) s. 129.

⁹³ Protection of Environment Operations Act op cit (n. 43) s. 169 (1) (b) and (c).

⁹⁴ Supra s. 169 (2).

⁹⁵ Environmental Protection Act op cit (n. 6) s. 66B (1) (a) and (b).

⁹⁶ Ibid s. 66B (c).

⁹⁷ Environmental Protection Act op cit (n. 18) s. 129 (2).

⁹⁸ Water Act op cit (n. 31) s. 828 (1).

provision.⁹⁹ The corporate officer is liable to the maximum penalty of the penalty for the contravention of the provision by an individual.¹⁰⁰ Evidence that the corporation has been convicted of an offence against a provision of the Act is evidence that each of the executive officers committed the offence of failing to ensure that the corporation complies with the provision.¹⁰¹ However, it is a defence for an executive officer to prove if he or she was in a position to influence the conduct of the corporation in relation to the offence, he or she exercised reasonable diligence to ensure the corporation complied with the provision; or he or she was not in a position to influence the conduct of the corporation in relation to the offence.¹⁰²

In Western Australia, a director or other officer concerned in the management of a corporation is guilty of the same offence as the corporation, where the offence is proved to have occurred with that person's consent, connivance or neglect.¹⁰³ The courts have used this provision to punish corporate directors or managers who committed environmental offences. In *Environmental Protection Authority v McMurty*,¹⁰⁴ a director of a company instructed an employee to empty tanks containing toxic chemicals into a nearby creek. It resulted in a devastating effect on ecological communities of plants, fish and invertebrates immediately downstream. The defendant was convicted of consenting to causing pollution and sentenced to three months' imprisonment. The director, by

⁹⁹ Ibid s. 828 (2).

¹⁰⁰ Ibid.

¹⁰¹ Ibid s. 828 (3).

¹⁰² Ibid s. 828 (4).

¹⁰³ Environmental Protection Act 1986 (Western Australia) s. 118.

¹⁰⁴ Unreported case, Court of Petty Sessions, WA, Michelides M. March 9 1995. For more comments, see Brunton, Directors, companies and pollution in Western Australia (1995) 12 *EPLJ* 159.

instructing employee to discharge toxic chemicals into a river, consented to cause pollution of water and was convicted as such.

The director or manager of a corporation may be prosecuted and sentenced in a dual capacity. In *Director-General of the Department of Land and Water Conservation v Greentree*,¹⁰⁵ the defendant was prosecuted for unlawful clearance of native vegetation both as an individual and in his capacity as a director of the corporation that he supervised. The court held that such prosecutions did not amount to double jeopardy or duplicity, because the offences were essentially different, one being directed at individual responsibility, the other at corporate liability. However, in the sentencing stage, the court had to be careful and avoid punishing the defendant twice over.

In conclusion, the Australian states punish water polluters with severe fines and with imprisonment. They differentiate between the way individuals and corporations are punished. Corporate water pollution offences are also attributed to directors, managers or agents. Prosecutions are used to ensure compliance with environmental law. Individuals “generally regard prosecution as extremely time-consuming of agency staff and financial resources, and as such a lengthy process that it minimized or negated any potential for deterrence.”¹⁰⁶ Offence and penalty provisions will continue to be part of environmental protection legislation in order to prevent waters from being polluted. The next chapter makes a comparative analysis of legislation in South Africa, the UK, the USA and Australia.

¹⁰⁵ (2003) 131 LGERA 234.

¹⁰⁶ J Norberry op cit (n. 42) 10.

CHAPTER SIX

COMPARATIVE ANALYSIS OF THE LEGISLATION

6.1 Introduction

Legislation in South Africa, the United Kingdom, the USA and Australia creates offences and penalties for water pollution in different manners. Water polluters are punished by fines, imprisonment or both. Remedial orders may be made in order to prevent or minimise the effects of water pollution or to restore water to its previous conditions. Citizen suit can be exercised by private persons to enforce water pollution legislation. Sometimes corporations pollute water in their activities and measures have been taken to punish corporate bodies as well as corporate officers.

In Australia, various orders may be made to deter persons from polluting waters, to restore and enhance the environment and to ensure that offences shall not reoccur in the future. This chapter compares and analyses legislation concerning offences and penalties for water polluters, remedial orders, citizen suit, liability of corporations and corporate officers and various orders to prevent water pollution.

6.2 Offences and penalties

The statutes in South Africa, the United Kingdom, the USA and Australia prohibit any person from discharging trade effluent into a water resource unless the discharger

has a permit and respects its conditions.¹ Failure to comply with conditions in a permit is a criminal offence. The statutes focus on the intention or negligence of the offenders and provide different punishment for water polluters. In the USA, negligent violations, knowing violations and knowing endangerment are criminalised. Knowing endangerment is severely punished. It occurs when a person contravenes any permit condition or limitation and knows at that time that he or she places another person in imminent danger of death or serious bodily injury.² South Africa can criminalise knowing endangerment and prevent people from causing serious harm to others by not respecting permit conditions.

Water polluters are punished by a fine or imprisonment and a subsequent conviction is severely punished. In Australia, statutes create an offence for a continuing offence and the offender is liable to a daily penalty for each day the offence continues after conviction, or after service by the authority of notice of the contravention.³ The continuing offence deters the offender to continue committing a crime after conviction, or after the competent authority has served a notice on him or her to cease committing the unlawful activity. South Africa can improve its legislation by creating a continuing offence, as it may encourage water polluters to stop committing the offence. Australian legislation imposes different punishment on corporations and individuals.⁴ Corporations are subject to more severe fines than individuals, even if they have committed the same offence. This approach should not be used in South Africa because the same offences should be punished in the same way, regardless of

¹ Water Services Act 108 of 1997 s. 7 (2), Water Resources Act 1991 (c 56) s. 85 (2) and (3), Clean Water Act 33 USC §. 1311 (a), Environmental Protection Act 1970 (Victoria) s. 38.

² Clean Water Act op cit (n. 1) § 309 (c) (3) (A).

³ Protection of Environment Operations Act 1997 (New South Wales) s. 123.

⁴ Environmental Protection Act op cit (n.1) s. 39 (5).

who committed the crime. If individuals and corporations pollute water in the same manner, they should get the same punishment.

6.3 Remedial orders, clean-up measure and recovery

In South Africa,⁵ the United Kingdom⁶ and Australia,⁷ legislation imposes an obligation on the owner, occupier or controller of the land to take all reasonable measures to prevent water pollution from occurring, continuing or recurring. If they fail to perform their duties, the relevant authority may take all necessary steps to remedy the situation. It may recover all reasonably incurred costs from the responsible persons. South Africa has a joint and several liability provision to recover such costs from the responsible persons. However, the latter may be unable to pay for the incurred costs and the relevant authority may lack sufficient funds to continue performing its operations.

In the USA, there is a state water pollution revolving fund that may be used to remedy the effect of water pollution. The federal government allocates funds for each state in this regard. South Africa should create a water pollution fund that may be used to remedy the situation and prevent water from being polluted at an unacceptable level. The government can provide finances to the fund. Other resources may come from trade effluent permit holders and fines or penalties imposed on water polluters.

⁵ National Water Act 38 of 1998 s. 19

⁶ Water Resources Act op cit (n.1) s. 161 (1).

⁷ Environmental Protection Act 1993 (South Australia) s. 64A (1).

6.4 Citizen suits

In the USA, the Clean Water Act provides a citizen suit that allows private persons to bring action against persons who violate effluent standards or limitations.⁸ The purpose of this action is to force persons to comply with their trade effluent permits. Citizens may also take civil action against the Administrator where he or she fails to perform any duty which is not at his or her discretion.⁹ Citizen action does not apply for wholly past actions but for present and future actions.

In South Africa, the Constitution contains a class action that may be used to enforce an environmental right. The class action may be used by persons to force others to comply with trade effluent permits. The persons who can bring a class action are: anyone acting as a member of, or in the interest of, a group or class of persons; anyone acting in the public interest; and an association acting in the interest of its members.¹⁰ South Africa should create a possibility for persons to bring an action against a catchment management agency, or other water pollution institutions, when they unreasonably fail to perform a duty which is not at their discretion. This class action may force an unwilling authority to satisfy its duties and avoid or minimise the effects of water pollution. Unlike citizen suits in the USA, the class action may cover past violations.

⁸ Clean Water Act op cit (n. 1) §. 505.

⁹ Ibid § 505.

¹⁰ Constitution of the Republic of South Africa Act 108 of 1996 s. 32 (c), (d) and (e).

6.5 Liability of corporations and corporate officers

UK statutes have specific provisions that allow a body corporate, directors and other officers to be prosecuted for offences committed by the company.¹¹ This materialises when a corporate is guilty of an offence which is proved to have been committed with the consent, connivance or neglect of any directors, managers, secretaries or other similar officers of the body corporate.¹² This provision does not target only directing officers, but includes other individuals in the corporations who may commit an environmental crime by their act or omission. They are not targeted simply by their positions. The responsible persons, as well as the corporation, are guilty of the same offence and liable to be punished accordingly.

In the USA, the doctrine of wilful blindness is used to impute knowledge of commission of the offence to a corporate officer and thereby secure his or her conviction. It arises when a corporate officer becomes suspicious of a criminal violation, but ignores it and fails to take any further action to investigate or mitigate the violation. A corporate officer who is not powerless to prevent the commission of the offence prescribed by the health and welfare statute may be held liable for the offence committed by the corporate body for the violation of such statute.¹³ Furthermore, the doctrine of *respondeat superior* is used in the USA to prosecute corporations. Under the doctrine of *respondeat superior*, a corporation may be held

¹¹ Water Resources Act op cit (n. 1) s. 217; Water Industry Act 1991 s. 210; and Water Act 1989 s. 177.

¹² Water Resources Act op cit (n. 1) s. 217 (1).

¹³ *US v Dotterweich* 320 US 277 (1943), *US v Park* 421 US 658 (1975).

criminally liable for the acts of any of its agents if an agent (1) commits a crime (2) within the scope of employment (3) with the intent to benefit the corporation.¹⁴

South Africa should adopt the UK approach and the doctrine of wilful blindness in the prosecution of the corporations, corporate officers and other individuals in the corporation. The UK approach will assist South Africa to punish corporations, directing officers, managers and other individuals in the body corporate, when an environmental offence has been committed. In addition, the doctrine of wilful blindness imputes knowledge of the offence to the responsible persons and therefore, secures their conviction for environmental offences. For these reasons, the approach in the UK and the doctrine of wilful blindness should be used in South Africa to successfully prosecute environmental crimes.

In New South Wales, if a corporation contravenes, by action or omission, any provision of the Act or regulations, each director or manager of the corporation is regarded as having committed the same offence.¹⁵ There is a defence for such a person if he or she satisfies the court that he or she was not in a position to influence the commission of the offence by the corporation or, if in such position, he or she uses all due diligence to prevent the contravention.¹⁶ This approach should not be followed in South Africa, because it presumes a director or manager guilty until he or she proves himself or herself innocent. In addition, directing officers or individuals are simply punished because of their positions.

¹⁴ Anon. *Developments in the law: corporate crime: regulating corporate behaviour through criminal sanctions*. *Harvard LR*, vol 92, No 6 (1979) 1227 at 1247.

¹⁵ Protection of Environmental Operations Act 1997 (New South Wales) s. 169 (1).

¹⁶ *Ibid* s. 169 (1) (b) and (c).

6.6 Various orders in connection with environmental offences

The Australian states, especially New South Wales, provide various orders to ensure the protection of the environment. They include, *inter alia*, orders to make investigation, recover monetary benefit, publicise offences and their condition or punishment and carry out specific projects for the restoration and enhancement of the environment. Other orders have the purpose of carrying out specified environmental public benefit, specified environmental audit, paying specific amounts to an environmental trust, attending a training course specified by the court and establishing a training course. The order to publicise the offence, the environmental service order and the specified environmental audit order are examined below.

6.6.1 Publicity orders or publication of the offence

If an environmental crime has been committed, a responsible person may be forced to publicise such an offence. Where a publicity order is awarded, the offending individual or company must publicise the offence, as well as the environmental or other consequences and penalties and other orders imposed as a result of the commission of the offence.¹⁷ Publication of the offence has a negative impact on the prestige of individuals and corporations. Publicising a violation - appropriately at the expense of the violator - serves at least three useful purposes: (1) it educates the public as to what constitutes unlawful conduct; (2) it spreads the deterrent message to other potential offenders, and (3) it apprises the public on the fact that a particular entity has operated outside the law, thereby giving the public the opportunity to

¹⁷ Ibid s. 250 (1) (a); Environmental Protection Act op cit (n. 1) s. 67AC (2); C Abbot. The regulation enforcement of pollution control laws: the Australian experience. *Journal of Environmental Law* (2005) vol 17 No 2, 161 at p. 174.

choose how it will deal with that entity in daily life, for example, by choosing not to purchase the violator's products or services.¹⁸ The publicity "may also inform others to the fact that they have been victims of corporate crimes, thereby increasing the possibility of civil cases being brought against the offenders."¹⁹ In deciding whether or not to seek a publication order, the EPA will take into account a number of factors, including the defendant's culpability and prior record and the environmental harm caused by the offence.²⁰

The Environmental Agency in England and Wales has also recognised the impact of adverse publicity.²¹ It is the most important consequence of prosecutions for big corporations that have prestige and reputation to uphold. Powers of adverse publicity in England and Wales are not vested in courts but in the government regulator.²² Unlike the formal publicity orders available in New South Wales and Victoria, the offender does not pay for negative publicity and the publicity cost is borne by the regulatory authority.

Publicity orders have a negative impact on corporations and individuals that must protect their prestige and image. They constitute a public admission of guilt and humiliation by the offenders. As a result, they will do everything in their power to ensure that the offence does not reoccur. The offender must pay the costs of the publicity orders. South Africa should introduce publicity orders in its water legislation, because they play a significant role in deterring the offenders from

¹⁸ R W Mushal, Reflection upon American environmental enforcement experience as it may relate to post-Hampton developments in England and Wales. *Journal of Environmental Law* 2007. (Accessed from the westlaw on 14 November 2007).

¹⁹ C Abbot op cit (n. 17) 174.

²⁰ Ibid 175.

²¹ C Abbot op cit (n. 17) 175.

²² Ibid 175 – 176.

subsequently committing the same offence. Due to their damaging effect on corporations or individuals, only courts should be empowered to authorise publicity orders.

6.6.2 Environmental service orders

Statutes in Australia enable the courts to impose environmental service orders on offenders.²³ These orders require the offender to carry out a specified project for the restoration and enhancement of the environment in a public place or for the public benefit. Service orders will invariably be used with publicity orders, because it is paramount that the community knows that the offender is carrying out the work not just as a gesture of good will but as a result of committing an environmental offence.²⁴

The Environmental Agency in England and Wales has identified its support for what has been termed 'community project orders.'²⁵ Unlike the current position in Victoria and New South Wales, these orders are used in dealing with non-corporate offenders who are not in a financial position to pay an appropriate fine. The order may also avoid the capacity problem associated with monetary fines whereby the value of the fine is limited by the wealth of the offender: an environmental service order could be useful where an offender does not have the financial capacity to pay a cash fine, but could absorb the cost of undertaking project work.²⁶ Furthermore, it contributes to the restoration and enhancement of the environment.

²³ Protection of the Environmental Operations Act op cit (n. 15) s. 250 (1) (c); Environmental Protection Act op cit (n. 1) s. 67AC (2) (d).

²⁴ C Abbot op cit (n. 17) 176.

²⁵ Ibid 177.

²⁶ Ibid.

South Africa should adopt environmental service orders in its legislation, as they contribute to the restoration or enhancement of the environment and prevent its degradation. In addition, offenders who do not have financial resources to pay their fines may have the opportunity to comply with the environmental service orders and participate in the protection of the environment. Environmental service orders may be made by the catchment management agency, by institutions dealing with water pollution or by courts.

6.6.3 Environmental audit orders

In the case of environmental crimes, many offences are caused not by deliberate or intentional acts, but by poor and ineffective management systems.²⁷ Legislation empowers courts in Victoria and New South Wales, in sentencing an environmental offender, to impose an environmental audit order, under which the offender must carry out a specified environmental audit of activities carried on by him or her.²⁸ If a company is required to audit some or all of its sites, any potential violations will be identified and corrected before harm is done. Mandatory audit orders require a review of internal company procedures. They aim to prevent the recurrence of an offence. By requiring companies to identify defective procedures and furnish the regulator with specific information about the process, the courts can indirectly minimise the risk of future environmental incidents.²⁹ South Africa should adopt environmental audit orders in its legislation, as they may detect and correct harm before it occurs. The

²⁷ Ibid 171.

²⁸ Protection of Environmental Operations Act op cit (n. 15) s. 250 (1) (d); Environmental Protection Act op cit (n. 1) s. 67AC (2) (d).

²⁹ Ibid.

catchment management agency and other water institutions or courts should be empowered to authorise environmental audit orders.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

Statutes regulate the discharge of waste or trade effluent into a water resource. The discharger must have a permit and comply with its restrictions, unless the activity falls under the exception. Noncompliance with permit conditions constitutes a criminal offence.

In South Africa, the National Water Act imposes an obligation on the owner, controller, occupier or user of the land on which an activity or a situation exists which causes, or is likely to cause, pollution of a water resource, to take all reasonable measures to prevent any such pollution from occurring, continuing or recurring.¹ If they fail to perform their duties, the catchment management agency may take necessary reasonable measures to remedy the situation and recover all incurred costs jointly and severally from the responsible persons.² A directive to prevent water pollution may be taken beyond one's own land. There is provision for the control of emergency incidents where a substance pollutes, or has a potential to pollute, a water resource.

It is an offence to commit an act or omission which pollutes, or is likely to pollute, a water resource. The offender is liable, upon a first conviction, to a fine or imprisonment

¹ National Water Act 38 of 1998 s. 19 (1).

² Ibid s. 19 (5).

for a period not exceeding five years, or both, and a subsequent conviction is punished by a fine or 10 years maximum imprisonment or both.³ A court may make an award of damages against the accused in favour of the person who has suffered loss as a result of the offence, or to remedy the situation.

The employee or agent and employer or principal may be convicted for the same offence. This arises if the employee or agent commits an offence with the express or implied consent of the principal or agent and vice-versa. Corporate bodies and directing officers may be punished if they pollute waters. A person who is, or was, a director of the firm at the time it committed the offence of polluting waters, shall himself or herself be guilty of the said offence, if the offence in question resulted from his or her failure to take all reasonable steps that were necessary in the circumstances to prevent its commission.⁴

The Water Services Act regulates the discharge of trade effluent. The disposal of trade effluent, in contravention of industrial use, is prohibited. The offender is liable to a fine or imprisonment, or both.

The Health Act empowers every local municipality to take all lawful, necessary and reasonably practicable measures to prevent the pollution of any water intended for the use of inhabitants of its district, or to purify such water which has been polluted.

³ Ibid s. 151 (2).

⁴ National Environmental Management Act 107 of 1998 s. 34 (7).

With regard to mining activities polluting waters, the Mineral and Petroleum Resources Development Act provides penalties. The holder of a mining right is responsible for any environmental damage, pollution or ecological degradation as a result of his or her operations that may occur inside or outside the boundaries of the area to which such mining rights relate.⁵ There is a provision for joint and several liability on the director or members of a close corporation for any negative impact on the environment, such as damage, degradation or pollution, advertently or inadvertently caused by the company or close corporation which they represent.⁶ A person who contravenes any provision preventing water pollution in mining activities is guilty of an offence and liable to a fine or imprisonment not exceeding five years.

In England and Wales, it is an offence to cause, or knowingly permit, controlled waters to be polluted. The offence of polluting controlled waters is a strict liability offence. This means that fault is not a requirement for the offence. However, mistake of facts (not of law) constitutes a defence to a charge of polluting waters. The accused may also raise a defence to the charge of polluting waters that the offence was committed in an emergency in order to save life or health.

There is a provision for clean-up measures and recovery. This happens where the polluting matter appears to be, or has been, present in any controlled waters. In these circumstances, the agency may perform works and operations in order to remove, or dispose of, the polluting matter. It may also remedy or mitigate pollution caused to the

⁵ Mineral and Petroleum Resources Development Act 28 of 2002 s. 38 (1) (e).

⁶ Ibid s. 38 (2).

waters. The agency performs works and operations only if it is necessary, or appears, after reasonable inquiry, that no person can be found on whom to serve a work notice.⁷ When the agency carries out necessary works and investigations, it may recover expenses reasonably incurred from any person who caused, or knowingly permitted, any polluting matter to enter any controlled waters.

Sometimes corporations and directing officers are punished for the same offence. Where a body corporate is guilty of an offence of polluting waters and that offence is proved to have been committed with the consent, connivance, or to be attributable to any neglect on the part of any director, manager, secretary or other similar officers of the body corporate, or any person who was purporting in any such capacity, then he, as well as the body corporate, shall be guilty of an offence and shall be liable to be proceeded against and punished accordingly.⁸ If a body corporate is managed by its members, their acts or defaults in connection with their function of management are considered as if they were directors of the body corporate.

Vicarious liability is used to punish corporations for the acts or omissions of their employees that pollute waters, even if they do not exercise the directing mind or will of the company, unless some third party interrupts the chain of causation.

In the USA, a discharger of pollutants into waters must have a permit and comply with its conditions or restrictions, including the concentration of pollutants that may be

⁷ Water Resources Act 1991 (c 56) s. 161 (1).

⁸ Ibid s. 217 (1).

discharged. The Clean Water Act contains provisions which sentence an offence per each day of violation. A subsequent violation is severely punished. The Clean Water Act imposes heavy penalties on water polluters.

State water pollution control revolving funds allow each state to construct treatment works publicly owned and implement a management plan to develop a conservation and management plan. The funds are used to alleviate the effects of water pollution.

Any citizen may bring an action against a person who is alleged to have violated effluent standards or limitations, or orders issued by the Administrator or state. Citizen action may also be brought against the Administrator if he or she fails to perform an activity in which he or she does not have the discretion.⁹ However, a citizen action cannot be brought if the Administrator or State has commenced, or is diligently prosecuting, a civil or criminal action in the court of the United States. Citizen suit does not apply to wholly past actions.

A corporation may be criminally liable for almost any crime except acts that manifestly require commission by a natural person. Corporate liability in the United States is based on the imputation of an agent's conduct to a corporation, usually through the application of the doctrine of *respondeat superior*.¹⁰ Some states adopt statutory language, that criminal acts must be committed by high corporate agents in order to trigger corporate

⁹ Ibid §. 505 (a) (2).

¹⁰ V Khanna. Corporate criminal liability: what purposes does it serve? *Harvard LR* Vol. 109 No 7 May (1996) 1477 at 1489.

liability. Other states advocate that corporate actions do not need to be notified by the directing officers in order to be chargeable to the corporation.

Criminal liability of corporate officers is governed by the doctrine of corporate officer that was established by the two US Supreme Court cases: *United States v Dotterweich* and *United States v Park*. The principle is that any corporate officer, being in a responsible relationship to conduct prescribed by a health and welfare statute, can be held criminally responsible for a violation of that statute if he or she fails to prevent others from committing such conduct. The doctrine of wilful blindness may be used to satisfy the requirement that a corporate officer knows about the commission of the offence.

In Australian states, the discharge of a polluting matter into waters is a criminal offence, unless the discharger has a permit to do so and complies with its limitation. Legislation creates a continuing offence. It occurs if the offence continues after a notice has been given to cease the conduct or, if no notice has been served, after conviction. Corporations are more severely punished than individuals.

Upon conviction of the offender, in New South Wales, various orders may be made in addition to any other penalties.¹¹ The court can issue an order to restore the environment to its previous condition or to prevent the continuance or recurrence of the offence. A person who suffers loss, or incurs costs, as a result of the commission of the offence may be compensated. The court may issue an order to recover costs and expenses of the investigation from the offender. The accused must never benefit from the offence and an

¹¹ Protection of Environment Operations Act 1997 s. 244.

order for monetary benefit may be made to avoid this circumstance. Publicity orders have a significant impact on the prevention of the crime, but they affect the prestige of the corporations or individual offenders. The court may make an order to perform a specified environmental audit of activities carried out by the offender, to ascertain compliance with environmental law and avoid future violations.

Most environmental crimes are committed, not because persons intended to violate the law, but as a result of ignorance. In certain circumstance, the offender, employees or contractors may be ordered to attend a training course. The court may also order the offender to provide a specific training course for employees or contractors. Failure to comply with the order is an offence.

Courts use vicarious liability to punish corporations. In New South Wales, the conduct of an officer, employee or agent of a body corporate acting within his or her actual, usual or ostensible authority is imputed to the body corporate.¹² The evidence that an officer, employee or agent of a body corporate had, at any specific time, a particular state of mind, is evidence that the corporation had that state of mind.

Environmental statutes usually provide that where a corporation has committed an offence under the legislation, then directors and other managers of the corporation are deemed to be guilty of the same offence.¹³ Environmental law does not allow corporate officers to hide behind a legal structure of the corporation. If a corporation commits an

¹² Ibid s. 127 (1) (a).

¹³ G Bates. *Environmental law in Australia*. 6th ed. (2006) 250.

offence, by an act or omission, each director or manager of the corporation is taken to have committed the same offence. However, the person may escape liability if he or she proves to the court that he or she was not in a position to influence the conduct of the corporation in relation to the offence, or he or she, if in such a position, used all due diligence to prevent the conduct by the corporation.

7.2 Recommendations

1. In Chapter 2.3.2, s. 151 (2) of the National Water Act does not specify the amount of a fine for a person who pollutes water. Although this defect can be cured by the application of the Adjustment of Fines Act,¹⁴ a lay person does not know the maximum fine. This section has to be amended to ascertain the amount of a fine, as it may also deter potential offenders from committing such a crime.
2. Statutes governing water pollution need to criminalise a continuing offence. This defect can be seen in Chapters 2.3.2, 2.3.10, 2.3.11 and a recommendation is made in 6.2. A continuing offence arises when an offence continues after a notice has been served on the person to cease the unlawful activity or, if no notice was served, after conviction of the offender. It is recommended that statutes should criminalise a continuing offence and such an offence must be punished per day of violation.

¹⁴ Adjustment of Fines Act 101 of 1991 s. 1 (1) (a).

3. As it was seen in Chapter 4.3, with the Clean Water Act in the USA, the National Water Act has to create a permanent fund to remedy polluted waters, if the offender is unable, or fails, to take reasonable and necessary measures or cannot be found. If polluted waters are not immediately remedied, they may cause a disastrous effect on the environment and have far-reaching consequences.
4. A remediation order must always follow a conviction to a fine or imprisonment for water pollution. In fact, when a fine or imprisonment is imposed, the offender is not compelled to review its management structure or reform the internal procedure or policies that contributed to or caused the wrongful conduct giving rise to the offence. Fines do not restore the environment to its condition before the offence was committed and remediation orders correct this defect.
5. Statutes have to introduce the suspension of a permit for a person who becomes a habitual offender. Suspension of the permit has to be applied for a person who commits a serious crime because it may amount to the suspension of all activities.
6. From Chapter 6.6.1, publicity orders are recommended to be included in South African legislation dealing with water pollution. If an environmental crime such as water pollution has been committed, a responsible person may be forced to publicise such offence, its environmental consequences, penalties and other orders imposed as a result of the commission of the offence. Publicity orders may damage the prestige of the offender and can have a significant impact on deterring

persons from polluting water. Publicity orders are made to the persons affected by, or interested in, the conviction and may appear in the offender's annual report. Many corporations are sensitive about their prestige and will ensure that the offence does not reoccur. Only courts may authorise publicity orders.

7. Environmental service orders should be introduced in water legislation. They are dealt with in Chapter 6.6.2 and require the offender to perform a specified project for the restoration and enhancement of the environment in a public place, or for the public benefit. Environmental service orders have the effect of enhancing the environment, encouraging its protection and avoiding its degradation.
8. Environmental audit orders should be included in water pollution laws. They have been recommended in Chapter 6.6.3 and have a significant impact on the protection and enhancement of the environment. Most environmental crimes are caused, not by deliberate or intentional acts, but by poor and ineffective management systems. The offender may be requested to carry out a specified environmental audit of his or her activities. This may materialise if the offence has been committed, or where there is a likelihood that the offence will occur in the future. A reasonable suspicion that an offence is being committed may also trigger an environmental audit order. When the person audits the activities, any potential violations will be identified and corrected immediately.

9. There is a need to provide environmental education to offenders, employees and contractors.¹⁵ Sometimes environmental offences are committed as a result of ignorance from the persons concerned. To rectify this situation, the catchment management agency, other water pollution institution or court may order the offender to attend, or cause employees or contractors to attend, a specified training course that deals with water pollution. The offender can also organise a training course for his or her employees or contractors.
10. It is recommended that corporations, corporate officers and employees should be punished simultaneously if the environmental offence, such as polluting water, is committed as a result of their activities.¹⁶ As a general rule, environmental law does not allow corporate officers to hide behind the legal structure of the corporation. If the offence is committed by the corporation, with the express or implied consent of a directing officer, he or she must be punished together with the corporation. Likewise, if an employee consents expressly or impliedly to the commission of the offence he or she must be punished together with his or her corporation. Targeting corporations, directing officers and employees simultaneously is a significant deterrent, because every environmental offence is committed by individuals and they know that they will be held responsible for their actions. The doctrine of wilful blindness may be used to impute knowledge of the offence to directing officers or employees in order to secure their conviction.

¹⁵ See chapter 5.5.3.

¹⁶ See chapter 6.5.

11. There is a shortage of personnel in the field of environment specifically in water pollution issues. The Department of Justice should include environmental courses in the training programmes of prosecutors and magistrates. Selected prosecutors and magistrates should be allocated to environment and water pollution matters so that they can build expertise in this field. Environmental law should be user-friendly and prosecution should be a last resort.

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