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Performance Audit: *Managing Compliance with Environmental Conditions of Approval*



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Introduction

Australia has a diverse and unique environment. To balance protecting the environment with society's economic and social needs, a legal framework has been created based on the guiding principles of ecological sustainable development. The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), administered by the Australian Government Department of the Environment (Environment), is the Australian Government's primary legislation to protect Australia's environment and conserve its biodiversity.

The Australian National Audit Office (ANAO) has conducted several performance audits relating to aspects of the EPBC Act, including:

- ANAO Audit Report No.31, 2006–07, *The Conservation and Protection of National Threatened Species and Ecological Communities; and*
- Audit Report No.38, 2002–03, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999.*

In response to the 2006–07 audit, the Australian Government allocated substantially more resources to EPBC Act compliance and enforcement activities through the establishment of a Compliance and Enforcement Branch in 2007 within the then Department of Environment, Water, Heritage and the Arts 'to promote awareness of, and compliance with, the EPBC Act'.

In 2013–14, the ANAO examined the Department of the Environment's (Environment's) regulation of proponents' compliance with conditions attached to approvals provided under the EPBC Act. This audit was particularly important as the conditions placed on approved activities (actions¹) are designed to protect matters of national environmental significance and form the basis on which approval is granted.

Background and audit planning

The EPBC Act (Part 3) prohibits the undertaking of an action without approval from the Australian Government Minister for the Environment (the Minister) or delegate, unless exempt, that is likely to have a significant impact on matters of national environmental significance (MNES).² Proponents, such as landholders, developers and miners, are required to refer their proposed actions to the Minister (via the department) to determine whether approval of the action(s) is required under the EPBC Act.

In those circumstances where the Minister (or delegate) decides that an action requires approval (that is, the action is a 'controlled action'), an environmental assessment of the action must be undertaken. The Minister (or delegate) will then decide (under Part 9 of the EPBC Act) whether to approve the controlled action, and the types of conditions, if any, to impose. Examples of the types of conditions that may be attached to approvals include:

- preparing, submitting to the Minister for approval, and implementing, management plans;
- conserving offset areas to compensate for any damage caused;
- specifying required environmental monitoring and testing;
- complying with specified industry standards or codes of practice; and
- lodging a bond, guarantee or cash deposit.

The approval of controlled actions allows proponents to implement their actions, subject to the environmental safeguards put in place to protect MNES through approval conditions. Proponents are required to comply with the conditions attached to approved controlled actions. Compliance with approval conditions underpins the effective operation of Part 9 of

¹ An action includes a project, development, undertaking or activity (or series of activities).

² The categories of MNES are: world heritage areas; national heritage areas; wetlands of international significance; listed threatened species or endangered communities; listed migratory species; nuclear actions; Commonwealth marine environment, Great Barrier Reef Marine Park; water resources from coal seam gas developments and large mining developments; Commonwealth land; Commonwealth heritage sites; and actions by Commonwealth agencies.

the EPBC Act and the public's confidence that approved actions will not detrimentally affect MNES.³

The controlled actions approved since the EPBC Act came into effect in July 2000 collectively involve investments or expenditure of hundreds of billions of dollars over the life of the actions. As at September 2013, the 635 approved controlled actions under the EPBC Act had around 8000 conditions attached to them to protect 1282 MNES.⁴ In general, most actions have a small number of attached conditions, with around 90 per cent of all approved controlled actions having less than 20 conditions attached to them. Ten approved controlled actions have in excess of 70 conditions, including one action with 116 conditions. The timeframes for these actions can range from a few years to decades. While the number of approved controlled actions, and the conditions attached to the approvals has grown over time, only 32 actions had been 'closed' and were no longer subject to compliance monitoring by Environment.

Objective, scope and criteria

The objective of the audit was to assess the effectiveness of the Department of the Environment's regulation of proponents' compliance with Part 9 of the *Environment Protection and Biodiversity Conservation Act 1999*.

To form a conclusion against this objective, the ANAO adopted the following high-level criteria:

- a structured risk management framework to assess and manage compliance risks had been developed;
- a risk-based compliance program to effectively communicate regulatory requirements and to monitor compliance with regulatory objectives had been implemented;
- arrangements to manage non-compliance were effective; and
- appropriate governance arrangements were in place to effectively support EPBC Act Part 9 regulation.

Methodology

In undertaking the audit, the ANAO reviewed Environment's files and documentation, including those associated with a sample of approved controlled actions selected by the audit team, and involved monitoring inspections, compliance audits and non-compliance investigations. The ANAO accompanied departmental staff on monitoring inspections and reviewed system documentation and key controls for two IT systems that support Part 9 monitoring, compliance and enforcement activities. Environment staff were interviewed and the views of relevant stakeholders, including proponents and industry peak bodies and environmental groups⁵, were sought on the department's regulation of approved controlled actions.

This methodology followed established ANAO practice and was in accordance with the ANAO's Auditing Standards. In particular, the conduct of the audit was informed by the ANAO's Better Practice Guide on *Administering Regulation: Achieving the Right Balance*, with the most recent guide released in June 2014. The guide provided a sound basis on which to plan and conduct the audit.

³ State/territory and local governments may impose their own approval conditions for an action in addition to those imposed by the Australian Government.

⁴ Of the 635 controlled actions: 432 controlled actions had one to two protected matters; 175 controlled actions had three to four protected matters; and 28 controlled actions had five or more protected matters.

⁵ The ANAO contacted proponents of approved controlled actions and general stakeholders (industry/environmental peak bodies and state/territory governments) requesting their views on Environment's regulation of proponents' compliance with Part 9 of the EPBC Act. The ANAO received 10 responses from proponents (from 62 requests), 11 responses from general stakeholders (from 49 requests) and one unsolicited response.

Overall conclusion and findings

Summary of conclusion

Nearly 14 years after the enactment of the EPBC Act, the Department of the Environment was yet to establish mature administrative arrangements to effectively discharge its regulatory responsibilities in relation to approved controlled actions. As a consequence, the assurance that the department had regarding proponents' compliance with action approval conditions, which were designed to address the risks posed to MNES, was limited. The extent of shortcomings in, and challenges facing, Environment's regulation of approved controlled actions—particularly in relation to compliance monitoring—did not instil confidence that the environment protection measures considered necessary as part of the approval of controlled actions had received sufficient oversight over an extended period of time.

Environment has acknowledged the shortcomings in its regulation of approved controlled actions and has initiated a broad program of work to address the shortcomings identified over recent years, including those identified from earlier reviews and this audit.

Key Findings:

- Environment was not well placed to demonstrate that it was effectively targeting its compliance monitoring activities to the areas of greatest risk. The department was yet to: establish an effective compliance intelligence capability to collect, store and analyse compliance intelligence; and identify an appropriate set of MNES risk factors (such as the compliance history of proponents) against which approved controlled actions could be assessed and ranked.
- While controlled actions were generally transferred to the compliance monitoring area soon after their approval, the area of the department responsible for assessing controlled actions had retained responsibility for regulating around 20 per cent of all approved controlled actions—some approved as early as 2001—for undocumented reasons. The approved controlled actions retained by the assessment branches examined by the ANAO were more likely to have had plans overdue for submission and other missed deadlines, and less likely to have had been actively monitored by the department.
- Compliance monitoring undertaken by the department had, generally, been insufficient to provide an appropriate level of assurance of proponents' ongoing compliance with their conditions of approval. In terms of proponents' obligations to submit material to the department, there were numerous management plans and compliance returns found to be overdue for submission, with generally poor evidence retained demonstrating the department's appropriate assessment of submitted plans and returns, particularly for assessments completed prior to 2013.
- The increasing workload on compliance monitoring staff over time had resulted in Environment adopting a generally passive approach to monitoring proponents' compliance with most approval conditions. As a consequence, the department had limited awareness of the progress of many approved controlled actions and the elevated risks to MNES that may result during particular stages of an action (for example, during ground clearance and construction).
- In many cases, instances of proponent non-compliance (mostly of a technical nature—such as, a missed deadline to submit a management plan⁶) were either not identified by staff, or were identified but not referred for assessment and possible enforcement action.

⁶ Management plans, assessed and approved by the department, establish controls for undertaking the actions that are designed to protect MNES. Delays in the implementation of management plans may elevate risks to MNES.

The failure to appropriately respond to identified non-compliance can: impact on the effectiveness of environmental safeguards; risk environmental damage; jeopardise the department's ability to take future enforcement action; and harm the public's confidence in the regulator.

- In the absence of appropriate procedures, the department's investigations into reported non-compliance with approval conditions were conducted inconsistently. Although documentation retained by Environment evidenced the enforcement decisions taken, there was scope to improve the department's documentation of the reasons for decisions, including the consideration of relevant factors and the consistency of enforcement responses over time.
- The performance information captured that is relevant to the compliance monitoring function had been limited, which had hindered the department's governance of this function and adversely impacted on its ability to publicly report relevant performance information. The limited information that Environment had included in its external reporting to stakeholders in relation to its EPBC Act Part 9 compliance activities did not provide stakeholders with sufficient information on which to determine the extent to which these activities were appropriate or sufficient to protect matters of national environmental significance.

Recommendations

The ANAO made five recommendations designed to improve Environment's regulatory performance, including to: develop a compliance intelligence capability and undertake periodic risk assessments; develop and implement annual compliance monitoring programs that target the greatest risk areas; update investigation procedures and improve the documentation of enforcement responses; and improve record-keeping and performance reporting related to the compliance monitoring function.

Summary of agency responses

The agency agreed to all ANAO recommendations.

Impact and results

The audit provided the Australian Parliament with an assessment of the effectiveness of regulatory arrangements related to the protection of important environmental assets within Australia. This assessment identified significant weaknesses in the management of compliance with conditions attached to approvals provided under the Government's primary legislation to protect Australia's environment and conserve its biodiversity. In particular, the audit concluded that:

- Environment was not well placed to demonstrate that it is effectively targeting its compliance monitoring activities to the areas of greatest risk;
- compliance monitoring undertaken by the department had, generally, been insufficient to provide an appropriate level of assurance of proponents' ongoing compliance with their conditions of approval; and
- the increasing workload on compliance monitoring staff over time had resulted in Environment adopting a generally passive approach to monitoring proponents' compliance with most approval conditions.

The audit report also commented directly on the appropriateness of performance measures and performance information established for the compliance function, with the audit concluding that the limited information that Environment had included in its external reporting did not provide stakeholders with sufficient information on which to determine the extent to

which these activities are appropriate or sufficient to protect matters of national environmental significance.

As outlined earlier, in response to the audit's findings, and shortcomings identified over recent years including those identified from earlier reviews, Environment has initiated a broad program of work to improve its regulatory arrangements. The department informed the ANAO that it is, among other developments: establishing a Regulatory Capability Development Program; developing and updating standard operating procedures; and developing a risk-based prioritisation model to assist with the targeting of its compliance monitoring activities.

The audit report received considerable attention from the media, Parliamentarians and key stakeholders, such as environmental groups. The issues identified by the audit have also been reported in the context of new approvals under the EPBC Act.

Challenges

The controlled actions examined as part of the audit ranged from relatively small land development works through to multi-billion dollar mining ventures and also related to many different types of industries. The compliance activities of the department also spanned many years, with a considerable amount of documentation (such as environmental management plans and milestone reporting) retained in relation to each action. The ANAO expended considerable resources examining hard-copy files that recorded evidence of the department's compliance activities. The compliance status for many actions examined could only be determined by a complete examination of all post-approval monitoring files—dating back many years. The volume of material and the manner in which it was retained over a large number of files, posed significant challenges. Further, the department had developed several information technology systems to support the administration of EPBC Act assessments and approvals. To assess the effectiveness of controls in place for key information technology systems, the audit team engaged the assistance of the ANAO's IT Audit Branch.

Lessons Learned

The audit's findings were underpinned by a structured sample of controlled actions and compliance activities, which included coverage of key activity types and industries. While the analysis of the sample necessitated the assignment of significant audit resources, the inclusion of extensive quantitative analysis in the audit report provided a strong basis for the audit's findings.

The audit team also consulted widely with relevant stakeholders to obtain their views on aspects of the department's regulatory arrangements and to inform the lines of inquiry for the audit.

The discussion of findings in the audit report was also supported by several case studies in which the ANAO provided examples of weaknesses in regulatory activities. These case studies helped to illustrate the impacts of the weaknesses identified from the ANAO's audit work.

In addition, the early engagement with the ANAO's IT Audit Branch to design the examination of relevant IT systems and subsequent system testing by IT auditors underpinned the audit's findings in relation to the adequacy of system controls and, ultimately, the integrity and reliability of compliance data.

ENVIRONMENTAL ASSESSMENT - A CASE OF TANZANIA

Paper presented by the National Audit Office of Tanzania (NAOT) at the Annual Conference of Working Group on Environmental Auditing (WGEA) - Manila, Phillipines held on 29th September to 3rd October 2014

1.0 Introduction

1.1 General Overview

The term Environmental Assessment (EA) is variously defined and understood. It refers to a formal process of systematic analysis of the environmental effects of development policies, plans, programmes and other proposed strategic actions. This process extends the aims and principles of EIA upstream in the decision-making process, beyond the project level and when major alternatives are still open.

EA represents a proactive approach to integrating environmental considerations into the higher levels of decision making, consistent with the principles outlined in Agenda 21. Often, broader, less detailed assessments are required at these levels compared to project EIA.

EA systems have a common purpose: to take account of environmental concerns in policy and planning decision-making, thereby contributing to sustainable development. However, there are varying interpretations of the role, scope and process of EA; for example with regard to substantive aims, contribution to environmental protection and sustainable development, inclusion of economic and social factors, and minimum legal and procedural requirements.

The premise of EA can be simply stated: EIA on its own is not enough. Only a relatively small proportion of the proposals and decisions made by governments are subject to examination. EA rounds out and scales up the coverage from projects to include policy, plans, programmes and other proposed strategic actions with potentially important environmental effects.

This process gets at the *sources* of environmental impacts, rather than treating only the *symptoms* in relation to specific projects.

By doing so, EA responds to what the Brundtland Commission called 'the chief institutional challenge of the 1990s'. From this perspective, EA facilitates informed and integrated decision-making through the provision of environmental information at the same time and on par with social and economic aspects. The introduction of EA has been driven by both procedural and substantive trends and imperatives. Often called the bottom-up and top-down strategies, these are aimed at:

- reinforcing project-level EIA; and
- promoting environmentally sound and sustainable development.

1.2 The Context of Tanzanian

According to National Environmental Management Act of 2004, EA is defined as a systematic examination conducted to determine whether or not a programme, activity or project will have any adverse impact to the environment.

The specific purpose of the assessment is to provide the decision makers with information allowing them to introduce environmental projection considerations in the decision-making process leading to the approval, rejection or modification of the project, plan or activity under examination. EA allows information to be compiled to evaluate whether an approval (permit) or refusal for the proposed activity or development will be in the best interest of the community.

Projects are categorised as a mandatory or non mandatory. Based on the Environmental Impact Assessment and Audit Regulations of 2005, if the project falls under mandatory¹ list, then should be subjected for the EA study. Upon registration the project is allocated registration Number and screened and a decision to carry out an Environmental Audit (EA) study is made by the National Environment Management Council (NEMC). In order to comply with the legal requirement, developer needs to commission an Environmental firm to undertake EA study on the project. NEMC has registered firms of experts and individual experts for conducting EA. Assessment criteria include ecological, social, economic, Indigenous interests, as well as current and future use of the proposed location.

2.0 Specific Objectives and Advantages of EA

2.1 Aims and objectives of EA

According to Sadler and Brook, 1998 the aims and objectives of environmental assessment include:

To support informed and integrated decision-making by:

- identifying environmental effects of proposed actions
- considering alternatives, including the best practicable environmental option
- specifying appropriate mitigation measures

To contribute to environmentally sustainable development by:

- anticipating and preventing environmental impacts at source
- early warning of cumulative effects and global risks
- establishing safeguards based on principles of sustainable development

To reinforce project EIA by:

- prior identification of scope of potential impacts and information needs

¹ Agriculture, Livestock and range management, Forestry, Fisheries, Wildlife, Tourism and recreational development, Energy, Petroleum, Transport and infrastructure, Urban development, waste disposal, Food and beverage industries, Textile industry, Leather industry, Wood, Pulp and Paper industries, Building and civil engineering industries, Chemical industries, Extractive industry, Non-metallic industries, Metal and engineering industries, Electrical and electronic industries.

- addressing strategic issues and considerations related to justification of proposals
- reducing the time and effort necessary to conduct individual reviews

2.2 Advantages of the EA

Despite its wide use and acceptance, project EIA has acknowledged shortcomings as a tool for minimising environmental effects of development proposals. It takes place relatively late at the downstream end of the decision-making process, after major alternatives and directions have been chosen.

Normally at this stage, the issues have narrowed to how a project should be implemented environmentally, rather than whether, where and what form of development is environmentally appropriate. By addressing these issues upstream in the decision-making process, EA can help to focus and streamline EIA of any subsequent projects.

More optimally, EA is a proactive tool to anticipate and prevent environmental damage caused by sector policies and plans enacted by development agencies. A key objective is to provide early warning of large scale and cumulative effects, including those resulting from many smaller-scale actions that otherwise would fall under thresholds for triggering a project EIA. For example, an EA of a land use plan can take account of biodiversity losses associated with proposed developments, or an EA of a national road building programme can address the implications for climate warming of increased CO₂ emissions in light of commitments under the Kyoto protocol and against other transport alternatives.

2.3 Enabling Conditions for Establishing Appropriate Institutional Arrangements

Enabling conditions for establishing appropriate institutional arrangements include:

- clear legal or administrative/policy mandate;
- explicit scope of application to decision-making;
- requirements and responsibilities for compliance;
- guidance on procedure and process to be followed;
- provision for administrative oversight; and
- mechanisms for quality control, including review of EA implementation and outcomes.

3.0 Guiding principles for EA process design and implementation

The following are the key guiding principles for EA process design and principles:

- *fit-for-purpose* - the EA process should be customized to the context and characteristics of policy and plan making;
- *objectives-led* - the EA process should be undertaken with reference to environmental goals and priorities;
- *sustainability-driven* - the EA process should identify how development options and proposals contribute toward environmentally sustainable development;
- *comprehensive scope* - the EA process should cover all levels and types of decision-making likely to have significant environmental and health effects;

- *decision-relevant* - the EA process should focus on the issues and information that matter in decision-making;
- *integrated* - the EA process should include consideration of social, health and other effects as appropriate and necessary (e.g. if equivalent processes are absent);
- *transparent* - the EA process should have clear, easily understood requirements and procedures;
- *participative* - the EA process should provide for an appropriate level of public information and involvement;
- *accountable* - the EA process should be carried out fairly, impartially and professionally having regard to the requirements in force and internationally accepted standards, and subject to independent oversight and review; and
- *Cost-effective* - the EA process should achieve its objectives within limits of available policy, information, time and resources.

4.0 Generic forms of EA of policies, plans and/or programmes

The Main three generic forms of EA of policies, plans and plans are:

- *Policy EA* - review of proposed government actions and options at the broadest level; includes potentially wide range of decisions in the form of guidelines, statements, position papers, legislation and strategies relating to specific sectors (e.g. national energy policy) or applying government wide (e.g. privatisation, trade liberalisation); and can be extended to audit or reassessment of long established policies that have adverse environmental effects (e.g. agricultural subsidies);
- *Sector plan and programme EA* - review of a development or investment programme for a particular sector (e.g. energy, transport or agriculture); includes evaluation and comparison of the environmental effects of major alternatives (e.g. demand versus supply measures and mix of fuel sources for power generation); and can be extended to any series of projects that, when grouped together (e.g. by stage of technology), can have potential cumulative effects; and
- *Spatial plan and regional EA* - review of multi-sector development or investment programme for a particular region (e.g. river basin, coastal zone or urban area) or a land use plan for an officially designated area; includes evaluation and comparison of the environmental effects of alternative strategies and measures for plan implementation; and can be extended to regional or ecosystem assessment of cumulative effects on resource potentials, biodiversity or other aspects of natural capital stock.

5.0 Practical Examples of methods and their usage in EA

The following are the practical examples of methods used in various steps of EA

Step	Examples of methods
Baseline Study	(1) SOE reports and similar documents (2) Inventory of environmental stock/setting (3) 'Points of reference' from comparable studies
Screening/Scoping	(1) Formal/informal checklists (2) Survey, case comparison (3) Effects networks (4) Public or expert consultation
Formulating options	(1) Environmental policy, standards, strategies (2) Prior commitments/precedents (3) Regional/local plans (4) Public values and preferences
Impact analysis	(1) Scenario development (2) Risk assessment (3) Environmental indicators and criteria (5) Policy impact matrix (6) Predictive and simulation models (7) GIS, capacity/habitat analysis (8) Benefit/cost analysis and other economic valuation techniques (8) Multi-criteria analysis
Documentation for decision-making	(1) Cross-impact matrices (2) Consistency analysis (3) Sensitivity analysis (5) Decision 'trees'

Furthermore, in order to test for the sustainability assurance a number of key questions are ought to be answered at different stages of EA. Those are as shown below:

Stage of EA	Sustainability test	Key questions
Screening	Direction toward requirements	<ul style="list-style-type: none"> • Is the proposal consistent with sustainability policies? • What are the environmental <i>implications</i> in this regard?
Scoping	Distance to target	<ul style="list-style-type: none"> • How does the proposal measure up against key indicators? • What are the significant environmental <i>issues</i> in this regard?
Significance	Determination of significance	<ul style="list-style-type: none"> • What are the environmental <i>impacts</i> of the proposal? • How significant are they with reference to sustainability policies and criteria?

6.0 Environmental Assessment in Tanzania

Tanzania has experience a rapid population growth and industrialisation which lead to the environmental problems such as: Deforestation, Land degradation and soil erosion, Pollution, Habitat destruction and loss of biodiversity, Household and industrial air pollution, and an increase in human, domestic and industrial effluent and waste production. The Environment Management Act No. 20 of 2004 sets out the institutional arrangement for management of environmental issues in Tanzania. The EA supports informed and integrated decision-making and contribute to environmentally sustainable development.

The support of informed and integrated decision-making may be through identifying environmental effects of proposed actions; considering alternatives, including the best practicable environmental option and specifying appropriate mitigation measures. The environmentally sustainable development may be achieved since the assessment aims at anticipating and preventing environmental impacts at source; early warning of cumulative effects and global risks; establishing safeguards based on principles of sustainable development.

6.1 Indicative list of areas subject to EA in Tanzania

According to National Environmental Management Act of 2004, the following are some of the indicative list of areas subject to EA in Tanzania: sector-specific policy, plans and programmes; spatial and land use plans; regional development programmes; natural resource management strategies; legislative and regulatory bills; investment and lending activities; international aid and development assistance; structural adjustment funds and operations; macro-economic policy; budgets and fiscal plans; international trade agreements etc.,

6.2 Institutional framework for environmental assessment

Vice President's Office is responsible for the overall environmental policy and regulation formulation, coordination and monitoring of environment policy implementation in the country while the National Environmental Management Council is the Regulator on environmental issues in Tanzania. It is responsible for overseeing the integrity of Tanzania's environment in order to ensure sustainable development. Local Government Authorities are responsible for overseeing planning processes, and for establishing local environmental policies and regulations and Non-Governmental Organizations (NGOs) Advocacy on environmental issues.

7.0 Challenges encountered

While Tanzania is striving to ensure that development projects mitigate or minimise environmental impact, a number of challenges have been experienced in the conducted environmental assessment. These are such as: Limited enforcement of the implementation of EA recommendation, limited enforcement of the implementation of Environmental Management Plans, lack of environmental standards to use as benchmarks for assessing environmental impacts. It was also experience that developers are not much aware of the need to conduct EAs and the relevant legislation applicable to them, little participation of public in EA process, Political influence in development projects. Although authorities are committed to environmental management, the socio-economic growth and development priorities, as well as other basic needs, typically override environmental issues

8.0 Conclusion and the way forward

It is widely agreed that Environmental Assessment is one of the effective tools in addressing most of the environmental problem and it guides decision makers while making decisions which might have impact to the environment. Therefore, it is worth ensuring that wider potential policy and institutional benefits from use of EA is adequately planned and implemented by (1) mainstreaming environmental objectives; (2) incorporating sustainability principles into policy-making; (3) meeting obligations under international environmental agreements; (4) 'sustainability assurance' for development proposals and options; (5) instituting environmental accountability in sector-specific agencies; and (6) ensure greater transparency and openness in decision-making.