



# AVENUES FOR IMPROVED RESPONSE TO ENVIRONMENTAL OFFENCES IN KAZAKHSTAN





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## FOREWORD

Legal instruments for environmental protection, such as laws, regulations and permits, establish conditions that businesses and individuals must meet in order to avoid negative environmental and health impacts that may result from their activities. In addition, governmental bodies (often supported by the public) take measures to make the law work. Such measures, first of all, provide incentives to achieve compliance voluntarily. However, non-compliance does occur – because of incompetence, ignorance, technical problems, financial gain or other reasons. Where offences are detected, governments can use administrative and judicial enforcement to restore compliance, recover the costs related to non-compliance, and punish the offender thus deterring repeated violations and unlawful behaviour by others.

Because of technical complexities of environmental protection and stakeholder diversity, the prevention and mitigation of environmental non-compliance requires a multi-disciplinary approach involving knowledge of legal, economic and social sciences. Another important element of success is coherence in enforcement policies – nationally (between different environmental media or sectors, as well as territorial administrative units) and internationally.

The current study aims to assist Kazakhstan to modernise its system for responding to environmental offences in light of good international practice. It provides policy makers, environmental regulators, and other stakeholders with a systemic analysis of the country's environmental enforcement system, and proposes recommendations that could improve the design and functioning of this system. For each area of analysis, the study describes good international practice and provides examples from different OECD countries, where relevant.

The study was produced by the OECD/EAP Task Force Secretariat in close partnership with the Committee for Environmental Regulation and Control of Kazakhstan. Mr. Vadim Ni, an independent expert, provided a first description and analysis of the environmental enforcement system in Kazakhstan. This was further developed by Dr. Andrew Farmer from the Institute for European Environmental Policy. Results of two OECD studies – on non-compliance responses in member countries and on compliance assurance systems in selected OECD and non-OECD countries – served as a basis for comparison with international practice. In addition, expert opinion on the report was provided by Norway's Pollution Control Authority, in particular Mrs Maren Wikheim.

Consultations with counterparts from the central and local level on the findings and recommendations were conducted in several instances, including during workshops in November 2006 and June 2008. In particular, the Committee for Environmental Regulation and Control and the Department of Legal Development and International Relations of the Ministry of Environmental Protection contributed to the development of the report. The project was possible due to funding provided by the Government of Norway that is gratefully acknowledged.

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## EXECUTIVE SUMMARY

**Background.** Kazakhstan has developed an extensive corpus of environmental laws and put in place a system of non-compliance response in order to make environmental law work. This system foresees administrative, civil, and criminal liability and provides for administrative and judicial paths of enforcement. It includes a panoply of sanctions (such as corrective orders, fines, permit withdrawal, production closure, imprisonment), comparable in scope with those used in OECD countries.

However, pervasive disregard for law – a legacy from the country’s Soviet past – continues to raise concerns in Kazakhstan as non-compliance prevents the country from achieving ambitious environmental objectives. To address this problem, the Ministry of Environment and its Committee for Environmental Regulation and Control requested assistance from the OECD/EAP Task Secretariat for analysing the existing system in light of good international practice and working out policy recommendations for reform of environmental sanctions.

**Key elements of the reform.** In order to improve the impact and efficiency of environmental sanctions, a package of reforms is necessary, including improvements in the design of this instrument of environmental policy implementation, but also taking other institutional measures to strengthen the country’s environmental enforcement system. A precondition for achieving real changes in the level of compliance is to adopt a more systemic approach to environmental regulation. The use of sanctions should be diversified beyond current strategies that are often perceived by non-governmental actors as a hunt for fines. At the same time, the deterrent effect of fines should be enhanced. Organisational and analytical capacity should be strengthened to operationalise adjustments in strategies and tools, and non-governmental stakeholders should be further empowered to contribute to environmental enforcement.

**Adopting a more systemic approach.** Policy makers and staff at all levels need to reconsider current opinions that only by making sanctions more stringent will they make the law work. To start with, enforcement should be seen as part of a more comprehensive approach to achieve compliance.

First of all, simply imposing sanctions will not help to “green” the regulated community if legal requirements are not clear and fair, *i.e.* technically and economically feasible. The latter requires a systematic use of Regulatory Impact Assessment and could be facilitated by costing models or other tools, such as, for instance, the Table of Eleven methodology that is used in the Netherlands.

Lack of knowledge on legal requirements will be a major impediment to compliance, particularly among small and medium-sized enterprises. Therefore enacting sector-specific General Binding Rules and providing compliance assistance to SMEs through web-based tools and training workshops will be necessary.

The existence of an enforcement system will not help if the offence detection probability is low. In this sense, more targeting is necessary to discover non-compliance among large industry, using a small set of assessment criteria, while random inspection could help detect violations amongst SMEs.

Finally, imposing sanctions will be counterproductive if their execution is disregarded. This requires better communication between environmental, fiscal, and judicial authorities, for example, connecting information systems of different authorities as part of e-government implementation.

**Improving the legal requirements that underpin the enforcement system.** It will be important to analyze the new provisions of the Environmental Code for enforceability by the administrative and criminal enforcement measures. For instance, modern self-monitoring requires criminal sanctions to prevent false reporting. Based on such analysis, the Ministry of Environment Protection will have to propose amendments to the Code of Administrative Offences and, possibly, Criminal Code. Coherence with enforcement policies in other sectors, in particular as concerns the severity of sanctions, will also need to be verified and improved.

**Diversifying instruments and strategies of non-compliance response.** The environmental authorities need to increase the deterrent effect of administrative enforcement by promoting strategies that use fully the entire toolbox of sanctions rather than transforming fines into a universal remedy. As concerns fines, they should be established at levels that prevent them from being treated as running costs, as is often the case. The latter requires that a larger spectrum of severe non-compliance is punished by applying variable fines with no upper limit. Criminal law should be complemented with fines for legal entities. At the same time, in order to “cure” significant or repeated violations, authorities may want to make recourse to independent environmental audit. Petty offences, however, can and should be dealt with using fines whose level is fixed within a precise interval, thus avoiding an administrative burden on both government authorities and the regulated community, and providing less scope for corruption.

**Recuperating economic gains of non-compliance through fines.** The soundness of approaches used to assess the amount of fines needs to be ensured. This requires amending the Code of Administrative Offences so that it includes the notion of economic gains from non-compliance. Such gains could be estimated based on economic models and recovered from the offender. To enable the use of such models, the length of administrative procedure should be prolonged for significant non-compliance and the economic models should be fully transparent and available to any party for independent verification. The use of this approach should not become universal, however, as it is quite resource-intensive. It should be left for cases that are most serious and long-lasting.

**Strengthening organisational capacity for environmental enforcement.** Currently, compliance is checked and enforced by a number of governmental bodies with relatively clear (though very fragmented and sometimes duplicative) mandates. There are concerns, though, over their ability to perform their functions because of limited organisational capacity and insufficient individual competence. While many of the capacity concerns are gradually addressed within the public administration reform, the lack of sufficient cooperation along the non-compliance detection and non-compliance response chain remains acute.

An important challenge for preserving the professionalism of governmental authorities is staff turnover and insecurity that often make the results of training programmes extremely volatile. Where turnover is under control, more structured training programmes are needed, involving different actors from both executive and judicial branches, governmental and non-governmental sector. Important subjects include, for example, the evidence base for enforcement, compliance with enforcement procedures, or soundness of decision-making.

Furthermore, the environmental authorities need to develop and publish a guidance document which would explain in detail the types of sanctions and circumstances of their use, as well as enforcement procedures that will be followed. Such a document should be developed in consultation with industry and public stakeholders and made publicly available in electronic form.



**Paying more attention to the analytical basis for enforcement and system’s transparency.**

The government needs to pay more attention to the analytical basis for enforcement and address information asymmetries among data users. Different authorities should aim to establish one coherent set of indicators, monitored with a proper periodicity and statistical soundness by the relevant actors. They need to prepare and share, at least within the government, periodic summary reports (reviews) on the inspection and enforcement activities. These should include data on the enforcement of legislation by the law enforcement authorities (courts, environmental prosecutors’ offices, and environmental police). Regular reviews of environmental enforcement, including a careful consideration of the deterrent effect of various sanctions, will need to be conducted.

In order to fully align country systems with international practice, this information needs to be made publicly available by all possible means. The law should clearly state the limits to any restriction on information availability relating to enforcement action.

Also Kazakhstan should adopt a web-based information system for the dissemination of sanctions imposed for non-compliance with environmental laws, not only to increase openness, but also to enhance the deterrent effect of adverse publicity.

**Empowering other stakeholders.** Parties other than the central government have to be empowered to influence environmental enforcement. The competence and powers of the local authorities to initiate and resolve cases based on administrative enforcement will need to be extended. Environmental authorities in cooperation with relevant governmental partners will need to review possible avenues for public participation in administrative enforcement and enable – through proactive dissemination of information and lower court fees – civil judicial enforcement. Furthermore, they will need to ensure that the confidentiality of inspection information does not prevent the general public from participation, if need be, in the trial of cases.

**Developing a road map for reform.** Based on policy recommendations provided in this report, it is recommended that the Ministry of Environment Protection develop a reform plan. Besides defining necessary actions and timeframe for their implementation, such a plan needs to address possible risks (e.g. resistance from line ministries or local authorities) and capacity development needs. Stakeholder consultations need to become a constituent part of reform process, as changes suggested in this report, e.g. consideration of economic gains of non-compliance, may have important repercussions on the industry but also on the revenue basis of central and local authorities. Also changes in the design of sanction and the path of their enforcement need to be considered through corruption prevention lenses.

## 1. LEGAL, ORGANISATIONAL, AND INFORMATION BASE

Environmental non-compliance response comprises any actions taken by a competent government authority alone or in cooperation with other actors to correct or halt behaviour that fails to comply with environmental regulatory requirements. Enforcement actions must have a sound legal basis and achieve several objectives, most importantly returning the violator to compliance. Additional objectives include punishing the violator while also deterring others, removing the economic benefit of non-compliance and correcting environmental damage. Overall, an effective enforcement regime should allow for a flexible and proportionate approach with a broad range of sanctioning options, so that authorities can respond to individual cases and the specific nature of the offence.

Responses to non-compliance, however, are only part of the suite of measures available to governments to ensure effective implementation of environmental law and should be a measure of last resort. Authorities need to communicate requirements effectively to those to whom they apply and should develop compliance promotion strategies. Compliance assessment should be supported by monitoring (including self-monitoring by businesses) and inspection. These preventative measures, which provide positive incentives to achieve compliance, may deliver compliant behaviour in the majority of cases.

### 1.1 Legislative framework governing environmental enforcement

#### 1.1.1 Types of environmental liability

The common classification of non-compliance responses is based on the different branches of law authorising each measure (*i.e.* the type of liability):

- **Administrative liability:** The general purpose of administrative enforcement is to restore compliance. Administrative measures can include a range of approaches from “soft” measures such as advice and warnings, to “harder” measures such as fines or the revocation of rights (*e.g.* closure of a facility);
- **Civil liability:** Civil enforcement generally addresses damage caused to persons or property. Civil measures are usually applied in parallel to administrative or criminal sanctions;
- **Criminal liability:** Criminal enforcement seeks penalties (that may include prison time for individuals) for egregious unlawful behaviour. Criminal responses are often provided to offences where administrative measures have been ineffective.

Administrative and criminal liability aims to protect society, while civil liability aims to restore the damage caused. All three types of liability are found in the application of environmental law. Administrative measures are – most often – applied by a government agency while civil and criminal measures are imposed, respectively, by courts and are sometimes referred to as judicial response.

Similarly to other countries, the legal framework in Kazakhstan sets out provisions for material (civil), administrative, and criminal liability. Environmental offences are divided into misconduct, for which just material and/or administrative liability is envisaged, and crimes, which entail criminal liability. An environmental crime is considered to be an act causing significant damage to the environment and human health. An administrative offence is deemed to be less socially dangerous and causing less damage to the environment and human health.

With regard to the civil (material) liability for environmental damage, *Article 321* of the Environmental Code envisages the obligation of no-fault compensation<sup>1</sup> for the damage caused for legal entities or individuals whose activities are highly environmentally hazardous. The list of such activities was approved in Kazakhstan by *Government Decree No. 543 of 27 June 2007*. Further details of the range of administrative and criminal penalties and how they are applied are provided in later sections of this report.

### *1.1.2 Hierarchy of non-compliance responses*

The hierarchy of non-compliance responses is often depicted by the so-called “enforcement pyramid” presuming that enforcement authorities are prepared to escalate sanctions where soft restorative action fails to achieve compliance, and that penalties at the top of the enforcement pyramid are sufficiently serious and effective to deter the possible offender.

To transpose this concept into practice, Kazakhstan established at the top of the enforcement pyramid sanctions that may be sufficient to serve as a strong deterrent to repeated violations. For example, environmental crimes can be punished with imprisonment up to 8 years and up to 15 years for ecocide (which is defined as a premeditated mass destruction of ecosystems and natural resources). At the same time, the “enforcement pyramid” approach still has to develop, as there is insufficient understanding of the need and way to use less harsh measures at the bottom of the pyramid, but also be ready to escalate sanctions when softer measures do not change the behaviour of the regulated community.

### *1.1.3 Entities subject to environmental liability*

Depending upon the path of enforcement, environmental liability can be linked to several kinds of entities. The Code of Administrative Offences distinguishes between natural persons (once the person is 16 years old), individual entrepreneurs, government officials, and legal persons. The severity of administrative sanctions for the same offence varies for these entities, most severe sanctions being applied to legal entities. Civil liability is linked to natural or legal persons. The law does not distinguish between them and uniform rates are set for the damage caused. Criminal sanctions may be applied to natural persons only. The latter does not correspond to international practice as in many countries corporate criminal liability is an integral element of the legal system.

### *1.1.4 Main principles of environmental enforcement applied in Kazakhstan*

An impressive set of enforcement principles are stipulated in both the administrative and criminal law of Kazakhstan (see Annex 1 and 2). If they are not followed during the enforcement procedure, the decisions made within this procedure can be declared void. For environmental authorities, it will be important to give full consideration to these principles during any review of existing sanctions, the details of their application (*e.g.* level of fines), and introduction of new sanctions.

In addition, *Article 5 of the Environmental Code* incorporates five principles relevant for environmental enforcement into the list of 15 general principles of environmental legislation. These include: (i) the obligatory nature of measures to prevent pollution and damaging of the environment; (ii) presumption of environmental risk of production and other activity; (iii) inevitability of liability for non-compliance with the environmental legislation; (iv) mandatory compensation of environmental damage; and (v) interaction, co-ordination and openness of government authorities.

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<sup>1</sup> That is, if they fail to prove the damage was caused by *force majeure* or intent of the affected person.

Following modern principles of regulation, the *Environmental Code* aims to change the content of and re-orient enforcement activities from simply detecting non-compliance to changing behaviour and achieving environmental objectives. It also stipulates mandatory compensations for environmental damage. Environmental liability and dispute resolution mechanisms are addressed in Chapter 46 of the *Code*. The latter is complemented by the *Law on Mandatory Environmental Insurance* of 2005.

At the same time, the *Environmental Code* does not list the enforcement functions among regulatory (environmental management) functions though the *Code of Administrative Offences* assigns relevant competencies for administrative enforcement to environmental authorities. This gap will need to be filled in by revising *Article 6* of the *Environmental Code*.

#### **1.1.4 Legal acts governing the scope and procedures of enforcement**

The legality of enforcement regimes needs to be guaranteed by the legal framework that would stipulate principles, scope, instruments, and procedures of enforcement. In Kazakhstan, both cross-cutting and sector-specific legal acts address these issues. This section will provide an overview of such legal acts, with more details being provided in other sections of the study.

To start with, the national legislation stipulates a large number of circumstances qualifying as “unlawful behaviour”. Both the *Criminal Code* and the *Code of Administrative Offences* have separate chapters dedicated to environmental non-compliance (see Annex 3 and 4). The environmental chapter of the former encompasses around twenty articles that define grounds for criminal enforcement (Article 277 to Article 294), while the latter provides for administrative liability in more than sixty articles (from Article 240 to Article 306). Amendments to these chapters are made every 2-3 years. Most often, they are introduced based on feedback from practice in order to increase the deterrent effect. Sometimes such amendments extend the scope of non-compliance to reflect new areas of environmental management. For example, in 2007 the *Code of Administrative Offences* was complemented with an article on non-compliance with environmental self-monitoring requirements.

The significance of environmental law for enforcement stems, first all of, from the fact that it establishes regulatory requirements. While the study is not intended to evaluate any specific law requirement, it will be important to mention that lawmaking approaches are not yet sufficiently advanced to include an *ex ante* assessment of expected spontaneous compliance or law enforceability. This creates impediments for enforcement, but also reduces the cost-effectiveness of the whole regulatory machine. In order to overcome such problems, specific tools are used in OECD countries, the most well-known being the “Table of Eleven”, introduced by the Ministry of Justice in Netherlands, that pre-scans the level of compliance and enables authorities to develop effective and efficient enforcement strategies.

Apart from stating regulatory requirements, the majority of sectoral laws set out norms and provisions for the actions of state authorities to determine compliance and include procedures for non-compliance detection and response. They usually contain brief provisions on the rights of the competent enforcement authorities to refer case files regarding activities which meet the conditions of criminal activity to law enforcement authorities. These provisions have been supported by the adoption of regulations further detailing the role of state authorities. Overall, the sectoral legislation focuses on administrative and civil enforcement rather than on criminal enforcement.

The environmental legislation has tremendously changed since its emergence in the 1970s. Most of these changes incurred in late 1990s, after gaining independence, and recently authorities launched the development of a “second generation” of environmental laws. In this context, Kazakhstan even became a pioneer of law codification: on 9 January 2007 the *Environmental Code* – a legislative act

that covers exhaustively the general and specific areas of environmental management – was adopted. It superseded the previous umbrella law *on Environmental Protection* of 1997, as well as some other specific laws. The Code expands considerably and governs in much greater detail the regulatory system and environmental inspection activities. It also promotes more cost-effective approaches of non-compliance detection, such as self-monitoring.

Alongside legislation on environmental protection is legislation on the use of natural resources. This is also based on laws developed in the Soviet period, although all contemporary legislation dates from at least 2003 (even though some earlier provisions remain unchanged). Important changes relate to private ownership of agricultural land, river-basin based water management, revising monitoring requirements, etc. The following laws relate to natural resource use: *Land Code* of 20 June 2003; *Forest Code* of 8 July 2003; *Water Code* of 9 July 2003; *Law on Protection, Reproduction, and Use of the Animals* of 9 July 2004; *Law on Mineral Resources and Use of Mineral Resources* of 27 January 1996; and *Law on Oil* of 28 June 1995.

Procedures for imposing liability are mostly governed by cross-cutting legal acts, including the current *Civil Code* that was passed in 1994; the *Code of Civil Procedure* of 1999; the *Code of Administrative Offences* of 2001; and the *Criminal Code* and the *Code of Criminal Procedure* of 1997. In addition to these, the procedure for conducting inspections and detecting administrative offences is prescribed by the environmental and natural resources laws, as well as by the *Law on Private Entrepreneurship* of 2006<sup>2</sup>. The *Law on the Prosecutor's Office* establishes the role and procedures for prosecutors' offices to oversee the activities of state authorities, including their application of administrative penalties, as well as observance of human rights and freedoms. The laws *on Interior Authorities* and *on Field Detection Activities* govern the activities of the environmental and veterinary police in their roles to detect, prevent, suppress, and solve environmental crimes.

Secondary legislation (decrees and orders adopted by the President, Government, ministries, agencies and committees) often addresses co-ordination between ministries and agencies and elaborates technical aspects of inspection or procedures for imposing penalties, etc. There is the *Decree of the RK Supreme Court No. 1 of 18 June 2004 on the Application by the Courts of the Legislation on Liability for Some Environmental Crimes*, which was issued to ensure correct and uniform application by the courts of the legislation on environmental crimes.

There is no single compendium that would provide easy access to this very complex information, scattered in many laws and regulations. In OECD countries, it has gradually become good practice to compile such information in what is called “enforcement and prosecution policies”. Having such a document sends a clear message to those who are regulated and provides a basis for ensuring a consistent approach within the state authorities themselves.

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<sup>2</sup> Article 37 of *Law on Private Entrepreneurship* states “government bodies shall be prohibited from passing regulations regarding the issues of the procedure for inspection of the entities engaged in private entrepreneurship.” If applied bluntly, this may inhibit the introduction of new enforcement procedures for the regulation of private companies and could either reduce the effectiveness of authorities in achieving environmental protection and/or prevent the introduction of procedures that are considered more efficient by business. At the same time, the Law has an important role to play in fighting corruption among inspectors and enforcement officers.

## 1.2 Actors involved in environmental enforcement

The roles of different governmental and non-governmental stakeholders in the application of non-compliance responses vary between different countries. Administrative measures are often applied by the authority that is responsible for inspection. This is especially so for softer measures. The decision to impose “harder” administrative measures can involve other institutions and appeals against them can involve the use of the courts. Criminal sanctions are applied through the courts, unless a settlement is reached before the case is heard. Prosecution often involves a prosecutor’s office (or similar), although in some countries prosecution can be undertaken by the regulators themselves.

### 1.2.1 Executive authorities: role of central government’s bodies

Within the Kazakh government, executive authorities are mandated to detect environmental non-compliance through routine and reactive inspection, provide administrative enforcement, file civil cases for damage compensation, as well as file criminal cases. Eight major actors have such functions (see Table 1). Units reporting to the Ministry of Internal Affairs have also investigation functions related to criminal cases. In addition, the Prosecutor’s Offices are mandated to verify the quality and lawfulness of inspection and administrative activities of other executive bodies.

**Table 1. Role of executive authorities in administrative and criminal enforcement in Kazakhstan**

Agencies and their functions	Committee for Environmental Regulation and Control	Water Resources Committee	Forestry and Hunting Committee	Fishery Committee	Committee for Geology and Use of Mineral Resources	Land Management Agency	Environmental and Veterinary Police Divisions	Prosecutor’s Offices
Planned and reactive inspection	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Initiation of administrative cases	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Use of “basic” administrative sanctions	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Imposing administrative sanctions in cases referred by local authorities	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Initiating administrative cases at the request of third parties	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Coordination/Supervision of local authorities	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>
Coordination/Supervision of executive agencies	<input checked="" type="checkbox"/>							<input checked="" type="checkbox"/>
Referring cases to Administrative courts	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Representing the government in civil cases	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Referring cases to Prosecutors offices	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>		
Conducting investigations under criminal law							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Referring cases to courts							<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Testimony in criminal cases	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Accusatory role in criminal cases								<input checked="" type="checkbox"/>

Source: Compiled based on national law and regulations of respective government agencies. Please note that competencies and powers are constantly evolving therefore the information in the current Table should be treated as indicative.



The Committee for Environmental Regulation and Control, which reports to the Ministry of Environment, has a key role in environmental inspection and administrative enforcement. The Committee for Environmental Regulation and Control was established as an autonomous body in late 2004, and reformed in 2007. It includes five departments (permitting and licensing, environmental review, environmental enforcement, waste management, administration and legal works) in the central office and has sub-national divisions covering 1-2 oblasts and the cities of Almaty and Astana. The Committee is mostly a pollution control authority. “Green” enforcement and enforcement of water resources management (quantitative aspects) was delegated to several enforcement bodies under the Ministry of Agriculture. The natural resource management legislation is also enforced by the Land Management Agency and the Ministry of Energy and Mineral Resources.

A very prominent role is played by Prosecutors Offices that employ environmental prosecutors whose key task has been, till 2007, supervision of executive authorities. The content analysis of press releases issued on the General Prosecutors’ Office web site over several years shows that environmental prosecutors put a very strong focus on imposing fines and verifying levels of fine collection. As of 2007, environmental prosecutors acquired a role in criminal enforcement and are entitled to lead investigations and present cases of environmental crime to courts.

**Box 1. Criminal prosecution powers assigned to Prosecutors’ Offices**

- Participate in examining the scene of a crime, order expert examinations, and carry out other actions necessary to address the issue of initiating a criminal case;
- Initiate a criminal case or deny prosecution;
- Refer to the appropriate authority the criminal cases initiated by the prosecutor’s office for interrogation or pre-judicial inquiry;
- Authorize, in cases stipulated by law, actions of officials engaged in field detection, interrogation, and investigative activities;
- Participate in particular investigative actions;
- Make a submission to get approbation for holding criminally liable a person who has immunity;
- Refer the case to the court.

Source: Article 46 of the Law on the Prosecutor’s Office

However, the environmental prosecutor’s ability to detect environmental crimes is very limited. Inspections can be conducted by the prosecutors’ offices based on the applications regarding the facts of violations filed by the general public or data submitted by public authorities engaged in enforcement and inspection in the area of environment and use of natural resources.

In other countries, the role of public prosecutors can vary. Firstly, there can be dedicated environmental prosecutors who have specialised knowledge of the field. Secondly, the role of prosecutor varies if the procedure is inquisitorial (where the prosecutor makes an investigation) or accusatory (where the role is to base a case on the arguments made by others, such as an environment agency). Given the increasing prominence of environmental crime, some countries have developed prosecutors specialised in environmental issues. Developments on this issue in Spain are illustrated in Box 2.

### Box 2. Establishment of environmental prosecutors in Spain

The development of new criminal offences on the environment in Spain in the mid-1990s resulted in a greater number of cases being brought and a realisation that the prosecution staff had insufficient knowledge and capacity to deal with these. Over time the provinces have created specialised environmental prosecutors who can address these issues seriously. In 2005 a specific environmental prosecutor in the Supreme Court was created by law and the provincial environmental prosecutors were more formally recognised in legal changes in 2006. These developments have enabled the problem of environmental crime to be of a higher profile. The environmental prosecutors work closely with the relevant authorities and also have their own network to compare experiences.

Source: Farmer A (2007) A Handbook of Environmental Protection and Enforcement.

The interior authorities can also play an important role in tackling environmental crime. In Kazakhstan, they are engaged in the field detection and forensic activities and interrogation and prejudicial inquiry in criminal cases within their competence. The interior authorities' capabilities in criminal enforcement are mostly limited to environmental crimes committed by individuals, as well as by the files submitted to them by the public authorities engaged in enforcement in protection of the environment and use of natural resources.

Despite a large number of central government authorities and their sub-national units (Table 2), it is not clear how many people work specifically on environmental enforcement in all of these organisations. Also the magnitude of budgets dedicated to this function is not known that prevents managers from making a sound judgement on the resources available for enforcement. However, many of these agencies claim to experience shortage of staff, in particular lawyers, transport necessary for on-site visits, and equipment necessary for analytical purposes.

**Table 2. Subordination and vertical organisation of executive agencies with mandates related to environmental enforcement**

Agency	Supervisory body	Territorial sub-units
Committee for Environmental Regulation and Control	Ministry of Environment Protection	Eight regional offices
Water Resources Committee	Ministry of Agriculture	Eight water basin authorities
Forestry and Hunting Committee	Ministry of Agriculture	Fourteen <i>oblast</i> offices
Fishery Committee	Ministry of Agriculture	Four inter-oblast fishery basin authorities and six <i>oblast</i> authorities
Land Management Agency	Government	Sixteen territorial units
Committee for Geology and Use of Mineral Resources	Ministry of Energy and Mineral Resources	Five regional offices
Environmental and Veterinary Police Divisions	Ministry of Internal Affairs	Represented in all <i>oblasts</i> , cities, and <i>rayons</i>
Prosecutor's Offices	President	Represented in all <i>oblasts</i> , cities, and <i>rayons</i>

Source: Web sites of the respective government agencies.

The majority of inspectors working at the sub-national level have an extensive length of service and receive refresher training. However, in some central-level agencies the staff turnover seems to be extremely high that prevents a gradual accumulation of professional competence. Furthermore, cross-fertilization of knowledge and skills is very limited, as training is conducted by each agency independently. There is, however, some coordination of work plans and, occasionally, joint inspection

or enforcement actions. According to some stakeholders, the 2002 restructuring of the former Ministry of Environment and Natural Resources<sup>3</sup> led to an increased fragmentation and sometimes duplication or “white spots” that present a major challenge. Others are noticing improvements in the effectiveness that is difficult to demonstrate, however.

### *1.2.2 Role of local authorities*

The role of sub-national institutions is gradually changing from the limited involvement to date. The increasing involvement of such bodies in regulation and enforcement is very important as it presents an opportunity to closely engage with local communities. However, a poorly orchestrated decentralisation creates the danger of institutional over-fragmentation and inconsistency, as well as raises concerns over the capacity of sub-national bodies to undertake roles given to them.

#### *Local Representative Bodies (Maslikhats)*

A *maslikhat* is an elective representative local authority operating at the oblast level (Cities of Astana and Almaty) and regional level (cities of oblast importance). The core competence of *maslikhats* in the area of the environment is the approval of programmes on environmental protection and use of natural resources, local budget expenditure, annual environmental pollution charge rates, as well as adoption of binding environmental rules operative in the territory.

#### *Local Executive Authorities (Akimats)*

At the local executive authorities (akimats) of oblasts (Cities of Astana and Almaty), the core responsibility for achieving the environmental goals lies with the departments of natural resources and natural resources use management. They perform the following functions: assurance of implementation of environmental programmes funded out of the local budgets; issuing permits for use of natural resources; giving an opinion of the state environmental review regarding the facilities within their competence; making available environmental legislation; and provision of urban amenities.

Currently, there is a trend to extend the power of local authorities, including on environmental protection. In particular, their competence now includes: issues of natural resources use management for a number of facilities; development of environmental pollution charge rates; organizing public hearings during environmental impact assessment; documenting the state environmental review of specific facilities with a minor environmental impact; and control over maintenance of localities.

However, departments of the local executive authorities do not have any environmental compliance assurance functions and do not inspect the entities engaged in private entrepreneurship for compliance with environmental legislation. At present, there is no framework for specialized training or re-training of employees of the departments for natural resources and natural resources use management.

Local executive authorities have created and strengthened the material and technical resources of the departments of natural resources and natural resource use management. Their staff often have more opportunity than inspectors of the central public authorities, to detect early, and get information from the public on, environmental violations, as well as to go on site and establish the fact of non-compliance. However, the departments have no legal mandate to verify environmental compliance or

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<sup>3</sup> In 2002, the former Ministry of Environment and Natural Resources was restructured into the Ministry of Environment. Its mandate to enforce compliance with requirements related to protection of water resources, protected areas and biodiversity was transferred to the Ministry of Agriculture.

hold guilty persons administratively liable. They can only submit files to the territorial units of the Committee for Environmental Regulation and Control, water basin authorities, environmental prosecutors' offices, and interior authorities.

### *1.2.3 Judicial authorities*

Kazakhstan's legal framework is continental; therefore, courts issue decisions under the provisions of law. The judiciary is composed of: Supreme Court, local courts, and specialized courts. At the Supreme Court and oblast court level, the structure of each of the courts includes the supervisory collegium, collegium for civil cases, and collegium for criminal cases. A system of specialized courts was created in Kazakhstan in recent years: inter-regional economic courts in 2002 and administrative ones in 2005.

Specialized administrative courts try some cases regarding administrative offences, as well as those challenging the orders of executive-branch officers in cases of administrative offences. Specialized economic courts act as courts of first instance for cases regarding legal entities and self-employed entrepreneurs<sup>4</sup> for judicial compensation of environmental damage and suspension of operations carried out in violation of law. Within the framework of the criminal proceedings, the regional court usually also acts as a court of first instance.

The Supreme Court-level judges practice joint preliminary discussion of the most complex aspects, taking into account the complexity of the trial of environmental cases. In recent years, the courts have been meeting the statutory case trial deadlines, although as recently as in the early 2000s the judges could protract the trial of a case in the first instance for six months and even a year.

In general, in order for the process of environmental enforcement to work successfully, it is necessary for the judicial system to be effective. The courts must take environmental crime seriously, understand the issues to make sensible judgments, and have sufficient resources to process the cases. However, in many countries, in many different contexts, there is concern from environmental enforcement authorities that the judicial system is far from effective. A serious environmental offence might result in a small fine, undermining the environmental enforcement process. It is common to hear complaints that judges do not take environmental issues seriously. However, in some cases this is because they do not understand them – both the nature of the environmental harm and the context of the offence in the general programme of environmental protection.

In such cases there is a need to ensure that the legal training process includes an understanding of environmental issues. Where judges do understand the issues, but do not take them seriously, then an environmental enforcement authority has a wider political problem to address. Countries have adopted various educational and other capacity enhancement processes for the judiciary. To support these are related processes, in August 2002, UNEP adopted an action plan (the Johannesburg Principles on the Role of Law and Sustainable Development) to strengthen the development, use and enforcement of environment-related laws.

### *1.2.4 Role of non-governmental stakeholders*

The role of non-governmental actors is increasing. Apart from their general role in examining the probity and effectiveness of governmental bodies, they also help overcome some capacity issues and support the enforcement process. However, doing this effectively requires a large degree of transparency on the side of government authorities and industry, which is not yet the case.

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<sup>4</sup> For individuals, regional court acts as first instance court in such cases.

A number of rather large business associations (such as the Eurasian Industrial Association or Kazakhstan Business Association for Sustainable Development), have been founded in recent years. Some of them expressly focus on facilitation of, and provision of services to, their members regarding the implementation of environmental legislation (see Box 3). Their activities have included the organisation of training on the requirements of environmental law.

**Box 3. Kazakhstan Business Association for Sustainable Development (KBASD)**

KBASD is a joint initiative of the Ministry of Environment Protection (MEP) of Kazakhstan, industry, and donor community. Members from industry include the Eurasian Industrial Association, Kazzinc, Aktobe Chromium Compounds Plant, Sokolovsko-Sarbaisky Mining Enterprise, AES Ekibastuz, Kazakhstan Aluminum and others. The Association aims to improve the environmental legislation and its implementation, and analyzes and give feedback on relevant draft laws, secondary legislation and policy documents. In 2003-2006, it organised a series of workshops to discuss challenges of compliance with country's environmental laws and regulations. KBASD played an active role within the process of Environmental Code development. In March 2007, government and business gathered at an International Business Forum that was sponsored by the Kazakh MEP and the country's Council for Sustainable Development that provided a platform for constructive dialogue, transfer of experience, and benchmarking. The association also provides training to its members and facilitates national and international networking.

The majority of environmental NGOs in Kazakhstan are small institutions, but form a network within the Ecological Forum of NGOs (Ecoforum). The latter has a strong focus on issues of practical implementation of water and forest legislation and compliance with requirements for public participation in the Environmental Impact Assessment (EIA) and state environmental review procedures. Ecoforum facilitates the development and submission of NGO position papers during the development of strategic, programme, and legislative instruments. This association also enables the non-governmental sector to be represented at the National Council for Sustainable Development, Citizens' Council at the Ministry of Environment, and basin councils.

The involvement of NGOs in the detection of non-compliance and enforcement is, however, very sporadic. Most often, NGOs use their right to signal non-compliance to competent executive authorities. Judicial enforcement is used very rarely because of costs and time that are implied in such cases. One notable exception is the Citizens' Association "Green Salvation" that has actively initiated court cases against both central public authorities and companies concerning access to environmental information and environmental compliance. In 2001 the former Ministry of Natural Resources and Environment developed a strategy towards enhancing interaction with NGOs. The proposed actions included: development of the annual plan and inspection of natural resource users based on interaction with NGOs; covering enforcement and inspection activities in mass media; organizing, jointly with NGOs, discussions, roundtables, and other events to discuss the outcomes of environmental compliance assurance. Unfortunately, this ambitious strategy was not fully implemented.

Specialized expert organizations in Kazakhstan provide a rather broad range of consultancy services, including those related to the various permitting or reporting procedures. Furthermore, large companies sub-contract such organizations to conduct self-monitoring. Some expert organizations are rather large companies with professional staff and their own laboratory and field testing equipment.

### **1.3 Analytical base for environmental enforcement and information disclosure**

Despite the use of some compliance and enforcement indicators, the analytical base for designing enforcement strategies is still meagre in Kazakhstan. First of all, several sets of indicators are used by different agencies. Beyond the above described executive and judicial bodies, these include the General Prosecutor's Committee for Legal Statistics and the Agency for Statistics. As a result,

enforcement data are extremely scattered, often inconsistent and insufficiently robust, and thus difficult to analyse.

Only one set of indicators was publicly available from the statistical yearbooks published by the National Agency for Statistics. The yearbook presented annual data on the following indicators:

- Accidental release of pollutants (number of cases and amount of damage claims);
- Number of suspended production processes due to violation of environmental legislation;
- Reduction in the release of pollutants due to suspension of a production process;
- Number of lawsuits referred to the public prosecutor and number of officials and natural persons held liable;
- Amount of levied fines and claims related to environmental violations.

In 2007, the statistical yearbook featured no environmental enforcement data.

Within various agencies, data are collected and summarised on a monthly, quarterly, and annual basis that, in principle, allow for a timely change of enforcement strategies, if need be. For example, the Committee of Environmental Regulation and Control collects monthly information from its territorial units (Box 4) on their non-compliance detection and enforcement activity. The coverage of data sets may vary considerably from one year to another thus making accurate identification of trends nearly impossible. The 2002 restructuring of the environmental administration has a particularly bad impact on the continuity of data collection and resulted in a total lack of relevant information for that year.

**Box 4. Indicators used by the Committee of Environmental Regulation and Control in monthly reports**

- Number of inspected facilities and non-compliance instances;
- Number of administrative orders: issued and implemented;
- Number of administrative responses, including oral and written warnings, and fines;
- Number of requests forwarded to court for suspending production processes;
- Number of damage compensation claims;
- Number of administrative orders to suspend project financing;
- Number of requests forwarded to competent authorities to withdraw permits or licences;
- Number of requests forwarded to competent authorities to terminate nature resource use contracts;
- Number of cases sent to court for criminal prosecution.

Source: Committee for Environmental Control, 2007.

Results of enforcement are also summarised in annual reports of various government authorities that can be made available to the general public upon request. Unlike other countries, Kazakhstan does not use the Internet to post such reports, though an ambitious e-government programme has been



recently launched. At the same time, the web site of the Ministry of Environment ([www.nature.kz](http://www.nature.kz)) is a source of relevant day-to-day information, including on enforcement actions. In 2008, the Committee for Environmental Regulation and Control opened its own web-site ([www.ecokomitet.kz](http://www.ecokomitet.kz)) and intends to disclose enforcement-related information more pro-actively.

A particularly good example of a system for making such information available is the Enforcement and Compliance History Online ([www.epa.gov/echo](http://www.epa.gov/echo)) website in the United States. This website provides compliance and enforcement information for approximately 800,000 regulated facilities nationwide. It allows users to find permit, inspection, violation, enforcement action, informal enforcement action, and penalty information covering the past five years. Due to the existence of ECHO, the public can monitor environmental compliance in communities, corporations can monitor compliance across facilities they own, and investors can more easily factor environmental performance into decisions.

It is also important to note that government authorities in the US can require companies to post enforcement-related information at their own expense, thus reducing burdens on the public authorities. An example is given in Box 5.

**Box 5. Imposing a Publicity Order in the United States: The case of Caster Corporation**

In the United States, the Federal Sentencing Guidelines indicate that a judge can order a convicted company to publicise (at its own expense) information on its conviction and what action it is taken to avoid non-compliance in the future. Such a remedy has been in place for a number of years.

For example, in 1985 the American Caster Corporation was found guilty of dumping 250 deteriorating drums of solvents. The President and Vice-President of the company received prison sentences and the company had to pay \$20,000 to clean up the contaminated site. Moreover, the company was order to take out a full page advertisement in the press on its conviction, at a further cost of \$15,000.

Source: New York Times, 17 February 1985.

In Kazakhstan, the latter type of information – specific enforcement cases – can be obtained from the Supreme Court. Every few years, the Supreme Court summarizes the trial of cases regarding violation of laws on environmental protection and use of natural resources. The summaries and notes regarding the judicial practice are posted on the Supreme Court’s web-site ([www.supcourt.kz](http://www.supcourt.kz)).

Many other central public authorities have launched websites, but often they lack relevant information. Some public authorities have set up special consultative bodies (e.g. water basin councils) to facilitate public information and participation.

There are two national publications in Kazakhstan intended for mass readers and focusing on environmental issues, including compliance and enforcement, the *Ecologichesky Kurier* [Environmental Courier] and *Kazakhstanskaya Ecopravda* [Kazakhstan Eco-Truth]. Both publications are owned by non-governmental organizations. The former includes articles of a more analytical character the latter publishes information on specific cases of non-compliance, reported by environmental NGOs.

## 2. NON-COMPLIANCE DETECTION

As a precursor of enforcement, the compliance monitoring system deserves some attention within this report. The main question is whether this system provides for a sufficiently high probability of non-compliance detection. Though no quantitative response exists, the authors of the report made an attempt to make a qualitative judgment in this field.

Besides government checks (inspections), the status of compliance can be verified through ambient monitoring near a facility, results of operators' self-monitoring programmes, supply chain inspections, independent audits or citizens' compliance monitoring (mostly complaints). Inspection by state authorities (or third parties sub-contracted by the government) remains the backbone of any compliance assurance system. The very visit to a site, in particular if combined with a rigorous check, may exercise in some cases a higher impact on the company's performance than penalties.

### 2.1 Inspection

Inspections conducted by state authorities remain the backbone of any compliance assurance programme. Potentially, this type of compliance monitoring provides the most relevant and reliable information. In average, the main environmental inspection authority in Kazakhstan – the CERC – conducts around 15-16 thousand inspections annually.

The inspection procedures in Kazakhstan are regulated by the 2007 Environmental Code and the Law on private Entrepreneurship No. 124 of 31 January 2006. This makes the system more transparent and assists in preventing corruption. The legal framework gives a number of powers to inspectors, which are not yet sufficient for ensuring a sufficient probability of non-compliance discovery (e.g., the frequency of planned inspection is limited to one site visit every year). Inspections can also be carried out *ad-hoc* upon request from citizens, mass media, public prosecutors offices, regional authorities, and Parliament Members.

Inspection schedules are developed on an annual and monthly basis. Most of the large facilities are inspected annually; SMEs are inspected, on average, every two-three years.

Site visits must be approved by the *oblast* chief inspectors and registered in advance with a competent authority reporting to the Ministry of Justice (the Committee for Legal Statistics and Special Records of the Prosecutor General's Office). Inspectors seem to face a lot of paper work as part of site visits approval: some estimate that up to 10% of their time may be diverted from field work to obtaining approvals. The resulting inspection warrant is handed over to the inspected company. The inspection can only be conducted by officials specified in the note of inspection.

Under the *Law on Private Entrepreneurship*, the inspection period must not exceed 30 calendar days; in exceptional cases, when special studies, tests, or expert examinations are necessary or due to a significant extent of the inspection, the head of the state environmental enforcement authority can extend the inspection period, but by no more than 30 calendar days. Some laws can set shorter inspection periods; in particular, the *Land Code* provides for 10 calendar days with the possibility of their extension by another 10 calendar days in exceptional cases.

Inspections can be single-medium or integrated and the latter are reported to be the most common. Prior to the visit, the compliance history and all permits are reviewed. Also inspectors develop site-specific inspection checklists. Site visits are announced to the regulated community 10 days in advance. Some experts, particularly from NGOs, consider that this time is used by many enterprises to hide evidence of illegal activities. Some enterprises may be inspected repeatedly if there is a need to check their action as a follow-up to the site visit.

During site visits, inspectors are supposed to check environmental documentation and actual compliance, assess environmental protection measures, verify equipment, and make sure that pollution and user charges are calculated and paid correctly. In reality, many inspectors focus on verification of relevant documentation and end-of-pipe devices. Capacity to assess production processes and environmental performances is quite limited due to a number of factors: poor knowledge of production processes, lack of practical experience, limited availability of monitoring equipment, etc. Every on-site visit should result in an inspection record (prepared in two copies) stipulating the violations revealed, the legal requirements that have been violated, the causes of non-compliance, and the corrective actions prescribed. The following are attached, if available, to the report: sampling notes, notes of inspection of environmental sites, and reports of the tests conducted.

If an administrative offence is detected, an administrative offence report is also prepared. Also, should a violation be detected, the inspector should establish whether this has caused any damage.

The end of the inspection period is the day on which the inspection findings report is handed in to the inspected entity not later than the inspection completion date specified in the inspection warrant.

## **2.2 Self-monitoring and self-reporting**

Environmental (self-)monitoring and reporting by enterprises has a long history at the largest industrial facilities in Kazakhstan. Although the majority of enterprise monitoring programmes date back only three to five years, some of the oldest enterprises established such programmes in the mid-1970s. The adoption of the Environmental Code marks progress in the legal basis for self-monitoring by enterprises that acquired many elements corresponding to good international practices, for example a differentiated scope of monitoring for large enterprises and SMEs, clearer procedures, etc. Also, legal stipulations exist in the Administrative and Criminal Codes to minimize the possibility of fraud and negligence.

The regulated community (in practice, the largest facilities) is in charge of developing individual multi-media monitoring programmes and of presenting them for approval to the competent authorities. Enterprises bear full responsibility (and costs) for implementing them and provide the necessary expertise, equipment, and analytical facilities. Sometimes these services are sub-contracted.

Results of self-monitoring are communicated to competent authorities through regular (statistical) reports or immediately in the case of emergency situations or accidents. Enterprises submit three standardised statistical reports: “2TP Air”; “2TP Water”; and “3 Toxic Waste” that are based on the reports inherited from the former Soviet Union. Air protection reports are due twice a year. Water use and protection, as well as toxic waste generation and disposal, reporting is annual. Territorial environmental protection offices (TEPOs) review these reports. The air and waste reports are then submitted to statistics authorities. The water report is submitted to the water basin management authorities. Statistical reporting by enterprises is confidential and the general public has access only to aggregated oblast-level data. All entrepreneurs (even the smallest ones) must prepare such reports, solicit their endorsement by TEPOs and submit them to fiscal authorities together with quarterly fiscal reports. This tremendously increases the administrative burden of reporting.

The Environmental Code improved the design of enterprise monitoring but the effectiveness of this system is still undermined by a number of problems. Several gaps in the regulatory framework remained unsolved, including a poor definition of basic concepts and underdeveloped secondary legislation. Competent authorities often consider that industries must monitor the maximum possible number of parameters regardless of the associated costs and benefits. Reporting is very fragmented and complex. At the same time, competent authorities do not have adequate resources to keep track of and analyze received data.

The quality of data raises doubts and there is evidence of major discrepancies between the measurements made by the state analytical laboratories and enterprise laboratories. Quality problems with laboratory tests often lead to controversy, which sometimes have to be resolved in court.

### **2.3 Complaints and inquiries**

Environmental inspectors have to respond to complaints from the general public and, more generally, inquiries from other authorities (e.g. the Parliament or the General Prosecutor Office) as concerns environmental compliance. Detailed statistics on complaints are not available but the Committee for Environmental Regulation and Control estimates that up to 30% of checks, depending on the region, may be conducted in response to such complains and inquiries.

### **2.4 Mandatory environmental audits**

In 2005, the legal basis was adjusted to allow for mandatory environmental audits. They may be required by inspectors in certain cases, *e.g.* re-organization or bankruptcy of a company. There is little evidence that this instrument is used in practice.

### 3. ADMINISTRATIVE PATH OF ENFORCEMENT

The administrative path of enforcement, which involves competent executive agencies possessing the technical knowledge in the field concerned, is the simplest to operate. Administrative sanctions do not bear the same degree of moral condemnation as criminal ones and entail less administrative burden. This type of system will only work, however, if the sanctions are sufficiently diverse and robust that operators wish to avoid them. This section addresses questions whether Kazakhstan has managed to establish such a system of administrative enforcement.

#### 3.1 Types of administrative sanctions

A wide range of administrative sanctions can be used in Kazakhstan to correct non-compliant behaviour. These are set out in *Article 46 of the Code of Administrative Offences* and include:

- **Warning:** a written communication of the official body authorized to impose an administrative penalty to the offender concerning the offence committed with a warning that unlawful conduct is inadmissible and must cease;
- **Administrative fine:** a monetary penalty within the limits set by law (see also Chapter 5);
- **Revocation** of license, special permit, or qualification certificate or its suspension for certain kinds of activities or certain actions. This includes, *inter alia*, cancellation or suspension for up to six months of permits for use of natural resources and environmental pollution and licenses in the area of environmental protection and use of natural resources;
- **Suspension or prohibition** of activities posing a threat to human health and the environment;
- **Confiscation** of the item which served as an instrument or direct target of the administrative offence, as well as the property obtained as a consequence of the administrative offence, and a forced conversion of such an item or property into state ownership;
- **Deprivation of the special right:** deprivation for the period from one month to two years of the right to hunt, fish, store or carry hunting weapons, ammunition for it, or fishing-tackle, drive vehicles or other such rights;
- **Forced demolition:** demolition of a structure erected, or being erected, unlawfully, at the expense of the offender, including those posing an environmental threat.

Powers to apply administrative sanctions vary between competent authorities. Some of these sanctions can be applied directly by executive bodies, while several others require the decision of administrative courts. Thus, the first three types of penalties listed above are imposed directly by inspectors. The last four types of penalties can be applied only through court proceedings.

Factors that define the severity of sanctions are stipulated in Article 61 and 62 of the *Code of Administrative Offences*. Aggravating factors include, for instance, the repeated and lengthy character of violations, involving a third person, or committing the offence during an emergency or natural disaster situation. Admitting the fact of non-compliance and correcting its consequences voluntarily

diminishes the severity of sanction. The involvement of administrative courts allows for an independent view of the case and an independent assessing of any mitigating or aggravating circumstances. However, it is important for the authorities to examine the results of this involvement and to periodically re-assess which penalties are most effectively and efficiently managed through this procedure.

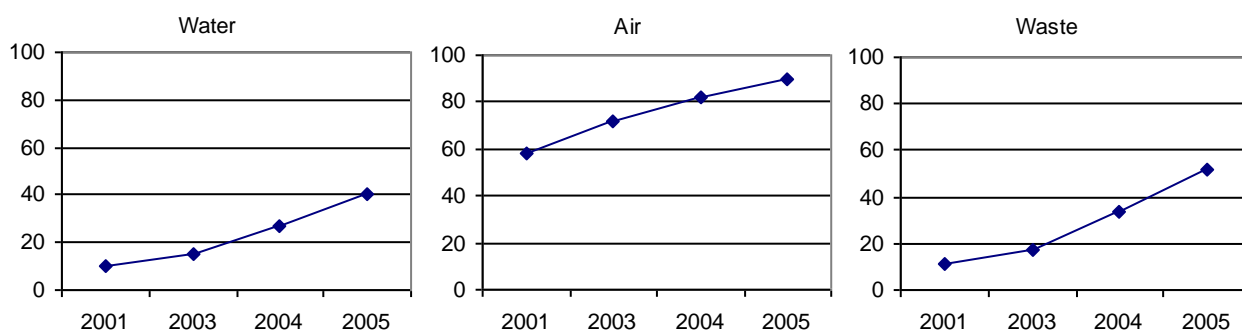
Some legal tools used in OECD countries do not exist in Kazakhstan. One notable example is administrative coercion, which is applied in situation when the offender does not voluntarily rectify a situation of non-compliance. In such cases, some inspectorates have the legal authority to remediate the offence at the offender's expense. This approach can also be used immediately if environmental quality or public health are seriously at risk, particularly when the offender has insufficient financial means. Inspectorates must be guided by strict and transparent procedures when applying this enforcement response, so as misuse of powers and public funds is prevented. Given these preconditions, it might be indeed premature to introduce this legal instrument in Kazakhstan in all cases mentioned above except for emergencies.

Also daily fines are not used in the Kazakh legal systems. Such a fine is charged for every day that non-compliance has occurred or a "running fine" calculated for the period over which an emission limit has been exceeded. Daily fines are most prominent in the United States but are also used in the Netherlands or Norway.

### 3.2 Practical application of administrative sanctions

Unlike OECD countries, where remediation of [non-criminal] offences commonly starts with non-repressive responses, administrative fines constitute the legal instrument at the bottom of the administrative enforcement pyramid in Kazakhstan. Though fines are considered to be too low to influence the compliance behaviour, imposing an administrative fine is nevertheless the most frequent sanction. Their share has been steadily increasing. For example, the percentage of offenders that were subject to administrative fines for air pollution has seen a sharp increase between 2001 and 2005. Other types of sanctions are very rarely applied. This might reflect fears to be condemned for corruption that inspectors have increasingly faced and opinions that imposing a warning means an obscure regulatory deal. Another factor is that performance assessment based on number and amounts of fines imposed, that creates perverse incentives and pushes inspectors to "hunt" for fines.

**Figure 1. Share of fines in the total number of administrative cases, % (2001-2005)**



Source: Ministry of Environmental Protection of the Republic of Kazakhstan.



International practice shows that non-repressive responses can give the offender ample opportunity to correct the violation without suffering losses in tangible or intangible assets. It may be quite effective both in countries with a consensual compliance culture (e.g. in Finland or Japan) or where formal enforcement tools are widely used (e.g. in the Netherlands or the United Kingdom).

**Box 6. Non-repressive response to violations in selected OECD countries**

**Japan.** Administrative actions in Japan are designed to guide or order operators to comply with the requirements, but not to impose penalties. Competent local governments promote regulatory compliance by businesses mainly through inspections and by issuing *administrative guidance* based on inspection results. Most businesses actually take steps to comply with the guidance: the intervention of the authorities is already considered as a sanction, and the potential loss of reputation for Japanese companies is likely a more important deterrent than in other countries. Stricter enforcement measures are imposed only if the emission/effluent limits are exceeded significantly or repeatedly. For example, in FY 2005, after 17,984 site inspections at “soot and smoke emitting installations”, administrative guidance was issued for 405 of them, an improvement order was issued in one case, and no penalties were imposed<sup>5</sup>.

**Finland.** Likewise, in Finland, if a violation is discovered, the operator is allowed (sometimes during the inspection itself) to present a *plan of corrective actions* to return to compliance. If the operator fails to present a compliance plan or its actions are judged inadequate by the competent authority, then the latter issues a compliance notice. In practice, compliance notices are used very rarely: in 2006, corrective actions were agreed as a result of 16.8% of all inspections by the Regional Environmental Centres, and compliance notices were issued in 3.3% of the cases<sup>6</sup>. Even when a compliance notice is used, it is regarded as a sanction in itself (as it is disclosed to the public) and rarely imposes penalties.

**Netherlands.** Upon detection of a violation in the Netherlands, the competent authority would most often issue an informal verbal warning. A verbal warning may be given on-site by an inspector or by a phone call from the office that a violation has been noted. Administrative sanctions are not imposed if the violation has been corrected in a timely manner, has not been committed deliberately, is clearly an isolated incident, is of limited extent and impact, and has been committed by an operator with an otherwise good compliance record. Sanctions are issued in only about 7% of the cases. In another example, more than 70% of violations in England and Wales are addressed through persuasion, and less than 20% by administrative enforcement notice (the remaining cases are referred for prosecution)<sup>7</sup>.

Source: OECD (2008). Environmental Compliance Assurance Systems: A Cross-Country Analysis.

The use of non-repressive response in Kazakhstan raises legitimate concerns, mainly because of entrenched disrespect for law in the side of the regulated community and possible corruption on the side of enforcers. However, the lack of non-repressive response may also reveal a poor/insufficient application of the most stringent sanctions. In theory, the deterrence effect of the latter is demonstrated by the likelihood to correct non-compliance using soft measures at the bottom of the enforcement pyramid. From this perspective, the enforcement system in Kazakhstan is quite weak. It is true, however, that environmental authorities cannot change the situation alone. This requires revising and adopting a coherent enforcement policy across different sectors.

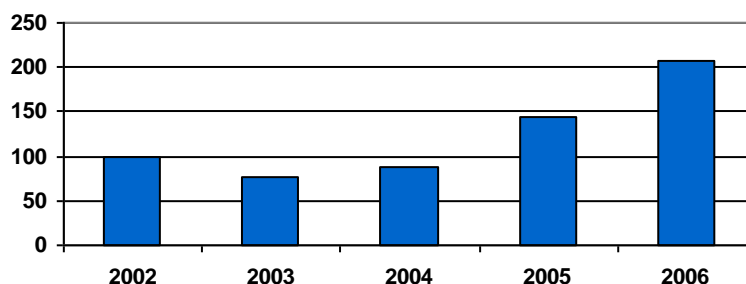
Meanwhile, Kazakh environmental authorities amended their enforcement strategy by increasing the use of license/permit suspension and temporary prohibition of activity. These are believed to have higher financial (and thus behavioural) implications. In line with this non-compliance response strategy, the incidence of issued prohibition notes more than doubled in 2006 in comparison with 2002 (see Figure 2) although their share in the total number of administrative sanctions is still very modest.

<sup>5</sup> Ministry of the Environment of Japan, responses to the OECD questionnaire, 2007.

<sup>6</sup> Ministry of the Environment of Finland, 2007.

<sup>7</sup> Environment Agency, 2007.

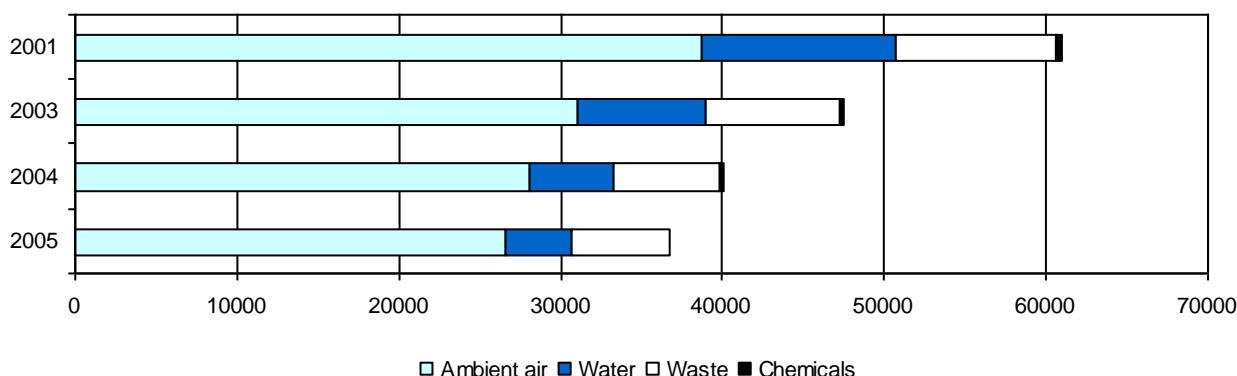
**Figure 2. Use of prohibition notices in response to environmental offences in Kazakhstan (2002-2006)**



Source: Statistical Yearbooks of Kazakhstan, 2003-2006.

Overall, there was a clear downward trend in the number of administrative cases (by more than one third) in the period for which data were available. As concerns media-related distribution, the lion's share of administrative sanctions relates to breaches of air protection legislation, followed by offences of nature conservation, waste and water legislations. Offences related to chemicals management are the least frequent (their detection even decreased from 451 in 2001 to 80 in 2005).

**Figure 3. Trends in the number of administrative cases in Kazakhstan, 2001-2005**



Source: Ministry of Environmental Protection of the Republic of Kazakhstan.

The downward trend in the number of administrative cases may be linked to a limited capacity to detect violations. This, in turn, may originate in a conundrum of institutional problems, starting from legal limitations on the frequency of inspection to one planned site visit annually to the decreasing number of staff in competent authorities. On the other hand, this trend might signal an improved compliance culture. While being plausible, this hypothesis requires a thorough verification.

The effectiveness and efficiency of various sanctions is discussed, to the extent possible, in Chapter 5.

### 3.3 Stages of administrative enforcement procedure

The administrative enforcement procedure includes the following stages:

- Recording an administrative offence and drawing up an administrative offence report (or issuance of a prosecutor's order to initiate a case);
- Initiation and handling of cases regarding the administrative offence;
- Issuing an order regarding the administrative offence;
- Execution of the order to impose an administrative penalty.

A case of an administrative offence is deemed to be initiated from the moment the administrative offence report was prepared or the prosecutor issued an order to initiate a case. The administrative offence report (prosecutor's order) is submitted for review to the judge or another authority authorized to try a case regarding the administrative offence within three days from the time it was drawn up.

It is largely at the discretion of the state inspector whether to file with the court a statement of claim concerning the suspension or banning of a certain business or other activities carried out in violation of the statutory requirements. Current legislation does not set clear criteria or grounds for applying this penalty.

Cases of administrative offences are tried within fifteen days from the day the judge or the authority authorized to try the case receives the administrative offence report and other case files. The timeframe for addressing the case can be extended by the court or authority handling it, but by no more than one month provided there is a motion from the parties to the proceedings in the case or if it is necessary further to ascertain the circumstances of the case.

The following are mandatory parties in the case regarding the administrative offence:

- Authority trying the case regarding the administrative offence;
- Person against whom the proceedings in the case are conducted (representatives thereof).

Furthermore, the following may be parties to the proceedings in administrative offence cases:

- Person affected (representative) is one to whom the administrative offence caused physical, property, or moral damage;
- Defence counsel is one defending the rights and interests of the person held administratively liable and providing legal aid to him/her;
- Witness;
- Attesting witness is one invited to examine during personal search; search of a vehicle; belongings; seizure of documents and belongings the individual has on him/her; examination of territories, premises, and property owned by a legal entity; or seizure of documents and property owned by a legal entity;

- Specialist has special knowledge and skills necessary to facilitate the collection, examination, and assessment of evidence, as well as use of technical devices;
- Expert is one disinterested in the case, who has special scientific knowledge, invited to give an expert opinion;
- Translator;
- Public prosecutor.

When trying the administrative offence case, the judge or authority is obliged to find out whether the administrative offence was committed; whether the person in question is guilty of it; whether it/he/she is subject to administrative liability; whether there are any circumstances mitigating or aggravating the liability; whether any property damage was caused; as well as establish other circumstances relevant for the correct solution of the case. The detailed procedure for handling cases regarding administrative offences is established by the *Code of Administrative Offences*.

Based on the outcomes of the examination of the case of an administrative offence, one of following orders is issued:

- Impose administrative penalty;
- Determine the proceeding;
- Refer the case for trial by the judge or authority authorized to impose a different kind or amount of penalty for the offence;
- Execute the order to impose a fine.

The order in cases of an administrative offence is announced immediately upon completion of the case examination. A copy of the order is handed immediately to the individual or their legal representative to whom it was issued, as well as to the person affected, and the authorized body that initiated the case, at their request. In the absence of these persons, a copy of the order is sent out within three days of its date of issue.

If violation of environmental legislation caused damage, a claim is also laid on the guilty person for voluntary compensation of harm or a legal action is brought with the court. In the event of a trial of the case which caused property damage, the court, when deciding the administrative penalty, at the same time collects such damage if its amount is not disputed. If the amount is disputed, the issue is tried in the civil proceedings.

When an administrative case is tried no state tax is payable. Travel expenses, accommodation expenses, and per diem for witnesses, specialists, and translators participating in the trial are covered by the inviting party.

If an administrative penalty in the form of a fine is imposed, it must be paid not later than thirty days from the day the order to impose it became operative with a subsequent written notification of the authority that issued the order to impose the fine. If the administrative fine is not paid voluntarily, the respective authority goes to the court for its forced execution.

### 3.4 Grounds and procedure for appeal

A judgment concerning an administrative offence issued by the public authority can be appealed in the administrative procedure at the higher authority or judicially based on the complaint of a person held administratively liable or based on the prosecutor's protest. If the judgment in the case regarding an administrative offence is appealed at the higher authority and court concurrently, the appeal is reviewed by the court. The appeal can be filed within ten days from the day a copy of the judgment was served.

The following grounds can be used to quash or change a judgment in the case of an administrative offence:

- Inconsistency of the findings of the authority (official) regarding the factual circumstances of the case set forth in the judgment with the evidence examined during the review of the appeal;
- Misapplication of law on administrative liability;
- Material violation of procedural norms of this Code;
- Inconsistency of the administrative penalty imposed by the judgment with the nature of the offence committed, personality of the guilty or property status of the legal entity.

The procedure of administrative appeal is governed by the *Code of Administrative Offences*. A written appeal drawn up in compliance with the specified requirements is filed with the authority that issued the judgment. This is obliged to file it, together with all the files, with a higher authority within three days of the date of the filing of the appeal. Then it is subject to review within ten days from filing. A correctly filed appeal suspends the execution of the judgment to impose an administrative penalty until the appeal has been reviewed, except where the administrative penalty is imposed at the venue of the administrative offence<sup>8</sup>.

A judicial appeal against the judgments of authorities (officials) authorized to try cases regarding administrative offences is governed by *Chapter 26 of the Code of Civil Procedure*. Missing the deadline for filing the appeal, expiration of the period for imposing an administrative penalty or that for executing the judgment does not serve as grounds for refusal of the appeal by the court. A preliminary appeal in the administrative procedure is not a prerequisite for filing the appeal with the court and its acceptance and settlement is on its merits. The appeal is reviewed by the court within ten days. The person who filed the appeal, as well as the administrative body or officer whose actions are under appeal are notified by the court regarding the time and venue of the court session; however, their absence is not an obstacle for trial and settlement of the case.

As regards a temporary extrajudicial ban on, or suspension of, activities of an entity engaged in small entrepreneurship, the prosecutor, having received the mandatory notice, checks the actions taken for lawfulness and, should they be unlawful, quashes or lifts the ban by his/her order.

Interviews of inspectors show that orders regarding environmental administrative offences are rarely appealed against in practice.

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<sup>8</sup> In the event of an environmental offence, a penalty is imposed at its venue if the fine imposed does not exceed five monthly reference coefficients and the person acknowledged the fact that the offence was committed.

## 4. CIVIL AND CRIMINAL ENFORCEMENT

### 4.1 Compensation of environmental damage through civil judicial procedure

Damage caused by the violation of environmental legislation is compensated voluntarily or as decided by the court. In the event of voluntary compensation, the claim specifies the amount payable to the budget and the deadline for transferring it. In the event of forced collection of environmental damage from a legal entity or private entrepreneur, the statement of claim is considered by the specialized inter-regional economic court as a court of first instance. The judge is obliged to decide whether to accept the case by accepting the statement of claim within five days from when the statement of claim was received; he/she issues a ruling to initiate a civil case. A civil case should be prepared for trial by the judge not later than within seven days from when the statement of claim was received. At this stage, the judge issues a ruling to prepare the case for trial and specifies actions which should be taken.

Cases regarding environmental damage compensation are usually tried within two months from the day the case preparation for the trial was completed. Judgment of the court of first instance, which decides the case on its merits, is issued in the form of a decision which becomes operative within fifteen days following its date of issue, unless it was appealed against within that period.

A court decision to compensate environmental damage, which has not become operative, can be appealed against in the appeal procedure by the parties and other persons involved in the case. The prosecutor involved in the trial has a right to enter a protest with the appeals instance. The Prosecutor General and his deputies, oblast and equivalent prosecutors and their deputies, regional and equivalent prosecutors and their deputies have a right, within their competence, to lodge a protest against the court decision regardless of their participation in the trial of the case. The case is tried in the appeals instance not later than within a month from the day it was received from the court of first instance. Court decisions regarding environmental damage compensation, which became operative, can be appealed against in the supervisory and review procedure based on newly-discovered circumstances.

### 4.2 Types of criminal penalties and factors determining their severity

The range of punishments available under the *Criminal Code* include: fine; deprivation of the right to hold a certain position or engage in a specific activity; engaging the offender in public works; correctional works; military service restriction; personal restraint; arrest; keeping the offender in the disciplinary military unit; deprivation of liberty; and the death penalty. Annex 4 provides a full list of the criminal penalties available in different categories of offence.

The *Criminal Code* distinguishes primary and additional punishments for criminal activity. A fine, deprivation of the right to hold a certain position or engage in certain activity, and engaging the offender in public works can be imposed both as a primary and an additional punishment. Deprivation of special, military, or honorary title, class rank, diplomatic rank, qualification grade, or national award and confiscation of property can only be imposed as an additional punishment. However, not all of these punishments can be applied for environmental crimes. Those that can be are described in more detail in Box 7.



#### **Box 7. Definitions of Punishments Imposed in Kazakhstan for Environmental Crimes**

**Fine** is a monetary penalty in the amount set by law imposed for a criminal offence.

**Deprivation of the right to hold a certain position or engage in certain activity** consists of the prohibition to hold certain civil service or local government positions or engage in certain professional or other activities.

**Correctional works** are punishments imposed for a period from two months to two years served at the place of work of the convict, with five to twenty percent of his/her remuneration being withheld for the benefit of the state.

**Personal restraint** means imposition by the court of certain responsibilities on the convict, which restrict his/her liberty; it is served at the place of his/her residence under the supervision of the specialized authority without isolation from society for a period from one to five years. For this kind of punishment, the following responsibilities are also imposed on the convict: not to change his/her permanent place of residence, work or study without notifying the specialized authority; not to visit certain places; not to leave his/her place of residence during his/her off hours; and not to go to other localities without the permission of the specialized authority.

**Arrest** is keeping the convict in conditions of strict isolation from society for a period from one to six months.

**Deprivation of liberty** consists in isolating the convict from society by sending him/her to a settlement colony or placing him/her to low-security, maximum-security, or a special-security correctional colony or prison.

The *Criminal Code* recognises that the punishments for criminal activity can be subject to mitigating and aggravating circumstances. Mitigating circumstances can be:

- A first low-gravity offence committed due to coincidence;
- The minority status of the guilty;
- Pregnancy or the guilty having young children;
- Voluntary compensation for property/moral damage caused by the crime;
- Crime committed as the result of grave personal, family, or other circumstances;
- Crime committed due to material, official, or other dependence;
- Sincere repentance, acknowledgement of guilt, active assistance with solving the crime, catching other accomplices in the crime, and search for the property obtained as a result of the crime, etc.

Aggravating circumstances can be:

- Repeated criminal activity and recidivism;
- Grave consequences caused by the crime;
- Crime committed by a group of persons, group of persons with prior collusion, organized group, or a criminal organization;
- Offender had an especially active role in committing the crime;

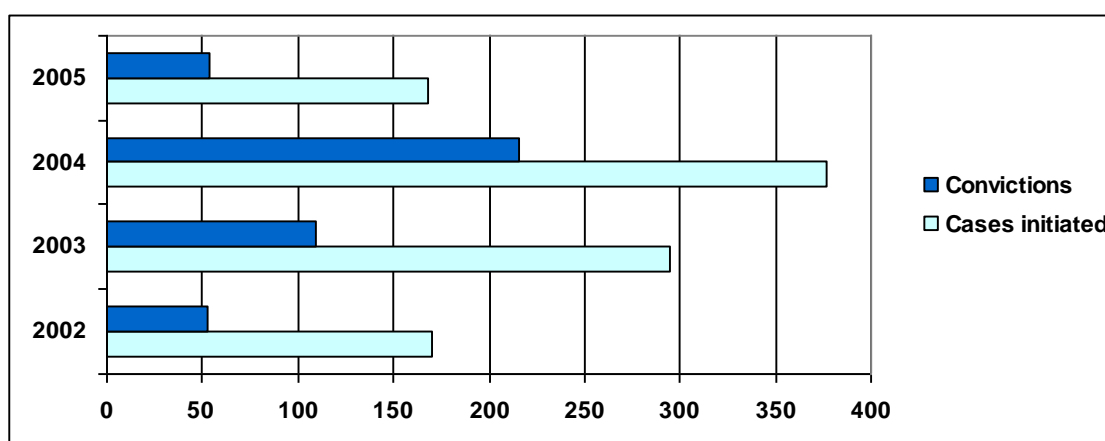
- Crime committed using weapons, ammunition, explosives, explosive devices or those imitating them, specially manufactured technical means, highly inflammable and flammable fluids, poisonous and radioactive substances, medicines or other chemicals and pharmaceuticals, as well as with physical or mental coercion or in a socially dangerous way.

Criminal legislation in Kazakhstan uses the concepts of *organized group* and *criminal organization (community)*. The former means a sustainable group that came together in advance; and the latter an organized group (organization) created to commit grave or especially grave crimes or an association of organized groups created for the same purposes (*paragraphs 3 and 4 of the General Section of the Criminal Code*). As noted above, committing a crime as part of an organized group or criminal community (criminal organization) is deemed to be one of the circumstances aggravating criminal liability and punishment. For example, in the case of illegal catching of sturgeon, deprivation of liberty for up to two years can be imposed as one of the alternative punishment measures. However, for the same offence committed by an organized group, deprivation of liberty from two to five years can be imposed.

However, it should be noted that the inspection reports of the competent environmental and natural resource authorities do not separately analyze organized environmental crime and do not even provide examples of it. The same is true for the summary of judicial practice with cases regarding environmental crimes prepared by the Collegium for Criminal Cases in 2005, which does not analyze environmental crimes or give examples of environmental crimes committed by an organized group. However, drawing on various informal sources, organized environmental crime is acknowledged to occur for offences such as illegal sturgeon fishing and trade and illegal extraction of, and trade in, sturgeon roe and poaching regarding some animal species entered into the Red Book.

In practice the prosecution of environmental crimes is relatively infrequent in Kazakhstan as is the use of criminal penalties. Data on the number of criminal cases between 2002 and 2005 (Figure 4) illustrate well this statement (this situation is totally different in comparison with the neighbouring Russia where some 40,000 criminal cases are tried annually). Cases related to natural resources are predominant. Convictions are issued in less than a half of initiated cases. The enforcement practice is further discussed in Chapter 6.

**Figure 4. Number of environmental criminal cases in 2002-2005**



Source: Statistical Yearbooks of Kazakhstan, 2003-2006.

### 4.3 Criminal enforcement procedures

The first stage of criminal prosecution is *initiating a criminal case* based on the information that has been obtained on the crime. For environmental crimes, the main sources of such information for the Prosecutors Office are:

- Files submitted by the competent public authorities responsible for the environment and use of natural resources;
- Applications from citizens and citizens' associations and information in the mass media;
- Direct detection of the facts by the environmental prosecutor's office, environmental or veterinary police.

For the competent public authorities in the area of environment and use of natural resources, the files are submitted directly to the Prosecutor's Office or the court. This stage ends with an order to initiate a criminal case issued by the prosecutor (or in some cases the interior authority). The copy of the order to initiate a criminal case is submitted to the prosecutor within twenty-four hours.

The next stage of criminal prosecution is the *prejudicial inquiry*, where the case concerning an environmental crime is examined by the interior authority inspector. The prejudicial inquiry generally ends not later than two months from when the case was initiated. The two-month period for the prejudicial inquiry can be extended based on the inspector's reasoned order on the following grounds:

- Complexity of the case – by the regional or equivalent prosecutor for up to three months;
- Extreme complexity of the case – by the oblast or equivalent prosecutor or their deputy for up to six months.

Having carried out the necessary investigative actions and established the evidence that an environmental crime was committed, the inspector prepares an indictment and submits it to the prosecutor. Should it consent to the indictment, the prosecutor's office refers the case to the court.

The next stage is the *prosecution in the court*. For cases regarding environmental crimes, the regional or equivalent court, usually where the crime was committed, is the court of first instance. The *trial* stage ends with issuing a verdict (conviction or acquittal) by the court. A copy of the verdict is handed to the defendant, his/her defence council and the prosecutor not later than five days after it was announced. The verdict of the court of first instance becomes operative within fifteen days after its announcement, provided it has not been appealed against by the convict or protested by the prosecutor.

The *verdict execution* stage begins on the day the verdict becomes operative or the case is returned by the appeals instance. Punishment in the form of a fine or confiscation of property is executed by the court that issued the verdict, as well as by the court at the location of the property and place of work of the convict. For other kinds of punishment, the judge sends an order to execute the verdict with a copy of the verdict to the authority responsible for its execution.

The following parties are involved in the criminal trial:

- *Court* – the body administering justice in criminal cases.
- Public authorities and officials engaged in criminal prosecution for environmental crimes:

- Prosecutor;
- Investigative or interrogation authority (interior authorities, national security authorities).
- Parties to the trial defending their own or represented rights and interests:
  - *Suspect* – person for whom a criminal case was initiated due to suspicion that he/she committed a crime;
  - *Defendant* – person for whom an order was issued to bring her/him in as defendant;
  - *Defence council* – person defending, according to law, the rights and interests of the suspects and defendants and providing legal assistance to them;
  - *Person affected (representative thereof)* – person to whom the crime caused moral, physical, or property damage (his/her representative).
- Other parties involved in the criminal trial:
  - Witness;
  - *Expert* – person disinterested in the case who has special scientific knowledge;
  - *Specialist* – person who has special knowledge and skills necessary to facilitate the collection, examination, and assessment of evidence, as well as use of technical devices;
  - Translator;
- *Attesting witness* – person engaged by the criminal prosecution authority to attest the fact that an investigative action was carried out, its progress, and outcomes;
  - Court session secretary;
  - Bailiff.

Judges are both constrained in their action and have some discretion. Thus they are obliged to comply accurately with the requirements of *the Constitution* and other regulations and administer justice in compliance with the rules set by the *Code of Civil Procedure* and *Code of Criminal Procedure*. However, they address, largely at their discretion, issues of the amount of compensation for the environmental damage caused by the violation of legislation and punishment imposed for environmental crimes.

The current *Criminal Code* provides for alternative punishments for the same constituent elements of a criminal offence. For instance, the following may be imposed for ambient air pollution: criminal fine; or deprivation of the right to hold certain positions or engage in certain activities for up to five years; or correctional works up to one year; or arrest for up to three months.

#### 4.4 Appeal procedure and grounds for appeal

A court verdict which has not become operative can be appealed against and protested by the parties in the appeal procedure within fifteen days from the date it was issued; and by the convicts in detention, within the same timeframe from the day the verdict was served. Collegiums for criminal cases of the regional and equivalent courts are the appeals instances for cases regarding environmental crimes. A case is tried in the appeal procedure not later than within one month from the date it was received. The following can serve as grounds for revision of the verdict of the court of first instance:

- One-sided and incomplete nature of the trial;
- Inconsistency of the court findings set forth in the verdict (judgment) with the actual circumstances of the case;
- Material violation of the law of criminal procedure or misapplication of the criminal law;
- Inadequacy of the punishment for the gravity of the crime and personality of the convict.

The following have a right to appeal against the verdict in the appeal procedure: the convict, acquitted person, their defence counsels and legal representatives, the person affected and their representative. The Prosecutor involved in the trial of the case as public prosecutor can also protest against the verdict. Furthermore, the Prosecutor General and his deputies, prosecutors of oblasts and equivalent prosecutors and their deputies, prosecutors of regions and equivalent prosecutors and their deputies have a right to protest against the verdict, within the limits of their competence, regardless of their involvement in the trial of the case.

The verdict of the court of first instance, as well as appeal and supervisory judgments can be appealed against and protested by the parties in the supervisory procedure. Generally, the supervisory collegium of the respective oblast and equivalent court plays the role of a supervisory instance for environmental crimes. The supervisory collegium of the Supreme Court tries cases based on the supervisory complaints and protests of the Prosecutor General in cases prescribed by the *Code of Criminal Procedure*. The grounds for revision of an operative verdict or judgment are the violation of the constitutional rights and freedoms of a citizen or misapplication of the law in the investigation or trial of the case, which entailed:

- Conviction of an innocent person;
- Unfounded acquittal or dismissal of the case regarding the person charged with a crime of medium gravity, grave or especially grave crime;
- Deprivation of the person affected of their right to judicial protection;
- Inadequacy of the punishment imposed by the court for the gravity of the crime and personality of the offender.

There is no time limit for a revision of the supervisory procedure due to innocence of the convict or due to the need to apply the law on less grave crimes, because of the severity of the punishment or for other reasons improving the condition of the convict. In contrast, appeal or protest of the supervisory procedure aggravating the condition of the convict or against an acquittal or court order to dismiss the case must be carried out within six months from when the respective verdict became operative.

## 5. MONETARY PENALTY ASSESSMENT

### 5.1 Fine assessment within administrative enforcement

Kazakhstan uses variable fines that may vary, however, only within a specified interval. The *Code of Administrative Offences* puts forward three approaches to assess monetary penalties linked to an administrative offence: (i) in minimum estimated rates (in the majority of cases); (ii) based on the environmental damage (e.g. for soil destruction, Article 250); (iii) as a percentage of the environmental pollution charge rate<sup>9</sup> (e.g. in the absence of a valid environmental permit or for non-compliance with Emission Limit Values (ELV) specified in permits – Article 243). For individuals or officials, the administrative fine is only assessed based on the so-called “minimum reference rate” (MRR), which is a standard amount revised annually and used specifically for penalty calculation (it is different from minimum wage). All three approaches are applied to legal entities. MER level is set for all of the country on an annual basis within the framework of the *Law on the Republican Budget for respective year*. Its increase seems to follow the GDP growth (Table 4).

**Table 3. Evolution of the minimum reference rate in 2000-2007 in Kazakhstan, Kazakh Tenge**

Indicators	2000	2001	2002	2003	2004	2005	2006	2007
Minimum reference rate (MRR)	725	775	823	872	919	971	1030	1092
MER Index	100	107	114	120	127	134	142	151
GDP index	100	114	124	133	143	153	164	172

Source: Kazakh legislation, calculations by report authors.

The maximum level of possible fine per violation is different for various areas of environmental law (Table 3). It was not quite clear how these levels are establishing and authorities may want to look into this subject in the future to ensure policy coherence. This level is quite low compared to some OECD countries and neighbouring China and Russia.

**Table 4. Examples of maximum levels of fines applicable in 2005, Kazakh Tenge (KZT)**

Field of legislation	Maximum administrative fine	
	Individual	Legal person
Ambient air protection	4,855	48,550 (1 000 percent of the pollution charge rate)
Water protection	29,130	97,100
Waste management	4,855	48,550 (1 000 percent of the pollution charge rate)
Chemicals management	Not applicable	194,200

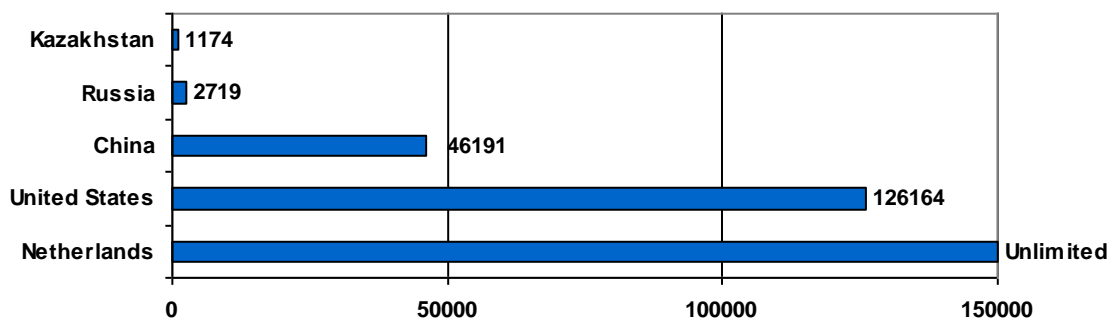
Note: In 2005, the GDP per capita equalled in 2005 **494 401 KZT**. 1 Euro = 164.42 KZT; 1 USD = 132.88 KZT.

Source: Vadim Ni, based on Kazakhstan's legislation.

<sup>9</sup> In this case, the administrative fine is calculated by multiplying annual emissions by the pollution charge rate and by 1,000 percent. For example, in 2006 the pollution rate of sulphur dioxide in ambient air in the North Kazakhstan Oblast was set at KZT 1 800 per tonne. An administrative fine for 10 tonnes of sulphur dioxide emitted above the ELV was KZT 180 000.



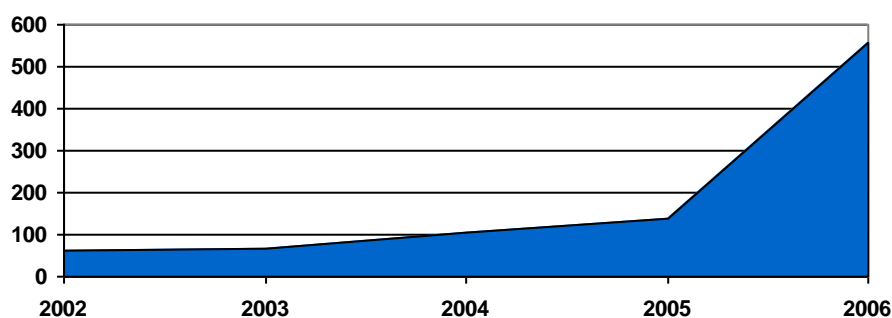
**Table 5. Maximum administrative fines for legal persons per offence, euros (data as of 2007)**



Source: OECD, 2008.

The available data did not allow an analysis of the minimum and maximum levels of actual fines, nor to calculate averages. Statistical information was available on the total amount of fines, which has seen a ten-fold increase. The amounts levied are even higher, since collection rates do not reach more than 90% and in some cases might be as low as 10%.

**Table 6. Amount of fines collected in Kazakhstan, million Kazakh Tenge (2002-2006)**



Source: Statistical Yearbooks of Kazakhstan, 2003-2006.

Analytical tools to estimate unlawful financial gains from non-compliance and the affordability of fines are missing. Therefore, according to the regulated community and NGOs, the application of fines often lacks proportionality.

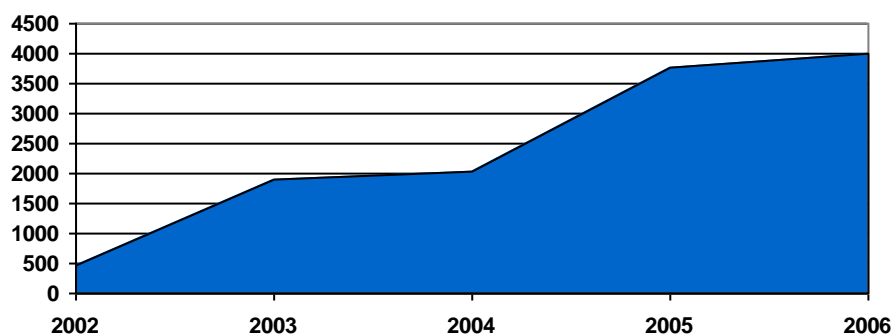
## 5.2 Assessment of damage compensation claims

Damage compensation claims are calculated by inspectors and may be paid voluntarily or enforced through Economic Courts. For example, in 2005 the CERC claimed damage compensations in 2,431 cases for the amount of 3.8 billion Tenge, of which 3.5 billion Tenge were paid voluntarily thus resolving 2,094 cases. Collecting damage compensations through the court procedure is more difficult, and collection rates are within the range of 10-25%.

Either direct or indirect methods of damage assessment are used. Within the direct method of assessment, actual costs necessary for environmental rehabilitation are determined. It is used where the consequences of the damage can be eliminated by engineering, technical, and technological or other solutions. For example, it is applied in cases of violation of the non-hazardous waste placement rules. The indirect method is largely applied in cases of pollutant release into ambient air, wastewater

discharges, as well as in cases of violation of the hazardous waste placement rules. This method employs calculations based on the volume of pollutant release and various coefficients that make the method unreliable therefore challenged in court with regularity.

**Table 7.Amount of damage compensations in Kazakhstan, million Kazakh Tenge (2002-2006)**



Source: Statistical Yearbooks of Kazakhstan, 2003-2006.

Often, the correctness of calculations is challenged as the calculation methods lack robustness. Inspectors consider this instrument to be ineffective due to the fact that in most cases environmental consequences are not addressed and money simply “dissolves” in the state budget. It is believed that requiring the regulated community to finance and manage rehabilitation of environmental conditions would be more environmentally effective and cost efficient.

### 5.3 Criminal fine assessment

The fine for a criminal offence is set through MRRs or as an amount of wage or other income of the convict for the period set by the court. The amount is determined by the court, taking into account the gravity of the crime committed and property status of the convict. Thus a fine can be imposed by the court in the amount from 25 to 20,000 MRRs. A fine based on the wage or other income can be imposed for a period from two weeks to one year.

### 5.4 Discretionary powers to assess fines

Although the powers of inspectors to apply administrative sanctions are limited, certain discretion exists due to the fact that the Code of Administrative Offences establishes only the upper and lower limits of fines. At the same time, the Code links the right to impose fines to the officials’ rank: inspectors may impose a fine on physical persons up to ten, on officials – up to 25, and on legal entities – up to 150 MRRs, while chief inspectors may impose a fine on physical persons up to 50, on official – up to 150, and on legal entities – up to 1,000 MRRs. Similarly, courts have discretion in establishing criminal fines.

## 6. COMPARATIVE ANALYSIS OF THE ENFORCEMENT PRACTICE

### 6.1 Numbers of cases

Analysis of periodic performance reports on inspection and law enforcement activities of various public authorities, as well as of the respective data of the Statistics Agency and the Supreme Court shows the application of administrative penalties is far more common than the application of criminal penalties, the latter forming less than one percent of the total number of cases. In cases of enforcement of the legislation on protection of ambient air and water resources, waste and hazardous chemicals management, the use of criminal proceedings is reduced to a few tenths of one percent. The bulk of criminal offences concern the protection and use of flora and fauna. The distribution of administrative cases by medium (ambient air, water, animal and plant kingdom) is more balanced and amounts to several dozens of thousands for each medium.

### 6.2 Difficulty of proof

The process of proof in administrative enforcement is less problematic and is usually much less time-consuming compared to the criminal or civil trial for environmental damage compensation. Constituent elements of an administrative offence in the area of environmental protection and use of natural resources are associated mostly with formal violations (timeframe, failure to carry out mandatory environmental activities, exceeding environmental standards, lack of treatment facilities or meters, failure to provide information, etc.). This makes it easier to establish and prove the facts necessary to hold someone administratively liable.

When an environmental offence is tried in a civil or criminal trial, the facts addressed are more difficult to establish and the circumstances examined are more difficult to prove, *e.g.* the extent of environmental damage; damage caused to human health; intent to carry out an illegal act, causal relationship between the unlawful act and environmental damage, etc. This concerns primarily protection of ambient air, water bodies, mineral resources, and land. In contrast, with specific species of fauna or flora, criminal liability is easier to establish. For example, these are: site of the act (*e.g.* a protected area or spawn areas) and use of special tools and means (explosives and chemicals, electric current and other means of mass destruction of biota).

As a result, according to the summary of 2000-2003 judicial practice with cases regarding environmental crimes, 98 percent of persons convicted for illegal extraction of aquatic animals and plants were held liable for fishing during spawning. It is also notable that in a number of cases the judges imposed a criminal sentence for illegal fishing where very minor environmental damage was caused (KZT 44, KZT 22, etc.).<sup>10</sup>

Another important aspect for comparative analysis of the opportunities for proof in the administrative and criminal trial of cases is the offender. In Kazakhstan, both an individual and a legal entity can be recognized as an administrative offender, while only an individual can be a criminal offender. This makes it rather difficult to hold criminally liable a guilty person in cases of an environmental crime committed, for example, by businesses such as an industrial installation.

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<sup>10</sup> It amounts to several tens of cents in the US dollars.

### 6.3 Variety of penalties

In a non-criminal trial of cases regarding non-compliance with environmental and natural resources legislation, the following sanctions are applied as a primary response against the violators, in descending order of their frequency:

- Fines;
- Environmental damage compensation;
- Deprivation of special right or license;
- Suspension or banning of the operation of a facility.

A fine is imposed as the primary penalty for the overwhelming majority of administrative offences; other penalties are usually imposed additionally to a fine. A fine is envisaged for all kinds of administrative offences in the area of the environment and use of natural resources, and for thirty-four *corpus delicti* out of seventy it is imposed as the only penalty. Furthermore, for fifty out of seventy constituent elements of an administrative offence in the area of environment and use of natural resources, only a fine can be prescribed as the primary penalty; in other cases, it is a fine or a warning (Annex 3).

For example, the operational suspension of a facility or banning procedure is usually only initiated if the user of natural resources systemically fails to fulfil previous orders to eliminate the violations detected at the facility. However, even taking into account this circumstance, the number of administrative cases whereby fines are imposed for the majority of environmental sites exceeds by an order of magnitude and more the total number of cases where, along with the fine, other penalties are also imposed.

A broader variety of penalties is envisaged for environmental crimes, including fines, correctional works, personal restraint, deprivation of freedom, arrest, and deprivation of the right to engage in certain activities; and for each of the specific kinds of environmental crime an alternative set of response measures against the offender can be applied (Annex 4). For this reason, a fine is not the prevailing penalty in criminal trials of cases; correctional works and personal restraint as such is used more often, including conditionally.

### 6.4 Treatment of multiple and repeated violations

Under *Article 66 of the Code of Administrative Offences*, a person on whom an administrative penalty was imposed is deemed to have been subjected to such a penalty for a year from when the execution of the order to impose the penalty was completed. A similar administrative offence committed again during the year is deemed to be a circumstance aggravating the liability for an administrative offence. It is possible for an entity to be a repeated yet infrequent offender. It is also possible that inspectors would miss or be prevented from using this aggravating factor because of restrictions imposed on the frequency of planned on-site visits.

The *Criminal Code* deems multiple crimes and repetition of crime to be a circumstance aggravating criminal liability. The multiple nature of the crime is generally understood as committing two or more acts described in the same article or paragraph of the article of the *Special Section of the Criminal Code*; and the repetition of crime as intentional crime committed by a person convicted for an intentional crime committed earlier.

There are no statistics on the facts of administrative offences or criminal cases in the area of environment and use of natural resources committed repeatedly in Kazakhstan. Therefore, it is not possible to consider the consequences of these provisions.

### **6.5 Deterrent effect**

Unlike environmental crimes, administrative offences in the area of environment and use of natural resources are not perceived as actions causing moral censure by society. In this context, it is interesting to note that the administrative response of administrative arrest, which is to a large extent related to public censure, is not used for an environmental offence. The situation is similar with repeated and even regular administrative offences. One of the reasons for such an attitude is the understanding that addressing the issue of environmental non-compliance often requires capital investment from industries in new technologies, and construction of treatment and processing plants.

In such conditions, the deterrent effect most often relies on the threat of taking stringent financial measures. These include: denial of an environmental pollution permit or denial of the renewal by the state of the natural resource use contract for the following period, and, in some events, even a ban or suspension of the non-complier or demolition of the constructed facility. At the same time, taking such measures with regard to industries can have major economic implications for the economy of the country as a whole or some of its regions, which is a major limiting factor in their practical application.

In areas where mostly individuals and small enterprises are principal offenders, the administrative fine is also an inefficient deterrent in many cases. Poaching, illegal cutting of trees and plantations in localities and illegal construction in the territory of water protection zones can serve as specific examples. *Inter alia*, this is due to social and economic problems (offender's dependence on the illegal activity as the sole source of income; lack of the offender's official income on which an administrative fine could be imposed; disproportionate amount of the economic benefits from the illegal activity compared to the size of fines imposed). Stringent economic measures (facility demolition, revocation of the environmental permit or right to use natural resources) with regard to small sources of environmental impact can also be taken to a rather limited extent. In cases of poaching and logging, the administrative fine being an inefficient deterrent is largely the reason why the grounds in the legislation for imposing criminal liability for such violations were extended.

Imposing a punishment through the criminal procedure for violation in the area of environment and use of natural resources is accompanied by bringing into play the mechanism of public condemnation and censure of the violator, even if a fine is imposed as a response. Penalties for environmental crimes such as personal restraint, deprivation of liberty, correctional works, and deprivation of the right to hold certain positions or engage in certain activities involve public censure to an even greater extent. In practice, for minor environmental crimes committed for the first time, judges impose conditional deprivation of liberty with a probation period. This type of criminal punishment is sufficient to discourage repeated violations.

### **6.6 Environmental effect of enforcement**

Core environmental compliance and enforcement indicators used in Kazakhstan are insufficient to provide an objective comparative assessment of the environmental effects of cases tried in the administrative and criminal procedures. They build on indicators such as the number of inspections conducted and violations detected, fines imposed and levied, legal actions initiated and collected, and cases regarding environmental crimes referred to the prosecutor's office and initiated.

## 6.7 Trial time and costs

Trial of administrative cases regarding environmental non-compliance is the quickest. It usually takes not more than one month from the moment an administrative offence report is prepared until the order regarding the administrative offence becomes operative, provided it is not appealed against. A criminal trial of non-compliance cases usually lasts at least three months from the moment the criminal case is initiated until the verdict of the court of first instance becomes operative, provided it is not appealed against. Environmental damage compensation in the civil procedure takes several months from the moment a statement of claim is filed with the court until the verdict of the court of first instance becomes operative. The actual timeframe within which the damage compensation adjudged by the court is collected depends much on the promptness and efficiency of the bailiff. In the event of voluntary damage compensation it is often a matter of a few days.

Comparative analysis shows that, for environmental and natural resource use legislation, the trial of cases in the administrative procedure is the most effective one in terms of its duration and is least costly both for the public authorities and the regulated community. Participation in the trial of criminal cases entails more expenses for the competent public authorities, such as travel and accommodation costs in some cases and significant amount of staff time. For a party held liable for violation of legislation, participation in the criminal trial or civil trial for environmental damage compensation can involve significant additional expenses for hiring a defence counsel or professional lawyer.



## 7. CONCLUSIONS AND RECOMMENDATIONS

An effective and efficient regime of non-compliance response to environmental offences is essential to achieve the objectives of environmental protection. Such a regime may have wider benefits than ensuring respect for the rule of law and protecting the environment, e.g. it may generate income from fines and other monetary penalties. However, equally it is important that an environmental sanctions regime is not primarily used to achieve some other (stated or unstated) objective of government policy or that methods used to achieve compliance undermine public confidence in that regime or in governmental intervention more generally.

The review and comparative analysis of the legal and institutional framework, enforcement procedures, as well as their practical application, allows conclusions to be made about some characteristics of enforcement in the area of environmental management in Kazakhstan. This chapter will discuss some of these conclusions and provide recommendations for action based on the study.

### **Instruments and strategies of enforcement**

For a long period, the administrative path of environmental enforcement has clearly prevailed over the civil and criminal procedures in Kazakhstan, as it is the case in many other countries. Statistics for the last few years reveal a noticeable increase in the number of administrative cases though the spectrum of constituent elements of administrative offences, which are described in the Code of Administrative Offences, has not been widened to a comparable extent. The latter are, however, in constant evolution in order to guarantee the enforceability of newly adopted pieces of legislation.

Although the panoply of administrative sanctions foreseen by law is close to international practice, the set of measures used in practice in Kazakhstan in response to administrative non-compliance is quite limited. In the overwhelming majority of cases fines are the preferred sanction. The procedure and practice of responding to repeated violations is still underdeveloped.

Criminal enforcement has been developing mostly as an addition to the administrative procedure for some categories of cases regarding violation by individuals and private entrepreneurs of the requirements of forest legislation, legislation on the specially protected areas, and protection, reproduction, and use of animals. In other cases, particularly those linked to pollution, the environmental crime articles of the Criminal Code *de facto* only serve as a tool to create a deterrence atmosphere and are hardly ever brought into play in reality. This is often linked to the difficulty of collecting evidence in support of a criminal prosecution.

The range of criminal sanctions is also limited, in particular that they do not apply to those responsible for legal entities (managers and owners). Including such a provision would serve as a strong message that environmental protection is to be taken seriously.

Civil trials serve a rather small percentage of environmental non-compliance, predominantly in cases when competent authorities fail to ensure voluntary environmental damage compensation or ensure it incompletely. Furthermore, in some cases the administrative fines imposed are, in essence, environmental damage compensation and, thus, the administrative procedure overlaps with the scope of civil enforcement.

### *Recommendations:*

- Continue harmonising the constituent elements of an administrative offence with any new piece of environmental legislation. As part of Regulatory Impact Assessment procedures, use instruments similar to the Netherlands' "Table of Eleven" to ensure full enforceability of proposed regulatory requirements;
- Further diversify the practical use of administrative sanctions beyond monetary penalties. Where appropriate, start the enforcement pyramid with non-repressive responses to non-compliance. Consider a more frequent use of social sanctions, e.g. by publishing the list of enterprises that violate environmental law on the web sites of competent authorities;
- Make a more systematic recourse to informal contacts with OECD inspectorates where necessary to correct the behaviour of Joint Stock Companies or multinational enterprises. Use the implementation mechanism of the OECD's Guidelines for Multinational Enterprises when multinationals violate the requirements of these Guidelines;
- Amend the Criminal Code to ensure that company managers and employees are able to be held criminally liable for the decisions that they make which may lead to environmental crime;
- When deciding on the level on sanctions, make a comparative analysis with corresponding legislation at least in the neighbouring countries, in order to ensure the coherence of enforcement strategies, primarily for those offences that may have a transboundary character or where organised crime may be involved;
- Systematically increase the level of a penalty in cases of repeated violation of environmental legislation. In relation to this, extend the time limit within which repeated violations can be taken into account so that legal restrictions on routine inspection frequency are not an impediment to the use of this legal sanction.

### **Design of monetary sanctions**

Fines are applied in Kazakhstan on a progressive scale, depending on the approximate estimate of the volume of economic activities (individuals, private entrepreneurs, or legal entities engaged in large entrepreneurship). They constitute a significant source of replenishment of the national and local budgets. Their environmental effect is not known and difficult to assess because of a missing analytical and methodological basis. Lack of reduction in the total amount of air emissions against the background of a substantial increase in the use of fines to address air pollution cases indicates that the environmental effectiveness of fines might be quite low. However, more in depth analysis is needed to see the picture clearly and unambiguously.

The revenue-raising focus of administrative fines transforms them into a fiscal tool rather than an instrument of environmental policy. Annually, the Ministry of Finance imposes on line ministries annual plans for revenue-raising linked to fines and monitors their implementation. This creates perverse incentives for inspectors and encourages what could be called a "hunt for fines". In their turn, the regulated companies perceive fines as a sort of running cost that does not cause any real financial risks or social consequences.

Another repercussion of the limited approach to penalties is the public distrust of enforcement and government's intervention in general as a tool for improving environmental conditions in the country and securing the citizens' right to an environment favourable for life and health. As a result, where a violation is detected, public opinion often becomes radical and people demand that the activity or construction of facility that has adverse environmental impact on their living conditions be banned completely. At the same time, a radical intervention, *e.g.* closing down non-compliant facilities, is difficult to implement because of economic and employment consequences for local communities. This means that improving the design of fines is a matter of immediate priority.

#### *Recommendations:*

- Regularly analyse the impact of monetary penalties on the behaviour of the regulated community and, when a robust methodology becomes available, on environmental results;
- Amend the Code of Administrative Offences so that it includes the notion of economic gains from non-compliance. Such gains could be estimated based on economic models and recovered from the offender.
- To enable the use of such models, the length of administrative procedure should be prolonged for significant non-compliance, staff trained, and the economic models should be fully transparent and available to any party for independent verification. At the same time, the authorities should not make the use of this approach universal, as it is quite resource-intensive. It should be left for cases that are most serious and long-lasting.

#### **Analytical soundness, transparency and accountability of enforcement**

In order to be effective and efficient, environmental enforcement needs a sound analytical basis. Furthermore, a practical application of the transparency and accountability principles is needed to ensure the fairness of sanctions. This is important for the public and for business. In Kazakhstan, legislation and procedures are generally supportive to such an approach. However, its use in practice still has to take roots. Data collection is regular, though this results in information that is not sufficiently adapted to the needs of strategic planning and are not disclosed to an extent that would stimulate social pressure on offenders. The protection of inspection information is generalised to any information related to enforcement cases, rather than being limited to forensic or intelligence information related to criminal cases.

The government needs to pay more attention to addressing information asymmetries among data users. Different authorities should aim to establish a single coherent set of indicators, monitored with a proper periodicity and statistical soundness. They also need to prepare and share periodic summary reports (including a review of performance) on the inspection, enforcement and sanctioning activities. These should include data on the enforcement of legislation by the law enforcement authorities (courts, environmental prosecutors' offices, and environmental police). Regular reviews of environmental enforcement, including a careful consideration of the deterrent effect of various sanctions, will need to be conducted.

#### *Recommendations:*

- Revise the provisions of the Environmental Code on the confidentiality of inspection information to ensure the availability of information necessary to enhance public participation in line with the Aarhus Convention;

- Better monitor the use of sanctions through improved indicators. In particular, record the roots of non-compliance, the type of offender (large industry versus SMEs), the economic sector, and any facts of repeated violations. By developing databases with administrative information, ensure the full traceability of particular cases and the behaviour of individual members of the regulated community;
- Analyse enforcement information in light of environmental and economic results, and regularly issue analytical reports of the level and evolution of environmental compliance through a collaborative effort of all competent authorities involved in environmental and natural resources management. This should help ensure policy and enforcement coherence at least within the environmental sector. Where possible, make cross-sector and cross-country analysis;
- Use conclusions from analysis to amend legislation and enforcement policies. To this end, consider organising thematic annual meetings of all three branches (legislative, executive, and judicial) involved in environmental regulation and enforcement. Build on the prior practice to discuss environmental law implementation within the Parliament, but enlarge the audience of meetings organised by the Parliament and make them more interactive and decision-oriented;
- Disclose enforcement data through usual channels and introduce new ones, e.g. web based tools such as the United States' "Environmental Compliance History On-line" to make the general public aware of government's efforts and results to ensure compliance;
- Develop and publish an enforcement policy which sets out in a single document how sanctions are to be used and their relationship to other work areas. Such a policy should be developed in consultation with industry and public stakeholders;
- Make publicly available periodic reports (analytical reviews, summaries) on environmental inspection and enforcement at request and proactively through electronic and other means.

### **Organisational capacity and stakeholder roles**

Compliance is checked and enforced by a number of governmental bodies with relatively clear (though very fragmented and sometimes duplicative) mandates. Parties other than the central government still have to be empowered to influence environmental enforcement. There are concerns, though, over the ability of various competent authorities to perform their functions because of limited organisational capacity and insufficient individual competence. The Ministry of Environmental Protection established a Training Centre for its staff but cross-fertilization between competent authorities is still poorly exploited and recourse to international networking and exchange is limited.

While many of the capacity concerns are being gradually addressed within the public administration reform, the lack of sufficient cooperation between authorities with regard to non-compliance detection and non-compliance response remains a significant impediment to delivering environmental outcomes. A critical challenge for preserving the professionalism of governmental authorities is staff turnover and insecurity, which often make the results of training programmes extremely volatile. Where turnover is less of a problem, more structured training programmes are needed, involving different actors from both executive and judicial branches, the governmental and non-governmental sectors.

Non-governmental stakeholders have a broad opportunity to detect environmental non-compliance and return industry to compliance through informal (such as social pressure) and formal (civil suits) mechanisms of enforcement. Therefore the competent authorities will need to assume the role of catalysing and facilitating the participation of commercial and non-commercial parties, which may act as indirect enforcers. These range from industry associations, through financial institutions, to citizens' environmental and other pressure groups. To this end, it will be important to review possible avenues for public participation in administrative enforcement and enable – through pro-active dissemination of information and lower court fees – civil judicial enforcement.

#### *Recommendations:*

- Develop and pass regulations on the competence and powers of the local executive authorities' officials to initiate cases regarding the administrative offences in environmental protection and use of natural resources, including at the administrative courts;
- Identify conditions that would enable competent authorities to retain staff, in particularly highly qualified experts, and would motivate higher performance;
- Provide relevant training for all competent branches of government, including the judiciary. Training should include the evidence base for enforcement, compliance with enforcement procedures and the soundness of decision-making. To this end, a training course on environmental enforcement could be established by the Training Centre of the Ministry of Environment Protection in cooperation with Public Administration Academy;
- Extend international exchange and networking and offer opportunities for training abroad first of all to experts that deal with cases of a transboundary character;
- Consider a more systematic use of the requirement for an independent environmental audit in cases of significant or repeated violation of law;
- In cooperation with non-governmental stakeholders, design and later introduce in practice the procedure for ensuring the general public's participation in the administrative enforcement of environmental legislation.

#### **A roadmap for reform**

Based on policy recommendations provided in this report, it is recommended that the Ministry of Environment Protection prepare a reform plan that would include specific measures and a timeframe and resources for its implementation. The strong link between current enforcement strategies with budgetary revenues or the possible impact on industry means that any reform might encounter resistance from line ministries, local authorities, or industrial lobbyists. Therefore consensus building needs to become a constituent part of the reform process. Also changes in the design of sanctions and the path of their enforcement need to be designed in a way that prevents corruption.

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## ANNEX 1. PRINCIPLES OF ADMINISTRATIVE ENFORCEMENT IN KAZAKHSTAN

Kazakhstan has set out the principles for the application of administrative offence in *Chapter 2 of the Code of Administrative Offences*. These are:

- Lawfulness and equality before the law;
- Exclusive competence of the court (concerning the cases within the competence of the court under the law);
- Presumption of innocence;
- Guilt principle;
- Inadmissibility of repeated administrative liability;
- Humanism (safety of the person and causing no physical suffering and not degrading the human dignity of the offender);
- Security of the person and respect for human and dignity;
- Privacy and inviolability of private property;
- Independence of judges;
- Language of the proceedings (proceedings to be in the official language, as well as in Russian and other languages, as necessary);
- Relief of the duty to testify (against oneself, one's spouse, and next of kin the range of which is determined by law);
- Securing the right to skilled legal aid;
- Publicity of the proceedings in the cases regarding administrative offences (openness of the proceedings in the cases regarding administrative offences both at the court and by other bodies (officials));
- Freedom to appeal against procedural actions and decisions;
- Judicial protection of rights, freedoms, and lawful interests of the person.<sup>11</sup>

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<sup>11</sup> The concepts and approaches to implementing those principles are defined in Articles 9-27 of the Code of Administrative Offences.

## ANNEX 2. PRINCIPLES OF APPLICATION OF CRIMINAL LAW IN KAZAKHSTAN

The *Criminal Code* does not itself provide a list of principles for the application of criminal law, but based on an analysis of respective provisions of the *Constitution* and the text of the *Criminal Code*, the following criminal law principles can be identified:

- Principle of lawfulness;
- Principle of equality of citizens before the court and the law;<sup>12</sup>
- Principle of guilty liability<sup>13</sup> for the criminal act committed;
- Principle of personal liability;<sup>14</sup>
- Principle of justice;
- No one can be held criminally liable for the same crime more than once.
- Principle of inevitability of criminal liability and punishment.

The main aim of criminal prosecution for violation of legislation is the prevention of acts dangerous for an individual, society, and the state and their socially dangerous consequences, *i.e.*, protection of public values and crime prevention (deterrence). Another principle of application is that liability is imposed exclusively through a judicial process. The *Code of Criminal Procedure* determines the underlying principles of the criminal enforcement procedure.<sup>15</sup>

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<sup>12</sup> The **principle of equality** means that “persons who committed crimes shall be equal before the law regardless of their origin, social, official and property status, gender, race, ethnicity, language, religion, convictions, affiliation to public associations, place of residence or any other circumstances.”

<sup>13</sup> According to the **principle of guilty liability**, a person is only subject to criminal liability for those socially-dangerous acts and socially-dangerous consequences with regard to which his/her guilt (intent or negligence) has been established;

<sup>14</sup> The principle of personal liability means that only an individual can be held criminally liable and that he/she can only be liable for what he/she committed personally.

<sup>15</sup> These principles include: lawfulness; administration of justice by court only; judicial protection of human and civil rights and freedoms; respect for human honour and dignity; security of person, protection of civil rights and freedoms in the proceedings in a criminal case; privacy, privacy of correspondence, telephone conversations, mail, telegraph and other communications; security of residence; security of property; presumption of innocence; inadmissibility of reconviction or criminal re-prosecution; administration of justice based on the equality before the law and the court; judge’s independence; court procedure on the adversary basis and equality of the parties; comprehensive, complete, and objective examination of the circumstances of the case; assessment of evidence based on moral certainty; securing the suspect’s and defendant’s right to defence; relief of the duty to testify (against oneself, one’s spouse, and next of kin the range of which is determined by law, as well as the privacy of confession); securing the right to skilled legal aid; publicity (open trial of a criminal case by all the courts and all the court instances); language of the criminal procedure (the criminal procedure is carried out in the official language and, if necessary, Russian or other languages are used in the proceedings on a par with the official language); and freedom to appeal against procedural actions or decisions.

### ANNEX 3. PENALTIES FOR ADMINISTRATIVE OFFENCES IN ENVIRONMENT AND USE OF NATURAL RESOURCES

Article of the Code of Administrative Offences	Penalty
Article 240. Violation of Sanitary and Environmental Requirements	Warning, fine
Article 241. Evasion from Environmental Pollution Clean-Up Measures	Fine
Article 242. Non-Disclosure of Above-Level Industrial Emission of Pollutants and Waste Placement	Fine
Article 243. Exceeding the Limit Values for Ambient Air Emissions, Effluent Discharges, or Emission of Pollutants, Wastewater Discharges or Industrial or Municipal Waste Placement without a Permit	Fine
Article 244. Violation of the Rules of Operation or Failure to Use Devices for Treatment of Ambient Air Emissions and Wastewater Discharges	Fine
Article 245. Non-Compliance with Statutory Requirements on Mandatory State Environmental Review	Fine
Article 246. Putting into Operation Vehicles and Other Mobile Means Exceeding the Standards for the Concentration of Pollutants in Emissions	Fine, suspension or prohibition of operation
Article 247. Operation of Motor Vehicles and Other Mobile Means Exceeding the Standards for the Concentration of Pollutants in Emissions	Warning, fine
Article 248. Violation of Legislation on Ambient Air Protection	Fine
Article 249. Non-Compliance with Ambient Air Protection and Fire Safety Requirements when Storing or Burning Industrial and Municipal Waste	Warning, fine
Article 250. Land Contamination	Fine
Article 251. Mismanagement or Failure to Use of Agricultural Land	Warning, fine
Article 252. Non-Compliance with Environmental Protection Regime Requirements for Land Use	Warning, fine
Article 253. Misuse of Land	Warning, fine
Article 254. Failure to Meet the Deadline for Returning the Land Occupied Temporarily or Failure to Fulfil the Duties to Bring it into Condition Good for Use as Designated	Warning, fine
Article 255. Carrying Out Prospecting Operations Without an Authorization to Use the Land Plot	Fine
Article 256. Failure to Meet the Deadline for Review of Applications for Land Plots	Fine
Article 257. Non-Disclosure of Information on Land Plots Available for Housing Construction, Special Land Fund	Fine
Article 258. Distortion of Land State Registration, Accounting, and Evaluation Data	Fine
Article 259. Carrying Out Operations for Geological Survey of Mineral Resources Without a Contract	Fine
Article 260. Violation of the Right to Geological Survey of Mineral Resources	Fine
Article 261. Violation of Industrial or Municipal Waste Placement or Wastewater Discharge Rules	Warning, fine
Article 262. Violation of Design Rules of Entities Engaged in Minerals Production and Treatment	Warning, fine
Article 263. Failure to Ensure Compliance with the Rules of Protection of Mineral Resources in the Construction and Putting into Operation of Entities Engaged in Minerals Production and Treatment	Fine
Article 264. Failure to Comply with Design Options for Production and Treatment of Minerals	Fine
Article 265. Violation of Environmental Norms and Rules When Using Mineral Resources	Warning, fine



Article of the Code of Administrative Offences	Penalty
and Treating Minerals	
Article 267. Violation of the Accounting Rules for the Status of Subsoils and Available Reserves of Mineral Resources	Fine
Article 268. Distortion of Primary and State Records for Production and Treatment of Minerals	Fine
Article 269. Violation of the Rules for Reliable Determination of the Amount and Quality of Produced and Treated Mineral Resources	Fine
Article 270. Violation of the Rules for Accounting for and Recovery and Disposal of Industrial and Municipal Waste	Fine
Article 271. Violation of the Rules for Bringing the Underground Workings and Drill Holes into Condition Ensuring Their Preservation and Public Safety	Fine
Article 272. Violation of the Rules for Liquidation and Preservation of Objects of Mineral Resources Usage	Fine
Article 273. Refusal to Report or Evasion from Reporting Information on Use of Minerals to State Mineral Resources Protection Authorities	Fine
Article 274. Issuance by Officials of Instructions or Authorizations Entailing Violation of the Legislation on Mineral Resources and Treatment of Minerals	Fine
Article 275. Violation of the Rules for Mineral Resource Use Operations	Fine
Article 276. Violation of the Water Resources Protection Rules	Fine
Article 277. Damaging Water Supply Facilities, Devices or Fire-Fighting Water Supply Systems, Violation of Their Operation Rules	Fine
Article 278. Illegal Construction Affecting the Condition of Water Bodies	Forced demolition of illegally constructed facility, fine
Article 279. Violation of the Rules for Primary Accounting for Waters and Their Use	Fine
Article 280. Distortion of Water Resources Accounting and Reporting Data	Fine
Article 281. Hindering Water Resources Management	Fine
Article 282. Illegal Use of Forest Fund Areas	Warning, fine
Article 283. Illegal Cutting and Damaging of Trees and Bushes	Confiscation of items that served as instruments of the specified violations, warning, fine
Article 284. Violation of Fire Safety Requirements and Sanitary Rules in Forests	Fine
Article 285. Violation of the Established Procedure for Use of the Cutting-Area Fund, Logging and Hauling of Timber, Extraction of Soft Resin and Wood Blood and Secondary Wood Materials	Warning, fine
Article 286. Violation of the Timeframe for Return of the Temporarily Occupied Forest Fund Areas and Specially Protected Natural Territories	Warning, fine
Article 287. Damaging Grasslands or Pastures or Unlawful Haymaking or Pasturage, Gathering of Drug Plants or Technical Raw Materials on the Forest Fund Land	Fine
Article 288. Violation of the Procedure or Timeframe for Reforestation of Logged Areas and Other Categories of Forest Fund Lands Intended for Restoration and Forest Breeding	Fine
Article 289. Destruction of Fauna Useful for Forests, As Well As Causing Damage to, or Contamination of, Forests by Waste, Chemicals or Other Damage to Forest Fund Lands	Fine
Article 290. Forest Use Inconsistent with the Permit Purposes or Requirements	Fine
Article 291. Construction and Operation of Facilities That Had Adverse Impact on the Condition and Reproduction of Forests	Fine
Article 292. Violation of the Prescribed Procedure for Designation and Valuation of Cutting-Areas	Fine

<b>Article of the Code of Administrative Offences</b>	<b>Penalty</b>
Article 293. Allowing the Felling of Timber in the Amount Exceeding the Estimated Cutting-Area	Fine
Article 294. Violation of the Rules of Transportation, Storage and Use of Plant Protection Means and Other Preparations	Warning, fine
Article 295. Violation of the Rules of Protection of Plant Vegetation Sites and Habitat, Rules of Creation, Storage, Accounting for, and Use of Zoological Collections, as well as Illegal Relocation, Acclimatization, Re-acclimatization and Cross-Breeding of Animals	Warning, fine
Article 296. Violation of the Rules of Protection of Fauna and Flora when Allocating, Designing and Constructing Settlements, Enterprises, and Other Facilities, Carrying Out Production Processes and Operating Vehicles, Using Plant Protection Means, Fertilizers and Other Preparations	Warning, fine
Article 296-1. Violation of the Procedure for Stay of Individuals in Specially Protected Natural Territories of Some Kinds	Warning, fine
Article 297. Damaging or Annihilation of Facilities Serving Selection and Genetic Purposes	Warning, fine
Article 298. Illegal Hunting or Use of Animal Kingdom	Warning, fine, confiscation of items that served as instruments or direct objects of the offence
Article 298-1. Violation of Fishing or Fish Reserves Protection Rules	Fine, confiscation of items that served as instruments or direct objects of the offence
Article 299. Violation of the Procedure of Assignment, Use, and Protection of Hunting Areas and Fishing Water Bodies	Fine
Article 300. Violation of the Rules for Treatment and Protection of Green Plantations	Fine
Article 301. Illegal Change of License Conditions or Violation of the Prescribed Procedure for Offshore Oil Operations	Fine
Article 302. Violation of Current Standards (Norms, Rules) or License Conditions Governing the Authorized Activities on the Continental Shelf	Fine, confiscation of vessel and instruments of offence
Article 303. Violation of the Rules for Conducting Marine Research on the Continental Shelf	Fine, confiscation of vessel and instruments of offence
Article 304. Violation of the Rules of Disposal of Waste and Other Materials or Preservation and Dismantlement Rules on the Continental Shelf	Fine, confiscation of vessel and instruments of offence
Article 305. Non-Compliance with Lawful Requirements of the Continental Shelf Protection Authority Officers	Fine, confiscation of vessel and instruments of offence, as well as of research results
Article 306. Illegal Transfer of Mineral and Live Resources of Continental Shelf	Fine
Article 306-1. Violation of Environmental Audit Legislation	Fine, deprivation of the right to engage in environmental audit

#### ANNEX 4. REMEDIES AGAINST ENVIRONMENTAL CRIMES IN KAZAKHSTAN

<b>Criminal Code Article</b>	<b>Criminal Penalties Possible</b>
Article 277. Violation of Environmental Requirements to Economic and Other Activities	Fine, personal restraint, deprivation of liberty
Article 278. Violation of Environmental Requirements in the Production and Use of Potentially Environmentally Hazardous Chemical, Radioactive and Biological Substances	Fine, personal restraint, deprivation of liberty
Article 279. Violation of Safety Rules When Handling Microbiological and Other Biological Agents and Toxins	Fine, personal restraint, deprivation of liberty
Article 280. Violation of Veterinary Requirements and Rules for Combating Agricultural Pests and Diseases	Fine, personal restraint, deprivation of liberty
Article 281. Water Pollution, Contamination, and Depletion	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, deprivation of liberty
Article 282. Ambient Air Pollution	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, deprivation of liberty
Article 283. Pollution of Sea Water	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, deprivation of liberty
Article 284. Violation of the Legislation on Continental Shelf of the Republic of Kazakhstan and Exclusive Economic Zone of the Republic of Kazakhstan	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works
Article 285. Damage of Land	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, deprivation of liberty
Article 286. Violation of the Rules of Protection and Use of Mineral Resources	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works
Article 287. Illegal Catching of Aquatic Animals and Plants	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, arrest
Article 288. Illegal Hunting	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, deprivation of liberty
Article 289. Violation of the Animal Kingdom Protection Rules	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works
Article 290. Illegal Handling of Rare and Endangered Species of Flora and Fauna	Personal restraint, deprivation of liberty
Article 291. Illegal Cutting of Trees and Shrubs	Fine, correctional works, deprivation of the right to hold certain positions or engage in certain activities
Article 292. Destruction or Damage of Forests	Fine, correctional works, arrest, deprivation of liberty
Article 293. Violation of Specially Protected Natural Territory Regime	Fine, deprivation of the right to hold certain positions or engage in certain activities, correctional works, personal restraint
Article 294. Failure to Take Measures to Clean-Up Environmental Pollution	Fine, deprivation of the right to hold certain positions or engage in certain activities, deprivation of liberty

## **AVENUES FOR IMPROVED RESPONSE TO ENVIRONMENTAL OFFENCES IN KAZAKHSTAN**

Kazakhstan has developed an extensive corpus of environmental laws and put in place a system of non-compliance response in order to make environmental law work. This system foresees administrative, civil, and criminal liability and provides for administrative and judicial paths of enforcement. It includes a panoply of sanctions, comparable in scope with those used in OECD countries. However, pervasive disregard for law continues to raise concerns in Kazakhstan as non-compliance prevents the country from achieving ambitious environmental objectives. To address this problem, the Ministry of Environment Protection of Kazakhstan and its Committee for Environmental Regulation and Control requested the OECD/EAP Task Secretariat to analyse the current system of environmental enforcement in light of good international practice and work out policy recommendations. The current study constitutes a response to that request.