An Australian Government perspective on developing an outcomes-based environmental approval system

Miranda Lello
Department of the Environment
Australia
miranda.lello@environment.gov.au

Paper: One of the objectives of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is 'to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'. In line with this objective, the EPBC Act sets out a process for assessment and approval of actions which will or are likely to have a significant impact on a matter of national environmental significance protected by the EPBC Act. The EPBC Act does not specify the type of regulatory mechanism to best achieve the objective of ecologically sustainable development.

The Australian Government Department of the Environment is investigating how an outcomes-based approach to environmental approvals could better achieve the objectives of the EPBC Act, while promoting innovation from businesses.

Background

Regulators can use a variety of approaches to achieve regulatory goals.

- *Prescriptive regulation* regulates the actions or activities of regulated entities. For example, regulating the kind of equipment which must be used in a factory to control emissions.
- *Management-based regulation* regulates the management practices an entity must have in place. For example, requiring businesses to submit plans for approval, and to comply with those plans.
- *Outcomes-based regulation* regulates the end result which an entity must achieve. For example, regulating the level of emissions from a factory, or the quality of air measured at specified locations in the vicinity of a factory.
- *Objectives-based regulation* sets up a framework based on specified objective, and regulated businesses must develop plans or processes designed to achieve those objectives.

Historically, environmental regulation in Australia and internationally has been prescriptive. Prescriptive regulation focuses on mandating particular technologies or processes that businesses must put in place. Outcomes-based regulations increased in popularity in the 1980s initially in the United States, following a broader desire to reduce government intervention. An early example of outcome-based regulations is the 1970 Clean Air Act in the United States. The Clean Air Act mandated a 90% reduction in exhaust emissions, *but did not specify how it should be achieved.* Business was able to decide what technologies and practices they would design and use to meet the target. Various forms of outcome-based regulations have since been adopted in a number of other countries, particularly for air and water quality, building and fire safety, energy efficiency, food safety, pipeline safety and work safety.

The benefits and risks of outcomes-based regulation

An outcomes-based regulation system will allow regulations to be tailored and fit-for-purpose for individual projects. Business will have increased flexibility and an incentive to develop more efficient and effective technological solutions to meet the required outcome. Outcomes-based regulation can potentially reduce compliance costs for innovative businesses, giving those businesses a competitive edge.[1] Outcomes-based regulation may also improve business

[1] Productivity Commission (2013), *Major Project Development Assessment Processes*. pp. 25-26.

and community understanding of the regulatory objectives, by clearly linking regulation to environmental protection goals.[2]

Outcomes-based regulation can benefit the environment by focusing business and regulators on defining, understanding and achieving environmental outcomes. In addition, requiring businesses to achieve certain outcomes increases certainty about the acceptability of the impacts of an action and allows for flexible, adaptive management. Encouraging innovation can also lead to environmental benefits. For example, Professor Michael Porter of the Harvard Business School suggests that prescriptive regulations can deter 'green' business innovation. The 'Porter hypothesis' is that outcomes-based regulation puts pressure on business to achieve particular outcomes in the most efficient way. In Australia, the Productivity Commission recommends that, where possible, outcomes-based conditions should be the default approach.[3]

Outcomes-based regulation can also allow more efficient and effective use of regulatory resources. Business would need to provide less detail about processes and particular management actions; and therefore, assessment of these actions could potentially be faster. Outcomes-based conditions also allow the regulator to focus on understanding and assessing environmental outcomes, rather than tying up resources to monitor compliance with administrative requirements.

Outcomes-based regulation is not without risk, and should only be considered when the business and project is suited to outcomes-based conditions[4]. For example, sufficient environmental information will be a requirement because outcomes are difficult to define or monitor in the absence of adequate environmental data. Approval conditions could also be difficult to enforce if the outcomes are too ambiguous or subjective.

Next steps: implementation of an outcomes-based environmental approval system in Australia

The Australian Government is working towards an outcomes-based approach to environmental regulation, where approval conditions are placed to achieve a certain environmental outcome. Pilot studies are underway and a strong policy framework is being developed to guide the application of outcomes-based conditions. An outcomes-based approach is most suitable for businesses who demonstrate capability and willingness.

The Australian Government's rollout of outcomes-based approvals will therefore initially focus on:

- Companies with a proven record of sound environmental management, including proven compliance with regulation
- Projects with well known and relatively easily managed risks. Initial implementation of an outcomes-based approval system will focus on low to medium risk activities.
- Projects where a clear set of environmental outcomes can be transparently established and measured. If the objective is clearly defined, measurable and enforceable, outcome-based regulations will likely be more effective.

[2] Michael Malavazos, 'A Model for Environmental and Health and Safety Regulation for the Mining and
Upstream Petroleum Industries' (1998), p 43.
[3] Productivity Commission (2013), *Major Project Development Assessment Processes*. pp. 25-26.
[4] Government of Canada (2013) *Literature Review to Assess the Relevance of Outcome-Based Regulations to Innovation.*