



Australian Government
Department of the Environment

Outcomes-based conditions policy

Environment Protection and Biodiversity Conservation Act 1999



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Cover images, clockwise from top left:

Front cover: Eucalyptus macrocarpa in full flower (Michael Marriott) | Karijini National Park (Cathy Zwick) | Southern boobook (Brian Furby)

Back cover: Ephemeral herbs after rain (Watarrka National Park) | Ornamental snake (Steve Wilson) | Mixed wildflowers near the Hamelin Pool at Shark Bay (Cathy Zwick)

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1. Introduction

This policy statement outlines the Australian Government's approach to the use of outcomes-based conditions of approval for controlled actions under section 134 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Outcomes-based conditions set out the environmental outcome the approval holder must achieve for a matter of national environmental significance without prescribing how that outcome is to be achieved.

1.1. Why outcomes-based conditions?

The Australian Government recognises that there are different ways to achieve good environmental outcomes. Flexibility in the methods used to deliver those outcomes is both necessary and desirable to:

- focus approval holders' resources on achieving outcomes rather than complying with administrative requirements
- encourage innovation in environmental management strategies
- enhance transparency of outcomes being sought
- focus regulatory effort on verifying that approval holders are achieving environmental outcomes
- build public trust and confidence in environmental regulation
- acknowledge good environmental and regulatory compliance records to foster behavioral change
- streamline assessment and approval processes
- improve knowledge and data about matters of national environmental significance.

The use of outcomes-based conditions does not mean that actions with unacceptable impacts or risks will be approved. Outcomes required as conditions of approval must be achievable and measurable to provide certainty for the approval holder, the Australian Government and the community.

Outcomes-based regulatory approaches are widely recognised as best-practice and have been recommended for use in the context of the EPBC Act for over a decade¹. Outcomes-based conditions for project approvals are utilised in several Australian jurisdictions².

1.2. Legislative and policy context

The EPBC Act is the Australian Government's primary environmental legislation, it is administered by the Department of the Environment. The EPBC Act provides a national scheme for the conservation of biodiversity and environmental and heritage protection and provides for Australian Government regulation of development proposals in relation to matters of national environmental significance, which include:

- nationally threatened species and ecological communities
- migratory species
- wetlands of international importance (listed under the Ramsar Convention)
- the Great Barrier Reef Marine Park
- national heritage places
- world heritage properties
- Commonwealth marine areas
- nuclear actions (including uranium mines)
- a water resource in relation to coal seam gas and large coal mining development.

1 See, for example, Productivity Commission (2013) Major Projects Development Assessment Research Report. www.pc.gov.au/inquiries/completed/major-projects; Parliament of Australia, Senate Standing Committee on Environment and Communications (1998). Environmental Assessments and Approvals. www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/1999-02/bio/report/c08

2 See, for example, WA EPA (2015) Environmental Assessment Guideline for Recommending Environmental Conditions (EAG11). <http://edit.epa.wa.gov.au/EPADocLib/EAG11-Conditions-revAugust2015.pdf>

Projects which are likely to have a significant impact on a protected matter must be referred to the Minister for the Environment for assessment and approval under the EPBC Act.

The Minister may attach a condition to a project approval if he or she is satisfied that the condition is necessary or convenient for protecting, repairing or mitigating damage to a protected matter. In deciding whether to attach a condition to the approval the Minister must consider mandatory legal requirements in the EPBC Act and any relevant conditions that have been, or are likely to be, imposed on the action under a law of a state or territory or another law of the Commonwealth.



Numbat (Dudley Alexander)



Gippsland water dragon (*Physignathus lesueurii howittii*) in replanted area (Andrew Tatnell)

2. What are outcomes-based conditions?

Outcomes-based conditions are tailored to the particular action and set out the environmental outcomes the approval holder must achieve for a protected matter without prescribing how that outcome is to be achieved. A project approval may rely primarily on outcomes-based conditions in addition to other conditions relating to monitoring and reporting on the achievement of those outcomes. Outcomes-based conditions will typically need to be developed in close consultation with approval holders and proponents.

In many circumstances other types of conditions will also apply to an approval. Determining the appropriate conditions to use in each instance depends upon the degree of certainty and consensus about the likely impacts on the protected matter and the availability and quality of baseline data and other information.

There are four broad approaches to environmental approval conditions:

- (i) **Prescriptive conditions** (technology or standards based) in which the process or procedural requirements are defined within the condition and the approval holder has little choice about how to comply. See hypothetical examples below:

- Within 30 days of the Commencement Date³, the Approval holder must erect rabbit-proof fencing on the western and southern boundaries of the Project Area in accordance with the *Standards for management—Fencing*, which provides:
 - the minimum standard for rabbit-proof fences is 1,050mm width, 40mm mesh diameter, 1.4mm wire diameter rabbit-proof netting
 - rabbit netting should be fixed so that it reaches at least 900mm above the ground and is either buried (to 150mm depth) or laid down and secured with pegs, rocks or timber
 - support the fence to withstand stock or native animal forces.
- At all times during the Term of Approval, Ambient Air Quality tested at the Nominated Project Sites must meet the standards established under the National Environmental Protection Measure for Ambient Air Quality or their replacements.

³ Note: The meaning of the capitalised terms in the examples (such as 'Commencement Date', 'Project Area', 'Term of Approval', 'Ambient Air Quality' and 'Nominated Project Sites') and the monitoring and reporting requirements would be set out elsewhere in the approval.

- (ii) **Systems-based conditions** (management based) which require the approval holder to develop management plans⁴. It is often appropriate to take an outcomes-based approach to management plans. For example:

- Within 30 days of the Approval Date and prior to the Commencement Date, the Approval holder must prepare and submit for the Minister's approval, a Threatened Species Management Plan which describes how and when the following will be undertaken:
 - a. Pre-clearing surveys for the Western Ground Parrot (*Pezoporus flaviventris*) and Sandplain Duck Orchid (*Paracaleana dixonii*).
 - b. Actions to avoid areas of Western Ground Parrot habitat within the Project Area.
 - c. Roadside surveys, to detect road-killed fauna, including Carnaby's Black Cockatoo (*Calyptrorhynchus latirostris*) and the Western Ground Parrot.
 - d. Reporting to the Department about Western Ground Parrots found within the Project Area.

- (iii) **Outcomes-based conditions** (performance based) in which the required outcome or specific level of performance (the 'what') is written into the condition and the method to achieve the outcome (the 'how') is chosen by the approval holder. Performance indicators (criteria, measures or tests) are used to determine compliance and effectiveness both over the term of an approval and at the conclusion of the action. For example:

At each of the Performance Dates, there will be no Net-Loss to the extent and distribution of the Existing Population of the Sandplain Duck Orchid (*Paracaleana dixonii*) within the Project Area.

- (iv) **Surrogate conditions** (performance based) specify an outcome (or a level of performance to be achieved) for something which directly supports the protected matter. In circumstances where the impacts of an action on a protected matter, or changes in the protected matter, are difficult to measure directly it may be appropriate for a condition to specify an outcome for something which directly supports conservation outcomes for the protected matter and is capable of specific measurement. For example, threatened species are often inherently rare, making changes in populations difficult to monitor accurately. The measurable outcomes for the surrogate must support positive conservation outcomes for the protected matter. For example, vegetation that comprises foraging habitat for Large-eared Pied Bat could be used as a surrogate for the condition or extent of populations of this species:

At the Expiry Date of the Approval, there must be no Net-Loss to the extent and abundance of Existing Foraging Habitat for Large-eared Pied Bat within the Project Area.

⁴ For the purposes of the EPBC Act, these are generally Action Management Plans.

3. Use of outcomes-based conditions

The Australian Government considers that all conditions of approval should be designed to achieve the best possible outcome for the relevant protected matter. Actions will vary in the extent of their suitability for outcomes-based conditions. Some actions or aspects of an action may not be suitable for the application of outcomes-based conditions.

The suitability for outcomes-based conditions will be determined on a case-by-case basis, incorporating identification of potential risks and in consultation with the proponent. The final decision on the condition-setting approach rests with the decision-maker.

3.1. When should outcomes-based conditions be used?

The following characteristics may indicate that an action, or parts of it, is suitable for outcomes-based conditions:

- Environmental risks are well understood and can be adequately managed.
- High quality baseline data about the protected matter or something that directly supports the protected matter (e.g. habitat) is available or could be obtained.
- There is a good understanding of and consensus about the likely impacts of an action on the protected matter.
- The approval holder has demonstrated capability and willingness to achieve the outcome.
- A sufficient level of knowledge and information on the protected matter is available to define an outcome.
- There are reliable methods available to achieve the outcome in the desired timeframe and there is reasonable confidence that the outcome is achievable.

- The outcome for the protected matter or something that directly supports the protected matter is measurable, able to be enforced and appropriately monitored.
- The performance towards achievement of the outcome is capable of independent and periodic audit.

If all of these elements are not fully met, outcomes-based conditions may still be viable as part of a hybrid set of conditions. For example, a systems-based condition could be used to address gaps in the available baseline data, while setting parameters for an outcomes-based management condition.

The decision whether to apply outcomes-based conditions takes into consideration the circumstances of the proponent. For example, the proponent of a smaller project with limited and well understood environmental impacts may prefer more prescriptive conditions if they do not have appropriate expertise in environmental management. Similarly, a highly capable proponent with a strong environmental history may already have the expertise and capacity to deliver good environmental outcomes for a project without the need for prescriptive conditions.

3.2. When should prescriptive or systems-based conditions be used?

Some actions will be less suitable for outcomes-based conditions. In some cases, the understanding or consensus regarding particular environmental risks may be limited, or threats to protected matters are too poorly understood. In other instances, the type of action or the technology to be used may simply be unsuited to outcomes-based conditions. These projects are likely to require more specificity and oversight of management planning and implementation by the Department.

In general the following characteristics may indicate that an action or an aspect of it is likely to require prescriptive or systems-based conditions:

- There is an inability to define a suitable outcome for the protected matter or something that directly supports the protected matter.
- There is limited scientific understanding or consensus about the likely impacts of the action on the protected matter.
- The action is likely to contribute to cumulative impacts or involves multiple projects or industries, making it difficult to identify responsibility for achieving the outcome.
- There is a lack of robust baseline data about the protected matter.
- There is a lack of knowledge about threats to the protected matter.
- There are particular environmental risks, or the ability to adequately manage risks, that requires a higher degree of prescription.

3.3. The role of approval holders

Outcomes-based conditions involve the approval holder committing to achieving environmental outcomes, some of which may take a number of years to achieve. Consequently, more prescriptive or systems-based conditions may be required where an approval holder has a history of:

- non-compliance with Australian Government environmental regulatory requirements which has resulted in adverse environmental impacts, or
- serious and/or ongoing non-compliance with reporting and monitoring requirements.

Approval holders, especially those without an established positive environmental management record, should demonstrate a commitment to achieving environmental outcomes. This can be partly demonstrated through existing frameworks, such as approval holders with an independently accredited environmental management system (e.g. AS/NZS ISO 14001:2004 compliant).

Outcomes-based conditions may require expertise in environmental management or monitoring activities that are not appropriate for a particular approval holder. The Australian Government recognises that some approval holders may be unable to commit to the level of management or monitoring required for certain outcomes and may therefore prefer more prescriptive conditions.

Approval holders may demonstrate their commitment to achieving environmental outcomes through evidence of:

- good environmental outcomes achieved in previous projects
- good practice internal environmental management and audit systems
- internal policies that mandate and provide incentives for adaptive management and continuous improvement, including adoption of 'best available' technologies
- third-party certified environmental management systems or systemic audits
- willingness to engage independent and suitably qualified experts to prepare documentation, provide advice or undertake peer review
- willingness to engage proactively with communities, scientists and others with local knowledge and environmental information, including collaborative approaches to achieving environmental outcomes
- full disclosure of adverse environmental incidents, outcomes and complaints
- publication and transparency of environmental performance data
- a favourable environmental history of company officers
- a history of positive engagement with the Department.

An approval holder's commitment to the achievement of environmental outcomes (or otherwise) will not be established by any single indicator.



Close-up of tree planting (Wirilda) inside plastic protector (John Baker)

3.4. Baseline data

Defining and monitoring outcomes-based conditions requires good knowledge of the particular protected matter and confidence in the baseline data.

Baseline data is essential to understand the current condition of the protected matter, and how best to define and measure an appropriate outcome relevant to the impacts of the proposed action. High-quality baseline data should be provided to the Department at the time of referral to assist in determining whether a proposed action is suitable for outcomes-based conditions.

In addition to high-quality baseline data, provision of proposed outcomes-based conditions at the time of referral may assist to expedite the assessment and

approval process. Where baseline data is not provided to the Department as part of referral information, it is more difficult to assess both suitability for outcomes-based approval conditions and whether any proposed outcomes-based conditions are appropriate. Approval holders must also demonstrate a capability and willingness to achieve an outcome and be able to implement appropriate monitoring strategies (discussed below) to ensure that the outcome and key performance measures or milestones are achieved.

Baseline data relates to the site where the proponent proposes to take the action. Knowledge and information about the protected matter relates to the overall scientific or expert knowledge about a protected matter, in particular knowledge about key threats to the protected matter.

4. Assurance Framework

Outcomes-based conditions require approval holders to demonstrate their progress towards meeting outcomes. Progress may be demonstrated through implementation of management activities and ongoing monitoring against periodic milestones or criteria and the maintenance of appropriate records.

Conditions will also require approval holders to make publicly available under an open licence the results of their monitoring activity (including baseline data collected) and in some cases report to the Department. This will both improve the available data for the relevant protected matter and demonstrate to the community and the Department that the project is on track.

Approval holders will be required to demonstrate they are on track to achieve a particular outcome. Where an approval holder advises the Department that they are not on track to deliver an outcome, and can demonstrate that best efforts have been made to comply with obligations under the EPBC Act, the Department will endeavour to work cooperatively with the approval holder to identify corrective actions. Depending on the stage of approval and the risks to protected matters, this may include seeking advice from relevant experts, developing new management plans, or applying more prescriptive conditions.

The Department will continue to undertake compliance and monitoring activities for outcomes-based conditions in accordance with the EPBC Act Compliance and Enforcement Policy (2013). Consistent with that policy, failure to maintain appropriate records or to notify or disclose a potential or actual breach of an outcomes-based condition to the Department can be referred for investigation and enforcement action.

The Commonwealth Minister will retain the power under the EPBC Act to add or vary the conditions of approval in particular circumstances. Those circumstances include:⁵

- where the approval holder has breached any condition of the approval (e.g. failing to comply with publication requirements or failing to meet a milestone)
- where the significant impacts of an action were not previously identified (either in nature or scale) and the Minister considers that a change to the conditions of the approval is needed to protect matters of national environmental significance.

Copies of the EPBC Act Compliance and Enforcement Policy (2013) are available on the Department's website: www.environment.gov.au

⁵ EPBC Act, Section 143

5. Guidance on outcomes-based conditions

The Department has published Outcomes-based Conditions Guidance which outlines the issues that must be considered and processes that may be

used to develop outcomes-based conditions under the EPBC Act. The Guidance is available on the Department's website: www.environment.gov.au

6. Evaluation

The Department is committed to evaluation of the effectiveness of new policies. Evaluation criteria for this policy will include:

- outcomes-based conditions are achieving better environmental outcomes than other condition-setting approaches
- whether regulatory compliance is improved through the use of outcomes-based conditions
- whether the public availability of data and information about actions being taken under an EPBC Act approval has increased
- the number of approvals granted under the EPBC Act that include outcomes-based conditions
- whether it has reduced the resources devoted to administrative requirements.

NOTE

The information in this policy statement and the *Outcomes-based Conditions Guidance* does not represent legal or professional advice. The statements included in this policy statement and the *Outcomes-based Conditions Guidance* are intended as guidance only and should be applied consistently with the requirements of the EPBC Act and Regulations.

This policy is one of a suite of policies in relation to environmental assessments and approvals under the EPBC Act. Current policies, as well as relevant associated guidance documents, are available at: www.environment.gov.au

